Removal of the National Director of Public Prosecution: A Critique of Emerging Constitutional Jurisprudence

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Abstract

In this article, I critically examine the constitutional provisions governing the removal of the National Director of Public Prosecutions. This examination is undertaken in the context of recent decisions by the High Court in *Corruption Watch (RF) NPC and Another v President of the Republic of South Africa and Others; Council for the Advancement of the South African Constitution v President of the Republic of South Africa and Others* [2018] 1 All SA 471 (GP); 2018 (1) SACR 317 (GP) and the Constitutional Court in *Corruption Watch NPC and Others v President of the Republic of South Africa and Others* [2018] ZACC 23, which found certain provisions of the National Prosecuting Authority Act 32 of 1998, which governs the removal of the National Director, unconstitutional. The article is critical of these two court decisions for their failure to properly justify the order to invalidate the provisions of the National Prosecuting Authority Act and to provide a proper account of the different separation of powers imperatives involved in the cases. The article is also critical of the Constitutional Court's approach to the abstract review of the sections in the National Prosecuting Authority Act, and of its suspension of the order of invalidity in a manner which took no due regard to established jurisprudence. Lastly, the article is critical of the Constitutional Court's omission to address the High Court order that the Deputy President should appoint the National Director, which runs counter to the text of the Constitution.

Keywords: accountable; independent institutions; National Director of Public Prosecutions; National Prosecuting Authority; removal; separation of powers—internal and external

UNISA university of south africa PRESS

Southern African Public Law
https://upjournals.co.za/index.php/SAPL
Volume 35 | Number 2 | 2020 | #7031 | 31 pages

https://doi.org/10.25159/2522-6800/7031
ISSN 2522-6800 (Online), 2219-6412 (Print)

Introduction

The National Prosecuting Authority (NPA) was established as a single national prosecuting authority in terms of section 179(1) of the Constitution of the Republic South Africa, 1996 (hereinafter the Constitution). This section provides that '[t]here is a single national prosecuting authority in the Republic … consisting of … a National Director of Public Prosecutions, who is the head of the prosecuting authority, and is appointed by the President, as head of the national executive.' The Constitution goes on, in section 179(2), to confer on the NPA 'the power to institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings.' As a representative of the state in bringing criminal proceedings against perpetrators, the NPA has a special role to play in the criminal justice system because of its responsibility to enforce criminal laws in South Africa by instituting criminal proceedings on behalf of the state. However, in recent years, the NPA has come under scrutiny, especially due to current powers of appointment and removal as well as the inability of successive individuals occupying the post of National Director of Public Prosecutions (hereinafter the National Director) to complete their statutory term of office.

One of the thorny contemporary issues affecting South Africa's criminal justice system is the need to find constitutionally compliant conduct or mechanisms to remove the National Director in a manner that upholds constitutional values. There is no doubt that the current framework governing the removal of the National Director is problematic, especially in terms of how it has been administered by the executive. However, as this article will show, recent case law that has tried to address some of these problems has created more uncertainty. It is no secret that, since the NPA was established in 1998, its national directors have been removed or resigned from office prematurely.[1] This has led

1 See 'Report of the Enquiry into the Fitness of Advocate VP Pikoli to Hold the Office of the National Director of Public Prosecutions' (2008); *Pikoli v President and Others* [2009] ZAGPPHC 99; 2010 (1) SA 400, which interdicted President Montlanthe from making a permanent appointment in the post of National Director before the legal proceedings regarding the legality of the removal of Pikoli were decided; *Democratic Alliance and Others v Acting National Director of Public Prosecutions and Others* 2012 (6) BCLR 613 (SCA), in which the court held that a decision by the NPA to discontinue prosecution is subject to constitutional review and that the Democratic Alliance, a registered political party, has *locus standi* to bring an application to review the record of the NPA's decision; *Democratic Alliance v President of the Republic of South Africa and Others* [2010] ZAGPPHC 194, in which the court held that, while the appointment of Simelane as National Director raised some concerns, it could not be said that the conduct of the President fell afoul of the Constitution; *Democratic Alliance v President of South Africa and Others* 2012 (12) BCLR 1297 (CC); *Democratic Alliance v President of the Republic of South Africa and Others* 2012 (1) SA 417 (SCA), which reversed the High Court decision and held that the appointment of Simelane was irrational and invalid; *Democratic Alliance v President of South Africa and Others* 2012 (12) BCLR 1297 (CC); 2013 (1) SA 248 (CC), in which the Court upheld the SCA decision to invalidate Simelane's appointment; *Jiba & Another v The General Council of the Bar of South Africa and Mrwebi v The General Council of the Bar of South Africa* [2018] ZASCA 103, which overturned a High Court decision which struck Ms Jiba from the roll of practice advocates; *Freedom Under Law (RF) NPC v National Director of Public Prosecutions*

to calls to reform the power to remove or appoint a National Director by transferring it from the executive to the legislature.[2]

In this article, I examine the constitutional provisions governing the removal of the National Director. This examination will be carried out in the context of recent decisions by the High Court, in *Corruption Watch (RF) NPC and Another v President of the Republic of South Africa and Others; Council for the Advancement of the South African Constitution v President of the Republic of South Africa and Others* (hereinafter *Corruption Watch 1*),[3] and the Constitutional Court (otherwise referred to as the Court), in *Corruption Watch NPC and Others v President of the Republic of South Africa and Others* (hereinafter *Corruption Watch 2*),[4] which found certain provisions of the National Prosecuting Authority Act 32 of 1998, which governs the removal of the National Director, unconstitutional.

The article is divided into four parts. Part one outlines the removal provisions in the National Prosecuting Authority Act. Part two discusses the *Corruption Watch 1* case and argues that the High Court did not properly justify its order invalidating the provisions of the Act, and that no proper account for the different separation of powers imperatives was considered by the court. Part three examines the judgment in *Corruption Watch 2*. This part is critical of the Court's approach to abstract review sections in the Act. Further, it is critical of the Court's approach to the suspension of the order of invalidity, which took no due regard to established jurisprudence. Lastly, this part is critical of the Court's failure to address the High Court order that the Deputy President should appoint the National Director, which runs counter to the text of the Constitution. Why is it important to canvass the latter point? Because the High Court decision in *Corruption Watch 1* binds a single judge in the Gauteng High Court division[5] and has strong persuasive value in another division.[6] Another significant ramification

and Others 2018 (1) SACR 436 (GP); *Corruption Watch (RF) NPC and Another v President of the Republic of South Africa and Others; Council for the Advancement of the South African Constitution v President of the Republic of South Africa and Others* [2018] 1 All SA 471 (GP); 2018 (1) SACR 317 (GP); and *Corruption Watch NPC and Others v President of the Republic of South Africa and Others* [2018] ZACC 23.

2 Since 2013, civil society organisations and political parties have advocated the reform of the NPA. For example, in 2013, the late Dene Smuts, a Member of Parliament representing the Democratic Alliance, introduced a private member's bill called the Constitution Eighteenth Amendment Bill (Eighteenth Amendment), which sought to amend certain provisions governing the NPA. See 'The Eighteenth Constitutional Amendment Bill', Government Gazette No 36566 (14 June 2013).

3 [2018] 1 All SA 471 (GP); 2018 (1) SACR 317 (GP).

4 [2018] ZACC 23.

5 This is important considering that the Constitutional Court left open some significant issues decided on by the High Court.

6 See Malcolm Wallis, 'Whose Decisis Must We Stare?' (2018) 135 SALJ 1, which advocates that now that we have a single High Court in South Africa, a single judge anywhere in the country should be bound by the decision of a full court of three judges, or a full bench of two judges, irrespective of which division constituted the full court or full bench. Likewise, single judges should ordinarily be obliged to follow the decisions of other single judges, because this promotes jurisprudential coherence

of this decision (and of *Corruption Watch 2*) is that it has revived the energy, among reformists, to propound for reforms.[7] Part four of the article is the conclusion.

The Provisions Governing the Removal of the National Director

Presently, the removal or suspension of the National Director is governed by section 12 of the National Prosecuting Authority Act. It is important to quote verbatim the pertinent parts of the latter provisions, which read as follows:

> 12 … (4) If the President is of the opinion that it is in the public interest to retain a *National Director* or a *Deputy National Director* in his or her office beyond the age of 65 years … the President may from time to time direct that he or she be so retained, but not for a period which exceeds, or periods which in the aggregate exceed, two years: Provided that a *National Director*'s term of office shall not exceed 10 years.
>
> (5) The *National Director* or a *Deputy National Director* shall not be suspended or removed from office except in accordance with the provisions of subsections (6), (7) and (8).
>
> (6) … (a) The President may provisionally suspend the National Director or a *Deputy National Director* from his or her office, pending such enquiry into his or her fitness to hold such office as the President deems fit and, subject to the provisions of this subsection, may thereupon remove him or her from office-
>
> (i) for misconduct;
>
> (ii) on account of continued ill-health;
>
> (iii) on account of incapacity to carry out his or her duties of office efficiently; or
>
> (iv) on account thereof that he or she is no longer a fit and proper person to hold the office concerned.
>
> (b) The removal of the *National Director* or a *Deputy National Director*, the reason therefor and the representations of the *National Director* or *Deputy National*

and consistency; *Peters and Another v S* [2019] ZAECPEHC 31; *Turnbull-Jackson v Hibiscus Court Municipality and Others* 2014 (6) SA 592 (CC) paras 53−56; *True Motives 84 (Pty) Ltd v Mahdi and Another* 2009 (4) SA 153 (SCA) para 100; *Brown and Another v Papadakis NO and Another* [2011] ZAWCHC 150; Hendrik Johannes Benade, 'The Authority of Full Benches in Other Divisions' (2013) 26 Advocate 14.

7 See Glynnis Breytenbach, We Should Be Considering Constitutional Amendments to Ensure an Independent NPA' (*Daily Maverick*, 21 August 2018) <https://www.dailymaverick.co.za/article/2018-08-21-we-should-be-considering-constitutional-amendments-to-ensure-an-independent-npa/> accessed 20 March 2021, which notes that the Democratic Alliance would be re-tabling a private member's bill to address the issue of the independence of the NPA.

> *Director* (if any) shall be communicated by message to Parliament within 14 days after such removal …
>
> (c) Parliament shall, within 30 days … or as soon … as is reasonably possible, pass a resolution as to whether or not the restoration to his or her office of the *National Director* or *Deputy National Director* so removed, is recommended.
>
> (d) The President shall restore the *National Director* or *Deputy National Director* to his or her office if Parliament so resolves.
>
> (e) The *National Director* or a *Deputy National Director* provisionally suspended from office shall receive, for the duration of such suspension, no salary or such salary as may be determined by the President.
>
> (7) The President shall also remove the *National Director* or a *Deputy National Director* from office if an address from each of the respective Houses of Parliament in the same session praying for such removal on any of the grounds referred to in subsection (6) (a), is presented to the President.
>
> (8) (a) The President may allow the *National Director* or a *Deputy National Director* at his or her request, to vacate his or her office-
>
> (i) on account of continued ill-health; or
>
> (ii) for any other reason which the President deems sufficient …

It is clear from the above provisions that the National Director cannot be removed from office without the concurrence of Parliament. Further, they indicate that Parliament has veto power against the President. The above legislative provisions first came under major scrutiny in *Corruption Watch 1*.

The *Corruption Watch 1* Case

The facts and circumstances that led to the dispute in *Corruption Watch 1* have been well covered in the public domain and will not be presented here. Above all, the legal issues that arose are clear and to the point, without the need to delve into the factual circumstances of the case. For the purposes of this analysis, I will focus on the legal issues that arose. In *Corruption Watch 1*, the High Court found sections 12(4) and (6) of the National Prosecuting Authority Act, which deal with the removal or suspension of the National Director, to be unconstitutional. The High Court's finding was predicated on two related arguments, supported by recent case law dealing with the independence of the judiciary and the independent investigative units of the South African Police Service. The High Court dealt with the constitutionality of those two provisions separately. In order to lay the foundation for my critical analysis of the court's findings and decision, I follow the same approach.

Firstly, in relation to section 12(4), the applicant relying on the Court decision in *Justice Alliance of South Africa v President of Republic of South Africa and Others*[8] (hereinafter *Justice Alliance*) argued that that provision is unconstitutional because it offends the guarantee of the independence of the NPA. An important point to note is that *Justice Alliance* dealt with the issue of judicial independence. There, the Court found section 8(a) of the Judges' Remuneration and Conditions of Employment Act 47 of 2001—which allowed the President to request a Chief Justice whose term is about to end to continue in office for an additional period determined by the President, if the Chief Justice consented to that request—unconstitutional. The Court reasoned that section 8(a) violated the principle of judicial independence because 'this … open ended discretion may raise a reasonable apprehension or perception that the independence of the Chief Justice and by corollary the judiciary may be undermined by external interference of the executive.'[9]

In addition, the applicant relied on the judgment in *Helen Suzman Foundation v President of the Republic of South Africa*[10] (hereinafter *Helen Suzman*), which dealt with the adequacy of the structural and operational independence of the Directorate for Priority Crime Investigation (DPCI), a corruption-fighting unit established under the South African Police Service Act 68 of 1995. In that case, the Court made some pronouncements regarding executive authority to renew the term of office of the head of the DPCI. It concluded that such power is inimical to the principle of structural and operational independence expected between the DPCI and the executive.[11] It reasoned as follows:

> Renewal invites a favour-seeking disposition from the incumbent whose age and situation might point to the likelihood of renewal. It beckons to the official to adjust her approach to the enormous and sensitive responsibilities of her office with regard to the preferences of the one who wields the discretionary power to renew or not to renew the term of office. No holder of this position of high responsibility should be exposed to the temptation to 'behave' in anticipation of renewal.[12]

The principle that emerged from *Justice Alliance* and *Helen Suzman* is that the law has to guard against external intrusion by the executive into independent institutions. In *Corruption Watch 1*, the High Court noted that this is a significant and binding principle, which should apply with equal force to the position of the National Director.

8 [2011] ZACC 23; 2011 (5) SA 388 (CC); 2011 (10) BCLR 1017 (CC).

9 ibid para 68.

10 [2014] ZACC 32; 2015 (2) SA 1 (CC); 2015 (1) BCLR 1 (CC).

11 See *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC); *Helen Suzman Foundation v President of the Republic of South Africa and Others; Glenister v President of the Republic of South Africa and Others* 2015 (2) SA 1 (CC).

12 *Helen Suzman* (n 10) para 81.

In addition, the applicant advocated for this principle to be applied to the National Director given the impartiality demanded of the National Director under the National Prosecuting Authority Act. In reaction to this, the High Court observed that the government did not challenge the essence of the applicant's argument except to point out that the declaration of constitutional invalidity sought by the applicant was academic. Without proper development, the government had cited the judgment in *South African Reserve Bank and Another v Shuttleworth and Another*[13] (hereinafter *Shuttleworth*) in opposition to the applicant's argument. The High Court rejected the government's reliance on the *Shuttleworth* judgment and distinguished that judgment from *Corruption Watch 1*. It then sustained the applicant's challenge to the President's power under section 12(4) of the National Prosecuting Authority Act to extend the tenure of the National Director.

Secondly, the applicant's challenge of section 12(6) of the National Prosecuting Authority Act centred around the unilateral presidential power to suspend the National Director, for an indefinite period, without pay. In support of this attack, the applicant relied on the judgment in *Helen Suzman*, where the Court disapproved of similar powers that had been granted to the Minister of Police, exercisable against the head of the DPCI. In *Helen Suzman*, the Court reasoned as follows:

> Suspension without pay defies the exceedingly important presumption of innocence until proven guilty or the audi alteram partem rule and unfairly undermines the national head's ability to challenge the validity of the suspension by the withholding of salary and benefits. It irrefutably presumes wrongdoing. An inquiry may then become a dishonest process of going through the motions. Presumably the minister's mind would already have been made up that the national head is guilty of what she is accused.[14]

Furthermore, the applicant also relied on the judgment in *McBride v Minister of Police*[15] (hereinafter *McBride*). Like in *Helen Suzman*, in *McBride* the Court dealt with the constitutional principle of presumption of innocence and the *audi alteram partem* rule in relation to the Minister of Police's power to suspend the head of the Independent Police Investigative Directorate (IPID), another independent institution established under the Constitution. The Court in that case set aside and declared invalid the Minister's decision to suspend and discipline the head of the IPID. It reasoned as follows:

> Without adequate independence, it would be easy for the Minister to usurp the power of the Executive Director under the guise of exercising political accountability or oversight over IPID in terms of section 206(1) of the Constitution. In this case, acting unilaterally, the Minister invoked the provisions of section 16A(1) of the Public Service Act, placed Mr McBride on suspension and instituted disciplinary proceedings against him.

13 [2015] ZACC 17; 2015 (5) SA 146 (CC); 2015 (8) BCLR 959 (CC).

14 *Helen Suzman* (n 10) para 85.

15 2016 (2) SACR 585 (CC); 2016 (11) BCLR 1398 (CC).

> Undoubtedly, such conduct has the potential to expose IPID to constitutionally impermissible executive or political control. That action is not consonant with the notion of the operational autonomy of IPID as an institution. Put plainly it is inconsistent with section 206(6) of the Constitution.[16]

According to the High Court in *Corruption Watch 1*, the principle set out in *Helen Suzman* and *McBride* in relation to the constitutionality of section 12(6) indicates that suspension without pay 'defies the exceedingly important presumption of innocence until proven guilty or the *audi alteram partem* rule.'[17] Since the President did not attack the principle underlying the applicant's constitutional challenge, the High Court simply upheld the challenge and declared section 12(6) constitutionally void.

Analysis of *Corruption Watch 1*

There are at least two problems with the High Court's decision in *Corruption Watch 1* that deserve mention.

No Proper Justification for Order of Invalidity

The first problem is that the High Court did not properly justify its decision to invalidate sections 12(4) and (6). Based on its own observation, the High Court arrived at this decision not because of the strength in the applicant's argument, but primarily because the government did not properly challenge the applicant's argument. This is not a convincing basis on which to declare an Act of Parliament unconstitutional. The better approach seems to be the one that has been adopted by the Indian and United States federal courts as well as Lesotho's apex court, namely that a statute is presumed to be constitutional and should not be declared unconstitutional unless its unconstitutionality is clear beyond all rational doubt.[18] A similar approach should be applied in South Africa, because it respects separation of powers and only invalidates an Act when convincing arguments are advanced.

16 ibid para 40.

17 *Corruption Watch 1* (n 3) para 126.

18 See *Suresh Kumar Koushal and Anr v Naz Foundation and Anr Civil Appeal* 10972 (2013) at para 28, which reasoned that 'every legislation enacted by Parliament or State Legislature carries with it a presumption of constitutionality. This is founded on the premise that the legislature, being a representative body of the people and accountable to them, is aware of their needs and acts in their best interest within the confines of the Constitution'; *Charanjit Lal v Union of India AIR 1951* SC 41, which at 11 held that 'the presumption is always in favor of the constitutionality of an enactment, and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles'; *Shri Ram Krishna Dalmia v Shri Justice SR Tendolkar & Ors* 1958 AIR 538; *Adkins v Children's Hospital, 261* US 525, 544 (1923); *Corporation Comm of Oklahoma v Lowe* (1930) 281 US 431; *Lambert v Yellowley* (CCA 2d, 1924) 4 F (2d) 915; *City of Louisville v Babb* (CCA 7th, 1935) 75 F (2d) 162; and *Sechele v Public Officers Defined Contribution Pension Fund and Others* [2011] LSCA 23 paras 11 and 16.

Moreover, in a number of cases the Court has held that when dealing with constitutional matters, a court has an obligation to raise a constitutional question of its own accord and deal with related arguments.[19] The Court first commented on whether a court can raise a constitutional question on its own in *Potgieter v Lid van die Uitvoerende Raad: Gesondheid Provinsiale Regering Gauteng en Andere*.[20] In that case, the Court confirmed an order of invalidity after a High Court, of its own accord, raised the constitutionality of a statutory provision and subsequently declared it invalid.

Furthermore, in *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development and Others*, Justice Ngcobo held that a court may raise, of its own accord, the unconstitutionality of a law that it is called upon to enforce.[21] Justice Ngcobo reasoned that 'the rationale for permitting a court to raise, of its own accord, a constitutional issue is rooted in the supremacy of the Constitution.'[22] Justice Ngcobo went further to explicate the justification for courts to raise constitutional questions of their own accord:

> A court is not always confined to issues of law explicitly raised by the parties. If a litigant overlooks a question of law which arises on the facts, a court is not bound to ignore the question of law overlooked. Another equally relevant principle in this regard is that of the separation of powers. Courts should observe the limits of their powers. They should not constitute themselves as the overseers of laws made by the legislature. Ordinarily, therefore, they should raise and consider the constitutionality of laws that are properly engaged before them and where this is necessary for the proper resolution of the dispute before them … There are two situations in which a court may, of its own accord, raise and decide a constitutional issue. The first is where it is necessary for the purpose of disposing of the case before it, and the second is where it is otherwise necessary in the interests of justice to do so.[23]

Based on this jurisprudence, I submit that the High Court in *Corruption Watch 1* was obliged to properly consider the constitutionality of the National Prosecuting Authority Act by requiring full arguments from the parties. When the government overlooked the law or relied on what the High Court thought to be wrong legal authority, it was obliged to bring into consideration the correct legal authority to ensure that the constitutional question before it was properly canvassed and resolved. I submit that it was wrong of the High Court to confine itself to the legal authorities raised or not raised by the parties as a basis for deciding such an important constitutional question.

19 See *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development and Others 2009* (4) SA 222 (CC); *Potgieter v Lid van die Uitvoerende Raad: Gesondheid Provinsiale Regering Gauteng en Andere* 2001 (11) BCLR 1175.

20 *Potgieter* (n 19).

21 *Director of Public Prosecutions, Transvaal* (n 19).

22 ibid para 35.

23 ibid paras 38−39.

In other words, even when the government did not properly challenge the principle upon which the applicant's argument was based, the High Court should not have rested there. Instead, it should have, of its own accord, examined the applicant's argument against other relevant authorities to ensure the proper resolution of the dispute before it and to ensure certainty in the law. This is particularly imperative when the potential result of the dispute is an order of invalidity of legislation. Declaring an Act of Parliament invalid is counter majoritarian and should not be arrived at lightly, as in this case. The framers of the Constitution did not consider such orders lightly either. This is why they made it a requirement that any order of invalidity made by a High Court, the SCA, or a similar court must be confirmed by the Court before it has any force.[24] In terms of section 167(4) of the Constitution, the Court has exclusive jurisdiction to make a final decision on whether an Act of Parliament is constitutional due to crucial separation of powers considerations.[25] In *Doctors for Life International v Speaker of the National Assembly and Others*,[26] the Court articulated the rationale and importance of granting this exclusive jurisdiction as follows:

> [S]ection 167(4) confers exclusive jurisdiction on this Court in a number of crucial political areas; it is given the power to decide … the constitutionality of any parliamentary ... bill. ... The purpose of giving this Court exclusive jurisdiction to decide issues that have important political consequences is to preserve the comity between the judicial branch of government and the other branches of government by ensuring that only the highest court in constitutional matters intrudes into the domain of the other branches of government … The principle underlying the exclusive jurisdiction of this Court … is that disputes that involve important questions that relate to the sensitive areas of separation of powers must be decided by this Court only.[27]

Hence, given the underlying importance that the framers attached to orders of invalidity of an Act of Parliament, it was critical for the High Court in *Corruption Watch 1* to have carefully considered arguments on both sides before issuing such order against the impugned provisions of the National Prosecuting Authority Act.

Whilst one could argue that the High Court considered the relevance of the *Shuttleworth* judgment to the resolution of the issues in *Corruption Watch 1*, its consideration was superfluous. The High Court had already determined that the government had not

24 See s 167(5) of the Constitution.

25 See *President of the Republic of South Africa and Others v South African Rugby Football Union* 1999 7 BCLR 725, 762−763 (CC) at para 73, which explains that 'the drafters of the Constitution necessarily envisaged that this Court would be called upon to adjudicate finally in respect of issues which would inevitably have important political consequences'; *King and Others v Attorneys Fidelity Fund Board of Control and Another* 2006 4 BCLR 462 (SCA) at para 24, which ruled that the invalidation of an Act of Parliament for breach of the constitutional duty to facilitate public involvement in its processes would be pre-eminently a crucial political question, which the Constitution reserved for the Constitutional Court to decide.

26 2006 (6) SA 416 (CC).

27 ibid paras 22−24.

challenged the plaintiff's argument; hence, its analysis to distinguish the *Shuttleworth* judgment had no jurisprudential value to the outcome of the case, because it had already decided the issue against which *Shuttleworth* was purportedly submitted. Therefore, I submit that the High Court's decision to invalidate sections 12(4) and (6) of the National Prosecuting Authority Act should not be hailed.

No Proper Account of Different Separation of Powers Imperatives

The second problem is that the High Court did not address the question of whether the case authorities relied upon by the applicant were appropriate and applicable to the resolution of the dispute in *Corruption Watch 1*. To put it differently, the High Court presumptively dealt with *Helen Suzman* and *Justice Alliance* as if they were relevant and applicable to the present dispute. In my view, *Justice Alliance* was not applicable to the dispute before the High Court, because that case dealt with external separation of powers considerations, namely the relationship among the three traditional branches of the state.

Unlike other constitutional systems that do not elaborate on separation of powers as a basis for structuring government, the South African constitutional framework is a bit more developed than simply providing a structure that separates governmental functions among three pillars. Also, whereas the Court in *South African Association of Personal Injury Lawyers v Heath and Others*[28] confirmed that the separation of powers doctrine is implied in the Constitution, the doctrine was expressly required by the Constitutional Principle VI, which is one of the thirty-four principles that governed the drafting of the Constitution. These principles were encapsulated in Schedule 4 of the Interim Constitution Act 200 of 1993.

Scholars have argued that a modern understanding of governmental structures requires us to view separation of powers as made up of two components: internal and external separation of powers.[29] Metzger makes a convincing case about this understanding. She argues that the 'defining characteristics of internal separation of powers measures is that they seek to achieve' separation of powers imperatives by 'operating within the confines of a single branch' of government.[30] To the contrary, Metzger correctly claims that

28 2001 1 SA 883, at para 20, which holds that 'I cannot accept that an implicit provision of the Constitution has any less force than an express provision.'

29 See Gillian Metzger, 'The Interdependent Relationship between Internal and External Separation of Powers' (2009) 59 Emory LJ 423; Peter Strauss, 'Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?' (1987) 72 Cornell LR 488; Neal Kumar Katyal, 'Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within' (2006) 115 Yale LJ 2314, 2316, which notes the enormous power of the executive since the war on terror began; Martin Flaherty, 'The Most Dangerous Branch' (1996) 105 Yale LJ 1725, which recounts the accumulation of power by the executive branch; A Greene, 'Checks and Balances in an Era of Presidential Lawmaking' (1994) 61 University of Chicago LR 123, which notes that the President's power has expanded and needs to be checked.

30 Metzger (n 29) 428.

external separation of powers imperatives operate through interaction among the different branches of government or with other forces external to a particular branch's operations.[31] Metzger observes that even though internal imperatives are available in all branches, the focus of internal separation of powers scholarship is on the executive branch, particularly presidential power, largely due to the notion that it poses the greatest risk of increased power in modern democracies.[32] Accordingly, internal separation of powers is often preoccupied with checks on presidential power.[33]

In the South African context, the threat of aggrandised executive authority is reinforced by the country's electoral system, which has historically ensured that the executive and legislative branches are controlled by the same political party. Although this is not constitutionally required—that is to say, it is arguably possible for the two branches not to be controlled by a single political party in South Africa—Katyal correctly cautions that when the same party controls both branches, loyalty, discipline, and self-interest generally preclude inter-branch checks and balances.[34]

Much of the literature and case law on separation of powers in South Africa has focused on external considerations—that is to say, the interaction between or among the three traditional pillars of government.[35] Moreover, the jurisprudence of the Court has focused on achieving the goals of external separation of powers, which is to prevent the over-concentration and abuse of power among different pillars of government[36] and to facilitate the imposition of restraints by one pillar of government against another.[37]

Internal separation of powers seeks to achieve similar objectives to external separation of powers by working within the limits of a single pillar of government, such as the executive;[38] however, its application must always be cognisant of and respect the external aspects in order not to undermine the traditional checks on executive power.[39]

31 ibid 428.

32 ibid 428−429.

33 ibid 428−429.

34 Katyal (n 29) 2321.

35 See Phineas M Mojapelo, 'The Doctrine of Separation of Powers (a South African Perspective)' (April 2013) Advocate; Dikgang Moseneke, 'Oliver Schreiner Memorial Lecture: Separation of Powers, Democratic Ethos and Judicial Function: Current Developments' (2008) 24 SAJHR 341; Dikgang Moseneke, 'Striking a Balance between the Will of the People and the Supremacy of the Constitution: Notes' (2012) 129 South African LJ 9; Sebastian Seedorf and Sanele Sibanda, 'Separation of Powers' in Stu Woolman and Michael Bishop (eds), *Constitutional Law of South Africa* (Juta 2008).

36 Mojapelo (n 35) 38.

37 *Certification of the Constitution of the Republic of South Africa, 1996* [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) para 108.

38 See Metzger (n 29) 428.

39 Metzger (n 29) 428 argues that whilst internal constraints 'serve the constitutional goal of checking excessive Executive Branch power, such constraints arguably undermine political accountability and the Executive Branch's overall unitary structure.' Because 'the role that internal constraints play in strengthening external checks, particularly external checks by Congress, makes them constitutionally suspect because they represent Congress aggrandizing itself at the President's expense.'

In other words, whilst few constitutional provisions directly address the internal functions of each pillar,[40] the jurisprudence tailored to these distinct internal imperatives is yet to be developed. Nevertheless, the presence of a wide range of independent institutions could be viewed as serving that internal check and independent decision-making function. These institutions include the DPCI, IPID, the Public Service Commission, the NPA, and the Auditor General.

The question is: What principles should govern internal separation of powers? Is it appropriate for courts to employ external separation of powers jurisprudence to determine internal separation of powers issues, given that the inventors of separation of powers never contemplated the growth of the administration and independent institutions?

With this in mind, let us go back to the High Court's decision in *Corruption Watch 1*. In my view, the levels of independence expected among the three pillars of government is distinct from what is expected from the NPA *vis-á-vis* the executive, because the NPA falls within the executive and the executive has express final responsibility over the prosecuting authority.[41] Hence, I submit that South Africa requires a nuanced constitutional jurisprudence that recognises these distinct separation of powers imperatives, and that case law dealing with external separation of powers, such as *Justice Alliance*, should not be employed as a normative standard to resolve disputes that at best concern internal separation of powers imperatives. As presented below, the Court made the same error, in my view, of relying on these authorities. To put it differently, *Justice Alliance* is not an appropriate authority for the regulation of the relationship between a traditional branch of government and agencies that fall within that branch. The relevant authorities on this issue are *Helen Suzman* and *McBride*, and possibly *Glenister v President of the Republic of South Africa and Others*.[42] Reliance on *Justice Alliance* instead of the latter authorities arguably undermines executive political accountability as well as popular oversight through the National Assembly.[43]

40 See s 179(1), dealing with the appointment of the National Director; section 196, read with the Public Service Commission Act 46 of 1997, dealing with the appointment of the Public Service Commissioners; section 206(6), read with section 6 of the Independent Police Investigative Directorate Act 1 of 2011; and section 221(1) of the Constitution, dealing with the appointment of the Financial and Fiscal Commission.

41 See s 179(6) of the Constitution.

42 2011 (3) SA 347 (CC).

43 See, for example, *FCC v Fox Television Stations, Inc* 556 US 502 (2009) 523, wherein Justice Scalia noted that 'Justice Breyer … claims that the FCC's status as an independent agency sheltered from political oversight requires courts to be all the more vigilant in ensuring that major policy decisions be based upon articulable reasons. … Not so. The independent agencies are sheltered not from politics but from the President.'

The *Corruption Watch 2* Case

Analysis of *Corruption Watch 2*

Since the High Court judgment in *Corruption Watch 1* declared certain provisions of the National Prosecuting Authority Act unconstitutional, the Constitution required that such declaration be confirmed by the Court. In *Corruption Watch 2*, Justice Madlanga confirmed some aspects of the High Court ruling in *Corruption Watch 1*. Given my views on *Corruption Watch 1*, I am compelled to critically examine aspects of the ruling in *Corruption Watch 2*. Like with *Corruption Watch 1*, and for the same reasons stated earlier, the facts in *Corruption Watch 2* are not critical. Where necessary, the facts will be incorporated to give proper context of the legal issues.

My examination of *Corruption Watch 2* focuses on the following three main points of law that I find problematic in the majority judgment: (1) the decision to declare sections 12(4) and (6) of the National Prosecuting Authority Act invalid in the abstract without proper regard to established principles of justiciability; (2) the decision not to restore Mr Nxasana to his original position of National Director despite a well-established body of law justifying that he should be restored to his original position; and (3) the omission to address an aspect of the holding by the High Court in *Corruption Watch 1* that the Deputy President of South Africa should appoint the National Director because the President, at the time, was conflicted.

Abstract Review of the National Prosecuting Authority Act

It is important to begin by highlighting that in South Africa, justiciability is understood to encompass most legal canons that prevent courts from adjudicating disputes,

including standing,[44] mootness,[45] ripeness,[46] and the prevention of advisory opinions.[47] These justiciability canons emanate from the constitutional imperatives to respect the law of separation of powers.[48]

One of the confirmation orders granted by *Corruption Watch 2* is that sections 12(4) and (6) of the National Prosecuting Authority Act are unconstitutional to the extent that they had the potential to impede the independence of the NPA. In arriving at this decision, the Court recognised upfront that there was no live controversy over the validity of these two provisions. In turn, the Court offered the following rationale as justification for entertaining the abstract challenge to those provisions.

Firstly, the Court observed that it has entertained abstract challenges in the past. It cited a dissenting opinion by Justice Kate O'Regan in *Ferreira v Levin NO; Vryenhoek v Powell NO*[49] (hereinafter *Ferreira*), where she approved that courts may entertain abstract public interest standing challenges in appropriate circumstances. In that case, Justice O'Regan offered a range of factors to be considered when determining whether or not to entertain an abstract challenge.[50] Despite Justice O'Regan's views being in the

44 See *Ferreira v Levin* 1996 1 BCLR 1 (CC) paras 162−169, 223−238; *Albutt v Centre for the Study of Violence and Reconciliation* 2010 3 SA 293 (CC) paras 32−35; *Port Elizabeth Municipality v Prut NO* 1996 4 SA 318 (E); Iain Currie and Johan de Waal, *The Bill of Rights Handbook* (Juta 2005) 72−84. See also Ziyad Motala and Cyril Ramaphosa, *Constitutional Law: Analyses and Cases* (Oxford 2002) 103, in which the authors argue that the Constitution adopts different standards on standing depending on whether the plaintiff's case is based on a mere claim of wrongdoing on the part of the defendant, versus a claim of wrongdoing which affects rights protected in the Bill of Rights. They further note that in the former instance the standards are more rigid, while in the latter instance the standards for standing are more flexible.

45 See *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) para 21; *S v Dlamini* 1999 4 SA 623 (CC) para 27; *Janse van Rensburg NO v Minister of Trade and Industry* 2001 1 SA 29 (CC) paras 9−10; Motala and Ramaphosa (n 44) 115−116, where the authors note that mootness is not a fully developed principle in South Africa and is unlikely to mirror the American approach, because even if an issue becomes moot, South African courts might still need to consider some aspects of the merits; *Wiese v Government Employees Pension Fund* 2012 6 BCLR 599 (CC) paras 21−24, which holds that the issues between the parties were moot due to recent legislative interventions.

46 See *National Coalition for Gay and Lesbian Equality* (n 45) para 21; *Chairman, State Tender Board v Digital Voice Processing (Pty) Ltd* 2012 2 SA 16 (SCA) paras 16−21; *Ritcher v Minister of Home Affairs* 2009 3 SA 615 (CC) para 40; *Legal Aid South Africa v Magidiwana* 2014 4 All SA 570 (SCA) paras 17−18.

47 *National Coalition for Gay and Lesbian Equality* (n 45) para 21; *Radio Pretoria v Chairman, Independent Communications Authority of South Africa* 2005 1 SA 47 (SCA) para 15.

48 See *National Treasury v Opposition to Urban Tolling Alliance* 2012 6 SA 223 (CC) and *Magidiwana v President of the Republic of South Africa* 2013 11 BCLR 1251 (CC).

49 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC).

50 These factors, according to *Ferreira* (n 44) para 234, are 'whether there is another reasonable and effective manner in which the challenge can be brought; the nature of the relief sought, and the extent to which it is of general and prospective application; and the range of persons or groups who may be directly or indirectly affected by any order made by the court and the opportunity that those persons or groups have had to present evidence and argument to the court.'

minority in *Ferreira*, in *Corruption Watch 2* the Court justified its reliance on them by pointing to the fact that a majority judgment in *Lawyers for Human Rights v Minister of Home Affairs*[51] (hereinafter *Lawyers for Human Rights*) quoted Justice O'Regan's views with approval.[52] It is not clear or explained why the Court in *Corruption Watch 2* did not rely on the majority judgment in *Lawyers for Human Rights* to justify its decision if it felt strongly that this is good law for the proposition that the abstract challenge should be entertained. Does the fact that *Lawyers for Human Rights* cited Justice O'Regan with approval elevate her minority statement of law into a majority view?

Furthermore, the Court relied on the argument of the Council for the Advancement of the South African Constitution (CASAC), one of the applicants in the case, that the abstract challenge is vital when the alleged unconstitutionality relates to independence, as was the case in the present matter. According to CASAC, it was better to pre-emptively challenge the relevant legislative provision rather than wait for a live controversy involving that provision. CASAC did not elaborate on why abstract challenges involving independence are vital and require special attention, while others do not. This begs the following questions: What sort of issues of independence require special attention from courts? Is it independence of an internal or external nature that deserves this special attention? What was vital about this case? The obvious criticism is that, like the High Court before it, the Court appears to have acceded to CASAC's argument without proper examination. The need for an abstract review should be vital or imperative not because an applicant alleges it to be, without proper explanation, but because a court finds it to be vital after examining any allegations against existing and well-established jurisprudence. Be that as it may, most of the justices in *Corruption Watch 2* decided that it was imperative that the abstract challenge be entertained.

The problem with the majority ruling in *Corruption Watch 2* is that it did not take proper account of its well-established precedent. The Court's jurisprudence regarding justiciability is well settled. According to this jurisprudence, courts will not adjudicate a matter that does not present an existing or live controversy. The theory behind this principle is that courts exist to determine concrete legal disputes and not to give advisory opinions on abstract propositions of law.[53] The Court has applied this justiciability principle since the dawn of democracy.

51 [2004] ZACC 12; 2004 (4) SA 125 (CC).

52 *Corruption Watch 2* (n 4) para 38.

53 See *Dormehl v Minister of Justice and Others* 2000 (2) SA 825; 2000 (5) BCLR 471 (CC) para 8; *S v Dlamini, S v Dladla and Others; S v Joubert; S v Schietekat* 1999 (4) SA 623; 1999 (7) BCLR 77 para 27, which notes that 'this Court has long since held that as a matter of judicial policy, constitutional issues are generally to be considered only if and when it is necessary to do so.' See also Motala and Ramaphosa (n 44) 113, where the authors note that Justice Kriegler, in *Ferreira* (n 44) 199, described ripeness as serving the useful purpose of highlighting that the business of a court is generally retrospective; it deals with situations or problems that have already ripened or crystalised, and not with prospective hypothetical problems; *Police and Prisons Civil Rights Union v South African Correctional Services Workers' Union and Others* [2018] ZACC 24 para 43, which notes that 'this

In *Corruption Watch 2*, the Court should have explained its decision to entertain the abstract challenge of sections 12(4) and (6) of the National Prosecuting Authority Act in the context of existing authorities. Constitutions and principles developed under it endure when they are consistently applied by courts, thereby promoting legal certainty and the institution of the rule of law. Legal certainty is by far the most important element of the theory of law.[54]

On substantive grounds, the Court in *Corruption Watch 2* found section 12(6), which allows the President to suspend the National Director without pay and for an indefinite period, invalid because it was susceptible to abuse by the President. The problem, as the Court noted, is that the President has absolute power to suspend without pay, which the Court thought could be used to render compliant the National Director or Deputy National Director.[55] Related to this problem was the validity of the power to unilaterally suspend enjoyed by the President. *Corruption Watch 2* cited with approval a majority decision by Chief Justice Mogoeng in *Helen Suzman*, which dealt with the independence of the DPCI and found that there is nothing inherently wrong with the power to unilaterally suspend.[56] According to the majority opinion in *Corruption Watch 2*, the problem that Chief Justice Mogoeng had with unilateral suspension is the possibility of suspension without pay and benefits.

On the other hand, in *Corruption Watch 2* the Court also cited with approval another judgment by Justice Bosielo in *McBride*, where in dealing with the independence of the IPID and the power of the Minister of Police to unilaterally suspend its head, the Court found that unilateral suspension of the head was inimical to the independence of the IPID.[57] Unlike Chief Justice Mogoeng in *Helen Suzman*, Justice Bosielo did not elucidate the problem with unilateral suspension. He simply addressed the issue in passing. In the light of these authorities, *Corruption Watch 2* found it unnecessary to

Court will not adjudicate an appeal if it no longer presents an existing or live controversy. This is because this Court will generally refrain from giving advisory opinions on legal questions, no matter how interesting, which are academic and have no immediate practical effect or result. Courts exist to determine concrete legal disputes and their scarce resources should not be frittered away entertaining abstract propositions of law'; *JT Publishing (Pty) Ltd and Another v Minister of Safety and Security and Others* 1997 (3) SA 514 (CC); *Janse van Rensburg NO* (n 45) paras 9−10, where, in rejecting to determine an issue, the Court said, '[T]his Court has held that an issue is moot if it does not present an existing or live controversy; such an issue is not justiciable. Here we cannot consider the constitutionality of section 7(3) in its amended form and we should accordingly express no opinion thereon'; *Geldenhuys & Neethling v Beuthin* 1918 AD 426 at 441, which notes that 'courts of law exist for the settlement of concrete controversies and actual infringements of rights, not to pronounce upon abstract questions, or to advise upon differing contentions, however important.'

54 See Gustav Radbruch, 'Legal Philosophy' in *The Legal Philosophies of Lask, Radbruch and Dabin* (Harvard University Press 1950) 107−108; Mtendeweka Mhango, 'Executive Accountability and the Separation of Powers: Introducing the Political Accountability Doctrine in South Africa' (2021) 35 Speculum Juris 33.

55 *Corruption Watch 2* (n 4) para 45.

56 ibid para 47.

57 ibid para 47; *McBride* (n 15) para 43.

explain the different approaches to the concept of unilateral suspension *vis-á-vis* the independence of constitutional bodies. Yet, the Court chose to rely on Justice Bosielo's judgment in *McBride* as its preferred grounds for invalidating section 12(6) of the National Prosecuting Authority Act.

In my view, the problem is that, given the two conflicting legal positions—*Helen Suzman* and *McBride*—the Court omitted to explain the two approaches and why Justice Bosielo's view was more controlling than the views expressed by the Chief Justice in *Helen Suzman*. The Court, without analysis of the two judgments, simply held that 'there is enough to invalidate section 12(6) based on [Bosielo's] reasoning.'[58] I submit that given the conflicting authorities and important implications for the emerging jurisprudence concerning independent institutions in South Africa, it was in the interest of justice and the need for a consistent jurisprudence for the Court to comprehensively address the issue. Neither the judgment in *Helen Suzman* nor the one in *McBride* can be said to be unquestionable.[59] There was sufficient authority, such as *Helen Suzman*, not to invalidate section 12(6). Why would the same Court in *Helen Suzman* and *McBride*, within a space of two years, find unilateralism in the suspension of public officials permissible and problematic at the same time? What principle is to be derived from this jurisprudence? Is unilateralism permissible or not? Does it depend on who the litigant is? Given the conflicting legal positions by Justices Mogoeng and Bosielo, shouldn't the majority in *Corruption Watch 2* have explained, in greater detail, the principle that was being followed or developed, and why? Based on the foregoing analysis, I submit that the majority judgment in *Corruption Watch 2* should be rebuffed to the extent that it does not foster certainty in the law.

Suspension of the Order of Invalidity

In order to give context to this section, it is important to outline brief facts from *Corruption Watch 2*. Mr Nxasana was appointed National Director from 1 October 2013.[60] In July 2014, nine months into his appointment, the then President informed Mr Nxasana of his intention to institute an inquiry to investigate his fitness to hold office. In addition, the President sent another communication to Mr Nxasana, informing him of his intentions to suspend him pending the finalisation of the envisaged inquiry. Mr Nxasana resisted this attempt by approaching the High Court to prevent the suspension. This court action was not pursued to finality, because late in 2014, the President proposed that the dispute be mediated. Throughout their engagements, Mr Nxasana made it clear that he did not want to vacate office, as there was no basis for him to do so.[61]

58 *Corruption Watch 2* (n 4) para 48.

59 See *AAA Investments (Proprietary) Limited v Micro Finance Regulatory Council and Another* 2006 (11) BCLR 1255 (CC); 2007 (1) SA 343 (CC) para 27.

60 *Corruption Watch 2* (n 4) para 6.

61 ibid para 9.

In early 2015, the President eventually set up the commission (initially communicated to Mr Nxasana in July 2014) that was to investigate Mr Nxasana's fitness to hold office. The commission set 11 May 2015 as the date for the commencement of the hearings.[62] Parallel to this process, the President, through his legal advisor, made a settlement offer to Mr Nxasana, which was signed by Mr Nxasana on 9 May 2015 and by the Minister of Justice and the President on 14 May 2015. Under this settlement agreement, Mr Nxasana would relinquish his position as National Director and receive a sum of R17.3 million as a settlement payment. Following this settlement agreement, on 18 June 2015, the President appointed Advocate Shaun Abrahams as National Director. Advocate Abrahams was the incumbent National Director at the time of the Court decision.

Two applicants, Corruption Watch NPC and Freedom Under Law, applied for the High Court to review and set aside the settlement agreement and to order that Mr Nxasana repay the R17.3 million settlement pay-out. The applicants also applied for the court to review and set aside the appointment of Advocate Abrahams. The High Court granted both applications, hence the confirmation proceedings before the Court.

One of the orders that the Court was asked to confirm was whether the termination of the appointment of Mr Nxasana as National Director was to be declared unconstitutional and invalid. Another order was whether the settlement agreement entered into between the President, the Minister of Justice, and Mr Nxasana, dated May 2015, under which Nxasana stepped down from his position, was invalid and to be set aside. The Court confirmed both orders of invalidity.

Flowing from this confirmation, the Court was tasked to fashion an appropriate remedy. Section 172[63] of the Constitution confers wide remedial powers on the judiciary.[64] The majority of the justices in *Corruption Watch 2* acknowledged that the well-established

62 ibid para 10.

63 172 (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.

64 See *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency* 2014 (1) SA 604 (CC); 2014 (1) BCLR 1 (CC) (hereinafter *AllPay 1*); *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency* 2014 (4) SA 179 (CC); 2014 (6) BCLR 641 (CC) (hereinafter *AllPay 2*); *Hoffmann v South African Airways* 2001 (1) SA 1; 2000 (11) BCLR 1211; [2000] 12 BLLR 1365 (CC); *Masetlha v President of the Republic of South Africa and Another* 2008 (1) SA 566 (CC); 2008 (1) BCLR 1; *Black Sash Trust v Minister of Social Development and Others (Freedom Under Law NPC Intervening)* [2017] ZACC 8; 2017 (3) SA 335 (CC) para 51, which notes that 'it is necessary to be frank about this exercise of our just and equitable remedial power. That power is not limitless and the order we make today pushes at its limits. It is a remedy that must be used with caution and only in exceptional circumstances.'

principle in *Steenkamp and Others v Edcon Limited* [65] (hereinafter *Steenkamp*) governed the resolution of the dispute in this case. In *Steenkamp*, the Court established the principle that 'an invalid dismissal is a nullity. In the eyes of the law, an employee whose dismissal is invalid has never been dismissed. If, in the eyes of the law, that employee has never been dismissed, that means the employee remains in his or her position in the employ of the employer.'[66] Based on this authority, the Court noted, Mr Nxasana remained an employee of the NPA and the issue of reinstatement did not even arise. All that was required was for him to physically resume office.

However, the majority justices reasoned that the physical resumption of office by Mr Nxasana did not necessarily have to follow as a consequence of the order of invalidity. According to the Court, each case will determine whether or not the normal legal position or consequences must be left to prevail or whether a new legal dispensation should be imposed as part of the Court's just and equitable remedial order. To illustrate this point, the Court cited two cases where a just and equitable relief was granted that was contrary to an exact legislative provision.

The first case was *Electoral Commission v Mhlope*[67] (hereinafter *Mhlope*), where, in spite of the Independent Electoral Commission's failure to compile a voters' roll, as required by section 16(3) of the Electoral Act 73 of 1998, the Court allowed the 2016 local government elections to go ahead in order to avert a constitutional crisis.[68] In other words, the Court emphasised that 'this is an exceptional case that cries out for an exceptional solution or remedy to avoid a constitutional crisis which could have grave consequences,'[69] since the mandate of the local government sphere was expiring on 16 August 2016.

Everyone would agree that averting such a crisis was justified for many reasons. Chief among them are: (1) under the South African constitutional framework, elections are required to take place by a prescribed date and the Constitution does not provide for an extension of the term;[70] (2) it is on the local government sphere that the obligation to deliver basic services to the population has been conferred[71] (in that sense, communities

65 (2016) 37 ILJ 564 (CC); 2016 (3) BCLR 311 (CC); [2016] 4 BLLR 335 (CC); 2016 (3) SA 251 (CC).

66 ibid para 189.

67 [2016] ZACC 15; 2016 (5) SA 1 (CC); 2016 (8) BCLR 987 (CC).

68 *Corruption Watch 2* (n 4) para 71. In *Mhlope* (n 67), the Court found that section 16(3) of the Electoral Act required the Independent Electoral Commission to include the addresses of voters in the voter's roll. The Commission admitted that it had failed to record such addresses, which, according to the Court, meant that the Commission had compiled the common voters' roll in a manner that is at odds with the strictures not just of the law but also of the rule of law, para 122.

69 *Mhlope* (n 67) para 137.

70 See section 159 and see *Mhlope* (n 67) para 127, which observes that 'the Constitution does not provide for the extension of this term of five years. Every constitutionally permissible solution must thus be explored to avert a looming constitutional crisis that could result from the unconstitutional elongation of terms of office.'

71 See sections 152 and 153 of the Constitution.

in South Africa have daily and direct interactions with the local government rather than with provincial or national governments); and (3) among the founding values of the South African democratic state are:

> (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
>
> …
>
> (c) Supremacy of the constitution and the rule of law.
>
> (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.[72]

Hence, these founding values would have been completely obliterated had the Court not suspended the order of invalidity to achieve the greater good of upholding these values. Having said this, the principle that emerged in *Mhlope* is that existing national legislation may be suspended from operation by the Court if justice and equity command it. I submit that an additional principle flowing from *Mhlope* is that the grounds upon which national legislation is suspended from operation must be of a profound magnitude, such as a constitutional crisis or possibly a state of emergency.

The second case in which the Court granted a just and equitable relief contrary to an existing legal dispensation is *Black Sash.*[73] In *Black Sash*, the Court declared that the contract between the South African Social Security Agency (SASSA) and Cash Paymaster Services (CPS), for the provision of social grants to more than 17 million South Africans, was constitutionally invalid. Despite this, the Court allowed CPS to continue to perform its constitutional obligations under the contract by suspending the order of invalidity. Like with *Mhlope*, most people would agree that had the Court not suspended the order of invalidity, more than 17 million South Africans would have suffered severe economic hardship, and many of their rights, such as the right to human dignity and social security, would have been severely impaired. Additionally, human dignity is one of the values upon which the South African state is founded, and had the Court not suspended the order of invalidity, one of the foundations of the state would have been undermined, leading to the possibility of civil unrest erupting in the country. Based on its holdings in *Mhlope* and *Black Sash*, the Court suspended the operation of the principle in *Steenkamp*, which meant that Mr Nxasana was not permitted to resume his office.

It is difficult to agree with the Court's conclusion on this issue. As alluded to earlier, it is clear from the Court's jurisprudence that the grounds for suspending the operation of valid legislation or dispensation must be grave. Both *Mhlope* and *Black Sash* established the principle that the proper grounds for the exception to apply must be a possible

72 Section 1 of the Constitution.

73 *Black Sash* (n 64). This case was a sequel to *AllPay 1* and *AllPay 2* (n 64).

constitutional crisis and that the exception must be designed to prevent the violation of the rights of millions of South Africans. This was not the case in *Corruption Watch 2*. Even though I agree with the majority justices in *Corruption Watch 2* that *Mhlope* and *Black Sash* did not create a closed list of what constitutes an exceptional circumstance, it is apparent that the two judgments created a high threshold that the circumstances in *Corruption Watch 2* hardly met. Above all, the suspension of legislation from operation undermines Parliament's law-making powers and the executive's role to implement legislation.

Let us consider the Court's justification for the suspension in the present case. The majority in *Corruption Watch 2* justified its reasons to suspend *Steenkamp* on the grounds that the leadership instability at the NPA would have continued unabated had Mr Nxasana been allowed to resume his office. This reasoning is not convincing if one considers the principle established in *Mhlope* and *Black Sash* as well as the effects of not suspending the law in those circumstances.

In *Mhlope*, the effect of not suspending section 16(3) of the Electoral Act would have meant the violation of the right of 26 million South Africans to vote and the breakdown of the rule of law. This is so given that no local government would have been able to lawfully perform its constitutional obligations, to the detriment of millions of South Africans who depend on the daily services provided by local government authorities.

Additionally, in *Black Sash*, the effect of not suspending the implementation of the contract between CPS and SASSA would have entailed the violation of the right to enjoy social security benefits of at least 17 million South African beneficiaries. It would also have led to the risk of these beneficiaries going without food and other necessities of life due to the possible failure of SASSA and CPS to pay social security benefits to those beneficiaries.

The common theme in *Mhlope* and *Black Sash* is that failure to suspend the operation of the law would have led to a constitutional crisis or directly and immediately affected, in a negative way, at least 17 million people. Let us compare this with the effect of not suspending the operation of *Steenkamp* in *Corruption Watch 2*. The latter would have entailed Mr Nxasana resuming his office, with no immediate consequences for the people of South Africa. In fact, the only possible immediate consequence would have been that the new President, Cyril Ramaphosa, who came to office after this dispute was already in the courts, would probably have caused Mr Nxasana's removal from office based on section 12 of the National Prosecuting Authority Act. This is not a consequence grave enough to warrant the application of the principle in *Mhlope* and *Black Sash* and suspend the principle in *Steenkamp*.

Moreover, in his dissenting opinion in *Corruption Watch 2*, Justice Jafta correctly found that there was 'nothing exceptional or extraordinary that warrants the exercise [of] remedial powers to prevent Nxasana from returning to office' because 'his return will

certainly not cause a constitutional crisis.'[74] Justice Jafta also correctly found that the instability in the NPA as an institution did not constitute a constitutional crisis, as referred to in *Mhlope* and *Black Sash*. In his view, the National Prosecuting Authority Act allowed the President to implement it in a way that would have prevented the immediate resumption of office by Mr Nxasana. For Justice Jafta, this would have been a better way of addressing the issue of Mr Nxasana's return than the suspension of a well-established principle in *Steenkamp*.

I agree with Justice Jafta. Beneath Justice Jafta's point is an attack on the Court's inconsistent application of constitutional principles. Justice Jafta felt, as I do, that the Court was not being true to its well-established principles—in this case the principle laid down in *Mhlope* and *Black Sash* versus that encapsulated in *Steenkamp*. Therefore, there was no sound jurisprudential basis for the Court to suspend the operation of *Steenkamp*.

Appointment of the National Director by the Deputy President

The last order granted by the High Court in *Corruption Watch 1* is the order that the Deputy President should appoint the National Director, given that President Zuma was allegedly conflicted. In its judgment in *Corruption Watch 2*, the Court did not address this issue. I submit that it was wrong for the Court to remain silent in the face of an important constitutional question. It is important that the ruling and constitutional interpretation by the High Court in *Corruption Watch 1* not be left to stand without comment from the apex Court, because this creates the impression that such an interpretation is sustainable under the Constitution. The absence of the Court's pronouncement on this question creates uncertainty in the law. To put it differently, the order of the High Court in *Corruption Watch 1* will, with all its implications for future presidents, remain binding. In all circumstances, I submit that this issue is key to important aspects of government and that justice cries out for the Court to address it. Moreover, the ruling on this issue cannot be said to be unassailable.

One could argue that since Zuma resigned as President in February 2018 and Ramaphosa, who was Deputy President at the time, was elected President, the issue became moot and therefore no longer justiciable. Indeed, it is settled law in South Africa that a case is moot and not justiciable if it no longer presents a live controversy.[75] Nevertheless, the Court has also held that the absence of a live controversy does not constitute an absolute bar to a matter's justiciability, because the Court has discretion

74 *Corruption Watch 2* (n 4) para 112. I wish to point out that a constitutional crisis bears no different meaning than a national crisis. In a constitutional democracy founded on the rule of law, a national crisis is a constitutional crisis. Hence, it is my view that a constitutional crisis would have ensued if 17 million South Africans were not paid their social grants.

75 Wiese (n 45); National Coalition for Gay and Lesbian Equality (n 45) para 21 and fn 18.

to consider the matter regardless.[76] In order to exercise this discretion, the Court has developed a test which seeks to ascertain whether any order the Court may grant will have a practical effect either on the parties or on others. It is common cause that since Zuma is no longer State President and Ramaphosa no longer the Deputy President of South Africa, the issue of whether the Deputy President may appoint the National Director became moot.

Nonetheless, there is no doubt that an order on this issue by the Court in *Corruption Watch 2* would have had practical effects on the public and bearers of constitutional powers. It would have assisted the public to know whether, as a matter of principle, a president (or another primary bearer of constitutional power, including other members of Cabinet) who is deemed conflicted in relation to the appointment of anyone to public office may relinquish that power in favor of another authority, such as a deputy president or deputy minister in the case of a Cabinet minister. The President and Cabinet members are conferred with the authority to appoint many public officials, and are bound by section 96 of the Constitution, which formed the basis of the High Court ruling in *Corruption Watch 1* that the Deputy President must be the one to appoint the National Director.

A ruling in *Corruption Watch 2* on this issue, despite being moot, would have had the practical effect of informing future presidents and ministers who are similarly situated. This would also have helped the Court to develop the jurisprudence by establishing a principle to guide the country. Suppose the Deputy President was equally conflicted based on allegations of corruption? Who steps in to make an appointment? What about the appointment of judges—Was President Zuma conflicted in appointing judges who might end up adjudicating on his corruption case?[77] How far does the principle in the High Court ruling go? Hence, I submit that the Court should have addressed the High Court's order and that it should, at an appropriate stage, address this question in order to clarify the law.

Conclusion

The NPA has been through turmoil in the last decade, which has led reformists to call for radical reforms. While these calls deserve consideration, concerns have been raised elsewhere about the proposal to deprive the President of the power to remove the

76 *Wiese* (n 45) para 22; *Van Wyk v Unitas Hospital and Another* (CC); 2008 (2) SA 472 (CC) para 29; *Radio Pretoria v Chairperson, Independent Communications Authority of South Africa and Another* 2005 (4) SA 319 (CC) para 22.

77 See Lawrence H Tribe, Timothy K Lewis, and Norman L Eisen, 'Unresolved Recusal Issues Require a Pause in the Kavanaugh Hearings' (Brookings Institute, 4 September 2018) <https://www.brookings.edu/wp-content/uploads/2018/09/Unresolved-Recusal-Issues-Require-a-Pause-in-Kavanaugh-Hearings_FINAL.pdf> accessed 23 March 2021, where the authors argue that President Trump may be conflicted in appointing a United States Supreme Court Justice due to possible future criminal charges against him that may have to be decided by the Supreme Court.

National Director, as this would be contrary to the constitutional scheme of ensuring that the executive remains in control and politically responsible for crime and prosecutions.[78]

In this article, I have criticised recent jurisprudence, particularly emerging from *Corruption Watch 1* and *Corruption Watch 2*, that dealt with the provisions for removing the National Director in the Constitution and the National Prosecuting Authority Act. I have strongly argued that *Corruption Watch 2* was wrongly decided, and I have advocated for the Court to correct some of the uncertainties that remain following its judgment in that case. In addition, I have demonstrated that the modern understanding of government requires us to view separation of powers as made up of two distinct components: internal and external separation of powers. As such, I argue that South African courts should develop a nuanced separation of powers jurisprudence that recognises these distinct imperatives, and where case law dealing with external imperatives should not be employed to resolve disputes involving internal imperatives.

78 Mtendeweka Mhango, 'Constitutional Eighteenth Amendment Bill: An Unnecessary Amendment to the South Africa Constitution' (2014) 35 Statute LR 19.

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