FILLING THE ACCOUNTABILITY VACUUM:

JUDICIAL ACTIVISM AND RESTRAINT IN CASES CONCERNING STATE CAPTURE, CORRUPTION AND EGREGIOUS PUBLIC MALADMINISTRATION IN SOUTH AFRICA

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A thesis submitted to the Wits School of Law, Faculty of Law, Commerce and Management, University of the Witwatersrand in fulfilment of the requirements for the degree of Doctor of Philosophy

Johannesburg

2025

DECLARATION

I, the undersigned, hereby declare that this thesis is my own work and that I have not previously submitted it in whole or in part at any university for a degree.

CHERESE THAKUR

Dubai, 10 October 2025

ABSTRACT

In the past two decades, state capture, rampant corruption and egregious public maladministration have had innumerable detrimental effects on the lives of South Africans. These abuses of public power went largely unchecked by accountability mechanisms in the executive and legislative branches of government, causing an 'accountability vacuum'. This thesis argues that in light of the failure of members of the political branches of government to take decisive action to hold to account perpetrators of state capture, corruption and public maladministration, the judiciary was called upon (by opposition parties, civil society organisations, and even private individuals) to exact accountability from political actors and curb the deleterious impacts of their actions to the extent allowed by the law.

In doing so, the courts – being aware of the broader political context and potential implications of their decisions – embraced judicial activism by employing creative interpretations of the law and making use of their wide remedial powers to hold recalcitrant officials to account. At the same time, the courts exercised restraint to ensure that their decisions did not trench upon the separation of powers between the judiciary and the elected branches of government. This concern was motivated not only by deference towards the constitutional limitations on the courts' powers, but also by the judiciary's need to protect its institutional security from attempts by those holding political office to undermine its authority.

The basis for this argument is set out by firstly defining key concepts such as state capture, corruption and public maladministration, and describing theoretical concepts such as legal realism, transformative constitutionalism and the separation of powers. These concepts provide a framework to understand the factors promoting judicial activism as well as those cautioning the need for restraint. Evidence to support the central claim is drawn from relevant court decisions separated into three broad categories: first, the courts' responses to attempts to impede the proper functioning of criminal justice institutions; secondly, the Constitutional Court's decisions in the *AllPay* and *Black Sash Trust* line of cases that held officials to account for malfeasance in public procurement decisions; and finally, the Constitutional Court's approach to cases that brought the remedial powers of a key watchdog institution, the Public Protector, into sharp focus.

The thesis concludes that the courts have, in general, successfully navigated the competing tensions of activism and restraint. This has allowed them to guard against some of the most egregious abuses of public power, though the need for them to use their powers judiciously has

meant that litigation is not a silver bullet for resolving failures of accountability in the elected branches of government.

ACKNOWLEDGEMENTS AND DEDICATION

The seed of this thesis was planted over a decade ago, when I had the opportunity to serve as a student research clerk to Judge Malcolm Wallis. I later served as a law researcher to the late Justice Thembile Skweyiya and to Justice Edwin Cameron at the Constitutional Court. Witnessing judicial decision-making in person and interacting with them, and indeed all the Justices of the Constitutional Court at the time, sparked my curiosity regarding the judicial process that I have explored in this thesis. I am grateful to all of them for their wisdom, encouragement, and guidance, both past and present.

I am deeply grateful to my supervisor, Professor Cora Hoexter, whose gentle but firm guidance and consistently uplifting reassurance has been invaluable in every way. I could not have asked for a better supervisor.

My thanks and wholehearted appreciation also go the Open Society Foundation for South Africa, whose generous scholarship has funded this research. I also extend my thanks to the Helen Suzman Foundation for administering the scholarship on behalf of the OSF-SA, and for the support at the formative stages of this thesis from my then-colleagues at the HSF, especially Francis Antonie.

I am very thankful for my friends and family who have been a constant source of encouragement, comfort and inspiration. I appreciate each and every one of you. Specifically, I acknowledge my sister Elisha, Vijay Solomon, and my parents Pearl and Pravin Thakur for standing by me at every step of this research journey.

A thought that has lived with me throughout writing this thesis is the resilience of my grandmothers, both of whom did not complete primary school education, and my grandfathers, who made the best of difficult circumstances and modest means to lay a solid foundation for the generations to come. I acknowledge and am grateful for their sacrifices and the rich inheritances they have bestowed in their values, including a love of knowledge that has fuelled this pursuit. This thesis is therefore dedicated to the late Manpathy and Deonarian Thakur, and to Shanthee and Inderjeeth Uday Singh.

My last and greatest thanks must go to my husband, Adriel Solomon, without whom this thesis would simply not have been possible, and to whom this thesis is also dedicated with my most heartfelt appreciation.

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LIST OF ABBREVIATIONS

ANC	African National Congress
AS	*Annual Survey of South African Law*
BAC	Bid Adjudication Committee
BEC	Bid Evaluation Committee
CC	Constitutional Court
CCR	*Constitutional Court Review*
COO	Chief Operating Officer
CPS	Cash Paymaster Services (Pty) Ltd
DA	Democratic Alliance
DPCI	Directorate for Priority Crimes Investigations
DSO	Directorate of Special Operations
EFF	Economic Freedom Fighters
FUL	Freedom Under Law
HSF	Helen Suzman Foundation
IPID	Independent Police Investigative Directorate
NDPP	National Director of Public Prosecutions
NPA	National Prosecuting Authority
PAJA	Promotion of Administrative Justice Act 3 of 2000
PELJ	*Potchefstroom Electronic Law Journal*
PFMA	Public Finance Management Act
PSC	Public Service Commission
PRECCA	Prevention and Combating of Corrupt Activities Act 12 of 2004
SABC	South African Broadcasting Corporation
SAJCJ	*South African Journal of Criminal Justice*
SAJHR	*South African Journal on Human Rights*
SALJ	*South African Law Journal*

SAPS	South African Police Service
SA Public Law	*Southern African Public Law*
SASSA	South African Social Security Agency
SCA	Supreme Court of Appeal
SIU	Special Investigating Unit
Stell LR	*Stellenbosch Law Review*
THRHR	*Tydskrif vir Hedendaagse Romeins-Hollandse Reg*
UNCAC	United Nations Convention Against Corruption
UDM	United Democratic Movement
VRU	*Verfassung und Recht in Übersee*

CHAPTER 1

STATE CAPTURE, CORRUPTION, EGREGIOUS PUBLIC MALADMINISTRATION, AND THE COURTS

1.1 BACKGROUND: THE COURTS IN A CAPTURED COUNTRY

The historic national general election of 1994 ushered in a new and hopeful period for South Africa. It marked the end of apartheid and the commencement of a democratic era governed by what some saw as South Africa's crowning achievement – the enactment of the interim Constitution[1] and later, the Constitution of the Republic of South Africa, 1996.[2] At the time, the latter was a model of 'state-of-the-art . . . modern constitutional design' featuring 'politically progressive rights provisions and novel institutional-design features'.[3] The Constitution was a decisive break from the apartheid past which had lacked meaningful checks and balances to prevent abuses of power and various egregious human rights violations.[4] The Constitution inter alia introduced a justiciable Bill of Rights,[5] established the Constitutional Court,[6] and put in place checks and balances between the executive, legislature and judiciary – most notably, the courts' power of judicial review to test laws and conduct against the Constitution as the supreme law of the land.[7]

Some twenty years later, the propitious sheen had worn thin.[8] Perceptions of corruption in South Africa had been rising steadily, with a marked increase taking place in the decade following the 2009 democratic election.[9] It was after this election that Jacob Zuma was sworn in as President as the leader of the African National Congress (ANC), which had won an

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[1] Constitution of the Republic of South Africa, Act 200 of 1993.
[2] For the remainder of this thesis, any reference to the Constitution without further qualification is to the 1996 Constitution.
[3] Theunis Roux 'Grand narratives of transition and the quest for democratic constitutionalism in India and South Africa' (2024) 57 *VUR* 5 at 14.
[4] Dikgang Moseneke 'Oliver Schreiner Memorial lecture: Separation of powers, democratic ethos and judicial function' (2008) 24 *SAJHR* 341 at 347.
[5] Chapter 3 of the interim Constitution and, in due course, Chapter 2 of the Constitution, 1996.
[6] Section 98 of the interim Constitution. In the 1996 Constitution the supremacy of the Constitution is established in s 1*(c)* and s 2, and the powers and functions of the judiciary are set out in s 167.
[7] Judicial review is discussed in further detail at 2.4*(c)* of this thesis.
[8] Mbongiseni Buthelezi & Peter Vale (eds) *State Capture in South Africa: How and Why it Happened* (2023) 10, who describe the events leading up to the zenith of state capture as a 'loss of hope'.
[9] 'Corruption Perceptions Index' *Transparency International*, last accessed from https://www.transparency.org/en/cpi/2024 on 27 March 2025. South Africa's rank fell from 55 in 2009 to 70 (out of 180 countries) in 2019.

outright majority of votes. This increase can be attributed to more than merely opportunistic corrupt transactions between disparate actors. Under an administration led by Zuma, it was becoming clearer that critical decisions were being made not in the public interest, but rather in the interests of a select group of political actors and people connected to them, resulting in the formation of a 'shadow state'.[10] This process was identified as state capture.[11] Concerningly, it was soon apparent that the President himself was a central figure in a network of associates aiming to ensure that state institutions were directed towards serving private ends in a systemic, well-organised series of transactions orchestrated by persons having 'an established relationship with one another', and involving 'repeated transactions, often on an increasing scale'.[12] Together with Zuma at the epicentre of this network were members of the Gupta family,[13] whose influence on Zuma was alleged to have been key to appointments of Cabinet Ministers and other senior officials as well as the awarding of lucrative state tenders.[14] The rolling out of the state capture project took place alongside other opportunistic corrupt transactions on a smaller, but still severely detrimental, scale.[15]

With Zuma as President and his appointees and cronies installed in key positions, there was little to hold back the forces of capture. In many instances of malfeasance, instead of holding the responsible people accountable, a 'predictable pattern' was observed:

> 'The narrative begins with the emergence of suspicions or proof of malpractices, followed by denial or attempted justification by the perpetrators; the employment of every available official instrument or procedure to mitigate the consequences for the perpetrators, including the 'deployment' of officials sympathetic (or beholden) to the perpetrators to sensitive positions to avoid effective countermeasures; the use of majoritarian dominance to exploit parliamentary procedures; and the exhaustion, funded by the public purse, of all litigation avenues.'[16]

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[10] Ivor Chipkin et al *Shadow State: The Politics of State Capture* (2018). See also P Pillay, K Chitunhu & L Chivandire 'State capture in South Africa: Going back to basics' (2023) 14 *African Journal of Public Affairs* 152 at 164.
[11] Chipkin et al ibid ix. State capture is defined in more detail below at 1.2*(a)*.
[12] Ibid.
[13] Specifically, brothers Atul, Ajay and Rajesh Gupta, who were businessmen who relocated to South Africa in 1993. British Broadcasting Corporation 'The Guptas and their links to South Africa's Jacob Zuma' *BBC* 14 February 2018, last accessed from https://www.bbc.com/news/world-africa-22513410 on 1 March 2025.
[14] Maurice O Dassah 'Theoretical analysis of state capture and its manifestation as a governance problem in South Africa' (2018) 14 *TD: The Journal for Transdisciplinary Research in Southern Africa* 1 at 5.
[15] Here, a distinction is made between 'opportunistic' corruption such as bribery in municipal procurement where the participants are not connected to a broader network of capture, which is relevant to this thesis; and 'petty' corruption (such as traffic officials demanding bribes to overlook traffic violations), which is not. See Hennie van Vuuren 'Small bribes, big challenge: Extent and nature of petty corruption in South Africa' (2004) 9 *South African Crime Quarterly* 11.
[16] Francois Venter 'State capture, corruption and constitutionalism in South Africa' in NC Steytler & Charles

In essence, the escalation of state capture initiatives in the 2010s revealed a profound 'accountability vacuum',[17] a situation that arises 'where the "democratic arms" of the state fail or flail'[18] in holding responsible individuals to account for wrongdoing. This can happen where, for instance, members of the executive choose not to discipline members in terms of formal standards of conduct[19] or in terms of the internal ethics codes of a political party.[20] It also occurs where Parliament fails to exercise its powers of oversight regarding executive conduct.[21] All of these phenomena were present in the 2010s, as state capture was becoming more observably prevalent.[22] A link can be drawn between the accountability vacuum; Zuma's leadership of the ANC; and the ANC's dominance in Parliament[23] and, consequently, the executive.[24] Owing to

> 'the Electoral Act, the anti-defection clause in the Constitution and democratic centralism all the power given by the people is concentrated in the very top hierarchy of the ANC. These provisions . . . weaken the independence of members representing the political party resulting in failure to hold the executive to account through parliamentary measures'.[25]

The accountability vacuum was further exacerbated by state capture, when political actors influenced accountability institutions charged with acting without fear or favour against maladministration, especially those with prosecutorial powers. This often took the form either

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Manga Fombad (eds) *Corruption and Constitutionalism in Africa: Revisiting Control Measures and Strategies* (2020) 69 at 69.

[17] Cora Hoexter 'A rainbow of one colour? Judicial review on substantive grounds in South African law' in Hanna Wilberg & Mark Elliot (eds) *The Scope and Intensity of Substantive Review: Traversing Taggart's Rainbow* (2015) 185 at 165, 189 and 193.

[18] Lauren Kohn 'Integrity & accountability commissions of inquiry: A South African perspective' (2024) 20 *Utrecht Law Review* 99 at 105.

[19] Such as the Executive Ethics Code Proc R41 *GG* 21399 of 28 July 2000, issued in terms of the Executive Members Ethics Act 82 of 1998.

[20] Such as the ANC Code of Ethics, which lists a number of acts of misconduct that may be referred to the organisation's Integrity Commission. African National Congress 'Constitution' *African Nation Congress*, last accessed from https://www.anc1912.org.za/wp-content/uploads/2024/09/ANC-Constitution-2022.pdf on 1 March 2025.

[21] This is discussed in further detail at 2.4*(a)*.

[22] Pillay, Chitunhu & Chivandire (note 10 above) 162.

[23] Out of 400 available seats in Parliament, the ANC secured 279 in 2004, 264 in 2009, 249 seats in 2014 and 230 sets in 2019. See 'South Africa National Assembly' *Inter-Parliamentary Union Archive* (2016), last accessed from http://archive.ipu.org/parline-e/reports/2291_E.htm on 21 March 2025 and 'South Africa' *IPU Parline* (2025), last accessed from https://data.ipu.org/parliament/ZA/ZA-LC01/election/ZA-LC01-E20190508/ on 21 March 2025.

[24] Deretha Bester & Bojan Dobovšek 'State capture: Case of South Africa' (2021) 26 *NBP. Nauka, bezbednosti, policija* 73 at 82. The ANC accounts for the majority of the executive because Parliament elects the President by a majority vote. The President then nominates Ministers from the National Assembly (see Pandelani Harry Munzhedzi 'Holding the executive to account in South Africa: Analysis of weaknesses and strengths' (2021) 11 *African Journal of Development Studies* 145 at 149). While the President is not required to nominate members from only his party, this has been the case in most instances where the ANC has held an outright majority.

[25] Shawwaal Peterson 'Does a dominant party democracy erode constitutional legitimacy? An analysis of the African National Congress and the South African Constitution' (LLM thesis, University of Cape Town, 2010) 68.

of compelling decision-makers not to investigate or prosecute corruption or removing those who resisted from their positions and installing more pliant leaders instead.[26] It also involved dismantling a key anti-corruption institution and replacing it with one that was less able to resist political influence, and thus less capable of carrying out its mandate.[27]

Thanks to the lack of meaningful support for accountability initiatives from the ruling party, there was little by way of effective action in the political realm to curb state capture and prevent the rapid increase in corruption in government institutions. Those without political power or influence who were concerned about the capture of state institutions instead sought an alternative means of ensuring accountability in practice: the courts. Opposition parties, non-governmental organisations, and in one case, even a private individual,[28] instituted litigation in the courts aimed at reviewing and setting aside the unlawful conduct furthering state capture and corruption. As Corder and Hoexter observe:

> 'In the Zuma years the superior courts had to deal with innumerable judicial review applications concerning politically charged matters and launched by opposition parties or NGOs. And the courts found themselves ruling with remarkable frequency that the South African government had acted unlawfully and unconstitutionally.'[29]

While many viewed these litigation initiatives as necessary given the accountability vacuum, this does not mean they were welcomed wholesale. Concerns were raised by what some saw as the 'judicialisation' of politics, that is, 'a growing reliance on adjudicative means for clarifying and settling fundamental moral controversies and highly contentious political questions'.[30] More specifically, this process has been described as 'lawfare'.[31]

In the broad yet intricate tapestry of the state capture narrative, it is this specific aspect

[26] David Bruce 'Control, discipline and punish?: Addressing corruption in South Africa' (2014) 48 *South African Crime Quarterly* 49 at 54–5.
[27] This is discussed in detail at 3.4.
[28] Mr Hugh Glenister. See the discussion of *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC) (*Glenister II*) in Chapter 3.
[29] Hugh Corder & Cora Hoexter '"Lawfare" in South Africa and its effects on the judiciary' (2017) 10 *African Journal of Legal Studies* 105.
[30] Ran Hirschl 'The judicialization of politics' in Robin E Goodin (ed) *The Oxford Handbook of Political Science* (2011) 254.
[31] Corder and Hoexter set out three senses in which the term 'lawfare' can be used. The intended meaning here is the 'use of litigation to resolve contentious political disputes: the phenomenon of asking courts to rule on problems that would tend to be resolved by political means in more mature jurisdictions, or that might not even be regarded as justiciable.' Hugh Corder & Cora Hoexter (note 29 above) 107. For a detailed discussion of the term, see Wouter G Werner 'The curious career of lawfare' (2010) 43 *Case Western Reserve Journal of International Law* 61. Lawfare is discussed in greater detail at 2.4*(c)*(ii).

that draws the focus of this thesis. This is because whether or not judges were comfortable with adjudicating matters better left to political resolution, they were constantly asked to do so. How they responded to the legal issues placed before them was guided by a number of influences. This thesis focuses on just two: the opposing forces of judicial activism and judicial restraint. Judicial activism in the context of state capture has been likened by Kohn to

> 'judicial adventurism, often necessitated by the need to ensure 'just and equitable' outcomes – in particular, when dealing with corruption and maladministration – and often by way of judicial reasoning that strains the text of the Constitution itself and, in turn, the judiciary's sacred place within the separation of powers'.[32]

Kohn's take is, with respect, somewhat cynical. As discussed in Chapter 2, judicial activism directed at accountability for conduct serving state capture and corruption may well be strategic, but is nevertheless rooted in a rich tradition of transformative constitutionalism. Nevertheless, Kohn's statement highlights the risk inherent to judicial activism that weighs on the courts: that is, the risk of going too far beyond the judiciary's limited powers under the Constitution, and of trenching on the powers of the other branches of government. Exercising care to avoid this risk manifests as judicial restraint. This thesis is concerned with how the courts have approached these competing considerations in cases about state capture, corruption, and egregious public maladministration.

1.2 TERMINOLOGY: STATE CAPTURE, CORRUPTION AND EGREGIOUS PUBLIC MALADMINISTRATION

(a) State capture

There is no shortage of definitions of state capture.[33] The overlap between them is significant. In its simplest terms, state capture can be described as the use and abuse of the state (in the

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[32] Kohn (note 18 above) 105.

[33] See, for example, Joel S Hellman et al 'Seize the state, seize the day: An empirical analysis of state capture and corruption in transition economies' (2000) 2444 *World Bank Policy Research Working Paper* 1 at 8; Maíra Martini 'State capture: An overview' *Transparency International* (2014), last accessed from https://knowledgehub.transparency.org/helpdesk/state-capture-an-overview on 2 March 2025; Sanet Madonsela 'Critical reflections on state capture in South Africa' (2019) 11 *Insight on Africa* 113 at 116–7; Pillay, Chitunhu & Chivandire (note 10 above) 8–9; Rene De Klerk & Hussein Solomon 'The institutionalisation of endemic corruption: State capture in South Africa' (2019) 82 *New Contree* 24 at 66; Bester & Dobovšek (note 24 above) 78–9, Maurice O Dassah (note 14 above) 2, Francois Venter (note 16 above) 70, Chipkin et al (note 10 above) ix; Robyn Foley 'State capture, the racket, and predatory power' in Buthelezi & Vale (eds) (note 8 above) 41–3; and Michaela Elsbeth Martin & Hussein Solomon 'Understanding the phenomenon of "state capture" in South Africa' (2016) 5 *South African Peace and Security Studies* 21 at 22.

form of institutions, laws, regulations and policies) 'for personal good instead of the good of the country'.[34] This can be perpetrated by actors from both the private and public sectors. State capture is corruption writ large, involving a number of complex interactions between influential participants seeking to subvert the operation of state institutions for their own benefit. Such advantages can take the form of protection from high-level political actors, including from law enforcement agencies.[35] The aim, therefore, is to 'change the formal and informal rules of the game, legitimise them and select the players who are allowed to participate'.[36] This is accomplished by

> 'establishing local networks of patronage, red tape and bribe extortion, lack of local capacity, misuse of local public resources, public procurement, the facilitation of services and informal payments, the culture of impunity and lack of efficient controls and oversight mechanisms'.[37]

This conduct was apparent in South Africa during the Zuma administration. The narrative of state capture in South Africa is an intricate web of events involving multiple participants that defies brief summation. Nor is it the purpose of this thesis to do so, as much ink has already been spilled tracing the many relationships, actions taken and deals struck, as well as their consequences.[38]

One significant event that some regard as the high point of state capture is worth highlighting: that is, the tumultuous few days in December 2015 where Zuma suddenly removed the Minister of Finance, Mr Nhlanhla Nene, from his position and replaced him with Mr Des Van Rooyen, seriously weakening economic confidence in the rand and prompting a public outcry.[39] After just four days, Zuma capitulated to public pressure, removing Van Rooyen and appointing Mr Pravin Gordhan as Minister of Finance. The Deputy Minister of Finance, Mr Mcebisi Jonas, issued a statement in March 2016 that the Gupta brothers had, at a meeting, offered him the position of Minister of Finance.[40] The effect of this tumultuous period

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34 Bester & Dobovšek ibid.
35 Chipkin et al (note 10 above) ix.
36 Ibid.
37 Madonsela (note 33 above) 116–7.
38 Some academic and journalistic texts on this topic include Chipkin (note 10 above), Buthelezi & Vale (note 8 above), Robin Renwick *How to Steal a Country: State capture and Hopes for the Future in South Africa* (2018), Pieter-Louis Myburgh *The Republic of Gupta: A Story of State Capture* (2017).
39 Daniel Silke 'Nenegate anniversary: A catalyst to begin caring' *News24* 9 December 2016, last accessed from https://www.news24.com/fin24/nenegate-anniversary-a-catalyst-to-begin-caring-20161209 on 7 March 2025.
40 *News24* Reporter 'Media statement by Deputy Minister of Finance Mr Mcebisi Jonas' *News24* 16 March 2016, last accessed from https://www.news24.com/news24/full-text-mcebisi-jonas-statement-20160316 on 1 March 2025.

was profound, marking a shift in the public's awareness of, and response to, state capture that was at that stage both pernicious and entrenched. It set off public protests against Zuma and prompted an investigation by the Public Protector of the day, Ms Thuli Madonsela, resulting in a report that raised several red flags about Zuma's conduct and recommended, inter alia, the appointment of a commission of inquiry headed by judge to investigate issues of alleged state capture.[41] Zuma was unsuccessful in his attempts to resist complying with this remedial action,[42] eventually establishing the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State, headed by Justice Zondo (State Capture Commission).[43] This inquiry was a mammoth task, taking over three years to complete and hearing evidence from more than 300 witnesses over 429 days of public hearings.[44] The report of the State Capture Commission paints an extensive picture of the scale of the accountability vacuum, including procurement irregularities; mismanagement of state-owned enterprises; corruption in various forms; fraud, money laundering, racketeering and other crimes; and other maladministration.[45] Pillay helpfully summarises the key findings of the Commission, which are worth restating here:

> 'State capture in the South African context evolved as a project by which a relatively small group of actors, together with their network of collaborators inside and outside of the state, conspired systematically (criminally and in defiance of the Constitution) to redirect resources from the state for their own gain.
>
> This was facilitated by a deliberate effort to exploit or weaken key state institutions and public entities, but also including law enforcement institutions and the intelligence services.
>
> To a large extent this occurred through strategic appointments and dismissals at public entities and a reorganisation of procurement processes.

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[41] Public Protector 'State of Capture report: Report on an investigation into alleged improper and unethical conduct by the President and other state functionaries relating to alleged improper relationships and involvement of the Gupta family in the removal and appointment of Ministers and directors of state-owned enterprises resulting in improper and possibly corrupt award of state contracts and benefits to the Gupta family businesses', last accessed from https://www.gov.za/sites/default/files/gcis_document/201611/stateofcapturereport14october2016_0.pdf on 1 March 2025.
[42] *President of the Republic of South Africa v Office of the Public Protector* 2018 (2) SA 100 (GP).
[43] The full record of the State Capture Commission can be found at *Commission of Inquiry into Allegations of State Capture*, last accessed from https://www.statecapture.org.za on 2 March 2025.
[44] Devi Pillay 'The Zondo Commission: A bite-sized summary' *Public Affairs Research Institute* (2022), last accessed from https://pari.org.za/wp-content/uploads/2022/09/PARI-Summary-The-Zondo-Commission-A-bite-sized-summary-v360.pdf on 2 March 2025.
[45] Ibid 2–3.

The process involved the undermining of oversight mechanisms, and the manipulation of the public narrative in favour of those who sought to capture the state.

Moreover, the subversion of the democratic process which the process of state capture entailed was not simply about extracting resources but was further geared towards securing future power and consequently shaping and gaining control of the political order (or significant parts of that order) in a manner that was necessarily opaque and intrinsically unconstitutional.'[46]

Further, Pillay refers to the State Capture Commission's identification of the 'key elements' of the state capture project as follows:

'i) the allocation and distribution of state power and resources, directed not for the public good but for private and corrupt advantage;

ii) a network of persons outside and inside government acting illegally and unethically in furtherance of state capture;

iii) improper influence over appointments and removals;

iv) the manipulation of the rules and procedures of decision-making in government in order to facilitate corrupt advantage;

v) a deliberate effort to undermine or render ineffectual oversight bodies and to exploit regulatory weaknesses so as to avoid accountability for wrongdoing;

vi) a deliberate effort to subvert and weaken law enforcement and intelligence agencies at the commanding levels so as to shield and sustain illicit activities, avoid accountability and to disempower opponents;

vii) support and acquiescence by powerful actors in the political sphere, including members of the ruling party;

viii) the assistance of professional service providers in the private sphere, such [as] advisers, auditors, legal and consulting firms, in masking the corrupt nature of the project and protecting and even supporting illicit gains; and

ix) the use of disinformation and propaganda to manipulate the public discourse, in order to divert attention away from their wrongdoing and discredit opponents.'[47]

The elements of state capture described in this way are illustrative of the extent of planning, organisation, and coordination needed to entrench it so deeply within state architecture. This

[46] Ibid.
[47] Ibid.

also highlights that undoing the influence of state capture will require extensive work by many stakeholders within government, political parties, the private sector, and non-profit civil society organisations.

(b) Corruption

Corruption is a crime defined in legislation. A general offence of 'corruption' is set out in s 3 of the Prevention and Combating of Corrupt Activities Act 12 of 2004 (PRECCA).[48] The definition is prolix,[49] a fact that is explained by the legislators' use of '"unbundling", which defines and then splits apart specific corrupt activities and practices, as opposed to providing a single definition or provision'.[50] For example, there is a section setting out offences relating to the conduct of specific persons (including public officers,[51] foreign public officials,[52] and more), another relating to '[o]ffences in respect of corrupt activities relating to receiving or offering of unauthorised gratification',[53] offences in respect of specific matters (such as contracts,[54] auctions,[55] and sporting events[56]), and more.

The result is a definition that has been described as 'over-broad, vague and cumbersome' and 'unnecessarily difficult to decipher, particularly because of the numerous

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48 '3 General offence of corruption

Any person who, directly or indirectly-

(a) accepts or agrees or offers to accept any gratification from any other person, whether for the benefit of himself or herself or for the benefit of another person; or

(b) gives or agrees or offers to give to any other person any gratification, whether for the benefit of that other person or for the benefit of another person,

in order to act, personally or by influencing another person so to act, in a manner-

(i) that amounts to the-

(aa) illegal, dishonest, unauthorised, incomplete, or biased; or

(bb) misuse or selling of information or material acquired in the course of the,

exercise, carrying out or performance of any powers, duties or functions arising out of a constitutional, statutory, contractual or any other legal obligation;

(ii) that amounts to-

(aa) the abuse of a position of authority;

(bb) a breach of trust; or

(cc) the violation of a legal duty or a set of rules,

(iii) designed to achieve an unjustified result; or

(iv) that amounts to any other unauthorised or improper inducement to do or not to do anything,

is guilty of the offence of corruption.'

49 S Hoctor, MG Cowling & JRL Milton *South African Criminal Law and Procedure Vol III: Part 2: Statutory Offences* 2 ed (2013) D 3–4.

50 CGT Cordell, HJ van As & J Botha 'Formulating a new conception of corruption through historical analysis' (2020) 83 *THRHR* 562 at 564.

51 Section 4 of PRECCA.

52 Section 5.

53 Section 10.

54 Section 12.

55 Section 14.

56 Section 15.

sections and subsections that make up the provision'.[57] The courts, tasked with applying this definition, have accepted a simplified version as follows:

> 'Anybody who
>
> *(a)* accepts any gratification from anybody else, or
>
> *(b)* gives any gratification to anybody else
>
> in order to influence the receiver to conduct herself in a way which amounts to the unlawful exercise of any duties, commits corruption.'[58]

This is a far less unwieldy definition. However, as this thesis is not concerned with the prosecution of offences but corruption in a broader sense, it is not necessary to limit the definition to the criminal law only. There is a simpler and more suitable alternative definition: 'Corruption normally refers to a condition where public officials pursue private ends using public means'.[59] This definition possesses the necessary breadth of meaning and accords with the intuitive sense of what corruption is, encompassing conduct such as nepotism, conflicts of interest, abuses of power, extortion, fraud, embezzlement, favouritism, abuse of privileged information, and bribery.[60]

Pillay et al distinguish state capture from corruption by reference to the motivation behind them: corruption aims to undermine the proper enforcement of laws, whereas state capture involves attempts to change those very laws and regulations to benefit the would-be capturers; in other words, to legalise corruption.[61] However, this distinction is based on considerations that are too narrow. State capture involves more than just efforts to change laws and regulations – in other words, lobbying, which is legal.[62] It also concerns attempts to undermine the proper functioning of *institutions* and *policies* in ways that are illegal.[63] For the purposes of this thesis, it is therefore sufficient to regard state capture as a species of corruption.

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[57] Cordell, van As & J Botha (note 50 above) 565–6.
[58] *Scholtz v S* 2018 (2) SACR 526 (SCA) para 123.
[59] Chipkin et al (note 10 above) 30.
[60] EA Mantzaris 'Towards an evidence-based corruption index in South Africa: The first step' (2018) 10 *African Journal of Public Affairs* 271 at 273.
[61] Pillay, Chitunhu & Chivandire (note 10 above)158–9.
[62] Dassah (note 14 above) 4. See also Boris Begović 'Corruption, lobbying and state capture' (2006) 106 *CLDS working paper*.
[63] For example, if capturers are unsuccessful in preventing the passage of a law creating a certain crime, they might use their influence to prevail upon the law enforcement system to ensure that they are not prosecuted for that crime. They are not concerned with acting lawfully, but rather with not being caught and punished for doing so.

It is worthwhile to locate corruption in its constitutional context. Corruption poses a direct threat to the values, ideals and vision contained in the Constitution. Venter observes that corruption, etymologically linked to 'decay, putrefaction, and destruction', is corrosive of healthy 'characteristics of public life [such] as honesty, ethical conduct, exemplary morality, balanced social development, economic growth, justice, consistency, tolerance, and constitutionalism'.[64] As these characteristics are incorporated into the Constitution, state capture and corruption can be conceived as an attack on the Constitution itself. This was certainly the view endorsed by the Constitutional Court in its now famous dictum in *Glenister II*:

> 'There can be no gainsaying that corruption threatens to fell at the knees virtually everything we hold dear and precious in our hard-won constitutional order. It blatantly undermines the democratic ethos, the institutions of democracy, the rule of law and the foundational values of our nascent constitutional project. It fuels maladministration and public fraudulence and imperils the capacity of the state to fulfil its obligations to respect, protect, promote and fulfil all the rights enshrined in the Bill of Rights. When corruption and organised crime flourish, sustainable development and economic growth are stunted. And in turn, the stability and security of society is put at risk.'[65]

In this thesis, the term corruption should be taken as including this context: not just that corruption involves the use of public resources towards private ends, but also to the detriment of members of the public, including by impeding the full enjoyment of their constitutional rights.

(c) Egregious public maladministration

This thesis was originally intended to be concerned only with state capture and corruption – two ills with a natural connection, as has just been explained. Even using the expansive definition of 'corruption' as above, the need for a third category, that of 'egregious public maladministration', became apparent when selecting the cases that are discussed in this thesis. Specifically, the cases considered in Chapter 4[66] arose from a set of suspicious circumstances that were not characterised as corruption in court, and accordingly were not decided on that basis. However, as is explained in detail in that chapter, the wilful and harmful conduct of the

[64] Venter (note 16 above) 71.
[65] *Glenister II* (note 28 above) para 166.
[66] See 1.4*(d)* below.

respondents went beyond mere maladministration.

The term ‘public maladministration’ is notoriously imprecise[67] and can encompass a range of malfeasance on the part of public officials. A convenient means to identify maladministration is with reference to the Promotion of Administrative Justice Act 3 of 2000.[68] Section 6 details numerous grounds upon which a decision may be reviewed and set aside, such as irrationality, unreasonableness, and procedural unfairness, being influenced by a material error of law, being taken for an ulterior purpose or motive or in bad faith.[69] While these are certainly relevant, a distinction must be made. Well-meaning officials doing their best may still make reviewable errors. This thesis is less concerned with maladministration of the sort that could arise due to honest error, inattentiveness or a skills or knowledge deficit caused by incompetence.

To ensure that the focus is maintained on only those cases that give rise to the tensions explored in this thesis, it is therefore necessary to append the word ‘egregious’ to denote conduct that is deserving of reprobation in that it was evidently wilful, resistant to correction, and ignored potentially severe consequences for members of the public.

1.3 NATURE AND SCOPE OF THESIS

(a) Title and aim of the thesis

The title of this thesis is ‘Filling the accountability vacuum: Judicial activism and restraint in cases concerning state capture, corruption and egregious public maladministration in South Africa’.

This thesis aims to describe and then critically assess how courts have approached their constitutional role in interpreting and applying the law, with a focus on analysing how the courts have navigated two competing considerations: advancing the public interest, including the promotion of human rights, through innovative uses of their interpretive and remedial powers (‘judicial activism’); and ensuring respect for the constitutional division of powers, including checks and balances (‘judicial restraint’). This analysis and assessment is made in the context of a specific type of case: namely, those concerning state capture, corruption and

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[67] Gerald E Caiden ‘What really is public maladministration?’ (1991) 51 *Public Administration Review* 486 at 486–8.
[68] See W Erasmus ‘Public administrators and maladministration’ (2015) 23 *Administratio Publica* 102.
[69] The relevant provision is reproduced at 4.4*(b)*.

egregious public maladministration. This is because these cases concerned situations where the elected branches of government failed to exercise their powers to ensure those responsible for wrongdoing were held to account, creating an accountability vacuum.

(b) Research question and enquiry

The primary question to be considered is whether the courts have successfully navigated judicial activism and restraint in the accountability-vacuum cases surveyed in this thesis. 'Success' is purposefully not defined in rigid and specific terms: the contexts surrounding the cases are so diverse, complex and at times interrelated that it is not possible to set strict criteria against which to gauge with finality whether the outcome of a case was successful. Rather, the meaning of 'success' is considered with reference to the Constitution. For the purposes of this thesis, a broadly successful outcome is one that advanced constitutional imperatives (such as human rights or the promotion of values such as openness, responsiveness and accountability in government (s 1*(d)* of the Constitution)) and accorded with constitutional principles such as the separation of powers (as discussed further in Chapter 2) by not amounting to judicial overreach.

The hypothesis is that this is indeed the case: that the courts have innovatively exercised their decision-making in ways that have been broadly protective of the public interest in accountability, but at the same time, have done so within the constitutionally prescribed limits of their powers.

In answering this question, a number of supporting questions will also be addressed. These include:

- How the courts conceived their constitutional role in the context of an accountability vacuum that allowed state capture, corruption and public maladministration to proliferate.

- The reasons why, and extent to which, judges made use of their power of interpretation and their broad remedial powers under s 172(1)*(b)* of the Constitution[70] in innovative ways to advance the public's interest in ensuring accountability.

- The reasons why, and extent to which, judges constrained their decision-making in

[70] Section 172 is reproduced at 2.4*(d)*.

order to ensure appropriate respect for the separation of powers.

(c) Originality and contribution to knowledge

Years after the conclusion of the State Capture Commission in June 2022, South Africa is still in the process of making sense of the profound and far-reaching effects of endemic corruption and egregious public maladministration, as well as the capture of key state institutions that enabled these evils to go unchecked. Rapid developments in the political and legal arenas have not allowed for many comprehensive analyses of the events during the height of the state capture era. Some, like the *Betrayal of the Promise*[71] report, later published in book form as *Shadow State*,[72] as well as *State Capture in South Africa: How and Why it Happened,*[73] have largely approached the issue from a political and social science perspective. These valuable works contextualise the relevant phenomena in light of South Africa's history which includes the past 10 to 15 years when corruption and grand-scale maladministration drew attention as a prominent challenge to the achievement of the Constitution's aims and objects.

Other scholars have viewed these issues through a legal lens by acknowledging the role of the judiciary in staving off some of the worst effects of state capture.[74] The judiciary is regarded as one of the few levers of the state that managed to avoid attempts to capture it.[75] Court judgments, such as those discussed in Chapters 3, 4 and 5 of this thesis, form an invaluable part of the record of state capture. As a result, there is an expanding body of commentary on the judiciary's work in fighting state capture and corruption in South Africa.[76]

Less has been said, however, on the effect that the accountability vacuum has had on the way in which judges approach the reasoning and outcomes of cases before them. This is the gap that this thesis seeks to address by going to the source – written judgments and, where available, extra-curial statements – and drawing out clues from the text suggesting that the courts allowed political considerations to infuse their decision-making and influence the outcome in order to reduce corruption and promote accountability.

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[71] Haroon Bhorat et al 'Betrayal of the promise: How South Africa is being stolen' *State Capacity Research Project* (2017), last accessed from https://pari.org.za/wp-content/uploads/2017/05/Betrayal-of-the-Promise-25052017.pdf on 6 January 2020.
[72] Chipkin et al (note 10 above).
[73] Buthelezi & Vale (note 8 above).
[74] See Corder & Hoexter (note 29 above), and Michelle le Roux & Dennis Davis *Lawfare* (2019) 267–96.
[75] Martin & Solomon (note 33 above) 24.
[76] This commentary is referenced extensively throughout this thesis. See, for example, Venter (note 16 above) 69, Corder & Hoexter (note 29 above) 105–26, Kate Dent 'Lawfare and legitimacy: The wicked problem of judicial resilience at a time of judicialisation of politics in South Africa' (PhD Thesis, University of Cape Town, 2021).

This type of strategic adjudication could be described as the work of a 'conscientious judge', a key concept in transformative constitutionalism.[77] Transformative constitutionalism (and more specifically, transformative adjudication) has received academic attention in the context of, inter alia, socio-economic rights,[78] equality,[79] and administrative law.[80] This thesis expounds on and contributes to the nascent but growing body of work that considers whether judges have responded to the dangers of state capture, corruption and maladministration by conducting themselves 'conscientiously' in accountability-vacuum cases.

There is an inherent tension in allowing political considerations to influence court decisions, because of the ever-looming threat of transgressing the separation of powers principle. This tension is even more pronounced where invasive remedies such as structural interdicts and punitive costs orders are included in the order. The effects of such orders can strain the relationship of comity between the judiciary and the elected branches of government, which can have real-world implications for how the judiciary is perceived – and indeed, for its institutional security. How this impacts on the choices judges make is another aspect that is ripe for further exploration in legal scholarship, particularly with regard to state capture, corruption and public maladministration cases.[81] This thesis describes and analyses how courts have responded to this tension and assesses the appropriateness of their responses.

This thesis also contributes to a broader and deeper understanding of the contextual circumstances surrounding the cases identified for discussion in Chapters 3, 4, and 5. Much of the scholarship on these cases focuses mainly on the contextual circumstances set out in the judgments; however, this thesis also refers to news reporting to establish what facts and information were circulating in the public domain (and which were likely to be known to judges) when these matters were being considered and decided. This is important because of the hypothesis that more than just the *legally* relevant circumstances as described in judgments

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77 See Karl Klare 'Legal culture and transformative constitutionalism' (1998) 14 *SAJHR* 146 at 148. Transformative constitutionalism is discussed in detail in Chapter 2.

78 See, for example, Marius Pieterse 'Coming to terms with judicial enforcement of socio-economic rights' (2004) 20 *SAJHR* 383 and the works referred to there.

79 See, for example, Cathi Albertyn & Beth Goldblatt 'Facing the challenge of transformation: Difficulties in the development of an indigenous jurisprudence of equality' (1998) 14 *SAJHR* 248 and the works referred to there.

80 See, for example, Cora Hoexter 'Judicial policy revisited: Transformative adjudication in administrative law' (2008) 24 *SAJHR* 281; Cora Hoexter 'The transformation of South African administrative law since 1994 with particular reference to the Promotion of Administrative Justice Act 3 of 2000' (PhD thesis, University of the Witwatersrand, 2009); Hoexter (note 17 above); and Geo Quinot 'Substantive reasoning in administrative-law adjudication' (2010) 3 *CCR* 111.

81 Although not unexplored. See Helen Taylor 'Forcing the court's remedial hand: Non-compliance as a catalyst for remedial innovation' (2019) 9 *CCR* 247.

influenced judges' decisions; rather, politically relevant considerations that were not necessarily reflected in their judgments also played a significant role.

1.4 METHODOLOGY

There is growing recognition that merely placing legal research into the 'doctrinal' methodological category is often no longer sufficient, or indeed an accurate description of most legal research.[82] That is particularly true of this thesis. At its core, this thesis is concerned with what motivated or may have motivated judges to act in certain ways and not others, including the extra-legal factors that may have played a role in their judgments. This cannot be ascertained from a strictly doctrinal approach, being one that 'draws on the legal system as the main supplier of concepts, categories and criteria'.[83] Nor can it be answered solely by empirical means. It is simply not possible, by any methodology, to yield a perfectly accurate account of every factor or influence acting upon judges before they reach a decision.[84] Fortunately, that is not the aim of this thesis. In seeking to 'describe and critically assess how courts have approached their constitutional role in interpreting and applying the law', the goal is not accuracy as to the judges' factual state of mind, but an appreciation of the judicial decision-making process in context, to better understand the levers at work that can guide future decisions pertaining to the law and the role of the judiciary.

To that end, this thesis employs a blend of methodologies to construct its best approximation of the factors that were likely to have influenced the judges, and then assess the application of those factors within a theoretical framework. First, this thesis incorporates *doctrinal* elements, in that it 'provides a systematic exposition of the rules governing a particular legal category, analyses the relationship between rules, explains areas of difficulty and, perhaps, predicts future developments'.[85] To take one example, it is not possible to critique judicial innovation in the development of the law on remedies without having regard to the established principles governing that area of law. The case that courts have regard to extra-

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[82] Terry Hutchinson & Nigel Duncan 'Defining and describing what we do: Doctrinal legal research' (2012) 17 *Deakin Law Review* 83 at 98–101.

[83] Pauline Westerman 'Open or autonomous? The debate on legal methodology as a reflection of the debate on law' in Mark van Hoecke (ed) *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (2011) 94.

[84] The question whether judges' decisions are influenced by what they ate for breakfast has been asked both in mocking jest as a criticism of legal realism taken to extremes, as well as considered seriousness. See Dan Priel 'Law is what the judge had for breakfast: A brief history of an unpalatable idea' (2020) 68 *Buffalo Law Review* 899.

[85] Hutchinson & Duncan (note 82 above) 101.

legal factors when deciding matters is made by first having regard to the *legal* factors that guide their decisions in broadly predictable ways; in other words, in the mode of legal formalism.[86] This thesis therefore engages in qualitative legal analysis of legal texts including case law and legislation.

Secondly, this thesis employs *theoretical research* to better locate the competing tensions in a theoretical framework that brings to the fore the 'conceptual bases of legal principles and of the combined effects of a range of rules and procedures that touch on a particular area of activity'.[87] This theoretical framework is constructed in Chapter 2 and is conceived using language deliberately chosen to invoke physical phenomena in three ways.

The first of these is 'tension', where binary considerations are situated on opposing poles, and it is envisaged that the judge's assessment of what is required in that case 'pulls' them to one end or the other. These considerations are, on the one hand, the impetus to make activist decisions, inspired by transformative constitutionalism and on the other, the drive to exercise caution and deference when deciding cases. While this is a useful conceptual tool to maintain a consistent understanding the factors influencing judges over the three diverse areas discussed in Chapters 3, 4 and 5, the binary and opposing nature of these considerations is, to some extent, an assumption. There may be, for example, instances where other factors not considered here may also exert corresponding forces on judicial decision-making. An example would be where judges are biased or subject to improper influences.[88]

The second physical phenomenon invoked in this thesis is 'expansiveness' versus 'restraint' in judicial decision-making. Here, 'expansiveness' (when used with regard to judicial activism) connotes the use of interpretive latitude to broaden the application of the law in new ways, sometimes by pushing up against the limits of established principles as air does when pumped into a balloon. In contrast, judicial 'restraint' accepts (for a variety of reasons, including formalism and institutional pragmatism) the boundaries of existing laws as relatively

[86] Formalism is discussed in further detail at 2.2 of this thesis.
[87] Hutchinson & Duncan (note 82 above) 101.
[88] While this is rare, it is not unheard of. A high profile attempted instance of this was made public in the formal complaint instituted by two justices of the Constitutional Court against another judge, John Hlophe, who was the Judge President of the Western High Court at the time. They alleged that Hlophe had met with them personally in an attempt to influence them improperly regarding a matter before them in which corruption involving Jacob Zuma was alleged. See *Judges Matter* 'Hlophe Tribunal 2008 – 2023', last accessed from https://www.judgesmatter.co.za/conduct/hlophe-tribunal-2008-2019/ on 1 March 2025. Hlophe was later impeached. See Marianne Thamm 'Huge majority of MPs vote to impeach Western Cape Judge President John Hlophe' *Daily Maverick* 21 February 2024, accessed online from https://www.dailymaverick.co.za/article/2024-02-21-huge-majority-of-mps-vote-to-impeach-western-cape-judge-president-john-hlophe/ on 1 March 2025.

fixed and unyielding.

Thirdly, this thesis refers to an 'accountability vacuum', a term borrowed from Hoexter, who in turn borrowed it from Taggart.[89] The vacuum, taken to mean an absence or lack, does not refer to a deficit of mechanisms or procedures to hold those engaged in malfeasance to account; rather, it connotes the failure to engage those processes in practice.

These physical phenomena are helpful metaphors to conceive how the theoretical underpinnings of this thesis ('transformative constitutionalism', 'the separation of powers') are situated relative to each other and how they are applied to the substantive subject matter areas.

The third research methodology employed is that of *fundamental* legal research, as it is designed 'to secure a deeper understanding of law as a social phenomenon,'[90] in particular, the political implications of law. This is done by ensuring that discussions of legal doctrine are considered together with contextual indicators, often in the form of contemporaneous news reporting that highlights the interrelationship between the courts and the political branches of government. This is important as the central source of tension comes from political conduct, that is, the failure to exercise political accountability mechanisms leading to the accountability vacuum that the courts attempted to fill. The courts may *avoid* allowing politics to influence their decisions, and indeed disavow such influence, but they cannot be wholly apolitical.[91]

Having considered the research methodologies that are employed in this thesis, a further question bears consideration: what evidence is used to support the claims made? Related to this: why should this evidence be relied upon for the purposes of this enquiry?

The main source used here is the judgments of the superior courts in South Africa concerning matters of corruption, egregious public maladministration, or both. The text of the judgments is subjected to critical analysis to highlight where the court's reasoning may have been influenced by political considerations prevalent at the time. Particular attention is paid to the language employed in the written reasons given for the decision, including in *obiter* remarks. Judges are constrained in many ways regarding the content of their judgments, inter alia by the facts placed before them, by process rules, and by precedent. Nevertheless, their

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[89] Hoexter (note 17 above). Hoexter was referencing Michael Taggart in 'The province of administrative law determined?' in M Taggart (ed) *The Province of Administrative Law* (1997) 1, 3.
[90] Hutchinson & Duncan (note 82 above) 102.
[91] See, in general, Dent (note 76 above).

political inclinations may (intentionally or unintentionally) find their way into the text, albeit in a 'coded' form: that is, implied rather than expressly stated.[92] Support for the central thesis can therefore be found in the judgments themselves by 'decoding' them in order to unearth these unstated influences. In addition to this, orders granted by the courts are analysed with reference to the reasons given. Therefore, the analysis of case law is influenced by principles derived from theories of judicial decision-making, as discussed above.

Secondary sources that are employed include academic texts in the form of books and journal articles, which are used to provide context as to the political climate in South Africa; to provide analysis of relevant laws and principles; and to provide different interpretations of the text of judgments advanced by scholarly commentators.

Another secondary source used is public statements by judges in the form of journal articles, speeches, public lectures, and interviews. While there are limits as to what judges may say publicly,[93] there are good reasons for judges to make use of public forums to debate issues of national importance in a responsible manner.[94] If done carefully, what is not stated in judgments can sometimes be said publicly. While these sources are also 'coded' to some extent, they can serve as a more candid reflection of what judges really think about certain topics.

As mentioned above, news reports concerning the conduct of relevant political actors from prominent media houses are also relied upon. These reports are a contemporaneous account of the facts that gave rise to litigation. Statements of political actors and responses to those statements can also reveal political machinations at work.

This thesis looks exclusively[95] at written sources to draw conclusions about what influential forces were acting upon judges when deciding cases, and the vast majority[96] of these texts are judgments. There are several reasons for this: first, judgments are the primary means by which judicial intent is expressed. They are carefully crafted because they are understood to contain

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[92] Timothy J Capurso 'How judges judge: Theories on judicial decision making' (1998) 29 *University of Baltimore Law Forum* 5 at 8.

[93] See art 11 of the Code of Judicial Conduct *GN* R865 *GG* 35802 of 18 October 2012, adopted in terms of section 12 of the Judicial Service Commission Act 9 of 1994.

[94] Goldstone JA provided some guidelines on how judges may engage properly with the public in Richard Goldstone 'Do judges speak out?' (1994) 111 *SALJ* 258.

[95] The methodology of interviewing judges was not selected for the purposes of this thesis, as the likelihood of securing such interviews is slim and even if secured, judges would not have shared their thoughts in a frank and unconstrained manner due to the considerations discussed here. On judges' freedom of speech outside the courtroom, see Cora Hoexter 'Non-judicial functions and activities' in Cora Hoexter & Morné Olivier (eds) *The Judiciary in South Africa* (2014) 288 at 311–16.

[96] The exception would be judges' speeches as recorded in textual format.

the rationale for the ultimate decision – ostensibly in its entirety. This is why, for example, appellate courts are not permitted to ask judges of courts *a quo* to clarify their judgments once handed down. Secondly, judges typically offer little by the way of extra-curial statements to provide context to their decisions. Judges rarely discuss their judgments publicly[97] as extra-curial statements could be used to suggest prejudice with regard to certain issues or parties and provide grounds for recusal in future matters.

It follows, then, that any inferences drawn about the motivations for a judge's decision one way or another from judgments are necessarily speculative. This does not mean that they are not valuable. In the crafting of court judgments, especially those of appellate courts, meticulous attention is paid to language: not just grammar and punctuation, but the narrative structure of judgments and the choice of vocabulary used – in other words, the style.[98] One revelatory aspect of the style of written opinions worth pointing out is that judges write with their intended audience in mind.[99] This extends beyond merely justifying their choices by explaining their reasoning: they also intend to persuade their audience. Romano and Curry observe that the

> 'simple fact is that judges recognise they *must* emphasise persuasion in order to offset their often-questioned ability to engage in the policy-making process through their interpretive power . . . Persuasion likewise transforms the judicial opinion from the simple resolution of a dispute into something greater; a political statement by a court.'[100]

A persuasive judgment discusses at least two alternatives and guides the reader towards the most valid one, with the author curating the presentation of information 'in order to move an audience in their favour'.[101] Judges therefore structure their decisions so that they are able to be understood by their 'intended audience in hopes that the argument will be internalised and

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97 Occasionally judges speak in public forums on issues that were previously before them in court. Such addresses are usually couched in more general terms akin to remarks contained in academic publications (and indeed, many of these speeches are published in journals as such) and very rarely reveal the internal thought processes of the judge in reaching her or his decision.

98 The author has had first-hand experience of this, having served as a law researcher to Skweyiya J and Cameron J of the Constitutional Court for one year between 2013 and 2014. For a survey of various opinions on the import of style in judicial opinions see RF Blomquist 'Playing on words: Judge Richard A. Posner's appellate opinions, 1981-82: Ruminations on sexy judicial opinion style during an extraordinary rookie season' (2000) 68 *University of Cincinnati Law Review* 651.

99 See generally Michael A Romano & Todd A Curry *Creating the Law: State Supreme Court Opinions and The Effect of Audiences* (2019) 27–33.

100 Ibid 34. Emphasis in original.

101 Ibid.

accepted as truth'.[102] Romano and Curry further note that

> 'when judges seek to persuade, they do so through engaging in a communicative strategy which highlights the complexity of an argument, engaging multiple threads and showing how they will eventually lead to a chosen, "correct" decision. This complexity is necessary, since judges must speak to a variety of audiences, all of whom may have some stake in their continued retention.'[103]

Romano and Curry outline radiating spheres of intended influence of judges' decisions, with other judges in the innermost circle and the public at large in the outermost, and with litigants, legal practitioners, and others in between. They point out that entire judgments are rarely consumed by the public; rather, journalists often act as intermediaries by reading important judgments and distilling the contents into news articles that are read by the public.[104] In this thesis, discerning the intended audience of the judgment is an important contextual clue as to any extra-legal factors that may be at play. For instance, is it written in a manner to serve as a guide (or warning) to elected officials on how to conduct themselves? Does it provide ballast to civil society and activists to engage in advocacy around anti-corruption issues?[105] Is it written to convince the reader of the court's self-restraint by not going beyond its role as determined by the separation of powers and therefore influence politicised discussions about the judiciary? Such questions are relevant, though not determinative, as other factors may also be at play.

Another potentially revealing element of judicial opinions suggested by Posner is the author's choice of style. Posner categorises these into styles that are 'pure' (in general terms, legalistic and impersonal) and 'impure' (in general terms, more conversational and personal) in tone.[106] He correlates the 'pure' style with a formalistic mode of judicial decision-making, and 'impure' style with a 'pragmatic' approach to judicial decisions, though himself concedes that these are only indicative, rather than determinative, because judges themselves can choose to subvert these categorisations.[107] The adoption of an impure or pure style may nevertheless provide a contextual clue regarding the intended audience of the judgment, where an impure style potentially favours broad understanding by the public.[108] An aspect that potentially

[102] Ibid.
[103] Ibid 35.
[104] Ibid 33.
[105] A key example of this is the oft-quoted paragraph 166 of *Glenister II* (note 28 above).
[106] Richard A Posner 'Judges' writing styles (and do they matter?)' (1995) 62 *University of Chicago Law Review* 1426–32.
[107] Ibid 1436.
[108] Gerald Lebovits, Alifya V Curtin & Lisa Solomon 'Ethical judicial opinion writing' (2008) 21 *Georgetown*

conceals the influence of extra-legal factors is the need for the authors of majority opinions to achieve consensus. Other judges can influence stylistic choices by making their vote conditional on their adoption.[109] These in-chambers machinations are ultimately unknowable to the reader as judges keep their deliberations confidential from the public.[110]

It follows, then, that the style employed by judges in their written judgments can provide an indication of the internal forces guiding judges' decisions, but it cannot supply clear answers. More important is the substance of the judgment itself. The following chapters of this thesis engage largely with the substantive content of the relevant judgments while locating them within the socio-political context within which the cases were heard and decided. But even context is not determinative. While it is likely that judges are influenced by surrounding circumstances of a case, without their express acknowledgment of this, the impact of current events also remains conjecture. Despite these considerations, judgments are the primary (and sometimes only) expression of judicial intent and are therefore deserving of close examination in this thesis.

1.5 CHAPTER OUTLINE

(a) Chapter 1: State capture, corruption, egregious public maladministration, and the courts

In this chapter, I have established the socio-political context relevant to corruption, state capture, and egregious public maladministration in South Africa by providing an overview of relevant political and legal developments. Further, I have defined several key concepts, and detailed the methodology used, research questions, and significance and originality of the thesis, and proceed now with an overview of the material presented in the ensuing chapters.

(b) Chapter 2: A theoretical lens

The next chapter provides the theoretical foundation for the case analysis that follows in Chapters 3, 4, and 5. It rests on three main pillars. The first of these is legal realism. The chapter traces the relevant background of this theory of judicial decision-making and contextualises it to South Africa. The second pillar is judicial activism as considered through the lens of transformative constitutionalism, which is critically assessed. The third pillar is judicial restraint, which is informed by the separation of powers as contextualised to South Africa and

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Journal of Legal Ethics 237.

[109] Patricia M Wald 'The rhetoric of results and the results of rhetoric: Judicial writings' (1995) 62 *University of Chicago Law Review* 1377.

[110] Richard Posner *How Judges Think* (2008) 2–3.

critiqued there. From this broad theme, several sub-themes are explored relating to judicial review, including institutional pragmatism, lawfare, and remedies. Lastly, this is followed by a discussion concerning the interplay between judicial activism and restraint as applied to accountability-vacuum cases.

(c) Chapter 3: The courts' responses to attempts to impede the proper functioning of criminal justice institutions

This is the first of three chapters that analyse case law through the theoretical lens established in Chapter 2. The chapter sets the scene by describing the context of South Africa's anti-corruption framework. The discussion is ordered around three themes regarding criminal justice institutions: the appointment of leaders, the removal of leaders, and attempts to change the structure and functioning of such institutions.

This chapter highlights how the courts navigated complicated terrain regarding the separation of powers in order to preserve the integrity of anti-corruption agencies. This included the invalidation of executive actions and requiring the legislature dramatically to alter the constitutive statute of a key anti-corruption investigative institution. It is considered whether these steps were constitutionally appropriate in the sense of going too far or not far enough.

(d) Chapter 4: Remedying the social grants crisis: the* AllPay *and* Black Sash Trust *cases

This chapter concerns the abuse of procurement processes manifesting as egregious public maladministration. It continues the analysis of case law by focusing on a particular line of cases, namely, the invalidation of the South African Social Security Agency's award of a tender to develop a system for the payment of social grants to beneficiaries across the country.[111]

Although the court did not consider allegations of corruption in these cases nor make any findings regarding corruption, the conduct of the parties coupled with their disregard for the orders of the Constitutional Court prompted the court to take decisive action against the evident egregious public maladministration. This included maintaining supervisory jurisdiction over the matter and making punitive costs orders against responsible officials, including the

[111] *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency* 2014 (1) SA 604 (CC), *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency (No 2)* 2014 (4) SA 179 (CC); *Black Sash Trust v Minister of Social Development* 2017 (3) SA 335 (CC); *Black Sash Trust v Minister of Social Development (Freedom Under Law NPC Intervening)* (2017) 9 BCLR 1089 (CC); and *Black Sash Trust (Freedom Under Law Intervening) v Minister of Social Development* 2018 (12) BCLR 1472 (CC).

relevant Minister. These cases, together with other relevant procurement cases, are illustrative of the courts' efforts to ensure that procurement laws are adhered to so that public funds are used efficiently and not to enrich private interests at the expense of the public.

To better understand the procurement law environment within which these cases were heard, the legal framework for procurement is described, including more recent developments such as the Public Procurement Act 28 of 2024. Next, corruption and maladministration in public procurement are contextualised, drawing attention to their deleterious impacts on the lives of people in South Africa, as well as attempts made by various institutions to deal with this pernicious issue by various institutions. The chapter then proceeds to discuss the *AllPay* and *Black Sash Trust* cases. This is deliberately done chronologically. Although the judgments bring up various themes and issues that are at times interrelated, by discussing them in sequence after establishing the context within which they were decided, a clearer picture of the extra-legal factors that potentially motivated the court's[112] decision-making in these cases emerges. This is because the cases show a progressive increase in the court's level of intervention, particularly with regard to remedy, that tracks the escalation in recalcitrance by the responsible officials and the urgency of the circumstances. However, the third *Black Sash Trust* judgment did not mark the end of the so-called social grants crisis. To consider their impact, events following the *AllPay* and *Black Sash Trust* cases are also discussed because they raise an important question: how effective were the judicial choices made in these cases in averting harm, not just to social grants recipients, but to the public interest in accountability against corruption?

(e) Chapter 5: 'This watchdog should not be muzzled': The courts and the powers of the Public Protector

This chapter discusses key cases dealing with the powers and functioning of the Public Protector, the 'Chapter 9' institution[113] mandated to investigate, report on, and take remedial action in response to alleged impropriety by state actors.[114] Specifically, it concerns the circumstances that arose during the tenure of former Public Protector Thuli Madonsela,

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[112] Froneman J wrote the majority opinions (most of which were unanimously decided) in all the *AllPay* and *Black Sash Trust* decisions discussed in detail here. Jafta J wrote for the majority in another related case that is not considered in detail, *South African Social Security Agency v Minister of Social Development* 2018 (10) BCLR 1291 (CC).

[113] Chapter 9 of the Constitution pertains to state institutions supporting constitutional democracy, and establishes several independent institutions such as the Public Protector, South African Human Rights Commission, Commission for Gender Equality, and more.

[114] Section 182 of the Constitution.

specifically, her groundbreaking investigation into upgrades made to former President Jacob Zuma's residence in Nkandla. Several of these ostensible 'security enhancements' were found not to be security-related and therefore constituted an unjustified use of public funds for Zuma's benefit. This chapter concerns the court's approach to the legal question that arose from this matter: whether the remedial action contained in the Public Protector's report was binding and could not simply be ignored, a question answered by the Constitutional Court in the affirmative.

The cases discussed in this chapter reveal the court's concern for the pressing need to fill the accountability vacuum created by the elected branches of government, including by ensuring that the Public Protector, as an independent institution, had the necessary 'teeth' to hold high ranking public officials – including the President – to account.

(f) Chapter 6: Conclusions and recommendations

The final chapter draws on the analysis and conclusions reached in preceding chapters to address the research questions detailed above, enabling a greater understanding of how judges decide matters where the competing tensions of judicial restraint and activism are in operation. Specific recommendations are made particularly with regard to concerns about the separation of powers. These recommendations could serve as guidance in future cases about the appropriate 'conscientious' approach to cases concerning corruption and egregious public maladministration.

CHAPTER 2

A THEORETICAL LENS

2.1 INTRODUCTION

As discussed in Chapter 1, this thesis concerns, in essence, the *how* but more importantly, the *why* of judicial decision-making. It asks whether judges are influenced to reach one outcome or another only by what is placed before them in the form of evidence, legal texts, and argument; or whether their own views on what is normatively right and important factor into their decisions (including the remedies ordered) and the justifications they provide for such decisions. These questions could be asked in reference to many types of cases, such as those concerning socio-economic rights, or land restitution, or any number of contentious legal issues. This thesis focuses on a specific type of case, those concerning state capture, corruption and egregious public maladministration, because they highlight an acute type of tension around the separation of powers. The need to respect the separation of powers is generally regarded as a 'restraining' factor in the award of remedies in state capture cases: judges exercise care not to intrude (and to not be *perceived* as intruding) on the realm of the executive and the legislature. This is not only due to the constitutional impetus[1] but also for political reasons. Because these cases involve areas of contestation concerning how to hold political actors accountable against some of their worst impulses – of abusing their public powers to advance their own pecuniary interests – any perceived overstepping of the boundaries of the separation of powers could have been seized upon by bad actors to discredit the judiciary. Such attacks posed a threat to the rule of law in an already tense political environment. Maintaining distance from the realm of the executive and legislature not only served to protect and uphold the rule of law, but also the institutional integrity of the judiciary in the mind of the public.

By drawing on context derived from media sources, this thesis also highlights dysfunction in the elected branches of government during the height of state capture and a perceived wilful disregard on their part to enforce accountability against bad political actors — in other words, an 'accountability vacuum'.[2] This gave rise to a narrative that only action by democratic institutions outside of electoral politics, such as the judiciary and independent institutions like

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[1] Though, as will be discussed further below, the separation of powers is not provided for expressly in the Constitution, it still remains an important foundation of South Africa's constitutional architecture.
[2] Cora Hoexter 'Judicial policy revisited: Transformative adjudication in administrative law' (2008) 24 *SAJHR* 281 at 289.

the Public Protector, could be effective to curtail rampant corruption and the subversion of state architecture to serve private interests. Matters that ought to have been resolved politically, such as through party disciplinary processes, were instead brought before the courts to decide.[3] The judges who decided these cases would no doubt have been aware of such narratives. The confluence of law and politics in the public realm was evident. It bears examining whether these considerations made their way into the courtrooms as a factor that pushed judges to engage in judicial activism to make decisions and order remedies that sought to alleviate the accountability vacuum.

This chapter considers the factors that, on the one hand, gave the courts reason to make findings and order remedies that responded meaningfully to the accountability vacuum that had allowed state capture, corruption and egregious public maladministration to proliferate and on the other, restrained judges from making decisions that could have been seen to be encroaching into the realm of the elected branches. The groundwork for this is laid by a brief discussion of American legal realism and how it has been interpreted in South Africa, which provides the backdrop for prevailing thought on judicial decision-making. Upon this foundational layer, the interplay between two opposing forces is then explored: on the one hand, the push towards transformative constitutionalism as one potential animating consideration behind judicial activism; and on the other, the separation of powers as a factor conducing towards judicial restraint and the limiting of judicial discretion. These topics are discussed in more general terms to leave room for the third section of this chapter, which applies these considerations to the realm of accountability-vacuum cases. While the specifics of such application are dealt with further in the three chapters that follow this one, the so-called accountability-vacuum cases involve particular considerations that throw the relationship between the judiciary and the elected branches of government into sharp relief. These considerations are explored in more general terms here.

2.2 LEGAL REALISM

This thesis seeks to describe the real-world, extra-legal factors that are likely to have influenced the South African courts in key cases concerning corruption and egregious public maladministration. Extra-legal factors are those that are not derived from legal instruments

[3] As will be discussed in the following chapters of this thesis, this was often done by those who lacked direct means to exercise political power, such as civil society organisations or opposition parties. This phenomenon has come to be considered as an instance of 'lawfare', a concept which is also expanded upon in this chapter at 2.4*(c)*(ii).

(such as statutes and regulations) and principles (such as judicial dicta). The idea that such elements can play a role in – or, indeed, be the very basis of – judicial decision-making is one that gained prominence through the American Legal Realist (hereafter, realist)[4] school of thought of the early 20th century. For the purposes of this thesis, it is helpful to contextualise the origins of realism and then discuss what realism (in a more modern, South African context) provides as a background against which the confluence of law and politics in judicial decision-making can be discussed.

In 1881 Olive Wendell Holmes Jnr made his famous observation that 'the life of the law has not been logic: it has been experience',[5] sowing the seeds of the American Legal Realism movement that would grow in the ensuing decades. The central thesis of realism posits that judges decide cases by firstly looking at the facts presented and then reaching a decision as to the outcome before considering legal authority. Only after an initial decision is made does the judge look to authority such as statutes or case law to support the chosen outcome, changing her decision only if it cannot be sustained by the available legal precepts.[6] In this way, the act of judging makes law, rather than just discovers it. Law is therefore not a static body of principles, but an activity.[7]

In its earlier (and more unrefined) form, American Legal Realism suggested that a judge's initial decision about the case before her is informed by that judge's 'human predispositions'[8] rather than legal reasoning involving the analysis of fact and law — a 'perspicacious flash termed the "judicial hunch"'[9] — in other words, the judge's inkling of what is right or fair in the circumstances. Having decided the outcome on the basis of the 'judicial hunch', the judge then seeks out legal principles to justify this initial position, and will depart from it only where such principles cannot be found. The 'judicial hunch' is informed by extra-judicial factors such as the judge's 'legal and political experience, political affiliations and opinions, and intellectual and temperamental traits'.[10] These factors give rise to the influential unarticulated premises

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[4] It is beyond the scope of this thesis to consider the other form of legal realism, Scandinavian Legal Realism, here.
[5] Oliver Wendell Holmes, Jnr *The Common Law* 46ed (1881).
[6] See Timothy J Capurso 'How judges judge: Theories on judicial decision making' (1998) 29 *University of Baltimore Law Forum* 5 at 5.
[7] See, for instance, Richard A Posner *The Problems of Jurisprudence* (1990) 225.
[8] Capurso (note 6 above) 6.
[9] Ibid. See also Adam G Todd 'An exaggerated demise: The endurance of formalism in legal rhetoric in the face of neuroscience' (2019) 23 *Legal Writing* 84, which draws on neuroscience to ground this 'hunch' as a feature of decision-making processes in the brain by relating it to categories of thinking devised by behavioural science.
[10] Charles Grove Haines 'General observations on the effects of personal political and economic influences in the decisions of judges' (1922) 17 *Illinois Law Review* 96 at 116.

that play a greater role than legal rules in determining outcomes of cases.

This 'extreme'[11] view of the process of judging has been tempered in later iterations of realism, following criticisms that, for instance, it tends to 'minimise the role of the rule of law' and that even though legal principles are not always determinative, this does not mean that 'those rules do not have significant, often controlling, influence during the decision-making process'.[12] One would be hard-pressed to find a modern-day realist who regards the 'judicial hunch' as the sole determinant in *all* judicial decisions. Rather, it is acknowledged that the influence of extra-judicial factors becomes more pronounced in certain cases, in particular those where there is indeterminacy in the law which calls on judges to exercise their discretion to reach a decision that is not legally obvious.[13] An example of this would be where two interpretations of a statutory provision are equally legally plausible and the judge must use her powers of interpretation to decide the matter. The judge may favour the interpretation that accords with her view of what is 'right' or 'just' in the circumstances – and this view will likely to some extent be informed by political or social factors peculiar to her. If individual instances of this are applied over adjudication in general, it follows that the act of judging is indicative of, and responsive to, the prevailing social and political climate in which it occurs.

The notion of 'rightness', 'justice', and 'fairness' introduces a new consideration – that of morality. Realism is, however, less concerned with morality — in other words, how judges *ought* to decide — than it is with describing how judges *actually* decide cases in practice. The theory that serves as a more apposite counterpoint to realism in terms of being a descriptive (rather than normative) theory is legal formalism.[14] Formalism considers the law to be sufficiently broad and detailed to 'cover the field' in respect of all circumstances that present before a judge in court. The judge's role is to ascertain correctly the applicable law and apply it to the facts at hand, in other words to 'use . . . deductive logic to derive the outcome of a case from premises accepted as authoritative'.[15] Importantly, this process is independent of the judge herself – any other competent judge in the same position should reach the same result.[16] A

[11] Capurso (note 6 above) 13.
[12] Ibid.
[13] Richard A Posner 'The jurisprudence of skepticism' (1998) 86 *Michigan Law Review* 827 at 891. See also Karl Klare 'Legal culture and transformative constitutionalism' (1998) 14 *SAJHR* 146 at 157.
[14] William Twining 'Legal R/realism and jurisprudence: Ten theses' in Elizabeth Mertz, Stewart Macaulay & Thomas W Mitchell (eds) *The New Legal Realism, Volume 1: Translating Law-and-Society for Today's Legal Practice* (2016).
[15] Richard A Posner 'Legal formalism, legal realism, and the interpretation of statutes and the Constitution' (1986) 37 *Case Western Reserve Law Review* 179 at 181.
[16] Capurso (note 6 above) at 9.

commentator can thus 'pronounce the outcome of the case as being correct or incorrect, in approximately the same way that the solution to a mathematical problem can be pronounced correct or incorrect'.[17] It therefore emphasises the 'scientific' nature of law, regarding law as a tool of reason and not of will, thereby stripping it of its political elements.[18]

In the South African context, a key proponent of legal realism, John Dugard, associated formalist adjudication with a 'positivist' approach to decision-making, that is, one that is founded on two 'cardinal beliefs; first, the truth of the theory of command,[19] and secondly, the need for the strict separation of law and morality'.[20] In his seminal 1971 address in a turbulent political period that saw world recognition for the rejection of apartheid – including its many racist laws – as morally repugnant,[21] Dugard decried the 'vulgar' positivist approach taken by judges towards decision-making during that time, arguing that positivism which sets law wholly apart from morality can act as a 'fig leaf' that hides judges' inarticulate premises from the view of the public.[22] Adopting a technical, formalist approach to decision-making allows judges to constrain themselves to (or at least, argue that they are constrained by) supposedly 'neutral' legal texts without engaging with their moral content. There is no imperative to imbue the law with substance in the course of their decision-making to promote the public good,[23] thus 'prevent[ing] an inquiry into the true motivation for certain decisions and present[ing] the law as neutral and objective when in reality it expresses a particular politics and enforces a singular conception of society.'[24] Dugard called upon South African judges to recognise that their role is not merely mechanical and that they do, in fact, 'create new law by filling in gaps

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[17] Posner (note 15 above) 181.

[18] Morton J Horwitz 'The rise of legal formalism' (1975) 19 *The American Journal of Legal History* 251 at 254–7. Note, however, that realism itself was considered to be movement towards 'scientific' inquiry into judicial decision-making, in that it calls for the adjudication to be analysed in terms of objectively observable phenomena, such as the linguistic (see Hanoch Dagan 'Legal Realism: Contemporary' in Mortimer Sellers & Stephan Kirste (eds) *Encyclopedia for Law and Social Philosophy* (2023) at 1995–7); sociologic (Ralph J Savarese 'American legal realism' (1965) 3 *Houston Law Review* 180 at 190) and psychologic (see, for instance, Theodore Shroeder 'The psychologic study of judicial opinions' (1918) VI *California Law Review* 89, although Shroeder's analysis was arguably contemporaneous with – or even pre-dated – some of the more significant developments in American Legal Realism).

[19] This theory holds that law reflects the 'command of the sovereign', requiring courts to interpret Parliament's will into law 'but not to reason why'. Catherine Albertyn & Dennis Davis 'Legal realism, transformation and the legacy of Dugard' (2010) 26 *SAJHR* 188.

[20] John Dugard 'Judicial process, positivism and civil liberty' (1971) 88 *SALJ* 181 at 188–9.

[21] See United Nations *Yearbook of the United Nations* (1971), last accessed online from https://www.un-ilibrary.org/content/books/9789210601986/read on 27 September 2024 at 63–4, which discuss 'matters concerning South Africa's apartheid policies'.

[22] Dugard (note 20 above) 183.

[23] John Dugard 'Some realism about the judicial process and positivism – A reply' (1981) 98 *SALJ* 372 at 372 fn 5, where Dugard considers that 'formalism rather than positivism explains the stance of the South African judiciary' towards unjust laws under apartheid.

[24] Pius Langa 'Transformative constitutionalism' (2006) 17 *Stell LR* 351 at 357.

in the statute' and so they must be aware of unacknowledged biases.[25] He also asked them to reject positivism (and consequently, formalist justifications for their decisions) which maintains the separateness of law and morality by allowing themselves to be 'guided by accepted traditional legal values in the exercise of their limited legislative function'.[26] The liberal 'traditional legal values' he described were (in similar terms) codified into law in the Bill of Rights when the (final) Constitution was enacted in 1996.[27]

Did the constitutional era mark the end of legal realism in South Africa, in that a legal instrument now 'covered the field' in respect of constitutional rights and obligations and that adjudication could again be said to proceed on the basis of the formalist approach? Of course it did not. The nature of language is such that it is rare that any text – but in particular one with rich normative content – will give rise to a single, universally understood and accepted interpretation. It is often the case that multiple plausible interpretations can apply to a single text.[28] The language of any constitution, even one as detailed as South Africa's, necessarily favours generality over specificity and therefore invites indeterminacy that must be resolved by the application of judicial discretion. In other words, as the realists hold, judges continue to make the law as they interpret it within the normative framework established by the Constitution. To that process, they bring unique unarticulated premises, such as their political views, their background, their identities in terms of sex and race, and more. As will be discussed further in the next section, Dugard's engagement with realist critiques of formalist adjudication were an early indication of the development of transformative constitutionalism.

The realist conception of judicial decision-making is no longer controversial: the statement that 'we are all realists now' is regarded as cliché.[29] Recent scholarship, including empirical research, has affirmed the realist position in a broad sense.[30] Realism has undergone significant

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[25] Dugard (note 20 above) 195.
[26] Ibid. Albertyn and Davis point out that Dugard's views on the correct way to infuse moral considerations into adjudication adopt a modern natural-law conception of law departing from a liberal legal tradition, which holds that the law is neutral and there are certain universal values that are immanent within law. In this way, Dugard breaks with critical legal realists, who instead insist that 'the underlying norms and values of legal system are inherently contested, requiring those who seek to change the law to engage the form, content and application of these values'. Whereas Dugard calls judges to be guided by liberal values in their decisions, critical legal realists call for close scrutiny of the legal system as a whole to determine whose interests are promoted over others (including in the course of judicial decision-making), and then to challenge those power structures. Albertyn & Davis (note 19 above) 190.
[27] Dugard (note 20 above) 197.
[28] Karin van Marle 'Transformative constitutionalism as/and critique' (2009) 20 *Stell LR* 286 at 289.
[29] Brian Bix 'The many faces of modern legal realism' (2022) 2 *Ordines* 18 at 20.
[30] See Lee Epstein 'Some thoughts on the study of judicial behavior' (2016) 57 *William & Mary Law Review* 2017 which surveys a number of studies about judicial decision-making that conduce towards the conclusion

development since the 1930s,[31] largely due to differences in view regarding the *extent* to which these unarticulated premises play a role in ultimate decisions (rather than whether they do so *at all*). Nevertheless, realism offers insights that are useful for this thesis: first, that there is a degree of subjectivity that is applied in judicial decisions that potentially leaves room for unarticulated premises unique to individual judges (based on their own experiences, training, political inclinations, and the like) to influence the outcome. Secondly, this effect is amplified where the law is not sufficiently determinate to set out a clear outcome for a given set of facts, and the judge must exercise her discretion to resolve this indeterminacy in a concrete decision. These principles are useful to describe *how* judges decide, but not necessarily how they *should* decide. The substantive chapters of this thesis are concerned with identifying and examining potential extra-legal factors that may have been influential in major corruption and maladministration cases – a descriptive task. At the same time, it is also concerned with the normative tensions that are also brought to bear in judicial decisions, such as the interplay between the transformative constitutionalism (a factor encouraging judicial activism) and the separation of powers (a factor encouraging judicial restraint).

2.3 TOWARDS JUDICIAL ACTIVISM: TRANSFORMATIVE CONSTITUTIONALISM

The previous section highlighted that while realism has many valid suggestions regarding how judges make their decisions in practice, it has less to offer about how judges *should* make decisions. This question has sparked an entire field of academic enquiry that it is not possible to traverse here. To narrow the field: as this thesis seeks to explore the impact of perceived accountability deficits in the elected branches of government, it is worth considering the extent

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that judges' decisions are indeed influenced by extra-legal factors. On the formalist/realist divide, see Adam G Todd 'An exaggerated demise: The endurance of formalism in legal rhetoric in the face of neuroscience' (2019) 23 *Legal Writing: Journal of the Legal Writing Institute* 84, which argues on a neuroscientific basis that the truth is somewhere in the middle: the realist mode of thinking is likely to be the more accurate description of judicial decision-making in practice. At the same time, he argues that 'formalism remains the central guiding structure for legal discourse and legal rhetoric' and that it 'peacefully coexist[s]with realist understandings of what constitutes effective legal rhetoric' at 127.

[31] This has included a shift in focus from interrogating the act of judging to interrogating how the operation of entire legal systems conduce towards certain results over others, largely by examining the power relations inherent in such systems. This field of inquiry is Critical Legal Realism which developed as a branch of the critical legal studies movement. See Denis M Davis & Karl Klare 'Critical Legal Realism in a nutshell' in Emilios Christodoulidis, Ruth Dukes & Marco Goldoni (eds) *Research Handbook on Critical Legal Theory* (2019) 27. Another, more direct offshoot of legal realism is new legal realism, which proposes an interdisciplinary, social science-focused approach to law that draws on methodology such as empirical research to understand better how law is experienced by people in their daily lives. See Bryan Garth & Elizabeth Mertz 'Introduction: New legal realism at ten years and beyond' (2016) 6 *UC Irvine Law Review* 121.

to which judges justify permitting policy considerations to influence the outcomes of their decisions. One approach to judicial decision-making that invites judges to be aware of prevailing social and political circumstances of the cases before them, and then to use their discretion to advance positive social outcomes (within appropriate limits) is transformative constitutionalism, and its 'natural adjunct', transformative adjudication.[32] This section details some of the genesis of transformative constitutionalism in the South African context, having regard to its application by the courts. It is shown that in embracing transformative constitutionalism, judges consider more than just the letter of the laws they interpret: instead, their interpretations are informed by the socio-economic and political context of the disputes before them. In this way, more expansive interpretations than suggested by the text can be applied. While the principle has broad acceptance, it is not without controversy. Accordingly, some of the contested aspects of transformative constitutionalism are explored in what follows.

(a) The genesis of transformative constitutionalism in South Africa and reception

The roots of transformative constitutionalism in South Africa can be linked to Dugard's vision of realist judicial decision-making, including his fervent dismissal of the positivist approach to adjudication. Positivism, according to Dugard, enabled judges to resist accountability for their role in furthering morally reprehensible policies by allowing them to avoid engaging with how 'technical rules of interpretation may be invoked to moderate the law's inequities'.[33] He instead advocated for judges to use their discretion to fill gaps in the law by 'advanc[ing] purposively human rights values in their rulings',[34] which was particularly poignant in its context of taking place decades before a justiciable Bill of Rights was passed into law. In the absence of such a codified normative framework at the time, Dugard called upon judges, where legislation was ambiguous, to apply 'recourse to liberal legal values . . . to mitigate the draconian effects of apartheid legislation'.[35] The post-apartheid codification of these liberal values in the Bill of Rights marked a change in the legal culture from one of authority to justification, one 'in which every exercise of power is expected to be justified; in which the leadership given by government rests on the cogency of the case offered in defence of its decisions, not the fear

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[32] Hoexter (note 2 above) 286, who refers to Dikgang Moseneke's statement that 'this type of adjudication is the task of judges who "are enjoined by the Constitution to uphold and advance its transformative design"'. Dikgang Moseneke 'The fourth Bram Fischer Memorial Lecture: Transformative adjudication' (2002) 18 *SAJHR* 314.
[33] Dugard (note 20 above) 187.
[34] Jackie Dugard 'Judging the judges: Towards an appropriate role for the judiciary in South Africa's transformation' (2007) 20 *Leiden Journal of International Law* 965 at 968.
[35] Albertyn & Davis (note 19 above) at 194.

inspired by the force of its command.'[36]

This culture applied equally to judges. Professor Karl Klare, in an influential 1998 article, set out in broad strokes a vision for adjudication under the new constitutional order, arguing that the act of judging invokes 'conflicting pulls and tensions . . . of freedom and constraint'.[37] This meant an appreciation that within the Constitution's sweeping vision of a just and equitable society, judges do make law when deciding cases, but at the same time they do not have free rein to give the text the meaning of their choosing.[38] Klare refers to the work of the 'conscientious judge',[39] that is, one who 'operates within and to some degree authentically accepts legal constraint, yet acts strategically to accomplish freedom and social justice'.[40] In doing so, the judge engages in the 'enterprise of inducing large-scale social change through nonviolent political processes grounded in law'.[41] This enterprise, transformative constitutionalism, is at its essence a

> 'long-term project of constitutional enactment, interpretation, and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction.'[42]

This project must be understood within the parameters of constraint, which Klare argues is not a characteristic of legal texts themselves but rather a 'particular kind of experience a legal actor has (or may have) in the course of doing legal-interpretive work with legal materials', such as when the legal actor finds that their preferred interpretation cannot be supported by the authorities upon which they purport to rely.[43] The process of adjudication in a transformative manner is an iterative process of testing justice-advancing interpretations of legal materials against the constraints immanent within them.

Klare's respected account of transformative constitutionalism and the approach of the

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[36] Etienne Mureinik 'A bridge to where? Introducing the interim Bill of Rights' (1994) 10 *SAJHR* 31 at 32.
[37] Klare (note 13 above) 149.
[38] Ibid.
[39] A concept first described by Etienne Mureinik (see Etienne Mureinik 'Dworkin and apartheid' in Hugh Corder (ed) *Essays On Law & Social Practice in South Africa* (1988) 181 at 183) who had not in his lifetime set out a precise definition of the conscientious judge. Klare drew on the body of Mureinik's work to build a substantive conception of the conscientious judge.
[40] Klare (note 13 above) 148.
[41] Ibid 150.
[42] Ibid.
[43] Ibid 160.

'conscientious judge' may well have created space for judges to allow political considerations in the form of value judgments to have an impact on their decisions where doing so serves the aims of dignity, equality and freedom – and then to 'more frankly . . . acknowledge [the] political character' of constitutional adjudication.[44]

In the ensuing years, the Constitutional Court has indeed acknowledged the transformative character of the Constitution in a diverse array of matters, such as the use of capital punishment,[45] the right of access to healthcare, [46] the application of prescription to disability grant debts,[47] the need for 'meaningful engagement' with occupiers before eviction by a state party,[48] and more. Many of those cases were viewed as advancing substantive justice, particularly in relation to socio-economic rights, by using 'purposive interpretation and creative application of a court's jurisdiction and remedial authority.'[49] The Constitutional Court of South Africa has been hailed as an model to other constitutional democracies for rights-based adjudication that advances social justice.[50] At the same time, the court has been subjected to robust criticism that it has not taken the transformative project far enough, particularly in relation to socio-economic rights.

On an assessment of the first major socio-economic rights cases decided by the Constitutional Court, Jackie Dugard argues – scathingly – that the judges' reluctance to make meaningful, pro-poor remedies for litigants in socio-economic rights cases displays a level of judicial conservatism (hiding behind the 'fig-leaf' of separation of powers) on a par with that of apartheid-era judges.[51] This uncharitable comparison critiques how the judges engaged with the interpretive constraints of the Constitution, but not some of the more pressing extra-legal

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[44] Ibid 151. See, for example, paras 302–4 of *S v Makwanyane* 1995 (3) SA 391 (CC), where Mokgoro J notes that 'the interpretive task frequently involves making constitutional choices by balancing competing fundamental rights and freedoms. This can often only be done by reference to a system of values extraneous to the constitutional text itself . . . To achieve the required balance will of necessity involve value judgments. This is the nature of constitutional interpretation.'
[45] Ibid para 262.
[46] *Soobramoney v Minister of Health (KwaZulu-Natal)* 1997 (1) SA 765 (CC) para 8.
[47] *Njongi v Member of the Executive Council, Department of Welfare, Eastern Cape* 2008 (4) SA 237 (CC) paras 79–80.
[48] *Occupiers of 51 Olivia Road, Berea Twp. and 197 Main St. Johannesburg v City of Johannesburg* 2008 (3) SA 208 (CC) paras 10, 17–18.
[49] Eric Christiansen 'Transformative constitutionalism in South Africa: Creative uses of Constitutional Court authority to advance substantive justice' (2010) 13 *Journal of Gender, Race & Justice* 575 at 577.
[50] See, for example, Michaela Hailbronner 'Transformative constitutionalism: Not only in the Global South' (2017) 65 *The American Journal of Comparative Law* 527 and Eric Kibet & Charles Fombad 'Transformative constitutionalism and the adjudication of constitutional rights in Africa' (2017) 17 *African Human Rights Law Journal* 340.
[51] Dugard (note 34 above) 969.

factors that were likely weighing on the court, such as the imperative not to be seen to be usurping the powers of the elected branches. The need for this was no doubt more acute as the highest court was navigating these crucial institutional relationships in a nascent democracy where accusations of counter-majoritarianism had real potential to undermine the court's goodwill and standing in the mind of the public at a sensitive time. Decades later, these considerations are no less important, but have taken on additional complexity. The next section of this chapter discusses the separation of powers as a constraint on the exercise of judicial discretion more fully.

Dugard's assessment is helpful in that it correctly identifies a spectrum of intensity with regard to levels of judicial activism under the mantle of transformative constitutionalism, with civil and political rights receiving 'aggressive' law-making intervention by the courts in comparison to the courts' 'timid' treatment of socio-economic rights.[52] Several authors[53] have argued that the courts are mistaken in not applying the same level of 'intensity' to scrutiny of socio-economic rights cases; it does not serve the purposes of this thesis to explore this further here.

It is useful to consider this spectrum of the degree of judicial activism observed and the potential reasons for it when considering accountability-vacuum cases. While such cases rarely involve the direct litigation of rights in the Bill of Rights, rights considerations are often invoked when providing the reasons for the decision or the remedies ordered. It should be noted, however, that contrary to Dugard's assessment, the classification of the human rights relied upon in such cases (civil and political versus socio-economic) is generally not a good predictor of the intensity of judicial activism that is brought to bear on the outcomes. For example, as will be discussed in Chapter 4 of this thesis in relation to the *AllPay*[54] and *Black*

[52] Ibid 977. Examples of this could include, for instance, judicial interventions that precipitated the passage of statutes legalising marriage between same-sex couples (*Minister of Home Affairs v Fourie* 2006 (1) SA 524 (CC)) and the possession of marijuana for personal use (*Minister of Justice and Constitutional Development v Prince (Clarke and Others Intervening)* 2019 (1) SACR 14 (CC)). It is worth noting that one of the justifications for a more constrained approach in socio-economic rights cases – the delicate balancing of resources – ignores the fact that changes to laws impacting civil and political rights also often require resource reallocation towards their administration.

[53] See, for instance, Mashele Rapatsa 'South Africa's transformative Constitution: From civil and political rights doctrines to socio-economic rights promises' (2015) 5 *Tribuna Juridică* 208; Carol Chi Ngang 'Human rights and socio-economic transformation in South Africa' (2021) 22 *Human Rights Review* 349.

[54] The *AllPay* cases are: *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency* 2014 (1) SA 604 (CC) (*AllPay 1*) and *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency (No 2)* 2014 (4) SA 179 (CC) (*AllPay 2*).

Sash Trust[55] line of cases, the potential risk that the right of access to social security[56] (a socio-economic right) would be denied to recipients of social assistance was an animating factor behind a far more interventionist approach by the Constitutional Court to relief, including orders granting the court supervisory jurisdiction over its implementation.[57] While the degree of judicial activism could be said to go beyond what has been the case for other socio-economic rights matters, the subject matter of *AllPay* was removed from the usual resource-related questions in that it primarily concerned irregularities in the public procurement process.

This can be contrasted with the judicial deference shown to the legislature by the majority in *Glenister II*[58] (discussed further in Chapter 3) by refraining to make precise orders as to how the invalidated statute[59] should be amended to ensure the necessary degree of independence of the Directorate for Priority Crime Investigation. *Glenister II* relied on the obligation contained in s 7(2) of the Constitution to 'respect, protect, promote and fulfil the rights in the Bill of Rights', specifically, 'the rights to equality, human dignity, freedom, security of the person and various socio-economic rights' – in other words, a mix of both classes of rights.[60] As shown by the above examples, the most likely reason that the specific human rights referenced in accountability-vacuum cases are not good indicators for the level of judicial activism is because usually they are referenced obliquely in relation to the effect that corruption and maladministration have on their fulfilment, rather than relied upon directly. Other factors, discussed further in this thesis, are more relevant indicators of judicial activism.[61] Nevertheless, concern for human rights in general is a key element of transformative constitutionalism and is certainly one of the driving reasons behind courts intervening more in cases concerning the accountability of the elected branches of government.

(b) Contestation surrounding the application of transformative constitutionalism

Despite the ubiquity of transformative approaches to constitutional adjudication,

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[55] The *Black Sash Trust* cases are: *Black Sash Trust v Minister of Social Development (Freedom Under Law NPC Intervening)* 2017 (3) SA 335 (CC) (*Black Sash Trust 1*); *Black Sash Trust v Minister of Social Development (Freedom Under Law NPC Intervening*) 2017 (9) BCLR 1089 (CC) (*Black Sash Trust 2*); and *Black Sash Trust v Minister of Social Development (Freedom Under Law Intervening*) 2018 (12) BCLR 1472 (CC) (*Black Sash Trust 3*).

[56] Section 27(1)*(c)* of the Constitution.

[57] Para 78 of *AllPay 2* (note 54 above). So concerned was the Constitutional Court about the question of relief that it requested new written submissions as well as a further oral hearing on the topic. See *AllPay 1* (note 54 above) para 96.

[58] *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC) (*Glenister II*)

[59] Chapter 6A of the South African Police Service Act 68 of 1995.

[60] *Glenister II* at para 200.

[61] Such as the need to fill the accountability vacuum where it is appropriate for the courts to do so.

transformative constitutionalism is nevertheless contested. Two critiques will be explored here: the first, which I identify as an 'internal' critique, concerns the manner in which transformative constitutionalism is interpreted and practised by the courts. The second, 'external' critique challenges the role that transformative constitutionalism has to play in achieving the Constitution's aims at all. Both of these critiques have relevant implications for how transformative constitutionalism is construed in the adjudication of accountability-deficit cases involving corruption or egregious public maladministration.

The 'internal' critique advanced by Roux challenges the underlying interpretive basis of transformative constitutionalism as put forward by Klare, but not the application of the concept itself. While he agrees that the outcomes of transformative constitutionalism were normatively desirable for the purposes of advancing the constitutional vision, he does not deem it necessary or helpful to the judiciary for the courts to admit their political function frankly in the course of transformative adjudication.[62] Doing so 'would leave [the judiciary] even more exposed than it currently is to the charge that it is an unelected body opposing "the people's revolution"'.[63] This blurs the distinction between law and politics in a potentially fraught arena – for instance, the adjudication of socio-economics rights cases which might call for courts to make decisions that could have policy consequences, such as budgetary allocations.[64] Roux's criticism includes a preferred alternative interpretive method for Klare's account of transformative constitutionalism that does not do violence to its aims – that is, by invoking a Dworkinian interpretation that sees the court as 'a court of law that has been given the task, through distinctly legal methods, of expounding the Constitution's vision for a just society in relation to the concrete disputes that come before it.'[65] This task includes identifying the best interpretation of the Constitution (which Roux argues is a postliberal reading of the Constitution) and then adjudicating in a manner that reinforces that interpretation.[66] Roux's suggestion is an important development for transformative constitutionalism because it offers a means to engage in adjudication that is political in nature, but which is supported with justifications that are less overtly so. This is achieved by making use of Dworkin's method, which is 'premised on the view that claims about the political morality informing a constitution should, and in practice often are, presented as claims about the objective correctness of a

[62] Theunis Roux 'Transformative constitutionalism and the best interpretation of the South African Constitution: Distinction without a difference?' (2009) 20 *Stell LR* 258 at 284.
[63] Ibid.
[64] Kibet & Fombad (note 50 above) 353.
[65] Roux (note 62 above) 284.
[66] Ibid 271–7.

particular interpretation'[67] – which, Roux argues, 'offers a more easily defensible way of giving effect to the progressive values underlying the Constitution'.[68]

Roux's method can be contrasted with the Critical Legal Realist manner of practising transformative constitutionalism, which would call into question whether any interpretation of human rights-based questions can ever be 'objectively correct', especially in a legal system steeped in history, fraught with contestation, and which advances a particular view of what is correct and morally good. The 'good of the community' is a disputed concept: each person has a different conception of what it means and how it can be realised. It is thus inherently political. Critical Legal Realism acknowledges this and takes the view that the distinction between law and politics is not as marked as some would believe (or want) it to be. Transformative constitutionalism goes a step further, seeing adjudication as an opportunity to '[transform] a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction'.[69] But regarding how that transformation is to be achieved practically, Critical Legal Realists lean in to the political aspect of adjudication by emphasising the need to grapple with the meaning ascribed to the shared values embodied in the Constitution through consultation and deliberation. The role of the courts in this endeavour includes justifying their decisions through clear reasoning that can inform public debate. Courts should also be prepared to 'interrogate the entire legal system in line with constitutional values'.[70]

Roux's preferred method, however, draws back from the political, arguing instead that 'despite the open textured nature of that Constitution, there are objective grounds on which the liberal reading can be asserted as the best interpretation of that document'.[71] It appears that in accountability-vacuum cases, the Constitutional Court has strategically skewed towards this interpretive method of constitutional adjudication, rather than frankly grappling with the political considerations at play in the cases before them. This is perhaps best illustrated by the reasoning adopted in the *Glenister II* judgment, a case that was politically fraught and ultimately decided by having regard to objective principles as a means to guide interpretation.[72] The utility of this approach in the time of state capture was clear, particularly due to mistrust

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67 Ibid 259.
68 Ibid.
69 Klare (note 1337 above) 150.
70 Albertyn & Davis (note 19 above) 215.
71 Roux (note 62 above) 280.
72 In this case, the court drew on, for example, the OECD's criteria for effective anti-corruption agencies, being specialisation, training, independence, resources and security of tenure. See *Glenister II* (note 58 above) para 187.

of state institutions fostered by the state capture project. They created circumstances that were not conducive towards frank and open engagement with the politics of judicial decision-making or that would have threatened the standing of the judiciary in the public's mind.

While Roux's 'internal' critique suggests a mechanism to preserve and advance transformative adjudication, Sanele Sibanda's 'external' critique suggests that it should be no longer be practised. Sibanda argues that at best, transformative constitutionalism has not yielded the substantive changes to the material well-being of those disadvantaged by apartheid that it aimed to bring about, and at worst, has 'contributed to the perpetuation of white cultural and economic dominance'.[73] He observes that

> 'transformative initiatives failed to deliver a miracle equivalent in structural and material change that matches the much celebrated transformative constitutional "miracle", but that these initiatives . . . have largely left intact the racial, economic, cultural, and epistemic hierarchies associated with colonial-apartheid'.[74]

Sibanda's valid criticism is that while transformative constitutionalism suggests (or promises) radical change, its focus has concentrated on its application in the courts. Courts apply the principle cautiously, such as by opting not to expend 'much effort into developing the notion of transformation as an explicit constitutional principle or value'.[75] This is a tacit recognition that the principle's value is largely rhetorical rather than practical, due to its 'ambiguous nature and the absence of any clearly discernible judicial standards against which to test whether the Constitution's muti-faceted, and sometimes contradictory, transformative commitments are . . . reconcilable.'[76] He argues that, short of providing 'meaningful critical insights into South Africa's deepening political, economic, social, cultural and epistemic crisis', transformative constitutionalism offers something more anodyne, a 'jurisprudence grounded in the balancing of tensions between government policy, programs or conduct and entrenched constitutional rights'.[77] Far from being an expansive concept that embraces radical change, by centring the judiciary it 'diminishes the critical roles of democratic politics; the other branches; constitutional institutions; civil society; and not least the populace; in the framing and

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[73] Sanele Sibanda 'When do you call time on a compromise? South Africa's discourse on transformation and the future of transformative constitutionalism' (2020) 24 *Law, Democracy & Development* 384 at 403.
[74] Ibid 388.
[75] Ibid 398.
[76] Ibid.
[77] Ibid 401.

development of the constitutional project'.[78]

Sibanda raises many salient points that call for incisive and difficult introspection by proponents of transformative constitutionalism. It is beyond the scope of this thesis to engage in depth with Sibanda's bold assertions that it is time to move on from the principle as a means of judicial interpretation. I do not, however, read as much as Sibanda perhaps does into the judiciary's role in advancing transformation in the course of adjudication. The courts are, by design, contributors to but not primary drivers of conversations about topics such as how to achieve meaningful transformation. Their role is relatively tightly circumscribed by the Constitution and the separation of powers. Any latitude they may have to apply transformative constitutionalism is in the realm of interpretation – judges cannot rewrite laws.[79] They have to respond to the cases put before them and are as such largely constrained by the facts of the case and the manner in which it is put forward by the respective parties and their legal teams. Transformative constitutionalism has proliferated in legal matters because it is a tool that is useful *to the courts* to give meaning and substance to the rights in the Bill of Rights in a manner that moves away from legal formalism. In this space, as discussed above, it has been successful in many ways. It bears asking why other stakeholders – legislators, administrators, constitutional institutions, civil society, the media and the public – are less engaged in discussions surrounding the principle than the judiciary and the academy. There is likely scope to broaden and deepen the discussion and application of transformative constitutionalism outside of the legal arena that should be explored before discarding the principle, though the courts are not the sole (or even primary) bearer of the responsibility to do this. Concerningly, Sibanda's criticism does not extend further to include possible revisions to or indeed replacements for the principle in a manner that would alleviate the harms he identifies. While Sibanda's criticism opens up an important conversation that should be had by proponents of transformative constitutionalism, until a viable alternative principle is identified, transformative constitutionalism retains its utility in constitutional adjudication.

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[78] Ibid 404.

[79] They can, of course, make use of remedies such as reading in, reading down or severance in limited circumstances. These and other remedies tend to be used cautiously out of concern for the separation of powers. See Chuks Okpaluba & Mtendeweka Mhango 'Between separation of powers and justiciability: Rationalising the Constitutional Court's judgement [sic] in the Gauteng e-tolling litigation in South Africa' (2017) 21 *Law, Democracy & Development* 1 at 9–11.

(c) Judicial activism: Conclusion

This chapter has so far set out the basis for how we conceive the act of judicial decision-making (that is, through the lens of legal realism) as well as one normative theory describing how judges should decide cases, particularly ones with human rights implications (that is transformative constitutionalism, as a project that 'aims to preserve stability through maintaining legal continuity and simultaneously to facilitate change in the societal fabric through transforming the legal, political and economic tenets of society').[80] This project 'requires judges to change the law to bring it in line with the rights and values for which the Constitution stands'[81] – in other words, to employ interpretations that are activist in nature, where the limits of the law are informed by Constitutional ideals rather than solely by the strict confines of the text being interpreted (without doing violence to the text, of course).

Transformative adjudication conduces towards more expansive, activist interpretations of the law. Klare's identification and articulation of this principle, leading to its express adoption and development by the Constitutional Court,[82] individual judges[83] and legal scholars has extended the interpretive leeway given to judges: and in so doing, their power to influence the outcomes of not just the litigants before them, but broader South African society. It is unsurprising that the transformative nature of the Constitution has been reinforced consistently through the courts, given its utility.

At the same time, the limits of judicial power are circumscribed, constraining how and when the courts may intervene. The separation of powers is an important principle moderating the application of judicial discretion. The next section discusses the normative implications of the separation of powers as a factor encouraging judicial restraint.

2.4 TOWARDS JUDICIAL RESTRAINT: SEPARATION OF POWERS

There is a natural tension between transformative constitutionalism and the limits of the separation of powers. While transformative constitutionalism encourages (where appropriate)

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[80] Marius Pieterse 'What do we mean when we talk about transformative constitutionalism?' (2005) 20 *SA Public Law* 155 at 157.
[81] Langa (note 24 above) 357.
[82] See, for example, *S v Makwanyane* (note 44 above) para 262; *Du Plessis v De Klerk* 1996 (3) SA 850 (CC) para 157; *Soobramoney v Minister of Health, KwaZulu-Natal* (note 46 above) para 8, *Van Rooyen v S* 2002 (5) SA 246 (CC) para 50, and *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC) para 142.
[83] See Moseneke (note 32 above) 309; Langa (note 24 above) and Dunstan Mlambo 'Transformative social change and the role of the judge in post-apartheid South Africa' (2022) 33 *Stell LR* 595.

expansive interpretations, innovation, and activism in judicial decision-making, concern for the separation of powers influences judges to engage caution and restraint to ensure their decisions are kept within acceptable limitations. This section sets out groundwork relating to the separation of powers as applied in the South African constitutional system. From this discussion, a picture of the source of the accountability vacuum emerges. This is followed by a discussion of the judiciary's specific role in providing content to the meaning of the separation of powers, as well as enforcing it through the principle of checks and balances (and in so doing, filling some of the accountability vacuum). This is discussed in the context of judicial review and remedies; the former concerning the judiciary's ability (within permissible limits) to make orders that encroach on the domain of the executive and legislature, and the latter concerning the practical expression of this – where the rubber meets the road, so to speak.

(a) The separation of powers and checks and balances in South Africa

Centuries ago, Montesquieu cautioned against the concentration of political power within governments. Instead, he 'brought together a whole range of thinking on the subject'[84] to craft his proposal of what has been come to be known as the 'tripartite system' of government. This system divided powers among the legislature (as enactors of law), the executive (as implementors of laws) and the judiciary (as enforcers of laws, which includes the determination of disputes between individuals).[85] To him, the separation of powers was a 'necessary, but not sufficient condition of liberty' and its absence would lead to tyranny.[86] In particular, he cautioned that

> '[w]hen the legislative and executive powers are united in the same person, or in the same body of magistracy, there can be then no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner. Again, there is no liberty, if the power of judging be not separated from the legislative and executive powers. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with all the violence of an oppressor.'[87]

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[84] Richard Bellamy 'The political form of the Constitution: The separation of powers, rights and representative democracy' (1996) 44 *Political Studies* 436 at 440.
[85] Baron de Montesquieu, Charles de Secondat, *The Spirit of Laws* (Thomas Nugent translation 1949) (1773) 221–2.
[86] Gerhard Casper 'An essay in separation of powers: Some early versions and practices' (1998) 30 *William & Mary Law Review* 211 at 214.
[87] Montesquieu (note 85 above) 222.

James Madison developed Montesquieu's formulation to clarify that this did not mean a complete separation of powers with no overlap. Rather, he proposed a constitutional formulation that provided that each of the branches of government (which he referred to as 'departments') should never wholly exercise the powers delegated to the other branches by the constitution. This did not mean that the respective branches 'ought to have no *partial agency* in, or no *control* over, the act of each other'.[88] His formulation therefore took into account the principle of checks and balances which 'requires the ordinary concurrence of one governmental entity in the actions of another, and thus permits one entity to check or veto the actions of another'.[89] The separation of powers, as a norm concerning the ordering of political power, has been developed over the ensuing centuries, and some regard it as *sine qua non* for describing a system of government as constitutional.[90] It has been described as comprising of the following four principles:

> '(1) *The principle of trias politica*: a formal distinction is made between the different branches of government, legislative, executive and judicial.
>
> (2) *The principle of separation of personnel functions*: each branch of government is staffed with different officials.
>
> (3) *The principle of separate functions*: each branch of government is entrusted with its core function, namely legislation, administration of state affairs and adjudication.
>
> (4) *The principle of checks and balances*: each branch is entrusted with special powers, to keep a check on the others so that an equilibrium in the separation and distribution of powers may be upheld.'[91]

How best to determine the separation of powers and apply checks and balances within democracies remains a subject of contention to this day.[92] It is however accepted that there is

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[88] James Madison 'The Federalist Papers No. 47' *Lillian Goldman Law Library*, last accessed from https://avalon.law.yale.edu/18th_century/fed47.asp on 25 March 2025. Emphasis in original.

[89] Jeremy Waldron 'Separation of powers in thought and practice' (2013) 54 *Boston College Law Review* 433 at 438. Examples of how this principle can find expression include judicial review (the judiciary's power to review decisions and actions of the executive and legislative branches of government), powers of presidential impeachment held by the legislature, the power of a president to veto laws, or the presidential power to appoint members of the judiciary.

[90] Jacob T Levy 'The separation of powers and the challenge to constitutional democracy' (2020) 25 *Review of Constitutional Studies* 1 at 2.

[91] Pieter Labuschagne 'The doctrine of separation of powers and its application in South Africa' (2004) 23 *Politeia* 84 at 87.

[92] Even the views of Montesquieu and Madison inspire debate in modern times, such as Waldron's assertion that Montesquieu's formulation is tautologous and not fully reasoned in his writings, and Madison's work suffers the same flaw. Waldron considers that these and other texts on the separation of powers elide the principle with

no singular model that fits all contexts, and these principles should be adapted to the needs of specific jurisdictions where they find application.

South Africa's particular conception of the separation of powers emerged from its difficult history. The period between 1910 and 1993 (which was the year the interim constitution[93] was enacted into law) was 'marked predominately by the dominance of legislative supremacy in a parliamentary system of government'.[94] In such a system, there was virtually no limit on parliament's power to legislate. This status quo, which enabled the governments of the time to enact and enforce racist laws and policies, was fiercely defended – with Hendrik Verwoerd[95] considering it 'unthinkable' to adopt a bill of rights against which legislation could be tested.[96] The power of the executive was also increased by the fusion of the executive and legislative branches of government, leading to the 'dominance of centralised power in the system'.[97] Because of this, a pale version of the separation of powers existed in South Africa, with one author observing that the 'only component of the doctrine that is upheld in South Africa is the formal classification of political power into legislative, executive and judicial functions'[98] while in practice, distinctions between the executive and legislature were elided and checks and balances largely absent.

The effect of this on the judiciary was profound. The power of judicial review was severely limited: judges' powers to invalidate laws were restricted to matters of process and not the substance of the law.[99] Consequently, 'judicial authority was not allowed to exercise judicial review to restrict executive power'.[100] Any judge hoping to effect change through adjudication

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others (such as checks and balances) and argues for a 'pure form' of the separation of powers. See Waldron (note 89 above). For some recent discussions on the separation of powers, see, for example Cass R Sunstein 'Separation of powers is a they, not an it' (2024) forthcoming, *Harvard Journal of Law & Public Policy,* last accessed from http://dx.doi.org/10.2139/ssrn.4850425 on 21 March 2025; Michael Foran 'Rights, common good, and the separation of powers' (2023) 86 *The Modern Law Review* 599, William Partlett 'Separation of powers' in Jan M Smits et al *Elgar Encyclopedia of Comparative Law* 3 ed (2023).

[93] Constitution of the Republic of South Africa, Act 200 of 1993.

[94] Labuschagne (note 91 above) 87.

[95] Verwoerd served as Prime Minister from 1958 until his death in 1966.

[96] Labuschagne (note 91 above) 88. Verwoerd's remarks reflect a long tradition of South African political leaders' disdain for judicial review: decades earlier, President Paul Kruger had, at the swearing in of Chief Justice Gregorowski, stated that '[the] testing right is the principle of the Devil'. John Dugard *Human Rights and the South African Legal Order* (2015) 24 , and see further Heinz Klug 'Introducing the Devil: An institutional analysis of the power of constitutional review' (1997) 13 *SAJHR* 185.

[97] Labuschagne ibid 87.

[98] JD van der Vyver 'The separation of powers' (1993) 8 *SA Public Law* 177 at 185.

[99] Labuschagne (note 91 above) 92. For full accounts of the performance of the highest court during this period, see Hugh Corder *Judges at Work: The Role and Attitudes of the South African Appellate Judiciary, 1910–50* (1984) and Christopher Forsyth *In Danger for Their Talents: A Study of the Appellate Division of the Supreme Court of South Africa, 1950–80* (1985).

[100] Labuschagne ibid 88.

– say, by upholding protection for individual rights and freedoms – was constrained from doing so. This is not to say that judicial activism was absent: some judges advanced progressive causes in judicial reviews grounded in administrative law,[101] or by interpreting unjust laws in a specific manner.[102] Famously, the Appellate Division in the two *Harris* decisions[103] 'took a heroic stand against parliament and the executive when the new Nationalist government attempted — successfully in the end — to disenfranchise non-white voters in the 1950's'.[104] The Appellate Division had, in those cases, struck down the offending legislation on the basis of the procedure[105] that had been followed in its passage, rather than any substantive concerns about its discriminatory impacts. The courts had no power to review on that basis at the time.[106]

It is this context that informed the constitutional drafting process, leading to the inclusion of the separation of powers as a constitutional principle used to shape the 1993 Interim Constitution[107] and against which the 1996 Final Constitution was tested. While several

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[101] See, for example, *Minister of Law and Order v Hurley* 1986 (3) SA 568 (A) as discussed in Cora Hoexter 'A rainbow of one colour? Judicial review on substantive grounds in South African law' in Hanna Wilberg & Mark Elliot (eds) *The Scope and Intensity of Substantive Review: Traversing Taggart's Rainbow* (2015) 185 at185–7. Writing in 1993, Geoff Budlender remarked that '[i]t is striking that over the past twenty years and even longer, almost all of the major judicial decisions which have protected or extended human freedoms in South Africa have been based on principles of administrative law. If one thinks of freedom of movement, the limitations on emergency powers, the opening of public amenities to all, and now even some aspects of labour law, one continually finds that the legal issue has been the control of the powers of government through the application of the principles of administrative law.' Geoff Budlender 'The accessibility of administrative justice' 1993 *Acta Juridica* 128. See also Hugh Corder & Cora Hoexter '"Lawfare" in South Africa and its effects on the Judiciary' (2017) 10 *African Journal of Legal Studies* 105 at 108–10.

[102] John Dugard's clarion call to judges in 1971 was to reject positivism and use their interpretive powers towards this aim. For an example of this sort of interpretation in action, see Dugard (note 20 above) at 191–4 where he discusses a group of cases concerning regulations issued under the Immigration Regulation Act (22 of 1913) which effectively made 'all Asians prohibited immigrants and . . . restrict[ed] the free movement of Asians from one province to another'. In one court where the validity of the regulations was challenged, the majority (per Kotzé and Gardiner JJ) held that because the Act had provided that prohibition of immigrants was to be made on economic grounds with regard to the need of the Union or the Provinces, and 'individuals of the non-white races differed widely in their educational and economic standards of life and it was impossible to prohibit all Asians on economic grounds', the Minister of the Interior had acted *ultra vires* the powers afforded to him by the Act. The prohibition was consequently unlawful. This interpretation was later not endorsed by the Appellate Division, which upheld the validity of the regulations. Numerous further examples are also provided in Lawrence G Baxter 'Apartheid and the South African judiciary' (1987) 5 *Duke Law Magazine* 9.

[103] *Minister of the Interior v Harris* 1952 (4) SA 769 (AD); *Harris v Minister of the Interior* 1952 (2) SA 428 (AD).

[104] Baxter (note 102 above) 9.

[105] The clause concerning the right of coloured people to vote was 'entrenched' in the Union Constitution, the South Africa Act of 1909, and thus required a two-thirds majority of both Houses of Parliament sitting together to be removed. The legislation attempting to remove that right was passed by a simple majority.

[106] See Joe W Pitts 'Judges in an unjust society: The case of South Africa' (1986) 15 *Denver Journal of International Law and Policy* 49 at 60–1 for a trenchant summary of the constitutional crisis that unfolded pursuant to the two *Harris* decisions. This resulted in extraordinary measures being taken by the Nationalist government to limit judges' abilities to review legislation, including packing the courts and introducing provisions into legislation that 'expressly denied the power of judicial review over the validity of acts of Parliament'.

[107] Constitutional Principle VI provided that '[t]here shall be a separation of powers between the legislature,

provisions (in both the Interim and Final constitutions) pertain to the delineation of powers between the various branches of government as well as checks and balances between them, the most important break with the past was the inclusion of judicial review, releasing the constitutional ties on judges' hands and allowing them to test laws for their substance.[108] This was bolstered by the inclusion of a justiciable Bill of Rights. Former Chief Justice Pius Langa noted that

> '[p]arliamentary supremacy had given constitutional form to a South African state characterised by inequality, racial discrimination and division. It gave way to the new constitutionalism which placed new values at centre stage. The core values were the achievement of equality, human dignity, the protection of human rights and freedoms, nonracism and nonsexism, a democratic system of governance and the rule of law. The separation of powers doctrine was employed to ensure that the new system of government contained within it the necessary "checks and balances" to uphold the values which must now be part of our lives.'[109]

While the Final Constitution does not expressly provide for the separation of powers, the principle is woven into the fabric of the Constitution. The Constitutional Court, tasked with certifying the text of the Constitution, acknowledged that

> '[t]he principle of separation of powers, on the one hand, recognises the functional independence of branches of government. On the other hand, the principle of checks and balances focuses on the desirability of ensuring that the constitutional order, as a totality, prevents the branches of government from usurping power from one another. In this sense it anticipates the necessary or unavoidable intrusion of one branch on the terrain of another. No constitutional scheme can reflect a complete separation of powers: the scheme is always one of partial separation. In Justice Frankfurter's words, "[t]he areas are partly interacting, not wholly disjointed"'.[110]

The separation of powers has been affirmed in various decisions in the Constitutional Court[111]

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executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness.' See also Forsyth (note 99 above) 61–73.

[108] Labuschagne (note 91 above) 92.

[109] Pius Langa 'Symposium "A delicate balance": The place of the judiciary in a constitutional democracy: The separation of powers in the South African Constitution' (2006) 22 *SAJHR* 2 at 4.

[110] *In re: Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC) (*First Certification Judgment*) paras 108–9.

[111] See, for example, *National Treasury v Opposition to Urban Tolling Alliance* 2012 (6) SA 223 (CC) para 44; *South African Association of Personal Injury Lawyers v Heath* 2001 (1) SA 883 (CC) paras 19 and 46; *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) para 66; *De Lange v Smuts* 1998 (3) SA 785 (CC) para 60, *Bernstein v Bester NO* 1996 (2) SA 751 (CC) para 105.

and is an accepted and entrenched part of South Africa's constitutional architecture. Nevertheless, the application of this principle in practice has given rise to political contestation between the branches of government. This has primarily been expressed in conflicts between the elected branches of government and the judiciary, which will be explored further in the following subsection.

But what of the relationship between the executive and the legislature? The Constitution provides for checks and balances between these two institutions as well, ostensibly conducing towards greater accountability. The legislature has oversight powers over the executive (and judiciary).[112] It is not necessary to list these powers exhaustively here, but a few are worth mentioning. Members of the Cabinet and Deputy Ministers are designated as 'accountable collectively and individually to Parliament for the exercise of their powers and the performance of their functions'.[113] Additionally, the National Assembly is tasked with 'overseeing executive action' including by 'overseeing the work of the governmental departments, national ministries and institutions, watchdogging departmental budgets, and considering international and regional treaties and agreements'.[114] Committees of Parliament have subpoena powers that allow them to call government leaders before them to present evidence regarding their work in implementing legislation (and other issues, such as executive spending).[115] The National Assembly can also call the President and Ministers to appear before them to reply to parliamentary questions. Further, the National Assembly is empowered to impeach the President[116] as well as to table and vote on a motion of no confidence in the President, which, if passed, requires the President, other members of Cabinet and Deputy Ministers to resign.[117] In turn, the executive also has powers to check the legislature, such as the requirement for Presidential assent to Bills passed by the legislature before they are enacted into law.[118]

Even with these checks and balances between the legislature and executive in place, questions have been raised about their effectiveness with respect to holding each other (but

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[112] An example of this is its role in confirming judicial appointments following nominations made by the President in consultation with the Judicial Service Commission and its ability to adopt a resolution for the removal of a judge where justified in terms of s 177 of the Constitution.
[113] Sections 92(2) and 93(2) of the Constitution.
[114] Evans Sakyi Boadu 'Evaluating the commitment of South Africa to the principles of separation of powers' in Isioma Ile & Omololu Fagbadebo (eds) *Democracy and Political Governance in South Africa: The African Peer Review Mechanism* (2023) 37 at 46.
[115] Ibid 47.
[116] Section 89 of the Constitution. See at 5.3*(c)*.
[117] Section 102 of the Constitution. Section 101 empowers the National Assembly to pass a motion of no confidence in the Cabinet excluding the President. If passed, the President must reconstitute the Cabinet.
[118] Section 79(1) of the Constitution.

more specifically, the executive) to account. This is because South Africa has a 'fused' model of the separation of powers which 'empowers the executive through the legislature by allowing Cabinet members to be members of the legislature and therefore able to exercise a powerful influence over legislative decisions by virtue of their positions'.[119] The Constitutional Court, in certifying this aspect of the Constitution, observed that this model was not 'destructive of the doctrine' of the separation of powers: rather, it 'provides a singularly important check and balance on the exercise of executive power. It makes the executive more directly answerable to the elected legislature'.[120]

In practice, however, the legislature has not been rigorous in exercising its oversight function over the executive, particularly during the state capture era. This is at least partly due to the operation of the party-list proportional representation electoral system, which resulted in the ruling African National Congress (ANC) chairing the majority of the committees in Parliament.[121] Tight control exerted by the party whip to ensure loyalty to the ANC resulted in committees not fully exercising their role in requiring detailed answers to incisive questions that would have shed light on corruption and maladministration during state capture. Opposition parties made several attempts to hold Jacob Zuma accountable with regards to his involvement in state capture by protests within the National Assembly as well as calling for several votes of no confidence; all of which were defeated by the ANC majority.[122]

Insufficiencies in legislative oversight over the conduct of the executive are a significant contributing factor towards the accountability vacuum that allowed state capture to proliferate, virtually unchecked by political mechanisms, for several years.[123] Those seeking to curb the tide of state capture were compelled to seek other avenues. This included appeals to independent bodies such as the Public Protector, but more significantly, the judiciary.[124] The

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119 Shadi Maganoe 'Legislative oversight and executive accountability in South Africa' (2023) 26 *PELJ* 1 at 3.
120 *First Certification Judgment* (note 110 above) para 111.
121 Hugh Corder 'South Africa's Parliament fails to hold the executive to account: History shows what can happen' *The Conversation* 24 October 2022, last accessed from https://theconversation.com/south-africas-parliament-fails-to-hold-the-executive-to-account-history-shows-what-can-happen-192889 on 22 November 2024.
122 Rod Alence & Anne Pitcher 'Resisting state capture in South Africa' (2019) 30 *Journal of Democracy* 5 at 14.
123 Ultimately, the Judicial Commission of Enquiry into State Capture made several recommendations aimed at strengthening parliamentary oversight, such as considering whether the introduction of a constituency-based electoral system would enhance the ability of members of the legislature to hold the executive accountable, the introduction of a system to track and monitor corrective action by the executive made pursuant to proposals by the legislature, and consideration of whether members of opposition parties should be appointed to chair Committees. *Judicial Commission of Inquiry into State Capture Report*: Part VI Vol. 4, 170–2.
124 Chapter 5 details how the courts were called upon to confirm the binding nature of the Public Protector's

next section considers more specifically the role of the judiciary in the context of the separation of powers.

(b) The separation of powers and the judiciary

Checks and balances within the *trias politica* introduce tension between the branches of government. While this is present to some extent between the legislature and executive, where there is a fused system and (as in South Africa's case) single-party dominance, that tension is greatly reduced (and as illustrated in the preceding subsection, sometimes problematically reduced to a formality to the detriment of accountability). This gives rise to a situation where the site of greatest contestation is between the judiciary and the elected branches of government.[125]

This is because, in constitutional democracies, the courts are the self-described 'ultimate guardians of the Constitution'.[126] While the constitution outlines the powers and functions of each branch of government and sets out various checks and balances, the judiciary – in performing its role of interpreting and applying law – is tasked with determining the meaning of those provisions in real-world situations. In all disputes concerning the proper application of the separation of powers which are ultimately decided by the courts, there is a spectre of a danger that the court will, through its interpretations, appropriate additional powers for itself.[127] Justice Dikgang Moseneke (as he then was) observed extrajudicially that:

> 'It is in the performance of this role that courts are more likely to confront the question of whether to venture into the domain of the branches of government and the extent of such intervention. It is a necessary component of the doctrine of separation of powers that courts have a constitutional obligation to ensure that the exercise of power by other branches of government occurs within constitutional bounds. But even in these circumstances, courts must observe the limits of their own power.'[128]

In other words, courts must grapple with the acute question of how to apply judicial restraint

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powers, which was an important development for accountability institutions.

[125] See Heinz Klug 'Transformative constitutions and the role of integrity institutions in tempering power: The case of resistance to state capture in post-apartheid South Africa' (2019) 67 *Buffalo Law Review* 701 at 702.

[126] Dikgang Moseneke 'Oliver Schreiner Memorial Lecture: Separation of powers, democratic ethos and judicial function' (2008) 24 *SAJHR* 341 at 349.

[127] To a certain extent, the court's embracing of transformative constitutionalism can be said to be inviting such concerns as courts are able to make decisions that are 'legislative in character'. Firoz Cachalia 'Separation of powers, active liberty and the allocation of public resources: The e-tolling case' (2015) 132 *SALJ* 285 at 294.

[128] Moseneke (note 126 above) 349.

in deciding whether certain disputes, often those that are policy-laden, are better left to the elected branches to resolve.[129] Firoz Cachalia takes the view that the principle of the separation of powers applies in these situations in two ways: first as a source of judicial authority (in the sense that the judiciary determines whether the power in question is appropriately categorised as executive, legislative or judicial) and secondly, as a source of constraint.[130] Cachalia argues that the 'post-formalist constitutionalism' of South Africa's democratic era has 'expanded the frontiers of judicial review'.[131] This has had in its effect a 'promiscuous expansion of public values that the judiciary has the ultimate authority to define and enforce, the erosion of traditional conceptions of justiciability, and the expansion of legal regulation of democratic politics'.[132] In light of this, the judiciary is duty-bound to exercise appropriate restraint.

How should it do this? Cachalia suggests that this is possible by applying a conception of the separation of powers that includes the 'value of collective self-determination or democratic accountability' in adjudication, by taking 'active liberty' into account when interpreting constitutional texts. This task is predicated on reliance on the separation of powers as a 'free-floating constitutional principle which provides the overarching normative framework for the consideration of such questions as a matter of law'.[133] In practical terms, this means courts should permit a 'democratic process to bubble up, before curtailing the conversation'[134] and 'limit [their] reliance on functionalism and spatial metaphors'.[135] However, Dennis Davis has observed, correctly, that more needs to be done to flesh out the normative framework established by the Constitution before it can be applied in this way.[136] Cachalia's arguments in favour of a principled reflection by judges on their constitutional role and which calls for them to yield certain questions to the legislative branch in order to preserve and strengthen democracy are certainly noble, but beset by the uncomfortable practical reality that the legislature has not done enough to hold the executive to account – not just for poor decision-making, but decision-making that allowed for corruption, wilful malfeasance and the intentional destruction of democratic institutions as part of the state capture project.[137] In this

[129] Prime examples of such disputes include cases regarding the allocation of resources (such as socio-economic rights cases) and the protection of the human rights of minorities (known as the counter-majoritarian dilemma).
[130] Cachalia (note 127 above) 287.
[131] Ibid 296.
[132] Ibid 297.
[133] Ibid 312.
[134] Ibid 299.
[135] Ibid 300.
[136] Dennis Davis 'Separation of powers: Juristocracy or democracy' (2016) 133 *SALJ* 258 at 262.
[137] Ibid 269.

climate, the courts were increasingly turned to for the resolution of political questions – not just those concerning accountability, but also disputes between political parties. This process of 'lawfare' compelled courts to consider whether they were being asked to 'use the chilling power of judgment to prevent a democratic debate from resolving complex questions'[138] and thereby enabling a 'juristocracy'.

At least one author, Felix Dube, effectively takes the view that a 'juristocracy' is, in fact, the intended constitutional structure, though he does not expressly label it as such. He makes a compelling argument that the Constitutional Court is, in fact, privileged and stands ahead of the legislature and the executive 'owing to its establishment as a sui generis institution with a legal and political mandate in post-apartheid South Africa.'[139] His claim rests on five main arguments, which it is worthwhile to set out here. First, the Constitutional Court is granted functions and authority in terms of the Constitution that exceed those of the legislature and executive. The second is that as the drafters of the Constitution designated the judiciary as its de facto institutional guardian, 'the entrenchment of constitutional review [reflects] a form of mistrust of Parliament and the executive, and the Constitutional Court as a sui generis institution [is] designed to express the drafters' mistrust and constitutional vigilance.'[140] Thirdly, contrary to assertions that rulings of the court can be counter-majoritarian and therefore less 'democratic' in nature, Dube asserts that the Constitutional Court embodies democratic representation precisely because it represents and defends the values underpinning the Constitution, particularly against encroachment by the elected branches of government. Fourthly, Dube takes the view that the Constitutional Court has a 'superior role in constitutional politics' given that it is often the final arbiter of political disputes. Finally, Dube argues that the Constitutional Court's law-making powers 'exceed the combined law-making powers of Parliament and the executive'.[141]

It is beyond the scope of this thesis to engage with each of these arguments in detail.[142] Nevertheless, taken as a whole, Dube's thesis is interesting when considered in light of

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[138] Ibid 261.
[139] Felix Dube 'Separation of powers and the institutional supremacy of the Constitutional Court over Parliament and the executive' (2020) 36 *SAJHR* 293 at 294.
[140] Ibid 305.
[141] Ibid 294.
[142] It is worth noting that in least one instance over the past decade, one aspect of executive influence over the judiciary has been greatly reduced, in the form of the transfer of functions from the Department of Justice to the Office of the Chief Justice, entrenching the Constitutional Court's institutional independence and strengthening its position relative to the other branches. This adds credibility to Dube's thesis.

important state capture-related decisions. In some cases, such as the *AllPay* and *Black Sash Trust* cases discussed in Chapter 4, the Constitutional Court was not able to compel immediate compliance with its orders. Several orders made use of such remedies as structural interdicts and punitive costs orders before officials finally responded adequately to address the harm. While it could be argued that the Constitutional Court eventually won in the battle of wills with the recalcitrant Minister, if the court had had the constitutional primacy or advantage as Dube suggested, compliance should theoretically have been assured sooner. Of course, it is also possible – or indeed likely – that the Court was strategic in the use of its constitutional might, electing rather to give the responsible officials room to comply before stepping in to avert serious harm.[143] In any case, Dube's thesis potentially sheds an interesting light on the Constitutional Court's role and is ripe for further exploration.

For the purposes of the remainder of this subsection, it is worth examining the reasons why courts may choose a more cautious approach. These will be discussed by addressing two key points, each narrowing this issue in turn: how the courts grapple with their role in relation to judicial review and how the courts have dealt with the question of remedies.

(c) Judicial review: Institutional pragmatism and lawfare

Following on from the previous discussion in this section regarding the separation of powers and the courts in general terms, it is helpful to focus on the judicial function that throws these concerns into sharpest relief: judicial review. Two issues are considered: institutional pragmatism in judicial review, where the courts look inwardly towards protecting their own interests; and lawfare, which involves the practice of turning to the courts to resolve political disputes.

(i) Institutional pragmatism

A departure point in considering institutional pragmatism that has been emphasised in this chapter is that litigants bring cases (and as such, specific legal issues grounded in fact) to the courts. This means that courts cannot initiate policy-laden decision-making in the way that the elected branches of government can,[144] even though their ultimate decisions may influence

[143] This is explored further in the following subsection concerning judicial review as 'institutional pragmatism' at 2.4*(c)*(i).
[144] The executive (ie a Minister or Deputy Minister) and the legislature (Parliamentary committee or individual member of Parliament) have latitude to introduce legislation to Parliament for consideration or passage. See Parliamentary Monitoring Group 'The legislative process' *Parliamentary Monitoring Group*, last accessed from

policy.[145] Parties are at liberty to frame legal issues in cases and decide what evidence to provide, and this has a bearing on the ultimate decision reached. However, courts can take up opportunities 'offered in the cases that arise before it to shape some of the broader substantive issues long explored in socio-legal studies of courts and judges'.[146] Courts, and the Constitutional Court more specifically, are mandated to give voice to the Constitution by interpreting and applying it, and their interpretations are binding upon the elected branches through judicial review. In this sense, there is some accuracy to Dube's assessment that the courts are constitutionally advantaged in certain ways compared to the other branches of government.

And yet, the Constitutional Court does not wield this advantage at every opportunity. Why? Heinz Klug conveniently defines this as the 'managing [of] the tension between legal principles and institutional pragmatism'.[147] This is achieved by a dual concern for prescripts found in legal texts (as expressed in statutes, regulations, and common law) together with institutional interests – in other words, the court's own concerns 'about its place as an institution within the constitutional and political system that has been evolving since the first democratic elections in 1994'.[148] These parallel concerns animating judicial decisions mirror the preceding discussion about transformative constitutionalism – but whereas transformative constitutionalism invites expansive interpretations of legal texts in order to advance rights-based interests, Klug suggests that institutional pragmatism encourages judges to decide strategically in the interests of the courts. In other words, judges seek to preserve the court's 'institutional security', that is, its 'ability to withstand actual or threatened attacks [which] may be inferred both from the frequency of such attacks and from a qualitative assessment of the [Constitutional Court's] and other political actors' responses to these attacks'.[149] Unlike in the United States of America, where the Supreme Court has defined political questions that are outside its purview, the Constitutional Court has drawn on the Constitution's nature as supreme law as legitimation for its occasional wading into political waters.[150] As Cachalia observes,

https://pmg.org.za/page/legislative-process on 5 January 2025.

[145] The appellate courts and the Constitutional Court have procedural mechanisms that they can use to select the cases that come before them, including rules of jurisdiction, standing, mootness, and other doctrines and rules.

[146] Klug (note 125 above) 6.

[147] Heinz Klug 'Finding the Constitutional Court's place in South Africa's democracy: The interaction of principle and institutional pragmatism in the court's decision making' (2010) 3 *CCR* 1 at 2.

[148] Ibid 4.

[149] Theunis Roux 'Principle and pragmatism on the Constitutional Court of South Africa' (2009) 1 *International Journal of Constitutional Law* 106 at 109.

[150] Sebastian Seedorf & Sanele Sibanda 'Separation of powers' in Stuart Woolman et al (eds) *Constitutional*

> '[i]n a jurisdiction in which the concept of law is so substantively laden, and where the reach of the law is so wide, there is, in principle, little scope for the application of any doctrine (like non-justiciability), political questions or even parliamentary privilege which seeks to insulate certain kinds of governmental action from legal control by erecting "rigid doctrinal barriers to judicial review".'[151]

In some cases, the strategic protection of institutional security involves more restrained decision-making, such as declining the right of direct access claimed in politically fraught matters. It can also take the form of more expansive interpretations, such as the Constitutional Court interpreting its own jurisdiction widely.[152] In this way, the Constitutional Court has adopted a strong conception of judicial review based on its 'particular understanding . . . of its own institutional function and mandate',[153] and which maintains a desirable equilibrium between legal legitimacy and institutional security.

(ii) Lawfare

Any retelling of the narrative of corruption, state capture and maladministration in South Africa over the past two decades is incomplete without some reference to lawfare.[154] While the term 'lawfare' can be understood in several ways, it will be discussed here in the sense of 'the use of litigation to resolve contentious political disputes', in other words, 'the phenomenon of asking courts to rule on problems that would tend to be resolved by political means in more mature jurisdictions, or that might not even be regarded as justiciable'.[155]

Many of the cases discussed in the following chapters of this thesis could fall within this meaning of 'lawfare' and so it is not necessary to describe instances of lawfare in detail here. Instead, for the purposes of this thesis, it is important to consider what has been described

Law of South Africa 2 ed (Original Service 06-08) 12-52.

[151] Cachalia (note 127 above) 296.

[152] An example of this is the decision in *African National Congress v Chief Electoral Officer of the Independent Electoral Commission* 2010 (5) SA 487 (CC), where the court reserved jurisdiction for itself over electoral matters implicating constitutional issues despite an express ouster clause in the Constitution in favour of the Electoral Court.

[153] Seedorf & Sibanda (note 150 above) 12-51–2. This does not mean that the courts' institutional interests are overemphasised when called upon to decide matters that may have political ramifications. Seedorf and Sibanda observe that the courts have deemed criteria for intervention based not on whether the issue before it is 'political' or not – rather, it is the 'review standard or yardstick that is applied . . . a legal norm (the review standard) must be able to solution or answer to the question raised.' Ibid 12-54.

[154] Hugh Corder and Cora Hoexter, in their analysis of lawfare during the Zuma years, describe the cases that could be identified as instances of lawfare as 'innumerable' and note that it was not possible to list them all. Corder & Hoexter (note 101 above) 111.

[155] Ibid. The authors (at page 106) describe two other senses in which this term can be understood which are not relevant to this thesis: the 'use and abuse of law by the state to achieve political or military ends' and 'a strategy used by the colonised and oppressed precisely in order to resist rule by law'.

as the 'dual' character of lawfare, the reasons why lawfare surged at the height of state capture, what it means for the separation of powers within a broader political context and how lawfare might shape the way judges decide cases.

Texts exploring the concept of lawfare sometimes characterise its expression as falling within binary categories of 'good or bad'.[156] 'Bad' lawfare is generally considered to take two forms: first, the weaponisation of criminal prosecution or the threat of prosecution in order to intimidate political rivals, particularly as a way to avoid accountability; and secondly, as the abuse of court procedure as a means to delay accountability processes.[157] The latter type of 'lawfare' is often described as 'Stalingrad tactics'[158] and includes 'constantly raising unwarranted interlocutory points, mounting spurious defences, launching baseless counterclaims and appealing against every adverse ruling, irrespective of the merits'.[159] Key to this strategy is access to the funding needed to pay the many legal costs associated with pursuing this approach to litigation. Concerningly, this has meant that Stalingrad tactics have been taken up by public officials whose legal costs are borne by the state – and ultimately, the taxpayer – even when the strategy is used to avoid accountability for wrongdoing such as corruption.[160]

'Good' lawfare describes the use of litigation as a 'last resort device to fill an accountability vacuum'.[161] This type of lawfare has been used by role-players without significant political power, such as minority political parties, civil society organisations, and even private individuals.[162] Acton argues that 'good' lawfare is both necessary and desirable, in that it 'gives a voice to those who are morally outraged at the dearth of government accountability' and is a 'necessary tool' that enables the courts to intervene where the executive

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156 See, for example, Michelle le Roux & Dennis Davis *Lawfare: Judging Politics in South Africa* (2019) 5, and Helen Acton 'Lawfare: How to approach it in South Africa's constitutional democracy' (2022) 1 *The Africa Governance Papers* 48.

157 Corder & Hoexter (note 101 above) 114–15. They cite, as an example of the first kind of 'bad lawfare', the laying of (and subsequent quick withdrawal of) spurious criminal charges against former Finance Minister Pravin Gordhan in October 2016. Mr Gordhan was at the time 'known to be the sort of Minister who would not permit the looting of the Treasury' (ibid).

158 This term was adopted by Mr Zuma's counsel Kemp J Kemp, who noted that it refers to the warfare tactics of the Soviet Union during the second World War, 'which involved wearing down the German forces in a five-month war of attrition' (Acton (note 156 above) 61). Kemp J Kemp is quoted as saying: 'This is not a battle where you send a champion out and have a little fight and that's it – this is more like we will fight them in every room, in every street, in every house.' *Judges Matter* 'Using Stalingrad tactics to delay justice', last accessed from https://www.judgesmatter.co.za/opinions/using-stalingrad-tactics-to-delay-justice/ on 19 January 2025.

159 Corder & Hoexter (note 101 above) 115.

160 *Judges Matter* (note 158 above).

161 Acton (note 156 above) 57, Corder & Hoexter (note 101 above) 119.

162 In the case of Hugh Glenister, discussed in detail in Chapter 3.

and legislature have failed to fulfil their constitutional obligations.[163] Moreover, in fulfilling this role, Acton argues (through a somewhat tautologous distinction) that it is imperative that the judiciary should distinguish permissible judicial activism from impermissible 'judicial overreach',[164] noting that

> '[j]udicial activism denotes the role played by the courts in upholding the constitution, while judicial overreach occurs when the courts violate the separation of powers principle by usurping the functions of the legislative or executive branches of government.'[165]

In my own view, these are both sides of the same coin. As the separation of powers is implicitly set out in the Constitution, it follows that any violation of the principle would be unconstitutional and outside of the court's mandate, which is to uphold the Constitution. Nevertheless, Acton is correct that courts should (and often do) observe the principle of judicial deference regarding cases that involve the powers of the executive or the legislature. These include cases which involve testing government decisions based on legality or rationality without necessarily making determinations on the merits, particularly when the latter involves substantive policy decisions.[166]

While many agree that the 'bad' form of lawfare is detrimental to the public interest, there are those who argue that even lawfare in its 'good' form is problematic.[167] Roux identifies three main concerns (two associated with 'good' lawfare and one associated with 'bad' lawfare) and assesses whether these concerns are well founded with reference to key cases from the Constitutional Court's 2018 term.[168]

The first concern is that lawfare undermines democratic politics by diverting political battles into courtrooms. In a South African context, an example of such a charge is that the Constitution, a product of negotiation and compromise, 'deflects attention away from the longer-term cultural and material effects of colonialism in South Africa'.[169] While Roux does

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[163] Acton (note 156 above) 57–8.
[164] See Chelsea Ramsden 'Judicial Overreach' *Helen Suzman Foundation*, last accessed from https://hsf.org.za/publications/hsf-briefs/judicial-overreach on 20 January 2025.
[165] Acton (note 156 above) 58.
[166] Ibid.
[167] Although, as will be demonstrated, defining lawfare as 'good' or 'bad' is not the most helpful way to conceive of lawfare as it manifests in practice.
[168] Theunis Roux 'The Constitutional Court's 2018 term: Lawfare or window on the struggle for democratic social transformation?' (2020) 10 *CCR* 1. It is important to note that Roux is critical of the use of 'lawfare' to describe 'the proliferation of litigation in post-apartheid South Africa' (that is, 'good lawfare'), instead favouring the limitation of its use to describe abuses of law.
[169] Ibid 14.

not dispute this entirely, he notes that this concern is 'prone to overstatement', noting that it is likely that any other constitution, if enacted, would have been insufficient to avoid these ills, because of the structures supporting colonialism and apartheid that are deeply ingrained into South Africa's history and the complexity of unravelling them in the present day.[170]

In essence, the problem is less a constitutional one than it is one of political will. It is less useful to lay blame solely at the Constitution's door, when the mechanisms contained in it and the institutions it establishes are not being applied optimally to address the legacies of colonialism and apartheid. The role of the courts in circumstances where such issues are brought before them is to interpret and apply the Constitution as it is; no more, no less. While it is not the court's role to initiate public discourse on such issues, an appropriately restrained application of its review powers can assist in the determination of crucial issues *in the law.* At the same time, it can leave sufficient space for continued public discourse that could lead to change through political mechanisms.

Roux is therefore correct that far from shutting off or deflecting from democratic engagement with issues that invoke broader politics the litigation of such issues can invite necessary discussion and debate within the public arena and democratic forums such as the legislature.[171] At the same time, it is important to acknowledge that it is less than ideal to force complex, multivalent issues into the confines of a court case, with its attendant rules of procedure designed to facilitate resolution of disputes in an adversarial system of adjudication. For instance, the selection of the applicant in a socio-economic rights case can have a material impact on the outcome of the decision, as can the court's decision to admit or refuse *amici curiae*. For these reasons, lawfare should not ideally be the first port of call, but it is also not a death-knell to democratic politics. In addition, the court's judicial review powers can also be used to reinforce protections of the ability to exercise political rights such as in the case of

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[170] Ibid 13-17.

[171] An example of this is the case of *Minister of Justice and Constitutional Development v Prince (Clarke and Others Intervening)*; *National Director of Public Prosecutions v Rubin*; *National Director of Public Prosecutions v Acton* 2018 (6) SA 393 (CC) concerning the legality of the possession of marijuana for private use. The case thrust the question of decriminalisation of cannabis into the public spotlight at a time where, despite cannabis being illegal in most countries, 'policies surrounding cannabis use are becoming steadily liberalised'. (KN Farrelly et al 'The impact of recreational cannabis legalization on cannabis use and associated outcomes: A systematic review' (2023) 17 *Substance Abuse* (online journal), last accessed from https://journals.sagepub.com/doi/abs/10.1177/11782218231172054 on 8 March 2025.) The outcome of the case – that the blanket criminalisation of cannabis possession and use violated the constitutional right to privacy – meant that the legislature's hand was forced into crafting legislation governing the possession and consumption of cannabis.

Mlungwana v S,[172] which struck down a law that had an effect of deterring legitimate forms of public protest.

The second concern Roux addresses is that lawfare tends to 'draw the judiciary far further into the political arena than has traditionally been the case', an argument raised by Le Roux and Davis.[173] Roux criticises their assessment of whether and how this has manifested, summarising their view as a mere observation that 'the adoption of the Constitution has drawn the courts into many politically controversial cases and that this potentially poses a risk to their institutional legitimacy'.[174] Roux argues that this concern is overstated. It does not follow that because courts are drawn into the political fray by having disputes placed before them, the judiciary (or indeed, individual judges) are necessarily politicised. As legal realism has established, there is a relationship between individual judges' personal views and their approaches to deciding cases. But the operative question must be whether the conclusions reached are supported by the law. This goes to the question of 'perceived independence'[175] – does the legitimacy of the judiciary suffer when the courts are called to decide political questions? Corder and Hoexter point out that the court's obligation to decide politically sensitive cases that deal with constitutional issues has resulted in the judiciary becoming 'the main casualty of a larger political battle':

> 'In recent years, lawfare has constantly placed the courts at loggerheads with the executive and legislature, and the results have not been pretty. Members of the ANC both within and outside the government have repeatedly accused the judiciary of "overreach": of violating the separation of powers by encroaching on the preserve of the political branches. The courts, and sometimes individual judges, have been subjected to intemperate criticism and have been accused of bias against the government. Court orders have been flouted too, seemingly in a more egregious fashion than in the past.'[176]

While political actors may seize upon opportunities provided by the court's determination of politically contentious questions to cry that the judiciary is partisan or is guilty of overreach (particularly when the courts reach decisions not in their interest),[177] where the court responds to its mandate appropriately and takes care to 'maintain a reputation for legally motivated

[172] 2019 (1) SACR 429 (CC).
[173] Le Roux & Davis (note 156 above) 5.
[174] Roux (note 168 above) 16.
[175] Ibid 5.
[176] Corder & Hoexter (note 101 above) 120. Footnote omitted.
[177] See Ramsden (note 164 above).

decision-making', it is generally able to withstand such attacks.[178]

Additionally, the court process is replete with mechanisms and conventions that assist the court (and individual judges) to guard against undue criticism of alleged impartiality or overreach. These include providing detailed reasons for their decisions; the availability of appeal, review and recission; the ability to dissent and state their reasons for doing so; and the rule that cases that are heard by two or more judges are decided by majority voting. Judges usually write judgments in their own names, which enables scrutiny of their decisions that could reveal patterns of partisanship – however, in particularly sensitive cases, courts have handed down judgments writing as 'the Court', emphasising the consensus between the judges regarding the reasoning and outcome.[179] It follows, then, that politicisation of the courts is not a necessary consequence of lawfare, though it is a hazard that may eventuate if the courts are not scrupulous and principled when deciding politically charged legal issues.

The last concern that Roux raises relates to the proliferation of Stalingrad jurisprudence. Like the others, Roux suggests that this concern is prone to overstatement: when litigants abuse court processes, the courts are at liberty to show their displeasure through mechanisms such as punitive costs orders. If done consistently, this should deter the use of this type of legal strategy. While he is correct that the use of Stalingrad tactics would 'not necessarily be grounds for questioning the wisdom of maintaining the Constitution', his reasoning that 'the ability of well-connected or wealthy litigants to use litigation to avoid accountability for their actions may in the final analysis be a price that is worth paying for the benefits that a commitment to constitutionalism and judicial review delivers' is somewhat defeatist.[180] Court resources are finite, and paid for by the public purse. Furthermore, inequality of access to justice is a real and persistent problem in South Africa. Courts should indeed use mechanisms at their disposal to deter frivolous litigation, while at the same time, other institutions such as the Legal Practice Council and Bar Associations ought to enact and enforce professional rules that hold legal representatives accountable for encouraging their clients to make use of such strategies.[181]

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[178] Roux (note 168 above) 17.

[179] See, for example, *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC) where the court handed down a landmark decision concerning the basis on which the courts may review the exercise of presidential powers. See also *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development* 2015 (5) SA 1 (GP), where the court was extremely critical of the government's failure to arrest President of the Republic of Sudan, Omar Hassan Ahmad al Bashir, as required by its obligations in terms of the Rome Statute.

[180] Roux (note 168 above) 18.

[181] Acton (note 156 above) at 66–7.

While it is important that litigants are able to ventilate legitimate legal concerns regarding the merits of a case or the procedure followed, if courts are not able to act decisively against abuse of the court process it can lead to perceptions of weakness on the judiciary's part, especially when this abuse is intended to frustrate accountability processes. A judicial system that can hold wrongdoers to account expeditiously and effectively is a bulwark against a culture of impunity taking root and spreading. As such, it should be defended with vigour against abuse.

It is therefore overly simplistic to suggest that lawfare is only 'good' or 'bad'. Like many tools or strategies for broader systemic change, it can yield benefits while still carrying risks. The surfeit of lawfare-type cases during the Zuma years when state capture, corruption and malfeasance were at their height does not mean that it was the best option to resolve failures of accountability – rather, it was the best option *for the time and context*. A more open, responsive approach from the political branches lessens the need for lawfare, and it falls to them and not the judiciary to drive that change. At the same time, the judicious use of lawfare by litigants together with careful and principled decision-making by the judiciary has a role to play in defending and advancing democratic aims, including fortifying accountability institutions and holding political actors to account for wrongdoing.

(d) Remedies

While judicial review in general certainly brings to the fore important conflicts regarding the separation of powers, these concerns are all the more acute with respect to the remedies that the courts can and do order in judicial review cases. Section 172(1)[182] of the Constitution grants the courts wide discretion to craft remedies to address law or conduct that is constitutionally untenable. Where a right in the Bill of Rights has been infringed, s 38 of the Constitution entitles the court 'to grant appropriate relief, including a declaration of rights'. From these provisions, three salient questions arise: first, how do courts choose the appropriate remedy; secondly, what potential impacts can these choices have on the separation of powers; and lastly, how do courts manage these impacts, particularly in light of the need to preserve their

[182] This section 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.'

institutional security?

Regarding the choice of remedy, Bishop notes that while judges have remarked extensively on the broad discretionary powers set out in the Constitution, 'they have limited [their own] remedial discretion by creating standards and principles to guide the exercise of that discretion'.[183] This narrowing, inevitable in the face of the 'blank canvas' of the wide discretion provided for in the Constitution, should nevertheless not have the effect of tying the courts' hands in future cases.[184] Early on, the Constitutional Court recognised that the only requirement for the relief was that it be 'appropriate' and that '[i]t is left to the courts to decide what would be appropriate relief in any particular case'.[185] A degree of flexibility and context-specificity should always be considered when applying these standards. The court in *Fose* went on to remark that 'an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced.'[186] This standard has been used in several landmark decisions, where the application of remedies such as mandamuses,[187] supervisory interdicts,[188] suspensions of declarations of invalidity,[189] severance,[190] and reading in[191] was able to limit deleterious impacts flowing from rights infringements effectively.

The question of what 'effectiveness' entails becomes more pronounced when the respondent is a government entity that is, for whatever reason, less likely to comply with the remedial order handed down. Such concerns invite consideration of remedies such as mandatory orders, supervisory orders (also known as structural interdicts) and personal costs orders.

Courts do not lightly presume or anticipate recalcitrance, as was shown in the *Treatment*

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[183] Michael Bishop 'Remedies' in Stuart Woolman et al (eds) *Constitutional Law of South Africa* 2 ed (Original Service 06-08) (2013) 9-45. A useful summary of these standards and principles can be found at 9-48.
[184] Ibid.
[185] *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) para 18. Bishop observes that the Constitutional Court has accepted only two 'unalterable limitations' on its discretionary remedial power: first, the s 172(1)*(a)* mandatory obligation to declare constitutionally inconsistent law or conduct invalid to the extent of its inconsistency, and secondly, the requirement that any remedy ordered must be 'effective'. Bishop (note 183 above) 9-47.
[186] Ibid para 69.
[187] *Minister of Health v Treatment Action Campaign (No 2)* 2002 (5) SA 721 (CC) (*TAC 2*) para 135.
[188] *AllPay 2* (note 54 above) para 78.
[189] See, for example, *Minister of Home Affairs v Fourie* (note 52 above) para 162.
[190] See *South African National Defence Union v Minister of Defence* 1999 (4) SA 469 (CC) para 45.
[191] *Bhe v Magistrate, Khayelitsha; Shibi v Sithole; SA Human Rights Commission v President of the RSA* 2005 (1) SA 580 (CC) para 136.

Action Campaign (No 2) case.[192] Nevertheless, they should not shy away from making orders such as structural interdicts where the circumstances indicate that it would be 'inadvisable for [the] court to assume' government will comply.[193] This is the first of three circumstances that Kent Roach and Geoff Budlender[194] have identified where structural interdicts are appropriate. The second is 'where the consequences of even a good-faith failure to comply with a court order are so serious that the court should be at pains to ensure effective compliance'.[195] The third is 'where the mandatory order is so general in its terms that it is not possible to define with any precision what the government is required to do,'[196] which allows the government entity a great degree of latitude to formulate a plan for implementation. This tempers the intrusiveness of the structural interdict vis-à-vis the separation of powers. The retention of supervisory jurisdiction allows the applicant to raise concerns with the court or use the plan as a basis for further advocacy in the public arena.[197]

Roach and Budlender flesh out, in the South African context, potential responsive techniques to the three reasons for government non-compliance with court orders, identified as 'incompetence, inattentiveness and intransigence'[198] which it is helpful briefly to describe here. For *inattentive* governments, being those that have allowed issues to fall within policy cracks or which have blind spots,[199] they suggest that a general declaration identifying the unconstitutional conduct (with a possibility of including reporting to the public as a requirement) should suffice.[200] This remedy displays a high level of institutional deference to the respondent government to develop and implement its solution.[201] A requirement that the respondent report to the public fosters public transparency, which in turn encourages the public

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192 *TAC* 2 (note 187 above) para 129. In this case, the Constitutional Court declined to confirm the High Court's supervisory order concerning the implementation of several healthcare interventions to address the HIV/AIDS epidemic, noting that government had 'always respected and executed orders of this Court' and that it had 'no reason to believe that it would not do so in the present case'. This was not borne out by subsequent events, and further litigation – including contempt proceedings against the Minister of Health and the MEC in Mpumalanga – was required to ensure adequate implementation of the remedial measures. See Mark Heywood 'Contempt or compliance? The TAC case after the Constitutional Court judgment: Case law' (2003) 4 *ESR Review: Economic and Social Rights in South Africa* 7.
193 *Sibiya v Director of Public Prosecutions: Johannesburg High Court* 2005 (5) SA 315 (CC) para 61.
194 Kent Roach & Geoff Budlender 'Mandatory relief and supervisory jurisdiction: When is it appropriate, just and equitable?' (2005) 122 *SALJ* 325.
195 Ibid 334.
196 Ibid.
197 Ibid.
198 Chris Hansen originally identified the three reasons in an American context. See Chris Hansen 'Inattentive, intransigent and incompetent' in S R Humm (ed) *Child, Parent and State* (1994).
199 Or sometimes, as was the case in *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC), there was not yet substantive content on what the realization of the right entailed until it was litigated.
200 Roach & Budlender (note 194 above) 327.
201 Ibid 347–8.

to engage political mechanisms (such as voting or protest) where it deems the solution to be lacking, before resorting to the courts again.

For *incompetent* governments – where constitutional violations are attributable to causes such as 'neglect, inadequate budgets and inadequate training of public officials', Roach and Budlender propose that courts make mandatory orders with the additional requirement of reporting to the court.[202] The reporting can also take the form of regular progress reports. Such orders impinge more on the separation of powers than declarations. A court should craft such orders carefully and, when reviewing progress, take care to maintain the balance between guiding the respondent entity and not substituting its own views as to what the correct course should be.

The last category of responsive techniques is reserved for *intransigent* governments, where the circumstances call for the 'deterrence, punishment and the incapacitation of actors that have proven themselves to be thoroughly incompetent and/or intransigent or . . . "have proven themselves unworthy of trust".[203] According to Roach and Budlender, remediation of these constitutional ills necessitates 'detailed mandatory interdicts enforced by contempt proceedings'.[204] The thrust of such orders is that they are sufficiently detailed that the non-complying respondent could face a credible charge of contempt of court for not performing specific actions as directed.

The strategy offered by Roach and Budlender is useful in several respects. It identifies degrees of escalation that successively increase the court's influence over implementation and the potential for the court to intrude on executive functions. It also suggests that the degree of escalation should be commensurate with the constitutional 'offence'. Taylor is correct, however, in her observation that it is somewhat unhelpful to frame non-compliance in the psychological terms that Roach and Budlender have adopted, considering the institutional roles for the judiciary and executive envisaged by the Constitution. This is because non-compliance is primarily an institutional problem, and structural interdicts should be used to address 'institutional dysfunction and political blockages that threaten rights at a systemic level, rather than punitive measures targeting the recalcitrance of individual public officials'.[205] The reason

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202 Ibid 349.
203 Ibid 350.
204 Ibid.
205 Helen Taylor 'Forcing the court's remedial hand: Non-compliance as a catalyst for remedial innovation' (2019) 9 *CCR* 247 at 252. Footnotes omitted.

for this is twofold:

> 'This approach recognises that non-compliance with remedial orders does not only strain institutional comity but also undermines the normative commitment embodied by the right at stake, harming both successful claimants and similarly situated rights-holders. Remedies 'concretise' rights in the sense that they require courts to respond to social context in a way that gives practical and tangible effect to rights. It is in their crafting of remedies that courts most closely engage with the contextual realities of the state's failure to fulfil its constitutional obligations, including the institutional problems that may underlie such a failure and jeopardise future compliance efforts.'[206]

In ideal circumstances, structural interdicts create a metaphorical bridge between the judiciary and executive in the form of a 'dialogic partnership',[207] allowing for exchanges of information between them (as well as, in the case of mandamuses, directions from the courts to the government) that aim to bring about compliance. The court should resist, however, crossing the bridge and substituting itself into policy and governance roles, such as formulating detailed plans or disciplining individual officials.[208]

Another reason why Roach and Budlender's guidelines and principles need refinement is that they do not suggest how the psychological states of respondent government entities should be diagnosed. Fearing more interventionist forms of supervision by the courts, respondents are potentially incentivised to downplay incompetence as inattentiveness, or more concerningly, intransigence as incompetence or inattentiveness. Unfounded allegations of intransigence put at risk institutional comity between the branches (and therefore, the judiciary's institutional security) and any response to perceived intransigence should be handled with caution. It is vital that the courts have enough information to distinguish between incompetence, which can be remedied by the court's guidance in a structural interdict, and intransigence, which may require a firmer hand in the form of a contempt order.[209]

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[206] Ibid.
[207] Albertyn and Davis (note 19 above) 215. See also Kent Roach 'Polycentricity and queue jumping in public law remedies: A two-track response' (2016) 66 *University of Toronto Law Journal* 3 at 46–7.
[208] Recalcitrant and intransigent individuals should, ideally, be dealt with in terms of defined structures such as being held to governance frameworks such as codes of conduct, codes of ethics, key performance indicators as provided for in contracts of employment, and the like. Where they hold political office, they should be subject to discipline within their political party's structures. Nevertheless, as will be discussed further in this chapter and in Chapter 4, the extent of the dysfunction is sometimes so great that the court is compelled to hold individual officials accountable.
[209] Roach & Budlender (note 194 above) 351.

Personal costs orders are also another form of remedy that frequently raise separation of powers concerns. Taylor, drawing on Woolman, refers to the need to 'pierce the political veil' to hold accountable political actors from the elected branches of government.[210] This symbolic veil refers to political actors' ability to take advantage of their representative capacity to act with impunity and not stand to face any personal accountability for their actions. Court orders are usually targeted towards 'state resources and state assets', even in cases where government entities are mulcted with costs pursuant to frivolous litigation, meaning that political actors avoid accountability as individuals.

Taylor identifies three remedies that can pierce the political veil: contempt orders, personal costs orders against public officials (*costs de bonis propriis*) and the formulation of 'relief as an ascertainable debt against the state that can be satisfied through the attachment of state assets that benefit public officials, such as motor vehicles'.[211] For the purposes of this chapter, contempt orders and orders of *costs de bonis propriis* will be discussed.[212]

As mentioned above, the threat of a contempt order is an effective means to compel intransigent officials to comply with court orders. Civil contempt[213] 'consists in the wilful and mala fide disobedience of a civil court order'[214] and is a crime, though it can either be 'prosecuted in criminal proceedings, which characteristically lead to committal' or dealt with in civil proceedings 'for punitive or coercive reasons'.[215] Only certain types of claims are enforceable by way of contempt order:

> 'In order for a court order to be enforced through a contempt action, the order must be ad factum praestandum; that is, to do or abstain from doing a particular act. Orders ad pecuniam solvendam – to pay a sum of money such as an order to pay damages or make restitution – cannot be enforced through contempt proceedings, even if the respondent has the means to pay but only refuses to do so.'[216]

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[210] Taylor (note 205 above) 274.
[211] Ibid 274.
[212] The third category of order is not discussed here because it is a 'cold and clinical' remedy that does not require proof of mala fides, while at the same time it does not punish officials in an individual capacity, as the assets attached are those of the state. See Taylor ibid 280.
[213] As distinguished from criminal contempt, which 'brings the moral authority of the judicial process into disrepute and as such covers a multiplicity of conduct interfering in matters of justice pending before a court. It thereby creates serious risk of prejudice to the fair trial of particular proceedings.' *Matjhabeng Local Municipality v Eskom Holdings Limited* 2018 (1) SA 1 (CC) paras 52–3.
[214] *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma* (*Zuma 2*) 2021 (5) SA 327 (CC) para 148.
[215] *Pheko v Ekurhuleni Metropolitan Municipality (No 2)* 2015 (5) SA 600 (CC) (*Pheko 2*) para 30.
[216] Aravind Ganesh 'Contempt and execution in vindicating the right to education' (2014) 29 *SA Public Law* 19

It has, however, been described as a 'blunt instrument' that is not well-suited to solving complex social problems.[217] This is because the remedy was largely developed to exact compliance from private litigants rather than state respondents, whose non-compliance can in many cases be 'caused by systemic rather than individual failings'.[218] The utility of contempt orders as a coercive mechanism for state respondents is greater where well-defined obligations are contained in an order directed at an identifiable individual or individuals.

Contempt orders are significant not just because they ensure that litigants' claims are satisfied. From a separation of powers perspective, the Constitutional Court has affirmed the court's constitutional power to ensure that its orders are complied with:

> 'The rule of law, a foundational value of the Constitution, requires that the dignity and authority of the courts be upheld. This is crucial, as the capacity of the courts to carry out their functions depends upon it. As the Constitution commands, orders and decisions issued by a court bind all persons to whom and organs of state to which they apply, and no person or organ of state may interfere, in any manner, with the functioning of the courts. It follows from this that disobedience towards court orders or decisions risks rendering our courts impotent and judicial authority a mere mockery. The effectiveness of court orders or decisions is substantially determined by the assurance that they will be enforced.
>
> Courts have the power to ensure that their decisions or orders are complied with by all and sundry, including organs of state. In doing so, courts are not only giving effect to the rights of the successful litigant but also and more importantly, by acting as guardians of the Constitution, asserting their authority in the public interest.'[219]

It follows that individual public officials as well as organs of state may find themselves the subject of a contempt order if they refuse to comply. While it is squarely within the court's power to do so to maintain its dignity and authority, this has the potential to strain the relationship of comity between the judicial and executive branches and should be exercised with care. In the United States, this can manifest in judges avoiding issuing contempt orders against public officials, while

at 25. Such orders are better enforced by attaching the assets of the debtor. See *Nyathi v Member of the Executive Council for the Department of Health Gauteng* 2008 (5) SA 94 (CC).

[217] *Meadow Glen Home Owners Association v City of Tshwane Metropolitan Municipality* 2015 (2) SA 413 (SCA) para 35.

[218] Joshua Davis 'Emptying the remedial toolbox: *Thubakgale*, residents, and constitutional damages' (2023) 12 *CCR* 221.

[219] *Pheko* 2 (note 215 above) paras 1–2.

> 'hardly ever officially announcing that sanctions are generally unavailable. The stretches that judges sometimes perform to avoid sanctions are evidence that the absence of sanctions is not merely random, but meaningful and motivated. As further confirmation of that point . . . several judicial utterances . . . indicat[e] that a contempt finding or sanction against a federal agency makes judges or their colleagues distinctly uncomfortable and uncertain in a way that contempt against other parties does not.'[220]

Parillo identifies instances where courts in the United States themselves have admitted to employing a 'double standard' in the application of contempt orders as between private and state litigants, such as by allowing state litigants to comply with modified injunctions and condoning their delays.[221] This does not mean that such orders are ineffectual: in the United States, the mere threat of a contempt order is often enough to exact compliance, though not necessarily because the state officials believe that they will not be committed for failing to comply. Rather, 'the reason is that contempt findings, regardless of sanctions, have the power to shame agencies and officials for breaking accepted norms of compliance with court orders'.[222] In other words, the political cost of non-compliance is high enough to compel state officials to meet their obligations.

As has been discussed elsewhere in this chapter and throughout this thesis, the South African experience during the state capture years has been that public officials have been able to act with impunity without significant political costs. This has meant that the courts have had to step in to hold officials accountable. A particularly noteworthy example of this was the contempt order that was enforced against former President Jacob Zuma by the Constitutional Court in the *Zuma 2* judgment.[223] This case concerns the court's response to Zuma's egregious conduct in three respects: first, his refusal to participate in the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State (State Capture Commission) – which was instituted to investigate malfeasance some of which Zuma himself was the author;[224] secondly, his refusal to comply with its order directing Mr Zuma to attend and give evidence at the State Capture Commission, and thirdly,

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220 Nicholas R Parrillo 'The endgame of administrative law: Governmental disobedience and the judicial contempt power' (2017) 131 *Harvard Law Review* 685 at 699.
221 Ibid.
222 Ibid 770.
223 *Zuma 2* (note 214 above).
224 *Judicial Commission of Inquiry Into State Capture Report*: Part VI, Vol.4 at 130–52, last accessed from https://www.statecapture.org.za/site/files/announcements/672/OCR_version_-_State_Capture_Commission_Report_Part_VI_Vol_IV_-_Recommendations.pdf on 23 January 2025.

his issuing of public statements 'levelling serious criticisms' against and denigrating the Constitutional Court.[225] The outcome of *Zuma 2* was an order declaring that Zuma had committed the crime of contempt and sentencing him to 15 months' imprisonment.[226]

While it is not necessary to discuss this judgment in detail here, it is worth noting that the intensity of Zuma's attacks on the judiciary was used as a justification for the sanction[227] as well as an aggravating factor with respect to the sentence that was imposed.[228] Even though Zuma was not a sitting President at the time of the offence, his former position was also taken as an aggravating factor justifying the custodial sentence. This case brought to a head the battle of wills that had raged between the Constitutional Court and Zuma throughout his presidency, where the court had in many instances thwarted Zuma's attempts to further the state capture project.[229] It had endured many verbal attacks by Zuma's supporters during his term of office, but, shorn of his role as President and its obligations of comity towards the other branches of government, Zuma felt at liberty to make statements against the judiciary that the court described as 'scurrilous', 'unfounded', 'egregious', 'intolerable', 'outlandish', and 'scandalous'.[230] It is clear from the judgment[231] that the court appreciated the grave threat to its institutional security occasioned by Zuma's remarks, and therefore acted decisively and forcefully to wield its constitutional powers to deliver its unprecedented punitive contempt order.[232] It should be mentioned that to some, the court's determination to visit consequences upon Zuma meant that it failed to give adequate consideration to his human rights, in effect detaining him without a fair trial (in the view of the minority of the court)[233] or depriving him of his rights of appeal or review.[234]

Whereas contempt orders threaten the liberty of a recalcitrant official, personal costs

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[225] *Zuma 2* (note 214 above) paras 4–5.
[226] Ibid para 142.
[227] Ibid para 88.
[228] Ibid para 123.
[229] Chapters 3 and 4 of this thesis delve into some of these in more detail.
[230] *Zuma 2* (note 214 above) paras 88–96.
[231] Ibid.
[232] These threats were not unfounded: the court's order directing Mr Zuma's incarceration was used to foment discord that, along with other factors, lit the spark for violent civil unrest in KwaZulu-Natal and Gauteng in July 2021. Noluthando Phungula 'Understanding the dynamics of South Africa's July 2021 social unrest' (2024) 8 *Journal of Nation-building & Policy Studies* 71.
[233] See *Zuma 2* (note 214 above) paras 232–3.
[234] See Christopher Fisher & Divashnee Naidoo 'Revisiting the imprisonment of Jacob Gedleyihlekisa Zuma for contempt of court by the Constitutional Court' (2023) 13 *CCR* 363 which considers *Zuma 2* together with *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State* 2021 (11) BCLR 1263 (CC).

orders are aimed at their pecuniary interests. This remedy has seen significant judicial development over the past decade.[235] Some general guidelines and principles that courts consider before making such orders are worth stating. As a general rule, the awarding of costs is within the discretion of the court.[236] It is important that the official be made aware that she is joined in the matter in her personal capacity where such an order is contemplated[237] and that she be given an opportunity to make representations to the court concerning the alleged bad faith or negligent conduct.[238] Where the conduct of the official is particularly egregious and 'worthy of a court's rebuke', the court may intensify the expression of its displeasure by awarding the costs on a punitive scale.[239] Courts are generally reluctant to grant personal costs orders[240] and have therefore limited their applicability to instances where the conduct of the official is mala fide or grossly negligent, assessed on a case-by-case basis.[241]

Black Sash Trust 2 brought an important development in the law on personal costs orders. Prior to this decision, personal costs awards against officials were made pursuant to their conduct in court proceedings. *Black Sash Trust 2* broadened the application of this remedy to 'conduct relating to the performance of constitutional duties'.[242] This marked an important shift: the threat of a personal costs order is one way for the courts to regulate the conduct of parties to litigation. It is a function of the court's inherent jurisdiction to control its process, and thereby maintain its dignity, which pre-dates the Constitution. *Black Sash 2* opened the door to its application to conduct beyond court proceedings, encompassing a wide range of constitutional duties identified by the court:

> 'Accountability and responsiveness are founding values of our democracy. All organs of state must provide effective and accountable government. The basic values and principles governing public administration include: the promotion and maintenance of a high standard of professional ethics; the promotion of efficient, economic and effective use of resources; public administration must be development-orientated; people's needs must be responded to; public

[235] See Max du Plessis & Muhammad Zakaria Suleman '*Ethekwini Municipality & Others v Westwood Insurance Brokers (Pty) Ltd*: Personal costs against public officials through the lens of *Westwood*' (2021) 138 *SALJ* 731 and Wesley Vos 'Personal cost orders: Protecting the public purse' (2020) *Stell LR* 138.
[236] *Kruger Bros & Wasserman v Ruskin* 1918 AD para 33.
[237] *Black Sash Trust 1* (note 55 above).
[238] *Black Sash Trust 2* (note 55 above) para 76; *Member of the Executive Council for Health, Gauteng v Lushaba* 2017 (1) SA 106 (CC) para 18.
[239] *Public Protector v South African Reserve Bank* 2019 (6) SA 253 (CC) (*Public Protector v SARB*) para 226. Footnotes omitted.
[240] Ibid para 45.
[241] *Black Sash Trust 2* (note 55 above) para 9. This test was affirmed again in *Public Protector v SARB* ibid.
[242] *Black Sash Trust 2* ibid paras 7–9; *Public Protector v SARB* ibid para 45.

> administration must be accountable; and transparency must be fostered by providing the public with timely, accessible and accurate information. Cabinet members are responsible for the powers and functions of the executive assigned to them by the President and they must act in accordance with the Constitution. All constitutional obligations must be performed diligently and without delay.'[243]

The court went on to remark that whether an official's conduct is 'improper' such that it warrants a personal costs order could be determined

> 'with reference to two linked issues: institutional competence and constitutional obligations. From an institutional perspective, public officials occupying certain positions would be expected to act in a certain manner because of their expertise and dedication to that position. Where specific constitutional and statutory obligations exist the proper foundation for personal costs orders may lie in the vindication of the Constitution, but in most cases there will be an overlap'.[244]

Taylor argues that *Black Sash Trust 2* does not clarify 'whether a public official's breach of constitutional duties which merely gives rise to litigation but is not sustained through the course of litigation can, without more, justify a personal costs order'.[245] She argues that it cannot, for four reasons: first, the facts of *Black Sash Trust 2* did not give rise to this question, and as such it cannot be relied upon as authority to support that contention. Secondly, 'the punitive element of a personal costs order lies in its being a *post facto* response to conduct connected with the litigation, rather than a remedial measure aimed at curing the breach' because it is 'more often only a deterrent in the sense that it seeks to preserve the integrity of court orders and foster respect for the rule of law'.[246] Thirdly, the text of the judgment refers to personal costs orders as a means to 'mark the court's displeasure with the conduct of public officials *in connection with the litigation*'.[247] Fourthly, and most significantly, prior Constitutional Court authority in the form of *Swartbooi* rejected the High Court's use of personal costs orders as a means to teach political office-bearers (in that case, municipal councillors) a lesson and cause them to consider their decision-making more carefully in the future.[248] The award of personal costs orders was found to be

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[243] *Black Sash 2* ibid para 7.
[244] Ibid para 8.
[245] Taylor (note 205 above) 277.
[246] Ibid.
[247] Ibid. Emphasis in original.
[248] *Swartbooi v Brink* 2006 (1) SA 203 (CC) (*Swartbooi*) para 25.

> 'an improper approach and reflects an improper purpose. It trenches upon the separation of powers because it is judicial conduct aimed at influencing the conduct of the legislative and executive branch of government. Courts have the power to set aside executive and legislative decisions that are inconsistent with the Constitution. They cannot attempt, by their orders to punish municipal councillors and, in so doing, influence what members of these bodies might or might not do. This motive of the High Court constitutes a dangerous intrusion into the legislative and executive domain.'[249]

I respectfully disagree with Taylor's view for two reasons, evidenced by references to the text of relevant judgments. The first is the revealing sentence following her quotation from *Black Sash Trust 2,* a sentence she omits. After remarking that personal costs orders 'mark the court's displeasure with the conduct of public officials in connection with the litigation,' the court added that '[t]hese tests are *also* applicable when a *public official's conduct of his or her duties*, *or* the conduct of litigation, may give rise to a costs order'.[250] The use of 'also' denotes an additional class of conduct subject to the tests, and the disjunctive 'or' clearly separates it from the conduct of litigation. Secondly, Taylor was writing prior to the finalisation of *Public Protector v SARB* in the Constitutional Court.[251] In its eventual judgment in this matter, the court clarified that this was indeed an extension by stating that '[u]ntil *Black Sash Trust 2*, [personal] costs were confined to conduct relating to court proceedings. We then extended it to conduct relating to the performance of constitutional duties.'[252] At the time, however, Taylor's view was nevertheless a reasonable one, attempting to resolve a perceived lack of clarity in *Black Sash Trust 2* by squaring it with reference to *Swartbooi*. Interestingly, while the Constitutional Court cites *Swartbooi* in both *Black Sash Trust 2* and *Public Protector v SARB*, it does not reference the dictum in paragraph 25 – an unlikely oversight, perhaps. It could also have been that the dictum was an inconvenient precedential hurdle that the court elected to sidestep rather than overcome considering the pressing need to bolster the court's toolbox of remedies against malfeasance by government actors.

The extension of this remedy's application perhaps illustrates Dube's point about the Constitutional Court's seeming advantage over the elected branches of government.[253] The court was able to draw on constitutional obligations described at a high, non-specific level to

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[249] Ibid.
[250] *Black Sash Trust 2* (note 55 above) para 9. My emphasis.
[251] Taylor (note 205 above) 278 fn 231.
[252] *Public Protector v SARB* (note 239 above) para 45.
[253] Dube (note 139 above), as discussed at 2.4*(b)*.

craft for itself a means to pierce the political veil and punish recalcitrant officials in a meaningful way by having them pay out of their own pockets.

Officials facing the prospect of personal costs orders have attempted to argue that the latter unconstitutionally impinges on the separation of powers.[254] These arguments have rightly not been entertained by the courts. The remedy is not broadly directed at institutions of the executive branch of government, but *individual office-bearers* within those institutions who are tasked with constitutional obligations. It is intended to deter further violations of constitutional rights.[255] But while separation-of-powers concerns are misplaced, the award of a personal costs order against a public official for improper conduct undoubtedly has political ramifications. The Constitutional Court took care to distance itself from these by emphasising the constitutional source of the remedy:

> 'When courts make costs orders they do not make judgments on the political accountability of public officials. They do so only in relation to how the rights of people are affected by the conduct of a public official who is not open, transparent and accountable and how that impacts on the responsibility to a court by those involved in the litigation. And as explained in *Black Sash 2*, the common-law rules for holding public officials personally responsible for costs are now buttressed by the Constitution'.[256]

Despite this, in real-world terms, the political effects are manifest. The person censured with such an order must endure a court-approved stain on their reputation. It also invites questions as to why the official was able to act in this way with impunity – why were they not disciplined or removed from their position by the government (or in the case of political office-bearers, by their party)? The proceedings in such cases and the judgments are often publicised by the media, drawing public scrutiny. While courts may not intend to make judgments on political accountability, this often is the effect of such orders in practice.

This again gives rise to concerns about whether the court's institutional security could be imperilled after granting a personal costs order, especially if it is awarded against a particularly high-ranking political official. The highest court's consistent emphasis on the constitutional root of this remedy can be seen as an example of its efforts to protect itself against

[254] *Black Sash Trust 3* (note 55 above) para 10.
[255] Clive Plasket 'Protecting the public purse: Appropriate relief and costs orders against officials' (2000) 117 *SALJ* 151 at 151.
[256] *Black Sash Trust 3* (note 55 above) para 10. See also *Public Protector v SARB* (note 239 above) para 148.

accusations that it is entering into the political fray. So too are its restraint in making personal costs orders by applying the very stringent tests set out above to the impugned conduct, its enforcing of strict requirements in terms of joinder and *audi alteram partem* rules, and its care to provide detailed justification when making such orders:

> 'Public office-bearers must be allowed the space to be human. And to err is human. It ought to take much more than ignorance, limited competence in one's area of responsibility, poor judgement or incidental but harmless unfairness to others to order personal costs against an office-bearer litigating in a representative capacity . . . [C]onstitutional office-bearers . . . should not be allowed to abuse their power or office with impunity. They should never be left free to mark out for prejudice or mete out unjust and unfair treatment to any person or institution . . . There should thus be no hesitation in visiting a public office-bearer with costs even on a highly punitive or attorney and client scale in an official or personal capacity when circumstances plainly justify this extreme censure. But when that has been done, the reasons for doing so and the gravity of the underlying conduct should never be difficult to make out or understand.'[257]

2.5 ACCOUNTABILITY-VACUUM CASES: NAVIGATING ACTIVISM AND RESTRAINT

The many threads of this chapter can now be pulled together. To summarise: first, this chapter has, so far, traced the development of legal realism and drawn from it the insight that it is not just the applicable law that influences the way that judges make decisions. Other factors may also play a role, including contextual political circumstances surrounding the cases that come before them. Secondly, when applying transformative constitutionalism in judicial decision-making – something that several judges regard as an important constitutional imperative – judges can make use of interpretive latitude afforded by legal prescripts to decide cases in a manner that promotes justice, in a form of 'judicial activism'. Thirdly, judges are not free to take their activism to extremes such that their decisions trench on the constitutionally determined powers of the legislature and executive. Their decision-making must be constrained by the separation of powers. Even so, the separation of powers permits areas of overlap in the form of checks and balances, including the court's power of judicial review and the remedies

[257] *Public Protector v SARB* ibid paras 46–9. As will be discussed further in Chapter 4, the Constitutional Court went so far as to appoint a referee, retired Judge Bernard Ngoepe, to conduct a fact-finding enquiry into the impugned conduct of Minister Bathabile Dlamini, eventually using his findings as a basis upon which to grant a personal costs order against her. The court's choice to do so allowed the parties to make submissions in greater detail and introduced more transparency to the process. Additionally, it affirmed the Constitutional Court's impartiality in the matter. See Taylor (note 205 above) 276.

it may order pursuant to a finding that the executive or legislature has engaged in reviewable conduct. From this emerges the tension caused by the competing principles of judicial activism and restraint.

So far in this chapter, these concepts have (with a few exceptions) been explored in more general terms rather than focusing too sharply on cases forming the subject matter of this thesis – those concerning state capture, corruption and egregious public maladministration, in other words, the accountability-vacuum cases. This is chiefly because the next three chapters undertake that task in detail in relation to cases that are defined under three broad categories: those concerning criminal justice institutions, malfeasance in public procurement processes, and the powers of a key independent watchdog institution respectively. However, before delving into those topics, it is worth considering how, at a high level, judicial activism and restraint have played out in the courts in accountability-vacuum cases.

The first question is whether judges have applied transformative constitutionalism to make activist decisions in accountability-vacuum cases. The answer is definitively yes. As the following chapters of this thesis demonstrate, judges have used non-obvious interpretations of the law and applied remedies creatively to halt unlawful exercises of public power;[258] prevent deleterious impacts of maladministration on ordinary people;[259] preserve and uphold the independence and effectiveness of 'integrity institutions',[260] and punish recalcitrant public officials for wrongdoing.[261] How this is achieved has to be answered with reference to the reasoning set out and order made of each individual case. This is because the state capture era has presented a variety of unprecedented circumstances and legal questions that the courts have been required to resolve.

From a higher vantage point, however, it can be argued – as Klug does compellingly – that transformation is served by special features of South Africa's constitution that 'temper power'.[262] These features take the form of a system of checks and balances intended to hold

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258 Such as the invalidation of the settlement agreement given to Mxolisi Nxasana pursuant to his removal from office as National Director of Public Prosecutions, discussed at 3.5*(b)*.

259 For example, preventing the collapse of the social security distribution system following the irregular award of a tender, discussed further in Chapter 4.

260 Such as the Directorate for Priority Crimes Investigations and the Public Protector, discussed further in Chapters 3 and 5 respectively. 'Integrity institutions' is borrowed from Klug (note 125 above).

261 Such as the committal of former president Jacob Zuma to prison for contempt of court, discussed above, and the granting of punitive costs orders, discussed above and in Chapter 4.

262 Klug (note 125 above).

constitutional actors accountable for abuses of power.[263] According to Klug, accountability is intrinsic to the idea of constitutionalism, as constitutions exist to prescribe the limits of government power.[264] They provide a blueprint against which the exercises of state power can be tested.

As has been discussed in more detail above, constitutions also traditionally reserve power for different branches of government, being the legislative, executive and judicial branches, that are able to act as a check on one another, thereby 'ensuring a more substantive version of the rule of law'.[265] In practical terms, as Klug points out, there is often a 'close political connection' between the legislature and executive, particularly where one political party is dominant, as is the case with the African National Congress in South Africa since 1994.[266] While Parliament is empowered to perform the 'traditional legislative role of overseeing the executive in addition to law-making', it has been considerably less effective as a watchdog than other independent constitutional entities.[267]

The judiciary traditionally stands apart in form and in deed: as an institution and at the level of individual judges, judicial independence is prized. Courts are constrained to pronounce only upon the issues placed before them by the parties and not make orders with overbroad effects. Individual judges are required to dissociate from public political life.[268] Klug identifies this tension as 'being at the heart of South Africa's post-apartheid constitutional order in which a popular, democratically elected ruling party coexists with a constitutional promise of democratic accountability'.[269] In this constitutional scheme, the courts (and especially the Constitutional Court) 'are charged with determining the allocation of constitutional authority and resolving conflicts that might be brought to the courts as different institutions struggle to ensure that there is legal accountability for governmental failures as well as individual malfeasance'.[270]

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263 Ibid 741.
264 Ibid 703.
265 Ibid 702.
266 This has been the case with the ANC since 1994. It was only in the 2024 national election that the party lost its outright majority in Parliament, resulting in the formation of the Government of National Unity that featured a more diverse allocation of executive roles between parties.
267 Klug (note 125 above) 720.
268 The Code of Judicial Conduct prohibits judges from being members of political parties and becoming 'involved in any political controversy or activity', unless 'it is required for necessary for the discharge of judicial office'. Code of Judicial Conduct *GN* R865 *GG* 35802 of 18 October 2012, adopted in terms of s 12 of the Judicial Service Commission Act 9 of 1994.
269 Klug (note 125 above) 702.
270 Ibid 703.

At the same time, South Africa's Constitution introduced accountability mechanisms deliberately *not* linked to political or judicial power, in the form of various constitutionally entrenched independent institutions such as the Public Protector, the Auditor-General and the Electoral Commission. Taken together,

> '[t]his structure reflects an attempt to institutionalize a system of checks and balances that relies neither on a strict or formal separation of powers, nor does it fragment power to the extent that it paralyzes governance. Instead, it seeks to provide a constitutional system of governance in which the government is empowered to address the legacies of apartheid while also creating multiple sites of power and authority to which political and social groups in conflict may repeatedly turn in their attempts to both be heard and to protect their interests or achieve, at times, irreconcilable goals.'[271]

State capture, corruption and public maladministration frustrate the transformative agenda by diverting much-needed public funds away from human rights-promoting interventions, as well as by rendering such interventions more complex.[272] Concerned individuals, non-governmental organisations and opposition political parties were and are able to engage these constitutional constraints on power to temper such abuses 'that had begun to undermine the post-apartheid democracy'.[273] This was in many cases enabled by the existence of '"integrity institutions" and the Constitutional Court's development of a doctrine of separation of powers that recognized the unique role of these institutions'.[274] In response to the undermining of 'traditional forms of democratic accountability' by corruption, the superior courts advanced a transformative agenda by

> 'interpret[ing] the constitutional provisions creating the "integrity institutions" and the Public Protector in particular, as well as their separation of powers doctrine to protect the role of these institutions against the political branches['] attempts to shield the president from charges of corruption'.[275]

Klug's assessment is a plausible explanation for the way the courts, and the Constitutional Court in particular, have approached accountability-vacuum cases. However, it is possible to go one step further to consider the root of the impetus to temper abuses of power, one that goes

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[271] Ibid 703.
[272] For instance, it becomes more difficult to troubleshoot for implementation faults such as capacity constraints, lack of appropriate skills, or poor systems design when state capture and corruption are involved.
[273] Klug (note 125 above) 703.
[274] Ibid. This is discussed further in Chapters 3 and 5 of this thesis.
[275] Ibid.

deeper than the constitutionally prescribed powers of the branches of government, including the court's power to review conduct performed in the exercise of those powers. Henrico argues that ultimately, judicial activism in these cases is motivated by a concern for human dignity.[276] He argues that there is a 'constitutional duty on the court to intervene – not as a substitute for the other branches of government – but to complement the democratic process of policy development and service delivery'.[277] While the case for this is more readily apparent in socio-economic rights cases, it is no less applicable to accountability-vacuum cases:

> 'Dignity takes on a broader dimension than mere recognition of self-worth. The citizenry, together with all organs of the state and the judiciary have a collective role to play in contributing to a stronger (deeper) sense of democracy. Hence, we must conceive of a form of civic dialogue arising from participatory democracy that plays itself out not only by way of exercising political rights, for example, voting, but other rights such as locus standi that seeks to hold the exercise of public power (on the part of government), or rather the failure of government to act, accountable by way of judicial review.'[278]

The case that values such as dignity infuse a transformational judicial approach to accountability-vacuum cases is made clearer when contrasted with reviews of the conduct of the elected branches in terms of Constitution the United States of America. The US Constitution has been regarded as 'counter-paradigm to the trend [of transformative constitutionalism] emerging in the Global South' in that it 'does not entrust the federal state with the task of bringing about a more just and equal society'.[279] Instead, US constitutionalism – as coded and as borne out in constitutional theory and practice – is intended to set out the parameters within which individuals can exercise their liberty. Its purpose, and that of the courts in applying it, is largely to 'safeguard individual freedom (understood in a negative, formal way), and guard against concentrations of state power that might endanger such freedom'.[280] In the United States, there is no textual imperative for the court to have regard to dignity when interpreting and applying the law when adjudicating abuses of constitutional powers; in South Africa, dignity is nothing less than a founding value of the Constitution.[281]

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[276] Radley Henrico 'Judicial review in South Africa and India: Advancing constitutionalism or undue activism?' (2023) 43 *Obiter* 797.
[277] Ibid 798.
[278] Ibid 804.
[279] Hailbronner (note 50 above) 536.
[280] Ibid 540.
[281] Section 1*(a)* of the Constitution provides as follows: 'The Republic of South Africa is one, sovereign, democratic state founded on the following values:
a. Human dignity, the achievement of equality and the advancement of human rights and freedoms.'

2.6 CONCLUSION

Accountability-vacuum cases therefore bring together a confluence of circumstances that are ripe for exploration regarding the tension between judicial activism and restraint. Three decades since the end of apartheid, the needs of ordinary South Africans remain untenably unmet, with issues such as poverty,[282] unemployment,[283] crime,[284] poor management of public infrastructure[285] and inadequate service delivery[286] remaining rife. This impacts their dignity negatively, by preventing them from enjoying their rights and freedoms fully. Those that are tasked with addressing these concerns – government officials who receive a democratic mandate to represent the people by way of elections – have a responsibility to the citizenry to develop and implement policies and programmes to address these concerns.[287] However, as was the case under state capture, some political representatives in government and those connected to them have conspired to direct the resources of the state towards their own ends. Not content with opportunistically seizing one-time opportunities such as tenders to take bribes, their actions went so far as to ensure their continued ability to exploit state resources by manipulating the functioning and even the structure of institutions designed to identify corruption and enforce accountability mechanisms. In other words, they embarked on a project of state capture, a 'betrayal of the promise' for progress that was made to South Africans at the

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282 World Bank Group 'Poverty and equity brief: Africa Eastern & Southern: South Africa' *World Bank* (2023), last accessed from https://databankfiles.worldbank.org/public/ddpext_download/poverty/987B9C90-CB9F-4D93-AE8C-750588BF00QA/current/Global_POVEQ_ZAF.pdf 26 January 2025.

283 The official unemployment rate was 32,1% in the third quarter of 2024. Statistics South Africa 'Statistics South Africa on the official unemployment rate in the third quarter of 2024' *South African Government Website* (2024), last accessed online at https://www.gov.za/news/media-statements/statistics-south-africa-official-unemployment-rate-third-quarter-2024-12-nov#:~:text=The%20official%20unemployment%20rate%20was,persons%20to%208%2C0%20million on 29 January 2025.

284 See David Bruce 'Murder trends in South Africa's deadliest provinces' *Institute for Security Studies* (2023), last accessed from https://issafrica.s3.amazonaws.com/site/uploads/PB-183.pdf on 26 January 2025.

285 See, for example, Alexander Kozul-Wright 'Load shedding & water woes: Can South Africa fix its ailing infrastructure?' *Al Jazeera* 22 May 2024, last accessed from https://www.aljazeera.com/economy/2024/5/22/load-shedding-water-woes-can-south-africa-fix-its-ailing-infrastructure on 29 January 2025.

286 While government sources have reported progress in relation to service delivery (see Statistics South Africa 'The state of service delivery in South Africa: Analysis of the census 2022 data' *Statistics South Africa* (2022), last accessed from https://www.statssa.gov.za/publications/Report-03-01-83/Report-03-01-832022.pdf on 29 January 2025), there remains well-documented discontent with the provision of basic services. See Christian Hamann & Rashid Seedat 'Quality of life continues to slide in South Africa's key economic province, Gauteng – New survey' *The Conversation* 23 October 2024, last accessed from https://theconversation.com/quality-of-life-continues-to-slide-in-south-africas-key-economic-province-gauteng-new-survey-241714 on 29 January 2025; and Joleen Steyn Kotze & Benjamin Roberts 'South Africans are fed up with their prospects, and their democracy, according to latest social attitudes survey' *The Conversation* 26 April 2023, last accessed from https://theconversation.com/south-africans-are-fed-up-with-their-prospects-and-their-democracy-according-to-latest-social-attitudes-survey-204566 on 29 January 2025.

287 Section 195 of the Constitution.

dawn of democracy.[288]

This thesis argues that, aware of these circumstances, the South African judiciary took up the difficult challenge of using its constitutional powers to stand in the way of state capture, corruption and maladministration to the best of its ability. The eradication of corruption and egregious maladministration serves the ends of dignity, equality and freedom, values that are affirmed by the Bill of Rights.[289] To do this, the courts have had to balance judicial activism and judicial restraint, acting as a 'conscientious judge'.[290] This thesis identifies examples of cases where it appears that judges have attempted to conduct themselves in the model of the conscientious judge and in so doing, engage in transformative adjudication with a view to a more accountable government.

Where such examples of transformative adjudication[291] are found, this thesis also examines the degree to which the responsible judges have adopted transformative constitutionalism's call to acknowledge the political character of their decision-making. This is done by not only highlighting instances where judges are 'candid and self-conscious about the politics of adjudication',[292] but also by identifying clues in the text that judges are trying to conceal their 'conscientiousness' out of a concern for interpretive fidelity by using legal principles in creative (or at least non-obvious) ways.[293]

This circles back to some of the earlier realists' thinking. Oliver Wendell Holmes took the view that '[t]he very considerations which judges most rarely mention, and always with an apology, are the secret root from which the law draws all the juices of life. I mean, of course, considerations of *what is expedient for the community concerned*.'[294]

When judges veer into the realm of policy, the limits of the separation of powers are tested. Taken too far, this could pose an existential threat to the judiciary and its institutional security. Repression of the courts by the political branches could be pursued through legal means, such

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[288] Haroon Bhorat et al 'Betrayal of the promise: How South Africa is being stolen' *State Capacity Research Project* (2017) 1.
[289] The Constitutional Court has held that corruption undermines the rights in the Bill of Rights. *Glenister II* (note 58 above) para 177.
[290] See Mureinik (note 39 above) 183 and Klare (note 13 above) 148.
[291] Hoexter (note 2 above) 286.
[292] Klare (note 13 above) 187.
[293] Ibid 158. See Cora Hoexter 'Courageous creativity and anti-formalism in administrative law: Notable contributions from the jurisprudence of Johan Froneman' (2022) 12 *CCR* 121 at 135 for an example of judicial candour as well as a discussion of differing views on how the 'vice of formalism' relates to the 'vice of judicial deception'.
[294] Holmes (note 5 above) 35. Emphasis added.

as amending laws concerning the courts, or other, more subversive actions, such as discrediting the courts publicly, refusing to abide by court orders, or reducing the courts' funding. Aware of this and seeking to avoid it, courts 'adjust their decisions according to their expectations about other political actors' policy preferences, and how likely it is that their policy preferences will survive interbranch conflict'.[295] Willingness to engage in activist judicial decision-making can be tempered in such circumstances, taking into account a risk assessment regarding potential reproach from the political branches of the state. Other chapters of this thesis highlight instances where such sensitivities apparently affect the reasoning and outcome in key judgments.

Ultimately, this thesis is concerned with the question to what extent the courts in South Africa have recognised the threat that corruption and egregious public maladministration pose to 'the good of the community', and have accordingly decided cases before them in a way that protects the public good, even where doing so has challenged the dominant formalist legal culture[296] and exerted pressure on the boundaries of the separation of powers.[297]

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[295] Roux (note 149 above) 112.
[296] See Albertyn & Davis (note 19 above) 188.
[297] For a consideration of the separation of powers in the context of transformative constitutionalism, see Langa (note 24 above) 357–8, and Moseneke (note 126 above). See also (albeit through the lens of socio-economic rights) Marius Pieterse 'Coming to terms with judicial enforcement of socio-economic rights' (2004) 20 *SAJHR* 383.

CHAPTER 3

THE COURTS' RESPONSES TO ATTEMPTS TO IMPEDE THE PROPER FUNCTIONING OF CRIMINAL JUSTICE INSTITUTIONS

3.1 INTRODUCTION

A necessary condition for state capture is the weakening of key institutions within the criminal justice system, specifically, the agencies that investigate and prosecute corruption. An effective way to hinder the functioning of these institutions is to undermine their independence.[1] The aim is to ensure that they are unable to act 'without fear or favour' against corrupt actors, allowing such persons to conduct themselves with impunity and without fear of sanction.[2]

This method was used extensively during the period of state capture. While Tamukamoyo[3] characterises this as a 'failure to entrench' independence, it is more properly described as an active campaign to reduce independence – a 'scorched earth strategy on public institutions'.[4] Fortunately, this campaign did not go unnoticed by civil society, opposition parties, and members of the public, with the result that moves bringing anti-corruption agencies under greater control of political actors became the subject of a number of cases before the courts.

This chapter considers to what extent the courts used their interpretive capacity and remedial powers to define the limits of executive powers in a way that insulated criminal justice institutions from excessive executive influence, and in so doing, protected their corruption-fighting capacity. This is done, first, by setting out the context of South Africa's anti-corruption framework in order to demonstrate how vulnerabilities within that framework could be exploited to serve the ends of state capture. This is followed by a discussion of three primary tactics employed by political actors to weaken criminal justice institutions, namely, the appointment of pliant leadership; attempts to change the structure and functioning of a key anti-corruption institution; and the removal of leaders who refused to act under direction of such actors.

[1] Hamadziripi Tamukamoyo 'Independence in South Africa's anti-corruption architecture: Failures and prospects' (2013) 71 *Focus* 10 at 12.
[2] David Bruce 'Control, discipline and punish? Addressing corruption in South Africa' (2014) 48 *South African Crime Quarterly* 49 at 52.
[3] Tamukamoyo (note 1 above) 12.
[4] Bruce (note 2 above) 55, citing Susan Booysen 'Nkandla – The ANC's house of cards' *Sunday Independent*, 6 April 2014, 13.

3.2 THE CONTEXT OF SOUTH AFRICA'S ANTI-CORRUPTION FRAMEWORK

It is useful briefly to examine the structure of South Africa's anti-corruption framework in order to show its vulnerabilities. This provides context to how political actors were able to use their executive and legislative powers to undermine anti-corruption institutions, as well as how the courts responded when called upon to evaluate these exercises of power against constitutional norms.

The architecture of South Africa's anti-corruption system utilises a decentralised, multi-agency approach that requires coordination, cooperation and monitoring between a large number of institutions.[5] At the centre of the elaborate framework are the key investigation and criminal prosecution agencies, namely the National Prosecuting Authority (NPA), the Asset Forfeiture Unit, the Independent Police Investigative Directorate (IPID),[6] the Special Investigating Unit (SIU),[7] the South African Police Service (SAPS) and the Directorate for Priority Crime Investigations (DPCI).[8] The judiciary also plays a central role in ensuring that anti-corruption laws are upheld. Other relevant institutions include the Public Protector, the National Intelligence Agency, the office of the State Attorney, as well as governance and oversight bodies such as the Department of Public Service and Administration, the Public Service Commission (PSC) and the Auditor General,[9] though this list should not be seen as exhaustive.[10]

This structure can be contrasted with the single-agency approach employed by the likes of Hong Kong and Singapore[11] which concentrates anti-corruption functions into one institution.

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[5] P Pillay 'Anti-Corruption agencies in South Africa and Brazil: Trends and challenges' (2017) 9 *African Journal of Public Affairs* 1 at 4.

[6] The IPID is mandated to exercise independent oversight over the South African Police Service and the Municipal Police Services by investigating alleged criminal offences committed by members of the police services. It is governed by the Independent Police Investigative Directorate Act 1 of 2011.

[7] The SIU is a statutory body established in terms of the Special Investigating Units and Special Tribunals Act 74 of 1996. It is mandated to 'investigate serious allegations of corruption, malpractice and maladministration in the administration of State institutions, State assets and public money as well as any conduct which may seriously harm the interests of the public, and to recover any financial losses suffered by State institutions through civil ligation. The SIU is empowered to take civil action to correct any wrongdoing it uncovers in its investigations.' 'About SIU' *Special Investigating Unit*, last accessed from https://www.siu.org.za/about-us/ on 26 March 2025.

[8] The DPCI is discussed further below at 3.4.

[9] Bruce (note 2 above) 52.

[10] For instance, other institutions with powers to investigate financial crimes and money-laundering also play a role in combatting corruption, such as the South African Revenue Service and the Financial Intelligence Centre. Pillay (note 5 above) 5.

[11] See, for instance, Bernard Lekubu 'Improving the effectiveness of the South African anti-corruption agencies and strategies: Lessons from Botswana, Hong Kong and Singapore' (2019) 32 *Acta Criminologica: African Journal of Criminology & Victimology* 74.

Both of these countries have been lauded for the relative success of these agencies,[12] though commentators have observed that this may depend on contextual factors such as the endemicity of corruption, the judicial system, degree of protection of the rule of law, and others.[13]

The question whether a multi- or single-agency approach is preferable to the South African context has been the subject of ongoing debate[14] that is beyond the scope of this chapter. However, it is worth considering some of the criticisms levelled against South Africa's multi-agency anti-corruption framework. One of these is the lack of coordination between the various agencies, leading to fragmentation that stands in the way of a holistic, cogent strategic approach.[15] This benefits those seeking to escape detection and prosecution for corrupt activities. Lack of coordination can happen where, for example, diligent investigations are conducted by one agency and then referred to prosecutorial authorities, but are not acted upon at that stage. Another criticism is the overlap between the functions of the various agencies, leading to confusion and duplication of effort,[16] with the result that functions are not performed optimally and resources are wasted.

An oft-repeated criticism directed at South Africa's framework is the lack of adequate insulation of each anti-corruption institution against political interference.[17] Instances of this are discussed in the course of this chapter. In a fragmented anti-corruption framework such as South Africa's, actions taken to undermine one institution have the potential to weaken the functioning of the entire system, as indeed happened under state capture. This vulnerability was exploited by proponents of state capture who made use of their political powers in a concerted campaign to maintain control over key institutions and prevent them from fulfilling their mandate independently. The aim of this was to prevent certain investigations from progressing, and to 'immunise or protect key people from prosecution'.[18] This campaign was so successful in decimating the proper functioning of the criminal justice system that, at the time of writing, many years after the phenomenon of state capture was recognised and

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[12] The latest Transparency International Corruption Perceptions Index at the time of writing ranks Singapore 3rd and Hong Kong 17th out of 180 countries for having lowest perceptions of corruption. *Transparency International* 'Corruption Perceptions Index' last accessed from https://www.transparency.org/en/cpi/2024 on 30 March 2025.
[13] OECD 'Models of anti-corruption institutions' in *Specialised Anti-Corruption Institutions: Review of Models* 2 ed (2013) 39 at 42.
[14] See, for instance, Lekubu (note 11 above).
[15] Bruce (note 2 above) 54.
[16] Pillay (note 5 above) 6.
[17] Ibid; Bruce (note 2 above) 54.
[18] Marianne Camerer 'Public administration and integrity in South Africa: The case of the National Prosecuting Authority' in Adam Greycar (ed) *Handbook on Corruption, Ethics and Integrity in Public Administration* (2020) 289 at 294.

following numerous investigations of corruption on the part of high-ranking senior government officials, there had been only two convictions in South African courts for state-capture related crimes.[19]

The impact of this is severe: repeated acts of interference over a number of years have the knock-on effect of undermining the public's confidence in 'government's commitment to the success of the anti-corruption system',[20] with empirical research showing an inverse relationship between levels of corruption and trust in institutions by the public.[21] This in turn feeds into general perceptions about the tolerability of corruption, which can contribute to low levels of reporting of corrupt activities and an increased willingness by the public to engage in petty corruption.[22]

It bears noting that while the apparent aim of the concerted attacks on the independence of criminal justice institutions was to undermine their anti-corruption work and in so doing, further entrench state capture, the unfortunate consequence was a weakening of the entire system of crime prevention, investigation and prosecution in relation to *all* types of crime in South Africa.[23]

As the court system plays a key role in administering criminal justice, it stands to reason that members of the judiciary would have been acutely aware of the campaign seeking to

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[19] See Jan Gerber 'Hawks' investigations only led to two state capture convictions, both with suspended sentences' *News24* 14 June 2023 last accessed from https://www.news24.com/news24/politics/parliament/hawks-investigations-only-led-to-2-state-capture-convictions-both-with-suspended-sentences-20230614 on 28 January 2025. A further conviction was secured from a court in the United States of America. See Carol Paton 'US court finds businessman guilty of bribing SAA officials for tenders' *News24* 3 August 2024 last accessed from https://www.news24.com/fin24/companies/us-court-finds-businessman-guilty-of-bribing-saa-officals-and-director-for-tenders-20240803 on 28 January 2025.

[20] Trevor Budhram & Nicolaas Geldenhuys 'Corruption in South Africa: The demise of nation: New and improved strategies to combat corruption' (2018) 31 *SAJCJ* 26 at 46.

[21] Michael Bratton & E Gyimah-Boadi 'Do trustworthy institutions matter for development? Corruption, trust, and government performance in Africa' (2016) 112 *Afrobarometer*, last accessed from https://afrobarometer.org/sites/default/files/publications/Dispatches/ab_r6_dispatchno112_trustworthy_institutions_and_development_in_africa.pdf on 30 March 2022.

[22] StatsSA 'Victims of crime survey 2013/2014' *StatsSA* (2014) 55, last accessed from https://www.statssa.gov.za/publications/P0341/P03412013.pdf on 30 March 2025.

[23] In relation to the NPA, see Lukas Muntingh, Jean Redpath & Kristen Petersen 'An assessment of the National Prosecuting Authority: A controversial past and recommendations for the future' *Dullah Omar Institute* (2017), last accessed from https://repository.uwc.ac.za/bitstream/handle/10566/5119/An%20Assessment%20of%20the%20National%20Prosecuting%20Authority%20-%20A%20Controversial%20Past%20and%20Recommendations%20for%20the%20Future.pdf?sequence=1&isAllowed=y on 30 March 2022 at 35. In relation to the criminal justice system as a whole, see Jeanne-Marié Versluis & Jan de Lange 'Rising crime, low prosecution rates: How law enforcement in SA has all but collapsed' *News24* 21 October 2019, last accessed from https://www.news24.com/citypress/News/rising-crime-low-prosecution-rates-how-law-enforcement-in-sa-has-all-but-collapsed-20191021 on 30 March 2022.

neutralise anti-corruption institutions, as well as the consequential effects of the general weakening of criminal justice institutions. It is probable that this appreciation informed, or even influenced, the courts' approach when challenges to decisions undermining these institutions were brought before them. This is explored further below.

3.3 REVIEWS OF DECISIONS CONCERNING THE APPOINTMENT OF HEADS OF ANTI-CORRUPTION INSTITUTIONS

(a) Factors contributing to reduced independence of appointees to positions of public power

Weakening the capacity of the various anti-corruption institutions within the criminal justice system to fulfil their mandate required a systematic, multi-pronged attack. An efficient means to achieve this – while still acting ostensibly within the legal framework – was to secure the appointment of leaders who were willing to act under the direction of political appointees, rather than independently.

This can be described as the most acute expression of a general trend of the politicisation of the public service. Camerer observes that this trend originated from a view from within the ANC that following the democratic transition, it had 'inherited a state which was illegitimate and structured to serve the interests of a white minority and was itself a "seedbed of corruption and criminal activity both within the country and abroad"'[24] and it was thus necessary to transform the state. This aim was pursued by a recruitment model that favoured 'political considerations over purely administrative ones' in order to ensure a break from apartheid bureaucracy and foreground the ANC's ideologies and philosophy, rather than considerations of merit and competence.[25]

This approach to recruitment then shifted away from one of ideology towards 'deploying ANC card-carrying cadres',[26] followed by a third category of political appointments to government posts, namely of friends and family of party members, mostly to reward political loyalty. Since 1999, changes were made to remove appointment responsibilities from statutory bodies such as the Public Service Commission, giving them instead to 'ministers and their provincial government equivalents'.[27]

This context illuminates that while the move towards political appointments was rooted in

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[24] Camerer (note 18 above) 290.
[25] Ibid.
[26] Ibid 291.
[27] Ibid 192.

seeking to break decisively from the apartheid state and its bureaucracy, it was co-opted to perform a narrow purpose of serving the political interests of the recruiters. This has been expressed clearly in relation to appointments of criminal justice institutions.

Partly due to South Africa's decentralised anti-corruption model, in order to ensure the effective capture of criminal justice institutions, proponents of state capture had to appoint compromised leaders to multiple key anti-corruption agencies. This endeavour was aided by weak appointment procedures set out in legislation establishing such bodies. Examples of deficiencies in such procedures include requiring selection by a relevant Minister acting alone, no provision being made for transparency in relation to decisions to shortlist or appoint, nor for candidate vetting and input by selection panels consisting of other stakeholders such as civil society.

Once appointed, such leaders were then able to further the state capture project by directing the relevant agency's scrutiny away from the corrupt activities of their political masters, weaponising that agency's investigative and prosecutorial powers against political rivals and those attempting to call out corrupt conduct and weakening the agency's ability to fulfil its role of acting against corruption from the inside.[28]

In order to protect the institutional independence of anti-corruption institutions, an urgent need arose to challenge the appointment of pliant leaders. As the enabling legislation provided for no means of public participation in such decision-making, an opposition political party and a civil-society organisation instead used lawfare to do so by turning to the courts for relief.

(i) The National Prosecuting Authority: Menzi Simelane

The case of *Democratic Alliance v President of South Africa*[29] (*Simelane*) is a good example of the courts using their powers to shield a key anti-corruption institution – in this instance, the NPA – from undesirable intrusion into its independence by political actors.

Mr Menzi Simelane was the Director-General in the Department of Justice at the time when Mr Vusi Pikoli was suspended from his position of National Director of Public Prosecutions (NDPP) by then President, Mr Thabo Mbeki. President Mbeki appointed a Commission of Inquiry led by Dr Frene Ginwala to look into Pikoli's fitness to hold office (Ginwala

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[28] Ibid 297.
[29] *Democratic Alliance v President of South Africa* 2013 (1) SA 248 (CC), better known as the *Simelane* case.

Commission). Simelane gave evidence to the Ginwala Commission under oath concerning the events giving rise to Pikoli's suspension – evidence that was later found to contain 'spurious'[30] complaints that fell to be 'rejected [as being] without substance, and may have been motivated by personal issues'.[31]

This stern indictment of Simelane's conduct spurred the Minister of Justice to request that the PSC (Public Service Commission) institute an investigation into Simelane's conduct during the Ginwala Commission. The PSC issued a report recommending that disciplinary proceedings be instituted against Simelane to consider his fitness to hold office. The Minister of Justice rejected this recommendation, however, and President Zuma appointed Simelane as NDPP two days later.

The Constitutional Court decided that the President had acted irrationally in doing so.[32] It straightforwardly applied the established legal principle that the exercise of executive power can be tested against the principle of rationality. This is done by evaluating the relationship between ends that are within the purview of the decision-maker's powers and the means chosen to achieve those ends. The means employed must be rationally related to the purpose for which the power was conferred. The ability of the court to intervene in executive decisions is circumscribed in that it is only allowed to inquire into the relationship between means and ends.[33]

On this basis, Simelane's conduct[34] made for an apparently simple conclusion that the President had erred in appointing him. This was particularly as the role of NDPP was not a purely 'political' appointment but was one that required actions to be taken without fear, favour or prejudice.[35] Thus, the fitness of a person to hold that office is objectively determinable. Here, acting dishonestly before a commission of enquiry was a relevant, objective fact that the President was duty-bound to consider. In failing to do so, the President had acted irrationally.

[30] Frene Ginwala 'Report of the enquiry into the fitness of Advocate VP Pikoli to hold the office of National Director of Public Prosecutions' *South African Government* (2008) last accessed from https://www.justice.gov.za/commissions/2008_ginwala.pdf on 24 November 2019 at 196.
[31] Ibid.
[32] *Simelane* (note 29 above) paras 86–91.
[33] Ibid para 32.
[34] This conduct included failing to disclose a letter from the President to then Minister of Justice Brigitte Mabandla concerning a request for information about the intended arrest and prosecution of National Commissioner of Police Jackie Selebi, failing to disclose the existence of a legal opinion he had obtained regarding the role of the NDPP and Directors-General, and improper accusations of dishonesty levelled against Pikoli.
[35] *Simelane* (note 29 above) paras 13, 16, and 24.

That the case turned on the rationality question meant that the court did not have to reach the thornier questions whether Simelane was fit and proper to hold the position of NDPP, and whether the President had an ulterior purpose in making the appointment. This may have been merely convenient, or (as is more likely) by design. The court was able to focus purely on the application of a legal test, ensuring that its decision was wholly within the judicial domain and could not be taken as encroaching unjustifiably into political terrain – an institutionally pragmatic approach to deter criticism from aggrieved political actors. Whichever was the case, the court could not have been unaware of the political dimensions of this case, which were well known to the public at large. These included that while the reason for Pikoli's suspension was officially reported to be 'the irretrievable breakdown of the working relationship between the Minister of Justice and Constitutional Development and [Pikoli]',[36] it was widely understood that the suspension had followed from the NPA's investigation into, and decision to prosecute, then National Police Commissioner Mr Jackie Selebi on charges of corruption. This fed into a larger unease of some senior officials regarding the role and functioning of the Directorate of Special Operations (DSO), a specialised unit tackling priority crimes including organised crime and corruption, which was housed in the NPA. Some saw the DSO as targeting ANC officials for investigation.[37] There were also ongoing tensions between the police and the DSO regarding the exercise of their respective anti-corruption mandates.[38] Lastly – and crucially – it was suggested that the DSO had pursued then Deputy President Jacob Zuma in an attempt to smear his reputation.[39]

By resting the decision on the rationality analysis, the court did not have to delve into the import of these political actions. For instance, as it did not have to consider Simelane's fitness and propriety to hold the position of NDPP, the court avoided having to pronounce on the implications of his having drafted the letter on behalf of Minister Mabandla that instructed Pikoli to cease the prosecution of Selebi, and what implications this had for his impartiality as NDPP. This was despite the fact that the court remarked on the letter as an indictment of the Minister's conduct, in that it amounted to 'improper interference with, as well as hindrance and obstruction of, the [NDPP] in the exercise, carrying out or performance of his powers, duties

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[36] Mail & Guardian Online reporter & Sapa 'Mbeki suspends prosecutions chief' *Mail & Guardian* 24 September 2007, last accessed from https://mg.co.za/article/2007-09-24-mbeki-suspends-prosecutions-chief on 24 November 2019.
[37] Ibid.
[38] News24 Reporter 'Pikoli: Why I was suspended' *News24* 17 February 2008, last accessed from https://www.news24.com/SouthAfrica/News/Pikoli-Why-I-was-suspended-20080217 on 24 November 2019.
[39] Mail & Guardian Online reporter (note 36 above).

and functions'.[40] It came perilously close, but ultimately did not go so far as to directly link that impropriety to Simelane. Rather, the court pulled back at the last instance by labelling his 'attempt to explain [the letter's] content and justify his own draft' as 'revealing'.[41] It did remark that it was 'probable that he did understand what he drafted',[42] signalling that he was aware that he was furthering an attempt to intrude on the NPA's independence. But ultimately, this was not the basis for the court's decision.

Instead, it dealt with more politically sterile questions, the answers to which were objectively determinable on the record and did not require a dissection of the facts to reveal allegiances or motivations. Their effect was akin to that of a silver bullet in applying the rationality test.

While the court did not itself decide that Simelane was not a fit and proper person to hold the position of NDPP and the eventual outcome did not rest on this, the judgment demonstrated at several points that this was the ineluctable conclusion. These points include that the Ginwala Commission's findings 'represented brightly flashing red lights warning of impending danger to any person involved in the process of Simelane's appointment',[43] through the extensive direct quotation of the Ginwala Commission's record of Simelane's testimony which served to 'reflect on his credibility and conscientiousness',[44] and through the finding that he had sought to mislead the commission and had himself acted dishonestly and falsely in accusing Pikoli of dishonesty.[45]

What emerges from this judgment is that the court's apparent reluctance to reach the questions of Simelane's fitness and propriety to hold office as NDPP and whether the President had an ulterior purpose in appointing him could be attributed to an abundance of caution in respecting the separation of powers. Even though subsequent events have shown that it was likely political considerations that influenced both the decision to suspend Pikoli and to appoint Simelane,[46] the court took care to demonstrate its restraint by justifying its decision fully,

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[40] *Simelane* (note 29 above) para 56.
[41] Ibid para 60.
[42] Ibid para 61.
[43] Ibid para 52.
[44] Ibid para 62.
[45] To the extent that the court considered the reasons advanced by the Minister as to why he ignored the criticisms before the Ginwala Commission, the evidence before the Ginwala Commission and the recommendations of the PSC, these were – as expected – purely of a technical legal nature and did not take into account any of the broader political considerations which would have made Simelane attractive as the holder of the position of NDPP.
[46] Karthy Govender 'The risk of taking risky decisions: *Democratic Alliance v President of the Republic of*

refraining from pronouncing on political decisions except where it was absolutely necessary, and neutralising even potential criticisms of overreach.[47]

Despite these efforts, criticisms did follow: not on the basis of the decision itself (which was widely lauded as being both necessary and valuable in the fight against endemic corruption and capture),[48] but rather on the basis of the weakness of the court's reasoning – particularly as it relates to rationality review. Kohn observes that despite Yacoob ADCJ's initial assertions about the clear distinction between reasonableness and rationality reviews, he employed 'superficial reasoning' to reach the dramatic conclusion that the rationality review enquiry applies to the *process* by which the decision is made and as well as to the decision itself.[49] In doing so, he ' boldly . . . expand[ed] the frontiers of rationality review' by incorporating failure to consider relevant considerations into the assessment of the rationality of a decision, linking it to the means employed to achieve the relevant end and asserting that such failures could colour process steps as irrational – thus vitiating the entire decision.[50] Kohn argues cogently that these conclusions did not follow from the case law upon which Yacoob ADCJ sought to rely.[51]

Kohn also challenges the court's insufficiently substantiated assertion that rationality review does not affect the separation of powers.[52] This is particularly in light of its reasoning shifting rationality review closer to a proportionality analysis which, she rightly suggests, should 'invoke meaningful engagement with the separation of powers'.[53]

Gildenhuys, somewhat less critical than Kohn on the reasoning employed by the court in relation to rationality review, nevertheless links the scope of rationality review employed in *Simelane* directly to the court's wish to eschew more difficult political questions:

> 'The fact that the Court avoided the reasonableness review standard, yet explicitly developed

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South Africa' (2014) 5 *CCR* 451 at 464.

47 *Simelane* (note 29 above) paras 41–5.

48 See, for example, Pierre de Vos 'Simelane and "rational" thought' *Daily Maverick* 6 October 2012, last accessed online from https://www.dailymaverick.co.za/opinionista/2012-10-06-simelane-vs-rational-thought/ on 25 January 2025.

49 Lauren Kohn 'The burgeoning constitutional requirement of rationality and the separation of powers: Has rationality review gone too far?' (2013) 130 *SALJ* 810 at 834.

50 Ibid.

51 Ibid. The cases that Yacoob ADCJ sought to rely upon were *Minister for Justice and Constitutional Development v Chonco* 2010 (4) SA 82 (CC) and *Albutt v Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC).

52 *Simelane* (note 29 above) para 44.

53 Kohn (note 49 above) 835.

> rationality review to require that each step of the process that led to the decision, as well as the decision itself, be rational, is indicative of its desire to achieve a certain outcome while still creating the impression that the case was decided on the less intrusive of the two review standards. In deciding the case on this basis, the Court was also able to avoid discussing the implications that such an appointment would have for one of the few remaining institutions capable of holding the ANC to account, a discussion that likely would have been necessitated if the reasonableness standard of review had been used. Indeed, the Court explicitly held that it made no finding as to 'whether the President had an ulterior purpose in making the appointment. As a result, the Court was not only able to largely avoid public criticism from the ruling party, but it was also commended for its carefully reasoned and constitutionally legitimate development of the rationality test.'[54]

Gildenhuys grapples with criticisms that the Constitutional Court failed to engage squarely with the threats posed by the ANC's enduring dominance as a party. She offers an astute appraisal of the factors weighing on the court: first, that 'South African legal culture is largely intolerant of political considerations featuring in judicial reasoning'.[55] Secondly, openly referring to political considerations could result in reputational damage to the court, thus weakening its own position – a particularly serious concern not only owing to its own existential considerations and institutional security, but also in light of the fact that under the Zuma presidency, only the judiciary and the Public Protector remained as uncaptured institutions able to hold the corrupt to account.[56] She observes that the

> 'threat of being labelled "anti-democratic" or "anti-ANC" may have been too real for the Court to openly undergird its decisions on the basis of the need to protect South Africa's democracy from the problems of single-party dominance and weak electoral competition, even if these considerations were key to the Court's decisions'.[57]

This analysis is borne out by various media reports referred to above, which, taken together with the context of various other acts of state capture coming to light in the early 2010s,[58] paint a picture of a fraught political atmosphere during which the actions of the ANC, but more precisely, Zuma, were largely beyond reproach in practical terms. It was no coincidence that

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[54] Lauren Gildenhuys 'Esoteric decision-making: Judicial responses to the judicialisation of politics, the Constitutional Court and *EFF II*' (2020) 36 *SAJHR* 338 at 345.
[55] Ibid 347.
[56] Ibid 348.
[57] Ibid.
[58] For a more detailed account of state capture during the Zuma years, see Ivor Chipkin & Mark Swilling (eds) *Shadow State: The Politics of State Capture* (2018) and Mbongiseni Buthelezi & Peter Vale (eds) *State Capture in South Africa: How and Why it Happened* (2023).

the two institutions most capable of exercising their powers of accountability during this time – the judiciary and the Public Protector – are institutions that, by constitutional design, are distinguished quite staunchly from the elected branches of government.

Simelane is illustrative of a court under an immense weight of responsibility. It is also illustrative of a Constitutional Court that, at least in this instance, could not be charged with the familiar accusation of 'lock[ing] themselves in an ivory tower of studied ignorance'[59] as to the real-world impact of its decisions. Faced with a choice whether to cleave close to the letter of established law regarding rationality review or to engage with an interpretation that expanded the law in a way that allowed a politically crucial decision to be made, it is apparent the correct – even if expedient – path was chosen.

(ii) The Directorate for Priority Crimes Investigations – Berning Ntlemeza

Like *Simelane*, the judgment in *Ntlemeza v Helen Suzman Foundation*[60] considered the propriety of the appointment of a leader of a key anti-corruption institution, in this case, the DPCI, a crime-fighting unit within the SAPS (South African Police Service). Lieutenant-General Berning Ntlemeza was appointed as the head of the DPCI by then Minister of Police, Mr Nathi Nhleko. This appointment attracted controversy, not least because of how the vacancy arose. Fingers had been pointed at Ntlemeza for collaborating with former head of intelligence, Mr Richard Ndluli, to oust Ntlemeza's predecessor Mr Anwa Dramat.[61] Dramat had been suspended, and later left the service, following allegations that he, together with Major General Shadrack Sibiya, had arranged for the illegal rendition of Zimbabwean nationals.[62]

Minister Nhleko appears to have circumvented ordinary appointment procedures to favour Ntlemeza, who had failed to make the initial shortlist. The post was then re-advertised, at which point Ntlemeza was shortlisted and appointed[63] to the leadership of the DPCI, beginning a tenure that would later be described as a 'nightmare reign'.[64]

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[59] Malcolm Wallis 'Commercial certainty and constitutionalism: Are they compatible?' (2016) 133 *SALJ* 545 at 550.
[60] *Ntlemeza v Helen Suzman Foundation* 2017 (5) SA 402 (SCA) (*Ntlemeza*).
[61] Sally Evans 'Hawks chief helped oust Dramat' *Mail & Guardian* 18 March 2016, last accessed from https://mg.co.za/article/2016-03-18-00-hawks-chief-helped-oust-dramat on 24 November 2019.
[62] In 2018, the NPA dropped charges against Dramat and Sibiya regarding the alleged renditions. See the report by *eNCA* reporter 'Update: Dramat, Sibiya cleared' *eNCA* 8 October 2018, last accessed from https://www.enca.com/news/update-dramat-sibiya-cleared on 24 November 2018.
[63] Abram Mashego 'How Nhleko gave Ntlemeza his job' *News 24* 22 January 2017, last accessed from https://www.news24.com/SouthAfrica/News/how-nhleko-gave-ntlemeza-his-job-20170122-2 on 24 November 2019. This process was not, however, challenged on review.
[64] Jessica Bezuidenhout 'Johan Booysen confirms the nightmare reign of Berning Ntlemeza' *Daily Maverick* 3

Two civil-society organisations, the Helen Suzman Foundation (HSF) and Freedom Under Law (FUL), applied to the High Court for an order setting aside the appointment on the basis that, in appointing Ntlemeza, the Minister had acted irrationally and unlawfully. Further, he had failed to fulfil his constitutional duty to protect the integrity and independence of the DPCI.

The HSF and FUL argued that this decision was reviewable because the Minister had failed to take relevant considerations into account – which in this case, were adverse findings against Ntlemeza made by a judicial officer in separate litigation concerning Ntlemeza's decision to suspend Sibiya.[65] Among other findings, Matojane J of the High Court took the view that Ntlemeza had suspended Sibiya in bad faith, and had violated Sibiya's right to just administrative action by virtue of his unlawful and irrational conduct.[66] Furthermore, Ntlemeza had conducted himself in a manner that was biased and dishonest, and had made false statements under oath.[67]

The Supreme Court of Appeal endorsed the High Court's decision[68] that Ntlemeza was not entitled to return to his post pending the determination of his application for leave to appeal against the High Court's judgment. While the Supreme Court of Appeal's judgment deals at length with procedural intricacies, a closer examination of the text reveals a subtle endorsement of Matojane J's findings regarding Ntlemeza's conduct and fitness to hold the position of head of the DPCI.

This can be found in the court's application of the test set out in s 18 of the Superior Courts Act 10 of 2013. This provision requires that the party applying for an order that the execution of a decision should not be suspended pending the outcome of an application for leave to appeal must establish that 'exceptional circumstances' exist that would favour the granting of the order. Further, the applicant must show that he or she will suffer irreparable harm if the order is not granted, and that the subject of the order will not suffer irreparable harm if it is granted.

The court found that the nature of the DPCI and its place in South Africa's anti-corruption

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May 2018, last accessed from https://www.dailymaverick.co.za/article/2019-05-03-johan-booysen-confirms-the-nightmare-reign-of-berning-ntlemeza/ on 24 November 2019.

65 *Sibiya v Minister of Police* 2015 JDR 0398 (GP) (*Sibiya I)*, as well as a further unreported judgment concerning Ntlemeza's application for leave to appeal the February 2015 judgment and Sibiya's application to execute the declaratory order (*Sibiya II*). A copy of *Sibiya II* is not available. It is, however, referred to in subsequent judgments of the High Court and Supreme Court of Appeal.

66 *Sibiya I* ibid para 31.

67 *Sibiya II* (note 65 above) para 8, as referred to by Tuchten J in *Helen Suzman Foundation v Minister of Police* 2016 JDR 0759 (GP) para 25.

68 *Helen Suzman Foundation v Minister of Police* 2017 JDR 0794 (GP).

architecture gave rise to such exceptional circumstances.[69] Thus, Matojane J's findings regarding Ntlemeza, when taken in the context of the DPCI's role and importance, were of such great concern that they justified disturbing the ordinary legal position. In essence, the court confirmed that Ntlemeza's position was so compromised as a result of his actions that he could not return to office, even temporarily. This is a severe indictment which speaks to the court's reluctance to have Ntlemeza occupy the position of head of DPCI. This was bolstered by the court's assessment regarding whether Ntlemeza would suffer irreparable harm as a result of the decision. As far as the court was concerned, removing Ntlemeza from office could do no further harm to his already ruined reputation.[70]

The Supreme Court of Appeal confirmed the High Court's finding that Ntlemeza's appointment was reviewable on the basis of unlawfulness and irrationality, and Ntlemeza was denied leave to appeal by both the Supreme Court of Appeal and the Constitutional Court.

It is worth considering that the circumstances in *Ntlemeza* might never have arisen had the Constitutional Court decided differently in *Glenister v President of the Republic of South Africa*[71] (*Glenister II*) around two years prior. While the import of this case is discussed in more detail below, for these purposes it suffices to note that in a subsequent case,[72] the HSF raised a constitutional challenge against s 17CA(1) of South African Police Service Act 68 of 1995 which set out the procedures to be followed in appointing the head of the specialised crimes unit within the police service, the DPCI. One of the HSF's arguments[73] was that the prescribed appointment procedure – which called for the Minister to appoint the DPCI head with the concurrence of Cabinet – was inadequate in that it fails to insulate him or her from political influence.[74] Rather than leaving the decision within the sole control of the national executive, the HSF submitted that Parliament's confirmation ought to be required in order to safeguard the DPCI's independence.

Two differing views emerged from the Constitutional Court on this question: that of Mogoeng CJ, writing for the majority, and Cameron J, who wrote a minority dissent in which

[69] *Ntlemeza* (note 60 above) para 45.
[70] Ibid para 46.
[71] 2011 (3) SA 347 (CC).
[72] *Helen Suzman Foundation v President of the Republic of South Africa; Glenister v President of the Republic of South Africa* (*Helen Suzman Foundation (2015)*) 2015 (2) SA 1 (CC).
[73] The HSF's first argument that the head of the DPCI should possess legal qualifications was dismissed, correctly, by Mogoeng CJ in his majority opinion.
[74] *Helen Suzman Foundation (2015)* (note 72 above) para 72.

two justices[75] concurred. Mogoeng CJ followed the reasoning in *Glenister II* closely, observing that the appointment procedure in relation to the position of DPCI head was no different to the procedure relating to the head of NPA, which the Constitutional Court had itself concluded was adequately independent – and that it was that same head who appointed the leader of the DSO (Directorate of Special Operations), which the DPCI replaced.[76]

Mogoeng CJ remarked directly on the question of separation of powers, electing to follow a cautious approach:

> 'Separation of powers requires that the Judiciary refrain from being unnecessarily prescriptive to both the Executive and Parliament on the kind of institutionally independent body required to stem the tide of corruption in this country. The constitutionally compliant policy choices they make must be respected even if there are, in the opinion of the Judiciary, better options available. Ours is to ensure that the constitutional requirements for a functional and efficient corruption-busting machinery have been met and nothing more or less.'[77]

Cameron J challenged this view, interrogating the conclusion that the procedure to appoint the DPCI head was indeed a 'constitutionally compliant policy choice'[78] – a conclusion that arose directly from *Glenister II*. While Mogoeng CJ drew from comparisons made in *Glenister II* against appointment procedures for the head of the DSO, Cameron J pointed out that such comparisons did not elevate the DSO to a gold standard for independence, and the question of the constitutionality of the appointment procedure remained open.[79] He then went on to make a thoroughly reasoned and deeply compelling case for the need for enhanced measures to ensure independence in the appointment of the head of the DPCI, including parliamentary approval.[80]

Given Cameron J's valid concerns and his sensible suggestion that enhanced oversight might allay them, it bears considering why no more than two justices joined on to his opinion. One can surmise that *Glenister II* – itself a judgment that employed a degree of interpretive latitude to reach its conclusions – left insufficient room to assail, after the fact, the appointment procedures contained in the DSO's establishing legislation. In other words, it almost worked

75 Froneman J and Van der Westhuizen J.
76 *Helen Suzman Foundation* (*2015)* (note 72 above) para 74.
77 Ibid para 75.
78 Ibid.
79 Ibid para 170.
80 Ibid paras 170–7.

too well by entrenching the DSO in the class of institutions regarded as possessing the necessary degree of independence. While this may have been beneficial at the time to show the stark differences between the DSO and the DPCI, thereby highlighting the need for measures to improve the DPCI's independence, the unintended consequence was that it was difficult not to conclude that on matters where the two institutions compared favourably, the constitutional standard was not met. Without the trigger of potential unconstitutionality to 'unlock' the judiciary's entitlement to enquire into the appointment procedures, the separation-of-powers concerns prevailed.

The majority's endorsement of Mogoeng CJ's view over that of Cameron J has been criticised as 'excessively deferential' and has having 'created a significant problem for the legitimacy of so important an institution'[81] – particularly in light of the events leading to Ntlemeza's removal from office. More rigorous appointment procedures, as well as parliamentary oversight, might well have prevented Ntlemeza's appointment at the outset, negating any need for the in-depth enquiry into his fitness and propriety performed by Matojane J and subsequent litigation by the HSF and FUL. However, this is mere conjecture – as Cameron J rightly pointed out, where the ruling party has a decisive majority, as was the case with the ANC, it is possible that decisions of the executive will be approved out of party loyalty alone.[82]

In my view, arguments that Mogeng CJ's approach was 'excessively deferential' wrongly place criticism at the judiciary's door. The onus rests rather on the elected branches of government to take steps to render appointment procedures more transparent, subject to oversight and, where appropriate, public participation.[83] The subsequent appointment of Lt-Gen Godfrey Lebeya in May 2018 was not preceded by any such additional measures. However, when filling the role of NDPP following the removal of Shaun Abrahams (discussed further below), President Ramaphosa embarked on a more consultative and transparent process: he established an advisory panel comprising of legal organisations and independent public institutions to assist him in identifying and selecting potential candidates for the post.[84]

[81] Jason Brickhill et al 'The administration of justice' (2015) *AS* 1 at 43.
[82] *Helen Suzman Foundation* (*2015)* (note 72 above) para 166.
[83] Institute for Security Studies 'Parliament can help recruit better leaders for South Africa's police and Hawks' *ISS Africa* 12 September 2017, last accessed from https://issafrica.org/about-us/press-releases/parliament-can-help-recruit-better-leaders-for-south-africas-police-and-hawks on 10 September 2022.
[84] The Presidency 'Statement on the appointment of the National Director of Public Prosecutions' *The Presidency Website* (2018), last accessed from https://www.thepresidency.gov.za/newsletters/statement-appointment-national-director-public-prosecutions on 14 September 2022.

Eleven candidates were interviewed in a process open to the media – albeit that this transparency was achieved as a result of a successful urgent application by the Right2Know Campaign in the High Court.[85]

(iii) Conclusion

Taken together, the *Simelane* and *Ntlemeza* cases are demonstrative of the courts' appreciation of the necessity and importance that leaders of anti-corruption agencies demonstrate high standards of ethical conduct. It is noteworthy that in doing so, the relevant courts relied on objective sources to establish Simelane and Ntlemeza's wrongful conduct. This would have helped to insulate the courts from allegations of pursuing political ends, as they were merely affirming the findings of another impartial arbiter.

The *Helen Suzman Foundation (2015)* case is illustrative of the restraint displayed by the Constitutional Court to ensure that the separation of powers was respected. This is even where the alternative outcome could plausibly have been justified as falling within the judiciary's powers, and could have effected lasting and vitally important change within anti-corruption institutions concerning how their leadership is appointed and, with hindsight, could have prevented the need for litigation to oust Ntlemeza by preventing his appointment at the outset. This caution by the court left room for the executive to take its own initiative to open up appointment procedures when appointing the NDPP – but unfortunately, such transparency was implemented on a seemingly ad-hoc basis, and it appears that no attempts have been made to formalise this new approach by amendment to the governing legislation. Again, this is through no fault of the judiciary's, but rather that of the elected branches of government.

3.4 CHALLENGES TO DECISIONS CHANGING THE STRUCTURE AND FUNCTIONING OF A KEY ANTI-CORRUPTION INSTITUTION: GLENISTER

(a) Background to the Glenister litigation

In 2008, two Acts of Parliament were enacted in order to give effect to political decisions that placed the future of South Africa's anti-corruption efforts in the balance. These decisions became the subject of a number of cases in which the judiciary affirmed not only the great need

[85] Raeesa Pather 'High Court orders NDPP interviews open to media' *Mail & Guardian* 13 November 2018, last accessed from https://mg.co.za/article/2018-11-13-high-court-orders-ndpp-interviews-open-to-media/ on 6 June 2022.

for effective anti-corruption agencies, but also how essential it is that such agencies have their independence protected. It did so in the face of clear signs that its judgments would be politically unpopular.

The first of these Acts, the National Prosecuting Authority Amendment Act 56 of 2008 (NPA Amendment Act) had the effect of disbanding the DSO, an institution that was commonly known as the 'Scorpions'. The second, the South African Police Service Amendment Act 57 of 2008 (SAPS Amendment Act), established a new corruption-busting entity, the DPCI, located in the SAPS, which came to be known as the 'Hawks'.

The context within which these decisions were made is important. The DSO had been established by former President Thabo Mbeki in 2001 as a unit within the NPA.[86] Its express purpose was to investigate priority crimes, thereby 'supplement[ing] the efforts of existing law enforcement agencies in tackling organised crime'.[87] It successfully prosecuted a number of high-profile cases, and as a result enjoyed wide public support.[88] Not long after its establishment, however, the DSO commenced investigations into alleged corruption perpetrated by high-ranking members of the ANC in respect of the procurement of arms. This, together with its successful prosecution of a trusted advisor to Mr Jacob Zuma, Mr Schabir Shaik, as well as its handling of the investigation of Zuma for corruption, apparently led to questions about the DSO's operations and location within the NPA and ultimately, to its disbanding.[89] This was notwithstanding that a commission of inquiry led by Justice Sisi Khampepe recommended that the DSO remain within the NPA, though with some changes to its operations and functioning.[90]

The decision to disband the DSO and to create the DPCI was unpopular with the public,[91] and was widely denounced by civil society, organised business, opposition parties,[92] and members of the academy.[93] It also raised the ire of businessman Mr Hugh Glenister, a private

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[86] Section 7(1) of the National Prosecuting Authority Act 32 of 1998.
[87] *Glenister II* (note 71 above) para 6.
[88] Joey Berning & Moses Montesh 'Countering corruption in South Africa: The rise and fall of the Scorpions and the Hawks' (2012) 39 *SA Crime Quarterly* 3 at 5.
[89] Ibid 6–7.
[90] Ibid 7.
[91] *News24* Reporter 'Survey: Leave Scorpions alone' *News24* 19 March 2008, last accessed from https://www.news24.com/SouthAfrica/News/Survey-Leave-Scorpions-alone-20080319 on 5 December 2019.
[92] Dianne Kohler-Barnard 'Who killed the Scorpions?' *Politicsweb* 18 July 2017, last accessed from https://www.politicsweb.co.za/documents/who-killed-the-scorpions on 5 December 2019.
[93] David Bruce 'Demise of Scorpions will be dismal for democracy' *Centre for the Study of Violence and Reconciliation*, last accessed from https://www.csvr.org.za/media-articles/latest-csvr-in-the-media/2094-demise-of-scorpions-will-be-dismal-for-democracy- on 5 December 2019; Pierre de Vos 'On the disbanding of the

citizen, who challenged both Acts of Parliament through the courts.

Characterising the political dimensions of this case in context some years later, Constitutional Court Justice Edwin Cameron – delivering a lecture at Duke University in 2011 – reflected that Glenister's challenge

> 'reveals the confluence of two different conceptions of the use of instruments of government: the use of state power, on the one hand, to pursue private, individual agendas; and the use of state power, on the other, to secure clean and accountable government'.[94]

Cameron asserted that the controversy that arose concerning the DSO 'was about the factional use of power, with each side intently asserting the guilt of the other'; that it was being used as a tool to persecute political enemies; that its success as a corruption fighting unit posed a threat to corrupt leaders, fuelling the drive to do away with it, and even that 'the unit's investigations against prominent post-transition politicians had a racial edge, and brought the new order into discredit'.[95] The decision to disband the DSO was highly political, and steeped in a desire to undermine effective anti-corruption efforts as part of a broader state capture project.

(b) Glenister I

The political dimensions of the litigation were apparent from the start. The judgment in *Glenister v President of the Republic of South Africa*[96] (*Glenister I)* demonstrated the court's deference to the legislative process. At the time that *Glenister I* was instituted in the High Court and on an urgent basis, the legislation disbanding the DSO and establishing the DPCI was still making its way through the two Houses of Parliament. Glenister's challenge was to the executive decision to initiate the legislation, and he sought an order directing the relevant Ministers to withdraw the Bills from the National Assembly.[97] His challenge was thus directed squarely at the actions of the two political arms of government, the executive and the legislature.

Politics was also placed front and centre in the submissions to the court, with the opposition

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Scorpions' *Constitutionally Speaking* 24 January 2008, last accessed from https://constitutionallyspeaking.co.za/on-the-disbanding-of-the-scorpions/ on 5 December 2019.

[94] Edwin Cameron 'Constitutionalism, rights and international law: The *Glenister* decision' (2013) 23 *Duke Journal of Comparative and International Law* 389 at 392.

[95] Ibid 393.

[96] 2009 (1) SA 287 (CC).

[97] Ibid para 3.

United Democratic Movement (UDM) attempting to impugn the decision on the basis that Cabinet was acting under dictation of the ANC.[98] The court made short shrift of this argument, dismissing it and acknowledging that 'there is nothing wrong, in our multi-party democracy, with Cabinet seeking to give effect to the policy of the ruling party', provided that such policy passes constitutional muster.[99]

The UDM also raised an argument that expressly stated what could well be the unspoken impetus behind most, if not all, instances of 'lawfare' in South Africa – that owing to one-party domination 'the Court should act because no-one else will'.[100] To this, the court merely affirmed the limits of judicial power as set out in the Constitution, simply remarking that '[t]he role of this Court is established in the Constitution. It may not assume powers that are not conferred upon it.'[101] The court thus demonstrated its unwillingness to be drawn into political battles, at least when asked to do so in such blatant terms.[102]

Even taking into account those arguments, *Glenister I* was relatively uncontroversial. By constitutional design, there are only very limited instances where a court would be justified in intervening prior to the conclusion of a legislative process. The bar is set high to show that the harm caused by the passage of impugned legislation is material and irreversible. The applicant did not clear it here.

The NPA Amendment Act and SAPS Amendment Act were duly passed.

(c) Glenister II

Glenister challenged the decision to pass the NPA Amendment Act and the SAPS Amendment Act on similar grounds to those in *Glenister I*, with the HSF as *amicus*.

In *Glenister II*, the majority[103] and minority judgments[104] agreed that the Constitution does not oblige Parliament to locate a specialised anti-corruption unit only in the NPA.[105] Ultimately, however, they reached vastly different outcomes. Ngcobo CJ would have dismissed the appeal. This would effectively have upheld the executive decision to act contrary

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[98] Ibid para 20.
[99] Ibid para 53.
[100] Ibid para 54.
[101] Ibid.
[102] Ibid 55.
[103] That of Moseneke DCJ and Cameron J at paras 160–251.
[104] That of Ngcobo CJ at paras 1–159.
[105] *Glenister II* (note 71 above) para 162.

to the Khampepe Commission's recommendations.[106] Moseneke DCJ and Cameron J, however, upheld the appeal to a certain extent, electing not to invalidate the two Acts entirely. Instead, the two statutes were declared invalid to the extent that they failed 'to secure an adequate degree of independence' for the DPCI.[107]

The nub of the difference between the minority judgment and the majority judgment is the approach to s 39(1)*(b)* of the Constitution[108] and the proper place of international law in South Africa's constitutional scheme. The minority judgment cautioned that until they are domesticated, ratified international agreements serve as interpretive aids and following domestication, they have the status of regular legislation. The obligations in those instruments cannot be elevated to constitutional rights and obligations. This is why there is no constitutional obligation to establish an independent anti-corruption unit.[109] To the extent that South Africa is bound by the United Nations Convention Against Corruption (UNCAC) to have such a unit, that instrument does not prescribe where such a unit must be located,[110] and so the executive was within its powers to disband the DSO and create the DPCI.

The minority judgment's assessment of independence drew on requirements contained in the UNCAC to conclude that members of the agency had to be protected from undue influence.[111] Taking into account that independence does not require absolute independence, the minority judgment was not troubled by the degree of political oversight exercised over the SAPS, and consequently, the DPCI. It was satisfied with the safeguards contained in the SAPS Amendment Act, taking the view that there was sufficient structural and operational autonomy.[112]

The majority judgment, on the other hand, reached its conclusion by engaging in a more searching analysis of the relevant constitutional provisions, including those relating to international law. In doing so, it placed far greater emphasis on s 39(1)*(b)* of the Constitution. Like the minority judgment, the majority acknowledged that the Constitution does not expressly command that an anti-corruption unit be established, nor does it prescribe operational

[106] By disbanding the DSO and creating the DPCI, located in the SAPS, as well as the subsequent legislative ratification of that decision in the form of the NPA Amendment Act and SAPS Amendment Act.
[107] *Glenister II* (note 71 above) para 251.
[108] Section 39(1)*(b)* provides that '[w]hen interpreting the Bill of Rights, a court, tribunal or forum . . . must consider international law'.
[109] *Glenister II* (note 71 above) para 113.
[110] Ibid para 80.
[111] Ibid para 118.
[112] Ibid paras153–6.

and other attributes for one.[113] The key word here, however, is 'expressly'. Unlike the minority judgment, which took the lack of prescription as creating a wide degree of discretion for the executive to decide for itself the structure, location, and functioning of an anti-corruption unit, the majority went looking for requirements that would ensure the effectiveness of the 'scheme taken as a whole'.[114] It found them in international law.[115]

The majority made use of the generality of s 7(2) of the Constitution[116] to conclude that it 'appropriates [the international law] obligation [to create an anti-corruption unit with the necessary independence] for itself, and draws it deeply into its heart, by requiring the state to fulfil it in the domestic sphere'.[117] It then teased out the implicit constitutional requirements for an anti-corruption agency by reference, inter alia, to provisions in the Constitution and the UNCAC.[118] As it turned out, these requirements circumscribe the discretion of the executive and legislature by prescribing essential features for anti-corruption agencies. Most notably, the effect of these provisions is to create a higher standard for the constitutional review of the legislation in question than mere rationality. The standard, according to the majority, is reasonableness.[119]

The reasonableness requirement is sourced – impliedly – in the obligation contained in s 7(2) of the Constitution. As such, the executive ostensibly has a wide range of conduct from which to choose when adopting measures to fight corruption (and the court will not prescribe what these may be) – with the caveat that they must be reasonable. And thus, the range of possible options available to the political arms of government is narrowed considerably.

Reasonableness, the majority found, must be determined at least in part with reference to international law, which demands that an anti-corruption unit have the 'necessary' independence.[120] Concerns about encroachment on executive discretion were allayed by noting that the requirement of 'necessary' independence establishes a parameter, but does not prescribe form and content. This did, however, allow the court to apply the test as to whether the necessary independence is present. The use of reasonableness instead of rationality allowed

[113] Ibid para 175.
[114] Ibid.
[115] Ibid para 178.
[116] Section 7(2) of the Constitution provides that '[t]he state must respect, protect, promote and fulfil the rights in the Bill of Rights.'
[117] Ibid para 189.
[118] Ibid paras183–8.
[119] Ibid para 191.
[120] Ibid para 192.

for a greater degree of judicial scrutiny of acts of executive decision-making: whereas the rationality enquiry could go no further than the question whether the establishment of the DPCI was rationally related to a legitimate government purpose,[121] reasonableness permitted the court to ask whether the DPCI was adequately independent. As the court observed, '[t]o create an anti-corruption unit that is not adequately independent would not constitute a reasonable step'.[122]

The majority concluded that, in many respects, the necessary independence was absent.[123] It then went on to hold that chapter 6A of the South African Police Service Act 68 of 1995 (SAPS Act) was inconsistent with the Constitution and invalid to the extent that it failed to secure an adequate degree of independence for the DPCI.[124]

What is interesting about *Glenister II* is how the majority was at pains to describe its line of reasoning and conclusions reached as self-evident, when (particularly in comparison to the dissenting judgment) they were not. In order to reach the requirement of 'necessary' independence with reference to international law, the majority had, first, to look deeply into s 7(2) of the Constitution, ascribing meaning to the provision that – while not incorrect – is, with respect, certainly not apparent. The effect was to elevate the standard of constitutional review of executive conduct, in this case, beyond rationality and to reasonableness.

Secondly, in order to strike down the SAPS Amendment Act for failing to create the necessary independence of the DPCI, the majority first had to establish that the interpretive injunction in s 39(1)*(b)* allowed binding rights and obligations to be created by international law. This was achieved by circling back to s 7(2) and reasonableness:

> 'That the Republic is bound under international law to create an anti-corruption unit with appropriate independence is of the foremost interpretive significance in determining whether the state has fulfilled its duty to respect, protect, promote and fulfil the rights in the Bill of Rights . . . Section 7(2) implicitly demands that the steps the state takes must be reasonable. To create an anti-corruption unit that is not adequately independent would not constitute a reasonable step. In reaching this conclusion, the fact that section 231(2) provides that an international agreement that Parliament ratifies "binds the Republic" is of prime significance. It makes it unreasonable for the

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[121] Ibid paras 63–70.
[122] Ibid para 194.
[123] See the majority's discussion from *Glenister II* (ibid) paras 208–50.
[124] Ibid para 251.

state . . . to create an anti-corruption entity that lacks sufficient independence.'[125]

This is important, because it leads to another point of departure from the minority judgment. Both the minority and majority judgments agree that the constitutional requirement is not complete independence. However, the conclusions reached about the degree of independence created, and its acceptability, were very different. One potential reason is that they had different standards in mind: rationality, as opposed to reasonableness.

The question arises how two judgments, taking into account the same facts and arguments, reached conclusions that were at such variance with each other. One possible explanation is that – whether consciously or unconsciously – the majority was cognisant of the potential harm that could follow the loss of the DSO if it were not adequately replaced. It sought out reasoning that led to an outcome that required a more robustly independent anti-corruption unit, even if that was located within the SAPS. That reasoning process used the opportunity created by the indeterminacy in s 7(2)[126] to import requirements from international law, even where no such requirements were expressly incorporated into the constitutional architecture.

This arguably was what enabled the court to test the provisions of the SAPS Amendment Act against what has now become known as the STIRS requirements for an effective anti-corruption agency (that is, one that is specialised, trained, independent, adequately resourced, and which enjoys security of tenure),[127] and to conclude that the DPCI was, in fact, insufficiently independent. There are therefore a number of textual indicators that point towards the majority's having had an outcome in mind (or perhaps an unarticulated 'hunch' at the time of adjudication as to the outcome) and finding the reasoning to reach it.

Notably, the majority demonstrated its understanding of how this matter was perceived generally in society by incorporating public perception into the test for necessary independence. The court took into account 'whether a reasonably informed and reasonable member of the public will have confidence in an entity's autonomy-protecting features' in determining whether it is sufficiently independent.[128] This allowed the court to compare the

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125 Ibid para 192.
126 That is, indeterminacy around the 'degree of action required by . . . s 7(2), and the latitude given to the state to realise its obligations'. Michael Bishop & Ngwako Raboshakga 'National legislative authority' in Stuart Woolman et al (eds) *Constitutional Law of South Africa* 2 ed (Service 3) 05–11.
127 These requirements appeared to be drawn from the report prepared in 2008 by the Organisation for Economic Co-operation and Development 'Specialised anti-corruption institutions: Review of models.' This report was extensively quoted in *Glenister II* (note 71 above).
128 Ibid para 207.

DSO and DPCI even as it acknowledged that the DSO was not a 'gold standard' for independence and disavowed any inclination to compare the two agencies, although, as pointed out above, this distinction was lost in at least one instance.[129] Public perception is a convenient proxy that not only gave the court the opportunity to acknowledge the public's disfavour towards the DPCI, but also allowed it to make the statement that the DSO was independent, and that 'comparison with it shows how markedly short of independence the DPCI falls'.[130]

The idea that the public's confidence in an anti-corruption agency's independence is 'a component of, or constitutive of, its independence'[131] was raised again in *Helen Suzman Foundation (2015)*.[132] This case considered the constitutional validity of further amendments to the SAPS Act that were meant to address the criticisms levelled against the SAPS Amendment Act in *Glenister II*.[133]

The majority in *Helen Suzman Foundation (2015)* tempered the reach of *Glenister II*'s reasoning. For instance, it took a different view about the import of public perception. In the High Court, Glenister had sought to introduce additional evidence to support his argument that the continued location of the DPCI in the SAPS was not constitutionally tenable, because 'the SAPS is the most corrupt institution in South Africa'.[134] Glenister was essentially attempting to weave the narrative about the dissolution of the DSO and the establishment of the DPCI into a greater one about corruption and state capture generally.

This evidence was treated very differently in the various judgments, a distinction that reveals the varying degrees of willingness to engage with political considerations when adjudicating. The majority judgment was scathing, labelling the allegations in the material as 'reckless and odious political posturing or generalisations which should find no accommodation or space in a proper court process'.[135] The object of including them was deemed to be to

> 'scandalise and use the court to spread political propaganda that projects others as irredeemable crooks who will inevitably actualise [the] projection that South Africa may well become a failed

[129] See the discussion of *Helen Suzman Foundation (2015)* in the context of *Ntlemeza* above.
[130] Ibid para 210.
[131] Ibid para 207.
[132] Note 72 above.
[133] *Glenister II* (note 71 above).
[134] Ibid para 24.
[135] Ibid para 29.

state. This stereotyping and political narrative is an abuse of court process'.[136]

Public perception as referred to in *Glenister II* could not, the majority concluded, mean that the public should be asked from time to time to weigh in on an institution's independence. Rather, the 'overriding consideration is whether the DPCI legislation has inbuilt autonomy-protecting features to enable its members to carry out their duties without any inhibitions or fear of reprisals'.[137] Accordingly, the additional evidence had correctly been struck out. [138]

The *Glenister* cases and *Helen Suzman Foundation (2015)* illustrate significant divergence in judicial approach to the question when it is appropriate to intervene in executive or legislative decision-making. *Glenister I* was highly deferential, whereas *Glenister II* drew on an intricate interpretation of constitutional provisions to justify its much more interventionist approach. The extent of the limitations on the court's powers to intervene in the policy choices of the executive and legislature on this issue became apparent in *Helen Suzman Foundation (2015)*, where the court tested the impugned provisions against reasonableness, narrowly construed, with the result that even though the DCPI was objectively not as independent as the DSO, the court could do no more to make an order beyond what reasonableness demanded. Glenister's motivation in bringing the case was to restore the DSO.[139] Even though doing so would have benefitted anti-corruption efforts, the courts could not risk overreaching into the executive's powers.

(d) What does* Glenister II *tell us about the court's willingness to employ interpretations that are not readily apparent from the constitutional text?

Glenister II was met with a range of reactions, from enthusiastic praise[140] to intense criticism. This varying spectrum of responses indicates that the judgment broke new ground in constitutional interpretation, but in a way that was deeply uncomfortable to more than a few commentators. As discussed below, many of the concerns related to the manner in which international law was used to not only interpret, but also import constitutional obligations into

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[136] Ibid. The court, at para 35, went even further, indicating that Glenister's evidence would have had the effect of reducing the dispute to a 'free-for-all insult-trading and political-point-scoring contest, sanctioned by a court of law'.
[137] Ibid para 32.
[138] Ibid para 35.
[139] *Glenister II* (note 71 above) para 17.
[140] See Pierre de Vos '*Glenister*: A monumental judgment in defence of the poor' *Constitutionally Speaking* 18 March 2011, last accessed from https://constitutionallyspeaking.co.za/glenister-a-monumental-judgment-in-defence-of-the-poor/ on 15 June 2022.

domestic law. In a broader sense, many expressed unease with the implication of the judgment on the separation of powers, alleging that judges had overstepped in the interests of reaching an expedient outcome.

In the political sphere, the decision was, unsurprisingly, unpopular with the ANC. The erstwhile secretary-general, Gwede Mantashe, used it to justify criticism of the judiciary generally, insinuating that the judgment amounted to the judiciary's positioning itself in opposition to the elected branches of government in a hostile and potentially dangerous manner.[141] He remarked that:

> 'My view is that there is a great deal of hostility that comes through from the judiciary towards the executive and Parliament, towards the positions taken by the latter two institutions. Unless this issue is addressed deliberately it's going to cause instability. It undermines the other arms of government and this could cause instability.'[142]

Among the critics from academia were Motala[143] and Tuovinen.[144] Motala, the more strident of the two, looks to the political dimensions of the case, while Tuovinen focuses on the court's application of international law. The essence of Motala's criticism is this: the majority's judgment departed from the text of the Constitution and ignored the court's own precedent that international law obligations are not self-executing in order to manufacture an obligation mandating the existence of an anti-corruption unit. Unfortunately, he does not engage with the majority judgment's views[145] that the Constitution, read holistically, points to the need for an anti-corruption institution outside of the executive's control.[146]

Tuovinen applies a more nuanced criticism about the majority's opinion as it interacts with the constitutional text. He argues that in electing to interpret s 7(2) almost entirely on the basis

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[141] Mpumelelo Mkhabela 'Full interview: ANC's Mantashe lambasts judges' *SowetanLive* 18 August 2011, last accessed from https://www.sowetanlive.co.za/news/2011-08-18-full-interview-ancs-mantashe-lambasts-judges/ on 9 June 2022.

[142] Ibid.

[143] Ziyad Motala 'Divination through a strange lens' *TimesLIVE* 27 March 2011, last accessed from https://www.timeslive.co.za/ideas/2011-03-27-divination-through-a-strange-lens/ on 10 June 2022. This comment was published 10 days after the judgment in *Glenister II* was handed down and its arguments are not as rigorous as could be expected from, for instance, a peer reviewed journal article or book. Unfortunately, Motala did not take his arguments any further than this comment in any subsequent publication.

[144] Juha Tuovinen 'What to do with international law: Three flaws in *Glenister*' (2014) 5 *CCR* 435.

[145] *Glenister II* (note 71 above) paras 195–200.

[146] It is difficult to conceive how the criminal justice system would investigate and prosecute corruption – a task which often requires highly specialised skills due to need to identify complex relationships and intricate financial flows – in an effective manner without a specialised unit such as the DSO or DPCI. The mandate for the very *existence* of the anti-corruption is very clearly be derived from the Constitution; there is no need to refer to international law to establish it.

of international law, the court failed to give due weight to norms contained in the Bill of Rights (by specific reference) and the Constitution (more generally), engaging with them in a 'cursory' fashion.[147] He argues that in *Glenister II*, international law 'takes the place of an engagement with substantive rights', and that while the judges acknowledged that 'the architecture of the Constitution and the erosion of a number of rights' would also have triggered s 7(2) as well, '[t]hey do not take this proposition any further'.[148]

Tuovinen may well be correct that *Glenister II* represents somewhat of a missed opportunity to build up South African jurisprudence on the impact of corruption on the specific constitutional rights, but this particular criticism is overstated. Tuovinen cites a single paragraph of the majority judgment in support of his claim – whereas the majority in *Glenister II* refers to the impact of corruption on human rights consistently throughout the judgment.[149] Perhaps what Tuovinen would have preferred is the more detailed analysis of the sort found in *Department of Transport and Others v Tasima (Pty) Ltd*,[150] handed down several years after *Glenister II*. Such discussion of the particular impact of corruption on specific rights is welcome, and is an increasingly prolific area of academic enquiry,[151] but, on its own, could not have solved the central questions in *Glenister II* about what form the Constitution envisages the anti-corruption institution to take. However, it could well have insulated the majority's reasoning against criticism by drawing clear lines linking the rights in the Bill of Rights to issues of institutional independence.[152]

Motala's more credible criticism[153] based on the text of the Constitution is that it grants no authority to the courts to 'provide their parameters on how an anti-corruption institution should be constituted'.[154] In doing so, the court imposed its own policy choices on the executive in a decision that was 'ideological and political' – an action that violated the separation of powers, undermined the court's legitimacy and 'showed a great distrust for democracy and a disdain

[147] Tuovinen (note 144 above) 447.
[148] Ibid.
[149] See paras 166, 170, 172–3, 175, 177 and 198 of *Glenister II* (note 71 above).
[150] 2017 (2) SA 622 (CC) paras 103–8.
[151] See, for instance, John C Mubhangizi 'A human rights based approach to fighting corruption in Uganda and South Africa: Shared perspectives and comparative lessons' (2020) 24 *Law, Democracy and Development* 225 at 229–30 and EA Mantzaris 'Corruption as a violation of basic human rights in South Africa and Russia' (2017) 9 *African Journal of Public Affairs* 15.
[152] See Henk Botha 'Representing the poor: Law, poverty and democracy' (2011) 22 *Stell LR* 21 at 538–9 for compelling, fleshed-out reasoning drawing such linkages.
[153] A further argument of Motala's was that the Constitution does not prescribe where the anti-corruption unit should be located – though, as Justice Cameron pointed out in his address to Duke University (note 94 above) at 407, this argument misconstrues the majority judgment, which made no such finding.
[154] Motala (note 143 above).

for political accountability'.[155] Motala excoriates the majority judgment for lacking 'cogency, depth of reasoning, or logic and fundamentally ignor[ing] the text and separation of powers', remarking that its approach 'reflects a low water mark in South Africa's constitutional jurisprudence'.[156] Cameron, responding to Motala, acknowledges that while the interpretation employed in the majority judgment 'may be viewed as novel or unique in nature', it 'draws deeply on the whole text of the Constitution' by examining not just the specific provisions in isolation, but the entire scheme created by the Constitution.[157] Cameron thus recognises the transformative and innovative character of *Glenister II*, underscoring this by an express statement that '[t]he decision does break ground'.[158]

The schism between the views of Motala and Cameron on what the Constitution justifiably permits in these circumstances can be ascribed to differing ideas about the application of transformative constitutionalism of the sort described by Klare.[159] The majority's reasoning can be seen as characteristic of the conscientious judge, one who 'operates within and to some degree authentically accepts legal constraint, yet acts strategically to accomplish freedom and social justice',[160] and who engages in the 'enterprise of inducing large-scale social change through nonviolent political processes grounded in law'.[161] Botha is correct in the assertion that placing 'legal' and 'ideological' decision making at diametrically opposed ends of a spectrum fails to acknowledge that the Constitution is, at its core, a political document.[162] The appropriate test is whether the reasoning employed by the court is plausible under the Constitution; if not, 'that is cause for criticising the Court's reasoning, not for concluding that it has forsaken its judicial mandate in favour of an overtly political role.'[163]

As far as the role of politics in *Glenister II* is concerned, the evidence is apparent: by the very extra-judicial account of one of the scribes of the majority judgment,[164] the political dimensions of the litigation were well known to the court, and thus the inevitable political fallout came as no surprise. *Glenister II* has also been charged with being yet another case in

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155 Ibid.
156 Ibid.
157 Cameron (note 94 above) 407.
158 Ibid.
159 Karl Klare 'Legal culture and transformative constitutionalism' (1998) 14 *SAJHR* 146.
160 Ibid 148.
161 Ibid 150.
162 Botha (note 152 above) 536.
163 Ibid.
164 Cameron (note 94 above) 392. This is also demonstrated by the various courts in the *Glenister* decisions canvassing the political context of the decisions at length. Rosaan Kruger 'The ebb and flow of the separation of powers in SA constitutional law – The *Glenister* litigation campaign (2015) 48 *VRU* 49 at 60.

which the court 'largely avoided developing a principled jurisprudential approach to challenging the ANC's increasing grip on power',[165] but the assessment of Gildenhuys in response is the correct one: such a challenge would not only have gone beyond the limits of the powers bestowed upon the judiciary by the Constitution, it would have opened up the court to political attack. The risks of this were too great during the height of state capture under the Zuma presidency, when few anti-corruption institutions remained uncaptured and able to hold members of the executive to account for involvement in the state-capture enterprise.[166]

3.5 THE SUSPENSION AND / OR REMOVAL OF LEADERS OF ANTI-CORRUPTION INSTITUTIONS

Threatening to suspend or remove leaders of anti-corruption institutions who refuse to take dictation from political actors is a particularly insidious and chilling method of subversion. First, it disables the office-holder from acting against wrongdoing. Secondly, suspension without pay can be abused to render independent office-holders compliant,[167] and removal can signal to a successor her likely fate if she is similarly steadfast in the independent and impartial performance of her duties.

Two cases illustrate how political pressure was brought to bear on leaders of anti-corruption agencies, namely, those relating to Mr Robert McBride of the Independent Police Investigative Directorate (IPID)[168] and Mr Mxolisi Nxasana of the NPA[169] respectively.

(a) McBride's case

McBride was suspended from his position as executive director of IPID in the midst of a 'political storm'.[170] This concerned the then head of the DPCI, Lieutenant-General Anwa

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165 Gildenhuys (note 54 above) 347, citing Samuel Issacharoff 'Constitutional courts and consolidated power' (2014) 62 *American Journal of Comparative Law* 585 at 605–7, (being the published version of the working paper) and, in relation to the judgment of the court *a quo*, S Choudhry '"He had a mandate": The South African Constitutional Court and the African National Congress in a dominant party democracy' (2009) 2 *CCR* 5.
166 Gildenhuys (ibid) 348.
167 *Helen Suzman Foundation (2015)* (note 72 above) para 85, *Corruption Watch NPC v President of the Republic of South Africa; Nxasana v Corruption Watch NPC* 2018 (2) SACR 442 (CC) (*Corruption Watch*) para 45.
168 *McBride v Minister of Police* 2016 (2) SACR 585 (CC) (*McBride*).
169 *Corruption Watch* (note 167 above).
170 *McBride v Minister of Police* (note 168 above) para 9.

Dramat and the provincial DPCI head for Gauteng, Major General Sibiya, who were allegedly implicated in the unlawful rendition of four Zimbabwean nationals.

The IPID, tasked with investigating the allegations, produced two reports that reached dramatically different conclusions. The first, issued in January 2014, took the view that Dramat and Sibiya were indeed involved in the unlawful renditions and should face criminal charges. The second report of March 2014 concluded that there was no evidence linking Dramat and Sibiya to the renditions and 'recommended that no criminal charges be brought against them'.[171] McBride was one of the signatories to the second report.

The Minister, apparently concerned at the degree of variance between the findings of the two reports, commissioned a firm of attorneys to investigate the circumstances surrounding the reports. Following this investigation, McBride was placed on precautionary suspension in March 2015, and served with a notice to attend a disciplinary enquiry.

This prompted McBride to launch an urgent application in the High Court[172] against the Minister. The High Court issued an order invalidating a number of provisions in the IPID Act[173] and the Public Service Act Proclamation 3 of 1994,[174] as well as reg 13 of the regulations to the IPID Act.[175] These were invalid because they failed to provide 'for parliamentary oversight in relation to the suspension, discipline or removal of the Executive Director and that they afford the Minister unilateral powers and the sole discretion to terminate the Executive Director's tenure'.[176] These provisions were inconsistent with s 206(6) of the Constitution, which requires that the police complaints body be independent.[177] The court also read s 17DA of the SAPS Act into s 6(6) of the IPID Act, and read down other provisions such that they did not apply to the executive director of IPID.[178] Further, the decisions to suspend McBride and subject him to disciplinary proceedings were also set aside, though this aspect of the order was 'suspended for 30 days to allow the National Assembly and the Minister to exercise their powers in terms of section 17DA (as it was read into section 6(6) of the IPID Act), should they

[171] Ibid para 9.
[172] *McBride v Minister of Police and Another* (2016) 1 All SA 811 (GP);
[173] Note 6 above. Section 6(3)*(a)* and s 6(6).
[174] Sections 16A(1), 16B, 17(1) and 17(2).
[175] Regulations for the Operation of the Independent Police Investigative Directorate in GN 98 *GG* 35018 of 10 February 2012.
[176] *McBride v Minister of Police* (note 168 above) para 17.
[177] Section 206(6) provides that '[o]n receipt of a complaint lodged by a provincial executive, an independent police complaints body established by national legislation must investigate any alleged misconduct of, or offence committed by, a member of the police service in the province.'
[178] *McBride v Minister of Police* (note 168 above) para 18.

so choose'.[179]

Bosielo AJ wrote for a unanimous Constitutional Court in confirmatory proceedings following the High Court's declaration of invalidity. The court had to assess not just the degree to which IPID must remain independent, but also how to reconcile that independence with accountability. The court found that there is nothing untoward in requiring the executive director of IPID to submit reports about its activities to the Minister, who then placed them before Parliament. This was all part of constitutionally mandated accountability.

What was untenable, however, was the effect of s 6(3)*(a)* of the IPID Act, which subjected the executive director to the provisions of the Public Service Act. This enabled the relevant executive authority to institute disciplinary proceedings against the executive director as well as to dismiss him. The groundwork laid by *Glenister II* and *Helen Suzman Foundation (2015)* regarding independence led to the inescapable conclusion that the impugned provisions of the IPID Act were unconstitutional. They were 'antithetical to the entrenched independence of IPID envisaged by the Constitution as it is tantamount to impermissible political management of IPID by the Minister'[180] which created an opportunity 'for the Minister to invoke partisan political influence to appoint someone who is likely to pander to his whims or is sympathetic to the Minister's political orientation'.[181]

The court did not consider the Minister's motivations for suspending McBride. Nor did it need to, as the Minister conceded the invalidity of his decisions.[182] The court did use the opportunity to comment unfavourably on the Minister's conduct, but carefully avoided direct accusation:

> '[T]he manner in which the Minister dealt with Mr McBride demonstrates, without doubt, how invasive the Minister's powers are. What exacerbates the situation is that he acted unilaterally. This destroys the very confidence which the public should have that IPID will be able, without undue political interference, to investigate complaints about the police fearlessly and without favour or bias'.[183]

The question of remedy received careful attention from the court. The court's approach

[179] Ibid.
[180] Ibid para 38.
[181] Ibid.
[182] Ibid para 22.
[183] Ibid para 43.

demonstrates astute balancing of separation of powers considerations with respect to both the executive and the legislature. With respect to the legislature, the court declared the offending provisions to be invalid but did not prescribe with specificity how they should be amended to cure the defect. Instead, it suspended the declaration of invalidity for 24 months to permit Parliament to cure the defect. The court was nevertheless strategic in its order: pending the amendment of the IPID Act to cure the constitutional defect, the court read in provisions of the South African Police Service Act which pertained to the removal of the National Head of the DPCI and notionally severed the offending provisions of the IPID Act. However, the Constitutional Court – in a show of deference to the legislature – declined to confirm that part of the High Court's order that would have made the reading-in permanent if the legislature failed to correct the defect within 12 months.[184]

Balancing was also required regarding the Minister's executive action. The Minister had argued that the decision to suspend and institute disciplinary proceedings against McBride should have been allowed to stand pending the completion of the disciplinary process, as there was a *prima facie* case that McBride had committed gross misconduct and it would not be just and equitable for him to resume his duties until the outcome was determined.[185] McBride, on the other hand, argued that unconstitutional conduct should be set aside.[186] The court decided to suspend the declaration of invalidity relating to the Minister's conduct for 30 days to allow the National Assembly and the Minister 'if they so choose, to exercise their powers in terms of the provisions' relating to the removal of the Executive Director of IPID (as read in).[187]

It is worth noting that the respect shown by the court for the legislature was, unfortunately, not reciprocated: the legislative process only commenced in earnest in May 2018, four months before the expiry of the two-year period, and was completed in Parliament in November 2019.[188] The Bill was finally signed into law by the President in November 2020 and the Act commenced in November 2024, eight years after the Constitutional Court's order.[189]

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[184] Ibid para 58.
[185] Ibid para 45.
[186] He argued that it would be 'untenable, if not invidious, for this Court to countenance an act which has been declared unconstitutional'. Ibid para 46.
[187] Ibid para 58.
[188] 'Independent Police Investigative Directorate Amendment Bill (B25-2018)' *Parliamentary Monitoring Group*, last accessed from https://pmg.org.za/bill/818/ on 25 March 2025.
[189] Kimera Chetty 'A missed opportunity: President Ramaphosa signs the IPID Amendment Bill into law' *Helen Suzman Foundation*, last accessed from https://hsf.org.za/publications/hsf-briefs/a-missed-opportunity-president-ramaphosa-signs-the-ipid-amendment-bill-into-law on 25 March 2025.

While some have argued that the legislature's amendments did not go far enough to ensure independence,[190] this case nevertheless illustrates the benefits yielded from the court's activist yet cautious approaches in the earlier cases of *Glenister II* and *Helen Suzman Foundation (2015)*, enabling it to establish precedent regarding institutional independence that was applied in *McBride* to fortify the independence of IPID.

(b) Nxasana's case

The other major case concerning powers of suspension and dismissal – *Corruption Watch*[191] – forced the court to decide what fate should befall the leader of an anti-corruption agency who, despite attempting to remain independent, eventually capitulated to the weight of political pressure.

Nxasana was appointed to succeed Simelane as NDPP (National Director of Public Prosecutions) after the latter's appointment was declared invalid. However, some nine months later, then President Zuma commenced a process to remove Nxasana from office. This involved launching an inquiry into his fitness to hold office on spurious grounds and threatening to suspend him pending the finalisation of the inquiry.

The reasons for this action against Nxasana appear to have been a result of his falling-out with two highly-ranked prosecutors linked to Zuma, Ms Nomgcobo Jiba and Mr Lawrence Mrwebi, over the decision taken by Jiba as acting NDPP to drop charges against Mr Richard Mdluli, another Zuma loyalist.[192] Nxasana alleged that Jiba and Mrwebi had used their

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[190] The HSF, which was admitted as *amicus curiae* in the matter, observed that '[d]espite receiving public submissions, conducting public hearings, and having the benefit of Constitutional Court jurisprudence on the question of adequate independence, the Portfolio and Select Committees, under advice from parliamentary legal advisors, opted for an incredibly narrow approach to amending the IPID Act. The Bill deals only with shifting the power from the Minister to parliament to conduct suspension, disciplinary and removal proceedings of the Executive Director. While this is a small step to granting a higher degree of independence from political interference to IPID, it falls abysmally short of both the High Court and Constitutional Court judgments.' Chetty ibid.

[191] Note 167 above.

[192] Claudi Mailovich 'Political interference undermined NPA, Mxolisi Nxasana told state capture inquiry' *BusinessLive* 2 September 2019, last accessed from https://www.businesslive.co.za/bd/national/2019-09-02-political-interference-undermined-npa-mxolisi-nxasana-told-state-capture-inquiry/ on 12 January 2020. See also Stephen Grootes 'Analysis: The rise and fall of Richard Mdluli, a man who damaged our society' *Daily Maverick* 17 January 2018, last accessed from https://www.dailymaverick.co.za/article/2018-01-17-analysis-the-rise-and-fall-of-richard-mdluli-a-man-who-damaged-our-society/ on 12 January 2020. Jiba and Mrwebi were later found to be unfit to hold office by former Justice Yvonne Mokgoro following a formal inquiry, and recommendations were made that they be removed from office. See 'Enquiry in terms of section 12(6) of the National Prosecuting Authority Act 32 of 1998' 1 April 2019, last accessed online from https://www.scribd.com/document/407700341/Mokgoro-Report-Unabridged-Version#from_embed on 30 January 2025 at page 335.

influence with the President to secure his ousting.[193]

Nxasana made some attempt to resist his removal.[194] However, he also told the President that he would consider leaving office voluntarily if he were paid out in full in terms of his contract, including the period remaining to be served. Such an agreement was reached, with Nxasana accepting some R10 240 0000 as a settlement in exchange for voluntarily stepping down as NDPP.

Unsurprisingly, the court in *Corruption Watch* found that the settlement agreement was invalid. The law allows NDPPs to step down voluntarily; however, the facts showed that Zuma was 'bent' on securing Nxasana's removal at all costs and thus induced him to do so.[195] This was not in line with the NPA's constitutionally mandated independence.

What is striking in the judgment is the court's unflinching account of Zuma's actions – that the former President used 'whatever means he could muster'[196] to remove Nxasana, and that Zuma was so 'desperate' to get rid of Nxasana that he gave him a blank settlement agreement and allowed Nxasana to enter any settlement amount.[197] That the grounds relied upon by Zuma to initiate proceedings against Nxasana were contrived was all but confirmed by the court's reasoning that if they had been sound, Zuma could have followed through with the disciplinary process and saved the costs of settlement. The court went so far as to say that 'the inference is inescapable that [Zuma] was effectively buying Mr Nxasana out of office'.[198] This was a remarkably forthright indictment of the President's conduct.

The invalidation of the settlement agreement had the effect of making the validity of the incumbency of Nxasana's successor uncertain. Mr Shaun Abrahams was a deeply unpopular NDPP.[199] He was regarded among members of the public as being loyal to Zuma[200] and thus

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193 Amil Umraw 'Mxolisi Nxasana: Officials peddled lies to Zuma in bid to oust me' *Herald Live* 19 August 2019, last accessed from https://www.heraldlive.co.za/news/2019-08-19-mxolisi-nxasana-officials-peddled-lies-to-zuma-in-bid-to-oust-me/ on 12 January 2022.
194 *Corruption Watch* (note 167 above) para 8.
195 Ibid para 25.
196 Ibid.
197 Ibid.
198 Ibid para 28.
199 See, for example, Lawson Naidoo 'It's time "Shaun the Sheep" was shorn of his job – Despite his wolf's clothing' *TimesLive* 25 February 2018, last accessed from https://www.timeslive.co.za/sunday-times/opinion-and-analysis/2018-02-24-its-time-shaun-the-sheep-was-shorn-of-his-job-despite-his-wolfs-clothing/ on 30 January 2025.
200 MO Dassah 'Effectiveness of South Africa's legislative and institutional architecture to combat public sector corruption' (2018) 26 *Administratio Publica* 5 at 24.

unable to carry out his prosecutorial role impartially. However, the court said nothing in the judgment on the questions surrounding Abrahams's independence or his character as NDPP. Nor could it have done so, as Abrahams's conduct was not before it.[201] Even so, the court did not hesitate to conclude that Abrahams's appointment was consequently invalid and set it aside.[202]

The court's use of its remedial discretion under s 172(1)*(b)*[203] in this case demonstrates its willingness to use the full extent of its powers to resolve a matter in a manner that promotes the good functioning of anti-corruption institutions. The majority, construing its remedial powers generously by referring to the requirements of justice and equity, found it appropriate to conclude that Nxasana was not entitled to resume office as NDPP. This was notwithstanding that his vacation of that office was invalid, and on the basis that Nxasana had not offered much resistance before agreeing to be bought out of office. This behaviour, the majority held, was not consonant with the 'fortitude and resilience' expected of the holder of the position of NDPP.[204]

The majority differed from the minority's more politically conservative opinion in that it found that exceptional circumstances existed which allowed the court to make use of its s 172(1)*(b)* powers. These circumstances included persistent instability in the NPA,[205] which would have been perpetuated had Nxasana resumed office only to face a disciplinary inquiry. The court evidently sought to bring stability to the NPA by using its broad remedial powers to wipe the slate clean, creating an opportunity for the President to appoint a new NDPP.

The timing of these proceedings may well have had an impact on the court's decision to grant the remedy it did. The court heard argument shortly after President Zuma stepped down. By the time judgment was handed down, President Cyril Ramaphosa's taking of office had ushered in a new period of optimism for South Africa's anti-corruption efforts in what has

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201 *Corruption Watch* (note 167 above). The court acknowledged at para 88 that none of the parties had suggested that Abrahams was not a fit and proper person to hold office.
202 Ibid paras 35, 88 and 94.
203 Section 172 of the Constitution 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.'
204 *Corruption Watch* (note 167 above) para 85.
205 Ibid paras 6, 57, 87 and 119.

come to be known as 'the New Dawn'.[206]

This change in leadership may have emboldened the court to describe Zuma's wrongful conduct as bluntly as it did (though it did not go so far to label it as such expressly). The court had no reason to fear political backlash for doing so. Furthermore, it gave the court impetus to confirm Nxasana's ineligibility to resume office, opening the door for the President to appoint an entirely new NDPP, untainted by the instability and factional battles that had marred that institution's recent history.

The confident language used and steps taken by the court in *Corruption Watch* can be contrasted with the restrained and technical legal language employed in *McBride*, a Zuma-era judgment. Despite the strong indications that McBride's removal was politically motivated, the court cast no aspersions on the Minister's conduct. This, in itself, can be seen as an indication of the courts' sensitivity to the prevailing political climate. It also suggests a shift in the weight that institutional pragmatism,[207] as an extra-legal factor, was accorded in judicial decision-making – becoming less important under a new political regime that held promise of breaking with the past where political circumstances required concern for the court's institutional security.

3.6 CONCLUSION

In order for the state capture project to succeed, it was imperative that criminal-justice institutions be severely undermined. This was attempted through a multi-pronged attack, aimed primarily at limiting investigative powers, as was the case with the disbanding of the DSO and the installation of a version of the DPCI that was limited in its independence as well as the suspension of IPID's pliant leader. This attack was also directed towards prosecutorial functions by appointing leadership willing to act under direction of political actors.

The battle to ensure the continued functioning and independence of South Africa's criminal-justice institutions was ultimately fought in the judicial system: The courts were called upon by civil society, opposition parties and even one concerned citizen to adjudicate decisions by elected representatives that were taken to advance the state capture project, and against the

[206] See, for instance, the official newsletter of Parliament, 'In Session' *Parliament Website* (2018) 1, last accessed from https://www.parliament.gov.za/storage/app/media/Publications/InSession/2018-01/final.pdf on 12 January 2020.
[207] See at 2.4*(c)*(i).

public interest. Even though some of these attempts at lawfare were misguided,[208] they nevertheless were able to ensure that state-capture fuelled initiatives to undermine key anti-corruption institutions were scrutinised by an independent and uncaptured judiciary for compliance with constitutional requirements. Nevertheless, the choice of language employed in the judgments and the remedies that were ordered illustrate that the courts were aware of the political dimensions of the cases. The judgments demonstrate the degree of care taken by the courts (and in particular, the Constitutional Court) to avoid criticising political decisions overtly. This was achieved inter alia by reliance on searching and, at least in *Glenister II*, non-obvious interpretations of constitutional prescripts, as well as findings made by other tribunals.[209] In this way, the courts were able adjudicate transformatively by using innovative interpretations of the law to protect anti-corruption institutions from becoming puppets of political actors.

The results of such efforts reflect a measure of success in preventing some of the more egregious attempts to undermine the criminal-justice system while preserving the institutional standing of the judiciary as impartial arbiter of disputes. These institutions (specifically, the NPA, the DPCI and the IPID) were restored to a degree of stability after a period of severe tumult. However, these cases also illustrate the limits of what can be achieved through the courts: in two instances where the court invalidated legislation, with respect to the SAPS Amendment Act in *Glenister II* and the IPID Act in *McBride*, the amended statutes that were subsequently passed into law met the standard for independence at a minimum and no more.[210] While these are policy choices rightly within the discretion of the legislature, they reflect diminished political will to ensure that anti-corruption institutions are insulated as much as possible from political interference so that they may perform their functions without fear or favour and, in so doing, fill the accountability vacuum. The court has no power to direct these policy choices.

Several years after the judgments discussed in this chapter were handed down, criminal-justice institutions are generally still underperforming, particularly regarding investigation and

[208] Such as Mr Glenister's unsuccessful attempt to stall the passage of the SAPS Amendment Act and the NPA Amendment Act in *Glenister I* (note 96 above).
[209] Such as the Ginwala Report in *Simelane* and the findings of Matojane J in *Ntlemeza.*
[210] See Collette Ashton 'Rethinking anti-corruption in South Africa: Pathways to reform' (2024) 60 *ISS Southern Africa Report* 1 at 12 concerning the DPCI's independence, and Chetty (note 189 above) regarding the IPID.

prosecution of corruption and state capture cases (both historical and new).[211] In hindsight, having regard to circumstances surrounding Ntlemeza's appointment as head of the DPCI, the outcome of *Helen Suzman Foundation (2015)* illustrates the courts' limited capacity to insulate the public fully from the consequences of poor political decisions. The period between Ntlemeza's appointment and the appointment of Lebeya could have been used to strengthen the DPCI's capacity at a time when state capture was at its height and its services sorely needed.

This illustrates that the powers of the judiciary can only extend so far to protect the independence and proper functioning of criminal-justice institutions. The criticisms directed towards the Constitutional Court with regard to *Glenister II* and *Helen Suzman Foundation (2015)* for opposing reasons – the court supposedly going too far in one instance and not far enough in another – are a strong indication that the court grapples with the competing tensions of activism and restraint in such cases with careful deliberation. It is also an indication that the court has generally balanced them well.

[211] See, for instance, the submission by Corruption Watch and the Institute for Security Studies to the State Capture Commission entitled 'State Capture and the political manipulation of criminal justice agencies' (2019) last accessed from https://issafrica.s3.amazonaws.com/site/uploads/2019-06-20-other-zondo-commission-submission.pdf on 17 September 2022 at 49–51.

CHAPTER 4

REMEDYING THE SOCIAL GRANTS CRISIS: THE *ALLPAY* AND *BLACK SASH TRUST* CASES

4.1 INTRODUCTION

In a broad sense, this chapter is concerned with the judiciary's response to egregious maladministration in the public procurement system. Corruption and maladministration in public procurement caused significant detriment to the public good during the period of state capture and beyond.[1] Much of the project of state capture, which involved the manipulation of state institutions, was directed towards the ultimate aim of ensuring that inflated, non-competitive public procurement contracts could be awarded to politically connected individuals so that they could, together with their co-conspirators in political office or the public service, extract wealth from the public purse with impunity.[2] Whether they arise out of honest error or deliberate manipulation of the procurement system to serve corrupt ends, tender irregularities have also been a prolific source of litigation in South Africa – particularly where aggrieved tenderers challenge awards or where procuring entities apply to court to set aside their own decisions.[3]

More narrowly, this chapter concerns a particular instance of maladministration – the legal dispute regarding the irregular award of a tender aiming to introduce biometric identity verification in the South African social grants system. This dispute led to litigation known as the *AllPay*[4] and *Black Sash Trust*[5] cases. The dispute, which precipitated what came to be

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[1] See Richard Chelin 'South Africa's mixed messages on procurement corruption' *ISS Today* (2021), last accessed from https://issafrica.org/iss-today/south-africas-mixed-messages-on-procurement-corruption on 24 September 2022. In the article it is estimated that in 2017, 50% of the R800 billion procurement budget was lost due to intentional abuse of the system. See also Nicole McCain 'Tshwane, Joburg, Cape Town: Procurement graft plagues major metros, Corruption Watch report reveals' *News24* 6 April 2024, last accessed from https://www.news24.com/news24/southafrica/news/tshwane-joburg-cape-town-procurement-graft-plagues-major-metros-corruption-watch-report-reveals-20240406 on 31 January 2025.

[2] See Robyn Foley 'State capture, the racket and predatory power' in Mbongiseni Buthelezi & Peter Vale (eds) *State Capture in South Africa: How and Why it Happened* (2023) 39 at 49–52.

[3] A non-exhaustive list of the many cases in the Constitutional Court that have arisen out of tender disputes includes: *City of Cape Town v Aurecon South Africa (Pty) Ltd* 2017 (4) SA 223 (CC); *Steenkamp NO v Provincial Tender Board of the Eastern Cape* 2007 (3) SA 121 (CC); *De Lacy v South African Post Office* 2011 (9) BCLR 905 (CC); *Esorfranki Pipelines (Pty) Ltd v Mopani District Municipality* 2023 (2) SA 31 (CC); *Areva NP Incorporated in France v Eskom Holdings Soc Limited* 2017 (6) SA 621 (CC); *Department of Transport v Tasima (Pty) Limited*, *Tasima (Pty) Limited v Road Traffic Management Corporation* 2018 (9) BCLR 1067 (CC).

[4] The *AllPay* cases are: *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency* (2014 (1) SA 604 (CC) (*AllPay 1*) and *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency (No 2)* 2014 (4) SA 179 (CC) (*AllPay 2*).

[5] The *Black Sash Trust* cases are: *Black Sash Trust v Minister of Social Development (Freedom Under Law NPC*

known as the 'social grants crisis',[6] has several features that commend it for analysis in this thesis. First, while the circumstances giving rise to the cases gave a very strong indication that corruption was involved in the tender process, *AllPay* was not heard or decided as a corruption case. This in itself is illuminating, as will be discussed further below.

Secondly, the dispute threw into question the continued stability of the social grants system and by extension, the survival of millions who depend on it. It is worthwhile to explore the court's approach to answering the difficult question of how to balance the rights of social grants recipients to access social security[7] with the demands of accountability, in circumstances where no meaningful accountability was forthcoming from the executive and legislative branches of government.

Lastly, the courts were required to revisit the matter several times over many years in order to compel a constitutionally acceptable outcome. This was due in part to issues of commercial interest raised by the disputing companies, but also in no small measure to the recalcitrance of the state officials tasked with giving effect to the public's right of access to social security through its procurement of an effective social grants payment system. This tested the judiciary's willingness to make full use of its remedial powers against private and state actors to achieve an outcome that protected the broader public interest, rather than merely the narrow interests of the disputing parties. The cases are revealing because they illustrated so well the tension between the judicial activism that was called for in the moment to avert potential disaster brought about by the government's non-responsiveness, and the restraint required to ensure that the court maintained comity as required by the separation of powers.

This chapter focuses on the rich material provided by the several judgments in the *AllPay* and *Black Sash Trust* cases, drawing out the subtle manifestations of this tension as reflected in the courts' reasoning and outcomes – both expressly stated and implied. This task

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Intervening) 2017 (3) SA 335 (CC) (*Black Sash Trust 1*); *Black Sash Trust v Minister of Social Development (Freedom Under Law NPC Intervening)* 2017 (9) BCLR 1089 (CC) (*Black Sash Trust 2*); and *Black Sash Trust v Minister of Social Development (Freedom Under Law Intervening)* 2018 (12) BCLR 1472 (CC) (*Black Sash Trust 3*).

[6] See, for example, Andries du Toit 'The real risks behind South Africa's social grant payment crisis' *The Conversation* 20 February 2017, last accessed from https://theconversation.com/the-real-risks-behind-south-africas-social-grant-payment-crisis-73224#:~:text=The%20failure%20of%20the%20South,of%20unscrupulous%20financial%20services%20companies on 15 February 2025.

[7] Section 27(1)*(c)* of the Constitution provides:
'27. Health care, food, water and social security
1. Everyone has the right to have access to
c. social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.'

is necessarily speculative; however, the interpretations of other scholars, reference to contemporaneous news reports, and some extra-curial statements by judges who decided these cases are supplied as evidence to support these claims. The aim is not to provide a precise account of the judicial thought process giving rise to these decisions. It is rather to illustrate with broad strokes the factors that were brought to bear on the highest court's decision-making and that likely influenced the outcome.

To do this, the chapter begins by setting out the relevant context, providing an overview of the procurement law framework in South Africa and focusing on those provisions that are intended to curb procurement irregularities. Secondly, it traverses briefly how the procurement system has become beset with corruption and maladministration, and is now one of the main ways by which public funds have been redirected to private interests.

Thirdly, the *AllPay* and *Black Sash Trust* cases are then analysed in fine detail by focusing on how the courts responded to the issues before them. For the purposes of this chapter, it is useful to do so chronologically. This is because when considered in sequence, these cases show a pattern of escalation in relation to the intrusiveness of the remedy ordered across the successive cases – an increase that was calibrated as an appropriate response to the intransigence of the executive officials' conduct and the pressing need to ensure the continued functioning of the social grants system.

In sum, this chapter considers whether the conduct of officials in respect of both the tender award and their response to various court orders was so egregious that the Constitutional Court was required to take decisive steps to hold them to account. The purpose is therefore to examine the *AllPay* and *Black Sash Trust* series of cases critically in light of these separation of powers concerns, scrutinising the text of these judgments to illuminate how the tensions are reflected in them.

4.2 OVERVIEW OF THE PROCUREMENT LAW FRAMEWORK IN SOUTH AFRICA WITH SPECIFIC REFERENCE TO ANTI-CORRUPTION PROVISIONS

The South African Constitution is fairly unique[8] in that it contains a provision, s 217, providing specifically for public procurement.[9] While s 217 establishes the principles that must be given

[8] Phoebe Bolton 'The public procurement system in South Africa: Main characteristics' (2008) 37 *Public Contract Law Journal* 781 at 782.

[9] Section 217 provides as follows:
'Procurement
217. (1) When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system

effect to in public procurement systems – namely fairness, equity, transparency, competitiveness, and cost-effectiveness – it also contemplates that public procurement systems may be used to achieve certain ancillary goals, such as the redress of past inequalities. The somewhat high-level prescription contained in s 217(1) was, at the time of writing, given practical effect in various pieces of national legislation[10] that moved away from the centralised model employed by the pre-democratic government[11] and towards a 'centrally steered but decentralised procurement regime',[12] where procurement takes place at the levels of government departments, municipalities and entities, including state-owned companies. While decentralisation has advantages, such as allowing procurement that is attentive to the specific needs of procuring entities and allowing for the stimulation of local economies, this model has been criticised for introducing challenges including 'lack of skills and capacity, noncompliance with policies and regulations, lack of accountability and corruption'.[13] Having a multiplicity of procuring entities at all levels of government as well as within state-owned entities also makes oversight more challenging, whether by state mechanisms (such as the Auditor-General)[14] or by the public (such as civil society and the media).

These challenges persist despite South Africa's legal framework having been designed to prevent corruption in procurement and to provide for accountability mechanisms. The latter include procedures that must be followed when procuring goods and services for state entities; parameters within which decisions to award or refuse tenders must be made; and remedies that can be used by aggrieved parties, who access them by way of application to court. It also

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which is fair, equitable, transparent, competitive and cost-effective.
(2) Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for—
(a) categories of preference in the allocation of contracts; and
(b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.
(3) National legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented.'

[10] Bolton (note 8 above) 782–4 provides a useful overview of these laws. Note, however, that the public procurement legal scheme is fundamentally altered by the passage of the Public Procurement Act 28 of 2024 discussed below. This Act is not yet in force at the time of writing.

[11] Before 1994, public procurement was governed by the State Tender Board Act 68 of 1968 at national and provincial levels, as well as various provincial ordinances. See Jonathan Klaaren & Pippa Reyburn 'Public procurement' in Stu Woolman et al (eds) *Constitutional Law of South Africa* 2 ed (Original Service 12-03) 25 at 25-2.

[12] Ryan Brunette, Jonathan Klaaren & Petronella Nqaba 'Reform in the contract state: Embedded directions in public procurement regulation in South Africa' (2019) 36 *Development Southern Africa* 537 at 552.

[13] Pandelani Harry Munzhedzhi 'South African public sector procurement and corruption: Inseparable twins?' (2016) 10 *Journal of Transport and Supply Chain Management* 1; Evangelos Mantzaris 'Public procurement, tendering and corruption: Realities, challenges and tangible solutions' (2014) 7 *African Journal of Public Affairs* 67 at 68.

[14] The Auditor-General is an independent institution supporting constitutional democracy, established in terms of section 181 of the Constitution. It is mandated to audit the spending of public money.

includes criminal sanctions to punish those who abuse procurement processes. These are discussed in detail below.

The aim of preventing corruption is implied from the principles in s 217(1) which contemplate a system that prevents 'patronage and corruption, on the one hand, and [promotes] fairness and impartiality in the award of public-procurement contracts, on the other'.[15] Procurement systems that are conducted fairly, equitably, competitively, and cost-effectively do not allow for the common forms of procurement corruption such as bribery of tender officials, price-fixing collusion, or inflated bids.

The principle that more directly evidences the drafters' awareness of the possibility that procurement processes could be abused is that of transparency. Transparency aids in preventing or rooting out corruption where the rules setting out procurement processes are defined clearly, and the public is able to access information about tenders. This makes it difficult to conceal impropriety from the public,[16] including losing bidders and civil society watchdogs who may challenge unlawful decisions, as well as the media which may publicise them further, spurring calls for accountability.

Transparency is not the only legal safeguard. It is useful for the purposes of this chapter to traverse relevant laws applicable to public procurement briefly, identifying those aspects that are intended to prevent or cure corruption and maladministration in procurement processes, while also offering a critique of these laws in relation to this aim.

However, before discussing the legal regime currently in force in more detail, it is also important to discuss briefly a notable recent development: the passage of the Public Procurement Act 28 of 2024. At the time of writing, the Public Procurement Act had been assented to by the President but had not yet commenced. The Public Procurement Act represents a fundamental shift in the public procurement legal framework. While it is beyond the scope of this thesis to discuss in detail how this Act will change public procurement in South Africa, some important provisions are worth highlighting as they are intended to increase

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[15] *Valor IT v Premier, North West Province* 2021 (1) SA 42 (SCA) para 40. See also *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* 2019 (4) SA 331 (CC) para 96 and *Steenkamp NO v Provincial Tender Board of the Eastern Cape* 2007 (3) SA 121 (CC) paras 33–5. The Constitutional Court observed that the obligation to procure goods and services in accordance with a system that gives effect to the procurement principles set out in s 217(1) 'is consistent with open and accountable administration which is an implicit requirement of the [constitutional principles]'. *Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC) para 285.

[16] Sope Williams & Geo Quinot 'Public procurement and corruption: The South African response' (2007) 124 *SALJ* 339 at 345.

oversight and curb abuses of the public procurement process.[17]

The Public Procurement Act establishes the Public Procurement Office which exercises oversight over procuring institutions by developing and supporting the 'implementation of necessary measures to maintain the integrity of procurement' and to 'ensure transparency in procurement'.[18] It may issue instructions which bind procuring institutions, excluding municipalities and municipal entities who may nevertheless be guided by circulars issued by the Office. The Act creates an obligation on provincial treasuries to promote and enforce effective management and transparency regarding procurement by procuring institutions.[19]

This Act also introduces an integrity regime for those involved in public procurement by providing for codes of conduct with which they are obliged to comply[20] and setting out obligations in relation to the conduct of officials involved in procurement,[21] declarations of interests by bidders,[22] the prohibition of conduct that exerts undue influence on procurement officials,[23] and the exclusion of certain categories of persons (such as public officials and holders of public office) from submitting bids.[24] It also aims to address the dilemmas that accounting officers have confronted in the past, where they have been unable to resist complying with directions from their superiors to perform unlawful actions in relation to procurement. The Act obliges such persons to refuse to comply with the unlawful direction and to report it.[25] Bidders, suppliers, and their representatives may be debarred from participating in procurement by procuring institutions if they engage in any of several forms of listed wrongful conduct, including having been convicted for fraud or corruption.[26] There is a specific obligation on accounting officers and authorities of procuring institutions to take measures to prevent abuse of the procurement system they manage.[27] The Public Procurement Act also mandates the creation of a disclosure regime for procurement information.[28] While the Minister must issue regulations prescribing disclosure requirements, the Act identifies several categories

[17] Section 2(2)*(b)* of the Public Procurement Act lists one of its objectives as 'advanc[ing] ethical conduct and combat[ting] corruption through access to procurement information and other transparency measures and introducing enforcement and appropriate sanctions for transgressors'.
[18] Sections 5(1)*(b)* and *(d)*.
[19] Section 6(1)(*a*)(ii) and (iii).
[20] Section 9.
[21] Section 10.
[22] Section 11(2) and (3).
[23] Section 12.
[24] Section 13.
[25] Section 14.
[26] Section 15(3)*(d)*.
[27] Section 26.
[28] Section 31.

that must be disclosed, and specifically requires that it be published in an online format and in a manner that facilitates monitoring. This could be used by, for instance, the media, community organisations, and civil society watchdogs to monitor procurement for signs of corruption and irregular spending.

The Public Procurement Office is also imbued with powers to investigate non-compliance with the Act,[29] including the power to search and enter premises.[30] Lastly, the Act creates several offences in relation to procurement, including 'interfer[ing] with or exert[ing] undue influence on any official of a procuring institution'.[31] The Public Procurement Act has been received favourably by some for its anti-graft provisions[32] though it remains to be seen whether its eventual implementation will bring the much-needed reform of the public procurement system towards a lasting ethos of integrity.

Regarding the public procurement legal framework currently in force, the Public Finance Management Act 1 of 1999 (PFMA) regulates financial management at national and provincial levels, and sets out legal mechanisms such as financial controls that are intended to curb procurement malfeasance. It empowers the National Treasury to make regulations[33] or issue instructions applicable to departments. It may also issue guidelines and circulars to 'ensure minimum norms and standards within the Government'.[34] This establishes a framework which Sambo identifies as having four main aims: to 'streamline the system of financial management in the public sector', to 'empower public sector managers to manage, but at the same time be held accountable', to 'ensure that the financial information provided is of a high quality and is provided on time', and 'to ensure that waste and corruption in the use of public assets is eliminated'.[35] The PFMA seeks to achieve the last of these aims inter alia by providing

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29 Section 54.
30 Section 55.
31 Section 60(1)*(b)*.
32 See, for example, Ray Mahlaka 'Time's up for tenderpreneurs as new Public Procurement Act tackles corruption loopholes that led to looting by middle-men' *Daily Maverick* 28 July 2024, last accessed from https://www.dailymaverick.co.za/article/2024-07-28-sas-new-public-procurement-act-takes-aim-at-tenderpreneurs/ on 2 February 2025 and Marelise van der Westhuizen & Katekani Mashamba 'Transforming public procurement: A comprehensive analysis of the Draft Public Procurement Bill' *CliffeDekkerHofmeyr* 14 May 2024, last accessed from https://www.cliffedekkerhofmeyr.com/news/publications/2024/Practice/Dispute/dispute-resolution-alert-14-may-Transforming-public-procurement-a-comprehensive-analysis-of-the-Draft-Public-Procurement-Bill- on 2 February 2025.
33 Section 76.
34 Bolton (note 8 above) 783.
35 Vaola Sambo 'Internal audit and financial misconduct: The case of the South African Social Security Agency (SASSA)' (2018) *The 3rd annual international conference on public administration and development alternatives*, last accessed from https://uir.unisa.ac.za/bitstream/handle/10500/25069/Internal%20Audit%20and%20Financial%20Misconduct-

for disciplinary proceedings in the case of financial misconduct by various types of public officials[36] as well as offences and penalties for particularly egregious forms of misconduct. While only one of these objectives relates directly to corruption and maladministration, the general scheme of sound financial management – if implemented correctly – would serve to create an ecosystem where it would be difficult for corrupt activities to go undetected.

Notably, the PFMA is not a procurement-centric statute. As Sewpersadh and Mubangizi observe, only s 38 of the PFMA (which concerns the general responsibilities of accounting officers) pertains to public procurement directly.[37] Its role in the procurement framework is better framed as being an 'overarching statute' that governs government finances at the national and provincial levels of government.[38]

The PFMA's local government counterpart is the Municipal Finance Management Act 56 of 2003. Like the PFMA, it does not concern procurement matters exclusively; however, it differs from the PFMA by its inclusion of chapter 11, which deals with supply chain management. Municipalities are obliged to adopt supply chain management policies that comply with a prescribed regulatory framework for municipal supply chain management. This prescribed framework must cover a long list of requirements detailed in s 112(1), including measures for 'combating fraud, corruption, favouritism and unfair and irregular practices in municipal supply chain management'.[39] Section 115(1)*(b)* obliges the accounting officer of municipalities to take reasonable steps to 'minimise the likelihood of fraud, corruption, favouritism and unfair and irregular practices'.

Regarding local government service delivery, the Municipal Systems Act 32 of 2000 permits municipalities to provide services through 'external mechanisms' by entering into service delivery agreements. Such external mechanisms can include entities such as non-governmental organisations and businesses that are 'legally competent to operate a business activity'.[40] This Act prescribes the procedures that must be followed before service delivery agreements may be concluded, including public consultation and the conducting of feasibility studies, which can also serve to guard against corruption by introducing avenues for

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The%20Case%20of%20SASSA%202018.11.20.pdf?sequence=2&isAllowed=y on 13 October 2022.
[36] See ss 81–5.
[37] P Sewpersadh & JC Mubangizi 'Using the law to combat public procurement corruption in South Africa: Lessons from Hong Kong' (2017) 20 *PELJ* 1.
[38] Ibid.
[39] Section 112(1)*(m)*(i).
[40] Section 76.

accountability, particularly as it relates to the public.

The Prevention and Combating of Corrupt Activities Act 12 of 2004 (PRECCA Act) creates a specific offence 'in respect of corrupt activities relating to procuring and withdrawal of tenders',[41] and also establishes a register of tender defaulters.[42] Endorsement of a supplier's name on the register entitles National Treasury to cancel agreements with that entity and obliges Treasury to disqualify it from making offers or obtaining agreements for the procurement of the specific good or service.[43] However, at the time or writing no tender defaulters had been listed on the register. This was because there had been no court order upon conviction mandating such inclusion.[44] The PRECCA Act also creates an offence in relation to the exchange of gratification intended to influence the conclusion of a contract or the price in such a contract.[45]

The Public Service Act 1994[46] and its associated regulations concern misconduct in the public service, which can include procurement-related misconduct. Misconduct is defined as potentially including

> 'acts that are to the prejudice of the administration, discipline and efficiency of a department, the acceptance or demand of any commission, fee or pecuniary or other reward in respect of carrying out or the failure to carry out official duties and any contravention of the prescribed code of conduct or any provision thereof'.[47]

The administrative law framework derived from the constitutional right to lawful administrative action[48] also serves to hold public officials accountable for irregular decisions relating to tenders. Constitutionally, challenges can be brought on the grounds of lawfulness, reasonableness, and procedural fairness[49] though the principle of subsidiarity requires that most of these challenges would be brought in terms of the Promotion of Administrative Justice Act

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[41] Section 13.
[42] Chapter 6. See 'Register for tender defaulters' *National Treasury*, last accessed from http://www.treasury.gov.za/publications/other/Register%20for%20Tender%20Defaulters.pdf on 31 January 2025. This register is different to the List of Restricted Suppliers, also maintained by National Treasury, which restricts companies or persons from doing business from the state where they are found to have obtained preferences fraudulently or failed to perform on a contract.
[43] Section 28(3).
[44] See National Council of Provinces 'Questions for written reply' *National Treasury* (2010), last accessed from http://www.treasury.gov.za/publications/other/minansw/2010/Reply%20to%20PQ%20460%20[CW569E].pdf on 13 October 2022.
[45] Section 12(1)*(b)*.
[46] Proclamation 103 published in *GG* 15791 of 3 June 1994.
[47] Section 20 of the Public Service Act, as paraphrased by Munzhedzhi (note 13 above) 4.
[48] Section 33 of the Constitution.
[49] Section 33(1) of the Constitution.

3 of 2000 (PAJA). The courts have held that decisions to award or refuse tenders generally constitute 'administrative action' as defined in s 1 of PAJA.[50] Procurement-related decisions can also be challenged by way of judicial review under the principle of legality in certain circumstances.[51]

Unsuccessful tenderers are entitled to reasons for decisions made in relation to their bids in terms of s 5 of PAJA, which gives effect to s 33(2) of the Constitution. In addition, they (and indeed, any member of the public) can seek access to information about public procurement decisions by request made under the Promotion of Access to Information Act 2 of 2000. Bolton further points out that aggrieved tenderers may find recourse by instituting court action in terms of the law of contract or delict.[52]

Lastly, the Preferential Procurement Policy Framework Act 5 of 2000 — which was enacted to give effect to s 217(3) of the Constitution, does not concern corruption or maladministration specifically. Madonsela, however, draws a subtle link between preferential procurement policies and state capture, suggesting that state capture

> 'began post-1994, after the state adopted a variety of policies to re-allocate resources across a broad sector. This included incentives for black industries and Black Economic Empowerment strategies. This radical economic empowerment meant controlling the height of the economy instead of creating black-owned small and medium-size enterprises.'[53]

Madonsela should not be understood as criticising preferential procurement per se. Rather, she argues that that 'radical economic transformation' – which some argue should be engineered through preferential procurement, among other policies – can be used to legitimise state capture. This occurs where, instead of advancing the interests of designated groups generally, preferential procurement policies are used to channel rents through patronage networks that rely on 'the favour of decision-makers at the top'.[54]

Despite a plethora of laws applicable to public procurement that feature provisions guarding against corruption and maladministration, these are still rife. Two deficiencies in the legal system may contribute towards this. This first is that the legal regime applicable to procurement is a 'hodge podge of rules from all the major branches of law' that has only

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[50] See *Steenkamp* (note 15 above) para 21, where the Constitutional Court held that decisions to award or refuse tenders constituted administrative action for the purposes of PAJA.
[51] See, for instance, *Compcare Wellness Medical Scheme v Registrar of Medical Schemes* 2021 (1) SA 15 (SCA) para 13.
[52] Bolton (note 8 above) 784.
[53] Sanet Madonsela 'Critical reflections on state capture in South Africa' (2019) 11 *Insight on Africa* 113 at 113.
[54] Ibid 120.

recently started to coalesce into a ‘distinct law of public procurement’.[55] It may well be that the mix of laws has not lent itself to coherence and understanding on the part of procurement officials bound to follow them. This may have contributed to a greater reliance on the courts to enforce public procurement laws, a trend which Quinot regards as ‘troubling’, particularly as courts are not best placed to be the primary forum for the public procurement law enforcement.[56] This is in part due to the ‘animosity bred by constant judicial interference in administration and resultant service delivery delays’.[57] There is no doubt that the courts are cognisant of this: the concern not to impose too readily on administrative discretion is reflected clearly in the *AllPay* and *Black Sash Trust* cases, as will be discussed further below. The new Public Procurement Act will hopefully address some of the concerns regarding coherence of the laws applying to procurement.

The second deficiency is that the continued failure to exercise anti-corruption measures consistently, such as criminal sanctions and accountability mechanisms contained in legislation. Especially where the conduct is egregiously wrongful, this failure has conduced towards a culture of impunity.[58] While fault for this inaction lies outside the judiciary, it may be an unspoken factor that exerts some level of influence on the way that judges approach and decide procurement cases before them, potentially by urging them to step in to compensate for the lack of accountability from those tasked with administering and overseeing public procurement.

Another point about the public procurement legal regime bears noting. A great many of the research efforts of procurement law scholars are directed towards reforming procurement systems by diagnosing failures and proposing solutions.[59] While such research frequently addresses corruption and maladministration, it is important to note that the literature does not suggest that this is the *sole* reason for failures in the procurement system. Rather, several issues contribute to South Africa’s procurement system not performing optimally.[60] These issues are

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[55] Geo Quinot ‘Enforcement of procurement law from a South African perspective’ (2011) 6 *Public Procurement Law Review* 193 at 193.
[56] Ibid 206.
[57] Ibid.
[58] Munzhedzhi (note 13 above) 6.
[59] See, for instance, Geo Quinot ‘Reforming procurement law in South Africa’ (2020) 7 *African Procurement Law Journal* 1, and David Fourie & Cornel Malan ‘Public procurement in the South African economy: Addressing the systemic issues’ (2020) 12 *Sustainability* 1 .
[60] Fourie and Malan identify these issues as follows: underspending on budgets; deficiencies in contract management; lack of the required skills, capacity and knowledge; inadequate planning; inadequate monitoring and evaluation; non-compliance with supply chain management policies and regulations, lack of accountability and unethical behaviour, high level of decentralisation and lack of consequence management at the executive level. See Fourie and Malan ibid 12–17.

often interlinked, making it difficult to ascertain whether irregularities in awards of contracts are as a result of corruption, or (for instance) other systemic issues, such as procurement officials lacking the necessary skills to carry out a tendering process in accordance with the legal framework. Nevertheless, the following section looks specifically at corruption and maladministration as found in public tender processes.

4.3 CORRUPTION AND MALADMINISTRATION IN PUBLIC PROCUREMENT

Inevitably, the state must procure goods and services in order to perform its functions, creating a nexus with the private sector involving the transfer of public funds to private entities. These interactions happen at all levels and branches of government and represent billions of rand – sometimes as much as one fifth of South Africa's gross domestic product.[61] A functioning procurement system can not only ensure that governments obtain goods and services at the most economically advantageous prices, but can also assist in promoting secondary, non-procurement related goals, such as developing domestic industries or advancing certain groups of the population.[62]

Unfortunately, bringing together public money and private interests create conditions ripe for exploitation, rendering procurement 'an avenue for failed public policies through corruption'.[63] Even in instances where corruption is not formally established, failed tender processes are a form of maladministration that has deleterious impacts on the proper functioning of government institutions as well as their ability to deliver services. Beyond the resulting inefficient use of public funds, inadequate or improper procurement processes have a real-world effect on the fulfilment of people's rights.[64] As a result, the public procurement system has drawn scrutiny by civil society,[65] the media,[66] the academy[67] and the public itself

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[61] Ryan Brunette & Jonathan Klaaren 'The Public Procurement Bill needs muscle to empower whistle-blowers' *Daily Maverick* 5 March 2020, last accessed from https://www.dailymaverick.co.za/article/2020-03- 05-the-public-procurement-bill-needs-muscle-to-empower-whistle-blowers/ on 13 October 2022.
[62] Williams & Quinot (note 16 above) 339.
[63] Nirmala Dorasamy 'An overview of public procurement, corruption, and governance in Africa' in Nirmala Dorasamy & Omolulu Fagbadebo (eds) *Public Procurement, Corruption and the Crisis of Governance in Africa* (2021) 21 at 22.
[64] An example of this is corruption and irregularities identified in the procurement of personal protective equipment for healthcare and other frontline workers to guard against Covid-19 infection during the pandemic. See Victor H Mlambo & Mandla M Masuku 'Governance, corruption and COVID-19: The final nail in the coffin for South Africa's dwindling public finances' (2020) 55 *Journal of Public Administration* 549 at 558–9.
[65] An example of this is the Procurement Reform Working Group, a civil society grouping that advocates for procurement reform using a collective voice.
[66] An example of this is the extended reporting by *Daily Maverick* on irregularities in the Digital Vibes tender, and the 'Silenced' series by *News24* concerning irregular payments that whistleblower Babita Deokaran tried to prevent from occurring. See note 68 below.
[67] Such as the African Procurement Law Unit at Stellenbosch University.

in recent years[68] in an attempt to diagnose what has allowed procurement malfeasance to proliferate and to propose reforms to the public procurement framework.

The separation of powers tensions inherent in judicial review are particularly acute in procurement cases. This can be ascribed to the decentralisation of public procurement, as well as the highly context-specific nature of procurement decisions. The courts therefore tread carefully when called upon to intervene in procurement decisions, particularly regarding remedy, as will be discussed further in this chapter.

As tenders have been observed to represent 'the uneasy confluence of private interests and money',[69] the phenomenon of public procurement acting as a site for corruption and maladministration is well-established. Corruption in relation to procurement can take diverse forms, including the manipulation of tender processes to ensure that a particular tenderer is favoured over others, the provision of insider information to a specific bidder by a procurement official, or the purchase of information from officials involved in the decision-making process to sell to competing bidders.[70] It can also include the following:

> '[B]ribery, extortion, embezzlement, nepotism, patronage systems, fraud, kickback schemes, false invoices, overpaying, fronting in Black Economic Empowerment (BEE) companies, inflated prices, unnecessary purchases, payments made for goods or services not received, ghost suppliers on the "preferred suppliers list", the use of shell companies, and "facilitation fees" required by state officials (a type of bribery).'[71]

Williams and Quinot have characterised procurement corruption as taking three forms: public, private and auto-corruption.[72] Public corruption 'moves from the supplier to the public official responsible for taking procurement decisions. This frequently takes the form of bribes or other non-monetary inducements given to the public official to influence the exercise of his discretion.'[73] These include activities such as designing tenders to favour a preferred supplier

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[68] This has been fueled in part by allegations of corruption in the award of contracts for personal protective equipment during the Covid-19 state of emergency, where the Minister of Health was implicated, as well as the high-profile murder of whistleblower Babita Deokaran, who had attempted to refuse suspicious payments on suspected corrupt procurement contracts at Tembisa Hospital. Such cases have shown in stark relief that procurement fraud can have life-or-death consequences. See *News24 Investigations* 'SILENCED | "Our lives could be in danger": Inside Babita Deokaran's R850m "fraud" probe' *News24*, last accessed from https://www.news24.com/news24/investigations/silenced-our-lives-could-be-in-danger-inside-babita-deokarans-r850m-fraud-probe-20220725 on 2 February 2025.
[69] Max du Plessis & Andreas Coutsoudis 'Considering corruption through the *AllPay* lens: On the limits of judicial review, strengthening accountability, and the long arm of the law' (2016) 133 *SALJ* 755 at 756.
[70] Mantzaris (note 13 above) 71.
[71] Ibid.
[72] Williams & Quinot (note 16 above) 342.
[73] Ibid 341.

or splitting a larger contract into smaller ones to avoid triggering obligations based on certain thresholds.

Private corruption includes conduct such as ‘collusion, price-fixing, maintenance of cartels or other uncompetitive practices engaged in by suppliers to the detriment of the government’.[74] The third form of corruption is auto-corruption, which refers to conduct such as where ‘a public official wrongly secures for himself or an associate privileges rightly belonging to the public, by by-passing or manipulating the formal procedures necessary for the award of these privileges’.[75] This happens where, for example, officials award a tender in a situation where they have a conflict of interest.

Public procurement serving as an avenue for corruption and maladministration is a worldwide phenomenon.[76] The issue is particularly acute in Africa, where issues such as inadequate transparency, insufficient application of accountability mechanisms, and integrity deficits have made public procurement processes particularly vulnerable to corrupt influences.[77] These three malaises are certainly present in South Africa as well. Mantzaris posits that this is because public procurement ‘is where the opportunities to engage in corrupt practices are greatest and where the rewards of corruption can be very high’.[78]

Procurement was a key factor in state capture. Under President Zuma’s tenure, a ‘highly organised’ power elite gave rise to a species of war economy, where the ‘shadow state establishe[d] a number of informal structures to produce profit, power and protection’.[79] Madonsela refers to the Zuma-Gupta symbiotic relationship as having been ‘pursued through traditional black economic empowerment which is aimed at reforming the white-dominated economy.’[80] It therefore sought to undermine the constitutional objectives of preferential procurement by subverting the public procurement system to benefit an exclusive few.

The considerable effects of procurement corruption in the state capture project featured prominently in the report and recommendations of the commission of inquiry into state capture

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[74] Ibid 342.
[75] Ibid.
[76] In 2014, the Organisation for Economic Co-operation and Development (OECD), comprising 38 member countries, analysed information contained in enforcement actions in respect of the foreign bribery offence, and found that bribes were paid to in respect of public procurement contracts in 57% of cases. OECD ‘OECD foreign bribery report: An analysis of the crime of bribery of foreign public officials’ *OECD Publishing* (2014), last accessed from https://doi.org/10.1787/9789264226616-en on 13 October 2022.
[77] Dorasamy (note 63 above) 22.
[78] Mantzaris (note 13 above) 67.
[79] Madonsela (note 53 above) 117.
[80] Ibid.

headed by then Chief Justice Raymond Zondo[81][82] (the State Capture Commission).[83] Concerning procurement corruption, the report noted that:

> 'Twenty years of frustration which includes a decade of state capture pitilessly exposed the flaws and weaknesses in the public procurement system, flaws and weaknesses which have been exploited by criminals to inflict lasting damage on the South African economy. The promise of service delivery so fundamental to the betterment of our society has not materialised.'[84]

After hearing oral evidence, including whistleblowers, and reviewing considerable volumes of written evidence, the State Capture Commission was able to establish a picture of endemic corruption in a number of state-owned enterprises. From this analysis flowed several recommendations to reform the public procurement system, including inter alia the establishment of an independent agency against corruption,[85] the use of deferred prosecution agreements to encourage self-reporting of involvement in procurement malfeasance,[86] the professionalisation of procurement officials,[87] the enhancement of transparency,[88] the protection of accounting officers and accounting authorities acting in good faith,[89] amendments to relevant legislation[90] and the enactment of legislation to address the pervasive problems in public procurement that allow corruption to flourish.[91] The Public Procurement Act is intended to address many of these issues.

While the impact of corruption on public procurement is now better understood after the many revelations of the State Capture Commission along with several high-profile scandals that have been exposed by the media in the past five years, the context of the *AllPay* and *Black Sash Trust* decisions was very different. The factual matrix giving rise to the impugned

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[81] Commission Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State.
[82] Justice Zondo was Deputy Chief Justice at the commencement of the Commission in 2018, then Acting Chief Justice from 11 October 2021 until 31 March 2022. He was appointed Chief Justice from 1 April 2022 until his retirement on 31 August 2024.
[83] See 'Judicial Commission of Inquiry into State Capture Report: Part 1, Vol. 1, Chapter 4' *State Capture Commission* (2022), last accessed from https://www.gov.za/sites/default/files/gcis_document/202201/judicial-commission-inquiry-state-capture-reportpart-1.pdf on 4 February 2025 paras 327–701.
[84] Ibid para 657.
[85] Ibid paras 682–90.
[86] Ibid para 691.
[87] Ibid paras 692–6.
[88] Ibid para 697.
[89] Ibid para 698.
[90] Such as the PRECCA Act and the Political Party Funding Act 6 of 2018. Zondo (note 83 above) paras 699–700.
[91] Ibid para 701.

decisions in these cases took place between 2011 and 2013,[92] at a time when the many deficiencies in the procurement system as described above were present and able to be exploited, but prior to the great push towards enhanced transparency and additional safeguards that followed towards the end of that decade.[93]

As discussed further below, the courts did not make an express finding on whether corruption motivated the irregularities which eventually resulted in the tender award being set aside. It is purely speculative whether, had the protections currently being introduced into the public procurement process been in force then, the irregularities in the process would have been detected and managed prior to the conclusion of the tender. The climate within which the *AllPay* and *Black Sash Trust* decisions were made was quite different: they took place prior to the broader awareness of the pernicious and entrenched nature of the corruption forming the heart of the state capture project. With this context in mind, the following sections consider these cases in greater detail.

4.4 THE *ALLPAY* DECISIONS

(a) Context: Allegations of corruption in the tender process

It is worthwhile traversing the context surrounding the *AllPay* and *Black Sash Trust* cases. The set of facts from which they arose is relevant: that is, a tender for the award that would see the introduction of biometric identity verification related to the payment of social grants. In the context of South Africa's gross economic inequality,[94] social grants are an essential safety net used by approximately 34% of the population that has a marked effect in insulating people living in poverty from some of its worse effects.[95] The continuous functioning of the social grants system is therefore imperative to ensure that the basic needs of millions of citizens are met. Any interruption would have a profound impact on the fulfilment of the human rights of grant recipients and their dependants.

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[92] *AllPay 1* (note 4 above) paras 8–14.
[93] See, for instance, page 10 of the National Anti-Corruption Strategy, which has as one of its six core pillars the goal to 'improve the integrity, transparency and credibility of the public procurement system'. *National Anti-Corruption Strategy 2020-2030*, last accessed from https://www.gov.za/sites/default/files/gcis_document/202105/national-anti-corruption-strategy-2020-2030.pdf on 4 February 2025.
[94] Lucas Chancel et al 'World Inequality Report' *World Inequality Lab* (2022), last accessed from https://wir2022.wid.world/www-site/uploads/2022/03/0098-21_WIL_RIM_COUNTRY_SHEETS.pdf on 13 October 2022.
[95] See Talent Zwane, Mduduzi Biyase & September Rooderick 'Assessing the impact of social grants on household welfare using propensity score matching approach' (2022) 24 *International Journal of Development Issues* 1.

As far back as February 2012, there were allegations of impropriety on behalf of Cash Paymaster Services (CPS) in relation to procurement processes. It was reported that Mr Norman Arendse, a member of the Bid Adjudication Committee for a prior tender for the payment of social grants, had alleged that an attempt was made to interfere in the tender process by offering him a bribe to favour CPS.[96] This tender was cancelled and reissued. The second tender was awarded to CPS. The losing bidder who had advanced furthest in the process, AllPay Consolidated Investment Holdings (Pty) Ltd (AllPay), went to court to challenge the tender award.[97]

The tender was mired in claims that it had been awarded to CPS as a result of the company's political connections. A day after CPS's contract term started, a news report alleged that a member of the Bid Adjudication Committee had been paid R1.4 million to award the tender to CPS.[98] These bribery allegations were never proved formally. Nevertheless, the 'whiff of corruption'[99] continued to permeate the subsequent litigation.

(b) AllPay 1

Despite the plethora of allegations in the media that the award of the social grants tender to CPS was done through the leveraging of political relationships — or, at worst, corruption — the Constitutional Court's judgment in *AllPay 1*, at surface level, appears to be largely sterile with regard to such allegations. A more searching examination of the judgment reveals the court's clear understanding of the potentially devastating effects of maladministration in the context of tender awards and deep-seated concern for the propriety of procurement decisions. It also demonstrates the court's care not to be drawn into positions that would offend the separation of powers principle, even if doing so would enable it to take a stronger stance against corruption. This is a good illustration of its exercising of institutional pragmatism.

Two themes here require closer examination as they are revealing with respect to the court's attitude towards corruption and malfeasance. The first is the Constitutional Court's determination on the question whether to permit AllPay to introduce new evidence that would demonstrate malfeasance in SASSA's award of the tender to CPS. The second, and far more

[96] Sam Sole & Craig McKune 'Name your price: Bribe offer for R7 billion tender' *Mail and Guardian* 24 February 2012, last accessed from https://mg.co.za/article/2012-02-24-name-your-price-bribe-offer-for-r7billion-rand-tender/ on 13 October 2022.
[97] The salient facts pertaining to the award are described below.
[98] Gcwalisile Khanyile & Piet Rampedi 'DG's R1.4m "bribe"' *IOL* 1 April 2012, last accessed from https://www.iol.co.za/news/politics/dgs-r14m-bribe-1267964 on 13 October 2022.
[99] Du Plessis & Coutsoudis (note 69 above) 759.

nuanced theme, is the court's approach to material irregularities in procurement processes. More specifically, it is worthwhile to consider whether its interpretation and application of the law could be linked to the need to address the difficult question of remedy in this case, and the need to achieve justice not just between the parties, but with regard to all those relying on social grants for their daily survival.

The issue of evidence received very little attention at all in the court's judgment in *AllPay 1*. It was considered and dismissed in a single paragraph, on the basis that 'the evidence sought to be introduced fails the test of being so crucial that, if accepted, it would likely change the outcome of the matter', that it was hearsay, and did not introduce any new independent evidence of major irregularities.[100]

What was the evidence that AllPay sought to admit? By AllPay's account, it was 'that of a SASSA official who was intimately involved in taking the minutes of the tender evaluation process' and that it provided 'a credible version of the way in which the tender process was compromised by a subversive scheme on the part of SASSA to ensure that CPS was the successful bidder'.[101] AllPay's founding affidavit in the Constitutional Court provides more context: it alleges that the tender process was tainted by 'dishonesty' and, somewhat obliquely, corruption and malfeasance.[102]

These allegations were made verbally by SASSA employee Mr Tsalamandris, who was present during the meetings of the Bid Evaluation Committee (BEC) and Bid Adjudication Committee (BAC) prior to the award of the tender to CPS, and were reduced to a transcript. Broadly, they included that Bidders Notice 2 was introduced in order to exclude bidders other than CPS from consideration, that AllPay's score was reduced following the oral presentation so that it would not be able to compete with CPS on price, that efforts were made to 'regularise' records to conceal the flaws in the process, and that various other steps were taken to ensure that CPS emerged the victor — a 'concerted stratagem on the part of SASSA to ensure that the tender was awarded to CPS'.[103]

These are serious allegations. Could, or should, the court have invoked its discretionary

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[100] AllPay's founding affidavit in the Constitutional Court in *AllPay 1* para 94, last accessed from https://collections.concourt.org.za/bitstream/handle/20.500.12144/3717/02Founding%20Affidavit.pdf?sequence=71&isAllowed=y on 21 March 2025.
[101] Ibid para 37.
[102] Ibid para 42, where AllPay states that 'evidence of the nature which AllPay sought to introduce, will rarely become available as corruption and malfeasance are best practiced in secret and not in the open'.
[103] Ibid para 222.

powers with respect to evidence so that it could entertain these allegations? Doing so would have cast the matter in a completely different light. It would have enabled the court to bring the allegations swirling in the media and public discourse into the courtroom, to be subjected to the harsh light of judicial scrutiny. Even the *amicus curiae* Corruption Watch[104] had asked the court to apply a point of principle that 'the admission of new evidence at a late stage should be relaxed in procurement cases in order properly to combat corruption'.[105]

Mubangizi and Sewpersadh argue that the court should have admitted the evidence into the review proceedings.[106] This is because the nature of corruption is that it manifests in procurement often in 'secret and clandestine ways and is executed by individuals capable of covering their tracks' and as such, 'given the strong link between procedural irregularities and corruption and the clandestine nature of tender corruption . . . courts tasked with adjudicating a tender appeal or review ought not to readily jettison evidence of allegations of corruption'.[107] They argue that the courts should adopt a 'more flexible approach'[108] because the evidence of corruption in a tender process might arise only once the award is reviewed or appealed.[109] In such circumstances, the court is seized with a civil case and is therefore not able to adjudicate whether the crime of corruption as defined under the PRECCA Act has been committed. Nevertheless, Mubangizi and Sewpersadh argue that evidence regarding alleged corruption in the process is relevant to the determination of the presence of irregularities, because the 'presence of corruption would strike at the heart of the process'.[110]

In the abstract, their approach can be commended for encouraging the court process to draw out the full picture of alleged corruption that could have given rise to the irregularities, as such information would be in the public interest. Nevertheless, it would have been inapposite for the court to follow it in *AllPay* and in most other tender reviews as well, for several reasons. First, with respect, the authors attach too much weight to Froneman J's use of the word 'material' in refusing to admit the evidence on the basis that 'no *material* evidence of

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[104] Corruption Watch is a non-profit, civil society organisation that 'aims to ensure that the custodians of public resources act responsibly to advance the interests of the public, and to ensure that opportunities for entering into corrupt relationships are reduced'. It is the South African chapter of Transparency International. See *Corruption Watch*, last accessed from https://www.corruptionwatch.org.za/about-us/who-we-are/vision-and-mission/ on 17 February 2025.
[105] *AllPay 1* (note 4 above) para 94.
[106] John Cantius Mubangizi & Prenisha Sewpersadh 'Tender irregularities and corruption in South Africa: The need to revisit issues of evidence' (2016) 29 *SAJCJ* 292 at 293.
[107] Ibid 297.
[108] Ibid 298.
[109] Ibid 300.
[110] Ibid 302.

corruption is sought to be admitted here'.[111] They suggest it implies that

> 'where evidence of corruption is material a court ought to admit it in tender review cases, even if such evidence is presented late in the proceedings or does not necessarily meet the strict requirements for the admissibility of evidence.'[112]

However, what Froneman J most likely intended was to state his conclusion about the test mentioned earlier, namely, whether the evidence was 'so crucial that, if accepted, it would likely change the outcome of the matter'.[113] He was not applying a test for 'material corruption', but one for evidence that was material to the case's outcome.

Secondly, it bears asking whether anything is gained by, as they suggest, creating a general principle that the rules of evidence should be relaxed once corruption is alleged. Corruption in a tender process may give rise to any of a number of review grounds under PAJA,[114] including, as was the case in *AllPay 1*, procedural irregularities. If the evidence before the court establishes the presence of any of these grounds of review, then admitting additional evidence

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[111] *AllPay 1* (note 4 above) para 94. Emphasis added.
[112] Mubangizi & Sewpersadh (note 106 above) 298–9.
[113] *AllPay 1* (note 4 above) para 94.
[114] Section 6(2) of PAJA provides that '[a] court or tribunal has the power to judicially review an administrative action if–
(a) the administrator who took it–
(i) was not authorised to do so by the empowering provision;
(ii) acted under a delegation of power which was not authorised by the empowering provision; or
(iii) was biased or reasonably suspected of bias;
(b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;
(c) the action was procedurally unfair;
(d) the action was materially influenced by an error of law;
(e) the action was taken-
(i) for a reason not authorised by the empowering provision;
(ii) for an ulterior purpose or motive;
(iii) because irrelevant considerations were taken into account or relevant considerations were not considered;
(iv) because of the unauthorised or unwarranted dictates of another person or body;
(v) in bad faith; or
(vi) arbitrarily or capriciously;
(f) the action itself–
(i) contravenes a law or is not authorised by the empowering provision; or
(ii) is not rationally connected to–
(aa) the purpose for which it was taken;
(bb) the purpose of the empowering provision;
(cc) the information before the administrator; or
(dd) the reasons given for it by the administrator;
(g) the action concerned consists of a failure to take a decision;
(h) the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function; or
(i) the action is otherwise unconstitutional or unlawful.'

to show corruption (which would have to meet a different, criminal law test)[115] adds little to the case. The authors do not suggest that the court should make an order that its judgment, including its assessment of the evidence of corruption, be submitted to the National Prosecuting Authority or any other anti-corruption agency for further investigation. But even if this were the aim – that is, to derive a secondary, public-interest centred benefit from civil litigation between competing tenderers – there are good reasons not to relax established evidentiary principles as a general rule in such cases. Hearsay evidence is by its nature less reliable and as such must meet certain requirements before being admitted,[116] and appeal courts will generally resist being the triers of fact for the first time, except in exceptional circumstances.[117] Significant court resources could be expended to establish the soundness of the hearsay evidence – and yet even a correct determination would yield little apparent advantage to the parties or the court. While it might benefit the public to know whether corruption tainted the tender process, any evidence that could establish this should rather be submitted to the appropriate anti-corruption authorities[118] for investigation and, if found to be sound, prosecution should follow. There is little to commend a blanket relaxation of the rules of evidence simply because corruption is alleged in a tender dispute.

The court's decision in *AllPay 1* not to entertain the allegations was therefore well judged – not only was it sound with regard to established principles of the law of evidence alone as

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[115] See s 13 of the PRECCA Act, which provides as follows:
'13 Offences in respect of corrupt activities relating to procuring and withdrawal of tenders
(1) Any person who, directly or indirectly, accepts or agrees or offers to accept any gratification from any other person, whether for the benefit of himself or herself or for the benefit of another person, as–
(a) an inducement to, personally or by influencing any other person so to act–
(i) award a tender, in relation to a contract for performing any work, providing any service, supplying any article, material or substance or performing any other act, to a particular person; or
(ii) upon an invitation to tender for such contract, make a tender for that contract which has as its aim to cause the tenderee to accept a particular tender; or
(iii) withdraw a tender made by him or her for such contract; or
(b) a reward for acting as contemplated in paragraph (a) (i), (ii) or (iii),
is guilty of the offence of corrupt activities relating to procuring and withdrawal of tenders.'

Section 13(2) similarly criminalises the act of offering a gratification in order to induce the other party to make decisions benefitting them in the context of a tender process.
[116] See *S v Ndhlovu* 2002 (2) SACR 325 (SCA) at para 13, where Cameron JA (as he then was) stated that '[n]ot only is hearsay evidence – that is, evidence of a statement by a person other than a witness which is relied on to prove what the statement asserts – not subject to the reliability checks applied to first-hand testimony (which diminishes its substantive value), but its reception exposes the party opposing its proof to the procedural unfairness of not being able to counter effectively inferences that may be drawn from it. For these very reasons, this Court emphasised more than four decades ago that "hearsay, unless it is brought within one of the recognised exceptions, is not evidence, ie legal evidence, at all."' This dictum was endorsed by the Constitutional Court in *Savoi v National Director of Public Prosecutions* 2014 (5) SA 317 (CC) para 38.
[117] See *Rail Commuters Action Group v Transnet Ltd T/A Metrorail* 2005 (2) SA 359 (CC) paras 40–3.
[118] Such as the police, the Special Investigations Unit or the Public Protector.

described above, but pushing the boundaries of established evidentiary principles to accommodate the recording would have invited valid criticism of the court's overstepping the separation of powers in order to strike at the conduct of executive actors. The court could have seen an activist role for itself as an inquisitor well-positioned to expose the root of the problem, but it nevertheless cleaved close to established legal principles and refused to admit the evidence. Moreover, as pointed out above, there would have been no appreciable benefit in doing so: AllPay itself admitted that the evidence was not necessary for it to succeed in its appeal.[119] The court's refusal to engage with AllPay's arguments about the evidence at any length in its judgment insulated it from the potential for such criticism, making it a sound decision not just in terms of the law of evidence but also from the perspective of the court's institutional security.

The second theme that will be explored here arises from the approach of the Supreme Court of Appeal that 'minor, inconsequential flaws' should not invalidate procurement processes owing to the public interest in public procurement matters. AllPay and Corruption Watch criticised this interpretation of the law on the basis that it 'impermissibly endorses a relaxed approach to the procedural requirements of public procurement tenders'.[120] The Constitutional Court was quick to reject the appeal court's view:

> 'To the extent that the judgment of the Supreme of Court of Appeal may be interpreted as suggesting that the public interest in procurement matters requires greater caution in finding that grounds for judicial review exist in a given matter, that misapprehension must be dispelled. So too the notion that even if proven irregularities exist, the inevitability of a certain outcome is a factor that should be considered in determining the validity of administrative action.'[121]

Instead, the refrain to which the court returns frequently in the judgment is the importance of procedural requirements in ensuring fairness and the 'even treatment of all bidders',[122] and that giving short shrift to questions of procedure by considering the matter 'through the lens of the final outcome . . . conflates the different and separate questions of unlawfulness and remedy'.[123] This was an important and correct distinction for the court to make at the outset for a number of reasons.

First, it affirmed the status and value of review on procedural grounds in administrative

[119] *AllPay 1* (note 4 above) para 44.
[120] Ibid para 16.
[121] Ibid para 23.
[122] Ibid para 24.
[123] Ibid.

law. The Supreme Court of Appeal's approach would have permitted procedural irregularities to be minimised as inconsequential. But PAJA and established principles of legality review do not ascribe differing weights to the various grounds of review; it is sufficient that a reviewable ground is established in order to justify an order setting aside the decision.[124]

The second reason was that it highlighted the role procedural requirements play in guarding against corruption and malfeasance. The court endorsed Corruption Watch's argument that 'deviations from fair process may themselves all too often be symptoms of corruption and malfeasance in the process. In other words, an unfair process may betoken a deliberately skewed process.'[125] This is the court's only reference to corruption other than its response to Corruption Watch's arguments regarding evidence.

It is very possible, then, that the court did suspect that the tender award was tainted by corruption. But, absent the issue being set before the court in the appropriate manner, the court appears to have channelled its concerns into determining whether correct procedure had been followed in the circumstances. In this way, the court was able to achieve two benefits: setting valuable precedent affirming the 'instrumental, not just intrinsic, value of upholding procedural fairness'[126] at a time when public procurement was often bedevilled by corruption, and ensuring that the court could not be accused of meddling in executive functions unduly or casting aspersions about impropriety on public office-bearers.

The third reason that it was important for the court to draw a clear line between unlawfulness and remedy is that it enabled the court to slice through the Gordian knot before it: how to resolve the dispute between two competing commercial entities in a manner that did not endanger the continued functioning of the social grants system upon which millions rely to meet their basic needs. This was a matter where the stakes were too high to come to a wrong decision.

The question of remedy in this matter was a vexed one, and it must surely have been uppermost in the minds of the judges in the High Court, Supreme Court of Appeal, and Constitutional Court. The thorny question of remedy may well have influenced the manner in which the courts approached the matter on the merits, including their respective interpretations of the applicable law.

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[124] See the use of the disjunctive 'or' in s 6 of PAJA as set out in note 114 above.
[125] *AllPay 1* (note 4 above) para 27.
[126] Du Plessis & Coutsoudis (note 69 above) 765. See also Meghan Finn 'AllPay remedy: Dissecting the Constitutional Court's approach to organs of state' (2014) 6 *CCR* 258 at 260.

Perhaps not so the High Court, where Matojane J found that the procedural deficiencies were sufficient to warrant the invalidation of the tender process, but found that considerations of 'practicality and certainty' in ensuring that social grant payments would continue uninterrupted did not require taking away the lucrative contract between SASSA and CPS.[127] While the expected outcome of such a procurement dispute would be an order that the tender process be run afresh, thereby opening up an opportunity for AllPay and others to bid for and perhaps win the contract, the weight of the implications of such a remedy here meant that the court could see no other option but to deny AllPay such relief.

The need to ensure that a system remained in place to pay social grants may not necessarily have been the primary motivation for the Supreme Court of Appeal's adoption of the approach that the public interest required that inconsequential errors in process should not invalidate the process. It could, however, have been an 'extra-legal factor' influencing its assessment of whether procedural irregularities were of that nature. In particular, it may – consciously or not – have led the Supreme Court of Appeal to understate the constitutional import of the two reviewable irregularities which the Constitutional Court found to exist, namely, the failure to evaluate CPS's empowerment partners, and the vagueness and uncertainty created by Bidders Notice 2, thus enabling it to make an order that would retain continuity in the system for the payment of grants.

The Constitutional Court observed that SASSA's conduct had resulted in the bidders' empowerment credentials being rendered a 'nullity' in the tender process, and that SASSA had not met its obligation to investigate and confirm the tenderers' empowerment credentials before a final award was made.[128] The Supreme Court of Appeal, adopting a flat, narrow reading of the law with barely any reference to the Constitution, did not find any such legal obligation. The Constitutional Court, however, teased out this obligation through a substantive and purposive reading of s 217(2) of the Constitution and the Preferential Procurement Policy Framework Act, concluding that such an assessment was material to the determination of the tender award, and therefore the tender was reviewable on this ground.[129] This marked a firm 'reject[ion of] the purely instrumental or merits-driven perspective of the Supreme Court of Appeal in *AllPay* [*1*], thus achieving a new approach to and balance in the treatment of

[127] *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency* [2012] ZAGPPHC 185.
[128] *AllPay 1* (note 4 above) para 68.
[129] Ibid paras 46–55.

formalities or procedural jurisdictional facts'.[130] This approach developed the common law, 'which had focused mechanically on the distinction between mandatory and directory provisions and had required strict compliance with the former'.[131]

Regarding Bidders Notice 2, the court considered that its introduction had rendered the requirements for the tender vague and uncertain, which in turn rendered the procurement process procedurally unfair. Its effect was to reduce 'the number of viable bids to one, rendering the process entirely uncompetitive and obviating any true, comparative consideration of cost-effectiveness'.[132] This can be contrasted with the Supreme Court of Appeal's approach, which in effect skimmed the surface regarding the effect of Bidders Notice 2 on the process by looking to the final outcome. That outcome came with a convenient remedy, which was to maintain the status quo.

The Constitutional Court acknowledged that the question of remedy would be anything but convenient, deciding instead to suspend the declaration of invalidity and make this important decision only at a later date, after the parties furnished crucial information. This bifurcated approach to remedy was hailed as a welcome judicial innovation 'worthy of replication in future cases'.[133]

AllPay 1 was also novel in that it was the first time the Constitutional Court directly considered a tender review.[134] It represented a 'pioneering contribution to our jurisprudence . . . setting out the appropriate review standard and emphasising the instrumental as well as intrinsic value of procedural fairness for guarding against corruption'.[135] It also put an end to the historical lack of clear distinction between the invalidity of administration action and the just and equitable remedy in pre-constitutional common-law review by instead imbuing the enquiry with the proper constitutional perspective, focusing on 'materiality' of irregularities rather than their consequence. More so, by refusing at the outset to adopt the approach to remedy by the High Court and the Supreme Court of Appeal – both of which would have allowed CPS to continue with the contract obtained pursuant to the tender even though they reached different outcomes on the merits – the Constitutional Court sent a forceful yet subtly

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[130] Cora Hoexter 'Courageous creativity and anti-formalism in administrative law: Notable contributions from the jurisprudence of Johan Froneman' (2022) 12 *CCR* 121 at 130.
[131] Ibid.
[132] *AllPay 1* (note 4 above) para 85.
[133] Helen Taylor 'Forcing the court's remedial hand: Non-compliance as a catalyst for remedial innovation' (2019) 9 *CCR* 247 at 257. See also Du Plessis & Coutsoudis (note 69 above) 768.
[134] Taylor ibid.
[135] Du Plessis & Coutsoudis (note 69 above) 764–5.

implied message that it would not, out of expediency, allow CPS to profit from circumstances over which hung the 'whiff of corruption'.[136] The insistence on proper procedure was a means 'to attain a further end of achieving the constitutional imperative to combat corruption'.[137] Incidentally, Cameron J, who heard the *AllPay* cases and joined the unanimous judgment of Froneman J, offers a glimpse into the judicial mind by expressly naming the conduct giving rise to the matter as 'corruption' in an extra-curial speech:

> 'More recently, the Constitutional Court has dealt consequentially with corruption in the outsourcing of social grant payments. This it did in the *AllPay* litigation, each judgment penned by Froneman J, who first of all reviewed and set aside the suspect tender award, and then, after a further hearing, creatively deployed the Court's remedial powers to provide a solution by which the wrongly benefitted tenderer could be replaced by a lawfully appointed one without disruption to payments, an arrangement the Court continued to supervise.' [138]

This suggests that the justices were indeed mindful of the need to step in to fill the accountability vacuum that had permitted these circumstances to eventuate.

AllPay 1 was ultimately thin in overt references to corruption and the court's impressions of whether the tender process was subject to undue influence, but rich in impactful jurisprudence concerning the proper approach to tender disputes. In keeping the focus strictly on a purposive interpretation of the Constitution and procedural requirements, the court avoided being drawn into speculation and thinly justified arguments, enabling it to keep a keen eye on ensuring that justice was done not only between the parties, but for all social grant dependents.

(c) AllPay 2

With questions of invalidity decided in *AllPay 1*, the sole focus of *AllPay 2* was to craft an order providing for a just and equitable remedy. This task was multi-layered: despite the court's emphasis on the need to observe proper procedure in public procurement, this was not a matter of merely reversing the irregular award to CPS. Rather, the interest in proper procedure had to 'be balanced against the essential need for uninterrupted service delivery in line with the obligations under ss 27 and 28 of the Constitution'.[139] There were myriad competing

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[136] Ibid 759.
[137] Gilbert Marcus & Max du Plessis 'The importance of process and substance' (2017) 32 *SA Public Law* 1 at 27.
[138] Edwin Cameron & Leo Boonzaier 'Venturing beyond formalism: The Constitutional Court of South Africa's equality jurisprudence' (2020) 84 *The Rabel Journal of Comparative and International Private Law* 786 at 813–14.
[139] *AllPay 2* (note 4 above) para 16.

considerations at play: the costs of ordering a fresh tender; the benefits of a more competitive tender in order to give expression to the principle of cost-effectiveness; the corrective principle, with its 'emphasis on correction and reversal of invalid administrative action';[140] and the 'primacy of the public interest in procurement and social-security matters'.[141] It is clear from the judgment that the overriding concern was continuity of service to ensure that the rights of millions of grant recipients were protected.

The court balanced these competing considerations by 'navigat[ing the] tension posed by competing remedial imperatives'[142] and ultimately eschewing a binary determination of remedy that would have limited the options to either ordering correction or maintaining the current position. Rather, it decided that the just and equitable remedy 'may lie somewhere in between, with competing aspects assessed differently'.[143] Its ultimate order[144] – that the declaration of invalidity regarding the award of the contract to CPS would be suspended and that the tender process would be run anew – had two purposes: firstly, 'ensur[ing] the timely and uninterrupted payment of social grants' and 'vindicat[ing] the public interest and uphold[ing] the rule of law by ordering that the tender process be re-run'.[145] The effect was to 'broaden the remedial lens' through which the court viewed the matter.[146]

The suspension of the declaration of invalidity was notable because it 'served to protect the rights of grant beneficiaries rather than its usual function of preserving comity as a dialogic device that shows deference towards the other branches of government'[147] by giving them the opportunity to remedy the defect.[148] Despite suspending the declaration of invalidity, the court was nevertheless quite interventionist in its remedy, as discussed further below. The order was also notable because, after applying a purposive interpretation of the Constitution, the court concluded that CPS's performance in terms of its contract with SASSA was not merely contractual but also constitutional in nature. As such, it was accountable to the people of South Africa for the performance of these public functions and was to this extent open to public

[140] Ibid para 29.
[141] Ibid para 33.
[142] Taylor (note 133 above) 255.
[143] *AllPay 2* (note 4 above) para 39.
[144] See ibid para 78 for the full order, which is quite detailed in its terms.
[145] Taylor (note 133 above) 256.
[146] Sandra Liebenberg 'The art of the (im)possible? Justice Froneman's contribution to designing remedies for structural human rights violations' (2022) 12 *CCR* 137 at 158.
[147] Ibid.
[148] See, for example, *Minister of Home Affairs v Fourie* 2006 (1) SA 524 (CC) paras 132–53.

scrutiny.[149] CPS would remain 'bound to its contractual and constitutional obligations'[150] to maintain the payment system in place until a new system was operational, and any failure to perform by CPS would have a 'dimension beyond mere breach of contract'.[151]

The deftness with which the court navigated the difficult waters between correction and the vindication of constitutional rights is demonstrated by its approach to the order that a new tender process be run. The court ventured into SASSA's executive terrain by prescribing by when it should run the new tender process, listing specific safeguards that must be included in the request for proposals, specifying the validity period for the new tender (if awarded), and ordering that a new BEC and BAC be appointed.[152] This was rationalised by the court's acknowledgment that the costs of a new tender process would be a 'justifiable price to pay' for the information SASSA would receive that could guide its decision,[153] and that absent a specified term for the new contract, CPS would be advantaged by its incumbency.[154] This interventionist approach was required to ensure 'effective relief' in terms of s 172(1) of the Constitution.[155]

The court also addressed a separation of powers concern raised by SASSA by leaving open the possibility that SASSA could, following the tender process, have declined to award the tender and chosen instead to take over the payment of social grants itself, which the agency had said it intended to do in 2017.[156] Nevertheless, the court did not let go of the reins entirely: it retained supervisory jurisdiction, mandating that in the event that the tender was not awarded, SASSA would have to furnish a report setting out further information about how it would go about making the social grants payment itself. Retaining of jurisdiction in this matter was a 'forward-looking accountability mechanism aimed at securing prospective compliance once the suspension of the declaration of invalidity lapsed'.[157]

While the order in *AllPay 2* is a model showing the court's skilful balancing of the tensions between activism and restraint, an analysis of the text of the judgment shows clearly that it was

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[149] *AllPay 2* (note 4 above) para 59. See Finn (note 126 above), who highlights as 'courageous and compelling' the finding that a private entity (CPS) was an organ of state for the purposes of this contract and was therefore a bearer of constitutional obligations, though it does raise some doctrinal difficulties which are explored further in her article.
[150] *AllPay 2* (note 4 above) para 63.
[151] Ibid para 63.
[152] Ibid para 78.
[153] Ibid para 40.
[154] Ibid para 43.
[155] Ibid paras 44–5.
[156] Ibid para 13.
[157] Taylor (note 133 above) 257.

under no illusions as to the real potential that members of the executive might fail to take their constitutional obligations seriously, even when doing so would endanger the livelihoods of millions of citizens. The court robustly criticised SASSA's conduct in relation to the flawed tender process, reiterating that it was 'SASSA's irregular conduct [that was] the sole cause for the declaration of invalidity and the setting aside of the contract between it and [CPS]'.[158] It described SASSA's conduct in the litigation as 'unhelpful and almost obstructionist' and noted that the institution had 'failed to furnish crucial information to AllPay regarding the implementation of the tender and to Corruption Watch in respect of steps it took to investigate irregularities in the bid and decision-making process'.[159]

The court's dim view of this conduct was apparent in its statement that '[SASSA's] conduct must be deprecated, particularly in view of the important role it plays as guardian of the right to social security and as controller of beneficiaries' access to social assistance'.[160] This no doubt influenced its finding that 'further disciplined accountability is needed in the initiation and execution of the new tender process'[161] in the form of a structural interdict. By retaining supervisory jurisdiction in terms that were described as 'almost patronising – and . . . certainly paternalistic – in its specification',[162] the court likely sought to send a message that responsible officials were under a microscope, with the intention that the enhanced scrutiny would engender urgency and diligence in the execution of their duties. Unfortunately, this was not to be the case.

4.5 THE *BLACK SASH TRUST* DECISIONS

(a) Black Sash Trust 1

(i) Factual matrix

The first *Black Sash Trust* judgment was handed down some three and half years after *AllPay 1*. During that interim period, SASSA had made no appreciable gains in putting in place a viable social grants system. Rather, it had run a tender process following which it made no award, and decided instead that it would itself take on responsibility for the payment of the social grants. Most importantly, SASSA had assured the Constitutional Court that it would be able to meet the deadline of 31 March 2017. On the basis of that assurance, the court had discharged

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158 *AllPay 2* (note 4 above) para 73.
159 Ibid.
160 Ibid.
161 Ibid para 71.
162 Michael Cosser, Narnia Bohler-Muller & Gary Pienaar 'Separation of powers and the dangers of judicial underreach' in: Daniel Plaatjies (ed) *Making Institutions Work in South Africa* (2021) 147 at 162.

its supervisory order.

However, by April 2016, functionaries within SASSA were aware that it was not actually capable of administering social grants come 1 April 2017. The Minister of Social Development, Ms Bathabile Dlamini said that she was informed of this in October 2016, but did not provide any indication to the court that she had made any enquiries before then. Further, neither SASSA nor the Minister informed the court of its inability to take over the payments, nor did they 'approach the court for authorisation to regularise the situation'.[163] When SASSA brought an application for authorisation in February 2017, Dlamini stepped in and ordered SASSA to withdraw it.

Mere weeks before the intended deadline, Dlamini and SASSA made an alarming statement: that 'CPS [was] the only entity capable of paying grants for the foreseeable future after 31 March 2017'.[164] They therefore intended to award the tender to CPS without a competitive process. The context around this statement gave serious cause for concern. The court had already expressed its displeasure with SASSA's conduct unambiguously in *AllPay 2* but even so, SASSA had failed to take prompt steps to comply with its order by 31 March 2017. Other questionable conduct had come to light in the media.[165] It would have struck any reasonable observer, including the court, that it was suspicious that in all the time SASSA had been given to rerun the tender process or make arrangements for it to pay social grants itself, it arrived at a conclusion that would effectively return the pre-*AllPay 1* status quo for a further full contract period. Since the court had discharged its supervisory order, the Black Sash Trust[166] applied to the Constitutional Court in the public interest to request the court's

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[163] *Black Sash Trust 1* (note 5 above) para 6.
[164] Ibid para 7.
[165] For instance, there were allegations that CPS was selling beneficiaries' personal information for marketing purposes (see Jenna Etheridge & Gareth van Zyl 'Privacy of SASSA beneficiary information a concern – Researcher' *News24* 8 March 2017, last accessed from https://www.news24.com/news24/southafrica/news/privacy-of-sassa-beneficiary-information-a-concern-researcher-20170308 on 13 October 2022). It was also alleged that the company had over-invoiced SASSA in the amount of R316 million, and that SASSA officials had lied to support CPS's claim to the funds (see Craig McKune 'How SASSA paid R316 million to a contractor based on a lie' *Mail & Guardian* 30 September 2016, last accessed from https://mg.co.za/article/2016-09-30-how-sassa-paid-r316-million-to-a-contractor-based-on-a-lie-1/ on 13 October 2022.)
[166] The Black Sash Trust is a South African human rights organisation established in 1955 that advocates for social justice. See *Black Sash Trust Overview*, last accessed from https://www.blacksash.org.za/overview/ on 10 February 2025. Freedom Under Law is a non-profit civil society organisation with a mission to promote democracy, the rule of law and the principle of legality in South Africa. See *Freedom Under Law*, last accessed from https://freedomunderlaw.org/?_gl=1%2A1jd3b90%2A_ga%2AMzA2MzY2NDA1LjE3Mzk1NDAxMzc.%2A_ga_11VBFM9XZE%2AMTczOTg4NDQ4NS4yLjAuMTczOTg4NDQ4NS4wLjAuMA..#about on 18 February 2025. The organisation was permitted by the court to intervene in the *Black Sash Trust* litigation by the court.

intervention to ensure the continued payment of social grants to beneficiaries.

(ii) The Constitutional Court's response

There is no express statement of any suspicion in *Black Sash Trust 1* that SASSA's intention to award the new tender to CPS was motivated by corruption. Nevertheless, the first paragraph of *Black Sash Trust 1* establishes the disapproving tone Froneman J would employ in his excoriation of the 'extraordinary' behaviour of Dlamini and SASSA, stating expressly that their conduct had done no less than place the achievement of the 'establishment of an inclusive and effective programme of social assistance' in jeopardy.[167] He further chastised them thus:

> 'This Court and the country as a whole are now confronted with a situation where the executive arm of government admits that it is not able to fulfil its constitutional and statutory obligations to provide for the social assistance of its people. And, in the deepest and most shaming of ironies, it now seeks to rely on a private corporate entity, with no discernible commitment to transformative empowerment in its own management structures, to get it out of this predicament.'[168]

The circumstances fell outside the ordinary and expected constitutional tension inherent in the separation of powers, where courts take care to 'tread cautiously to preserve the comity' between the judiciary and the elected branches of government.[169] Instead, the court was now left to deal with the executive reneging on its assurance that it would 'be able to fulfil an executive and administrative function allotted to it in terms of the Constitution and applicable legislation', and moreover, this failure would have serious consequences.[170] Not only did it display a lack of concern for the threatened infringement of people's social assistance rights, but it 'disregarded' the 'foundation of the court's remedial order'.[171] The court remarked on the lack of 'reciprocal comity from the Minister and SASSA in respect of the remedial order and withdrawal of the supervisory order, towards the judicial branch of government', noting that '[i]t must be considered whether their conduct went even beyond that'.[172]

There is a palpable shift in tone and approach between the *AllPay* cases and the first *Black Sash Trust* case. *AllPay 1* and *AllPay 2* – both in their choice of language and the eventual order granted – demonstrate the court's willingness to assume a degree of mutual comity

167 *Black Sash Trust 1* (note 5 above) para 1.
168 Ibid para 8.
169 Ibid para 10.
170 Ibid.
171 Ibid.
172 Ibid para 13.

between the branches of government; that whatever the reason for SASSA's missteps in awarding the contract to CPS, the firm but gentle chastisement grounded in the rights of social grant beneficiaries would have been enough to trigger a change in approach by SASSA officials and Dlamini, and if not, oversight by other members of the executive to ensure compliance with the court's order. This assumption was not made out of generosity, but rather a profound understanding of, and respect for, the separation of powers.

The facts giving rise to *Black Sash Trust 1* revealed that the court's trust in this reciprocal comity was misplaced: 'SASSA and the Minister [failed] to keep their promise to this Court and the people of South Africa'.[173] The text of the judgment expresses an undercurrent of frustration that the court had to be drawn into providing such accountability through its judicial powers, a role that, 'at [that] particular time, [was] not one of the Court's choosing'.[174] It emphasised that it was called upon to step in not because it wished to flex its powers in relation to the executive, but because it was required to do so in view of its constitutional responsibility which, in these circumstances, included staving off impending disaster. The court remarked that:

> 'Judges hold office to serve the people, just as members of the executive and legislature do. The underlying danger to us all is that when the institutions of government established under the Constitution are undermined, the fabric of our society comes under threat. A graphic illustration would be if social grants are not paid beyond 31 March 2017. It is to the practical avoidance of that potential catastrophe that we must now turn.'[175]

The severity of the situation was made clear in the court's approach to the preliminary issues of direct access and urgency. Noting that 'it is difficult to conceive of a matter more urgent on a national scale . . . the conduct of the Minister and SASSA has created a situation that no one could have contemplated: the very negation of the purpose of the court's earlier remedial and supervisory order' and recognising that its intervention was required to avert a national calamity, the court granted direct access.[176]

The court emphasised the precarious situation created by SASSA and Dlamini, being the 'very real threatened breach of the right of millions of people to social assistance'.[177] This extraordinary and potentially dire circumstance triggered the court's just and equitable

[173] Ibid para 14.
[174] Ibid.
[175] Ibid para 15.
[176] Ibid para 36.
[177] Ibid para 43.

remedial powers under s 172(1)*(b)*(ii) of the Constitution.

The question of remedy had three important elements: first, the issue of how to manage the contractual relationship between CPS and SASSA, given that CPS was the only entity that was capable at that point of continuing social grants payments, and secondly, the retention of supervisory jurisdiction. The third element introduced the question whether SASSA officials, Dlamini, or both, ought to be held accountable for their conduct in their personal capacities.

The first element required delicate balancing and justification. The court elected to require that the regime it had put in place in *AllPay 2*, which had provided for the continuation of the contract between CPS and SASSA, remain in place. This took the unusual step of ordering parties into a contractual relationship and setting the terms of that relationship, an approach at odds with the principle of contractual freedom. Nevertheless, this unusual course of action was brought about by exceptional circumstances, and the court did not shy away from it.[178] The court did, however, hold back from 'imposing limits in advance on specific contractual terms that may be agreed to between SASSA and CPS', instead holding that the constitutionality or legality of such terms could be challenged at a later point, if necessary. This shows its caution in not pushing the limits of its remedial powers further than was necessary to ameliorate the risk of threatened harm.

On the issue of court supervision, the court noted that 'not much has changed [since *AllPay 2*], except that this time around the Minister may have contributed to the continued recalcitrance'.[179] It thus fell to the court to address the problem of SASSA's inability to get its affairs in order. In a unanimous judgment Froneman J criticised SASSA and Dlamini in direct, unflinching terms, stating that it was 'disingenuous and incorrect' to use the court's discharge of its supervisory jurisdiction as justification not to keep the court informed when they became aware that SASSA would not be able to pay social grants itself.[180]

The court considered that SASSA and Dlamini had 'disregarded' its order – the material content of which was *not* discharged – by failing to put in place systems by which SASSA would be able to pay social grants, or to contract this function out pursuant to a competitive tender process. This situation of their own making perpetuated the threat to the 'continued protection of access to their right to social assistance for grant recipients',[181] and thus justified

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[178] Ibid para 51.
[179] Ibid para 57.
[180] Ibid para 59.
[181] Ibid para 62.

further court supervision, which was duly ordered.

At the same time, the court was mindful that SASSA and Dlamini's conduct had shown that supervisory jurisdiction was not enough to ensure compliance, stating that '[m]ore [was] required'.[182] It therefore turned its attention to the question of accountability. The conduct of Dlamini and SASSA officials had provided 'reasonable grounds for investigating whether this Court's remedial order was disregarded and, if so, whether it was done wilfully'.[183]

Dlamini's place at the top of the chain of accountability meant that it was not necessary or possible at that stage to determine whether individual members of SASSA should be mulcted in costs. This was a matter requiring potentially affected parties to be joined to the proceedings in their personal capacities and given an opportunity to explain their conduct in relation to the issues.[184]

Ultimately, the court made an extensive order of some 14 paragraphs, going into detail as to the rights and responsibilities of each party. This included adding terms and conditions to the contract between CPS and SASSA. Further, the court required Dlamini and SASSA to file reports quarterly on its progress made towards ensuring payments of social grants. The court's order was explicit as to the details of such reporting, leaving little to their discretion. It also made an order – no doubt in light of past experience – requiring Dlamini and SASSA to file affidavits immediately upon any material changes in relation to the quarterly reports. It also drew 'on the additional checks and balances provided by the Chapter 9 institution, the Auditor General . . . instructing that the AG "and any other person(s) or institution(s) appointed by the Court", evaluate, amongst others, "the implementation of the social grants during the 12-month period"'.[185] Notably, for these purposes, Dlamini was called upon to file affidavits explaining why she should not be joined in her personal capacity, and why she should not pay costs of the application from her own pocket.

(iii) Analysis of the court's response

Black Sash Trust 1 paints a picture of a court in a 'remedial predicament'.[186] Taylor correctly identifies Froneman J's choice of language as recognising that it was not just incompetence that gave rise to the situation confronting the court, but intransigence, and so his judgment was

[182] Ibid para 72.
[183] Ibid.
[184] Ibid paras 73–5.
[185] Lauren Kohn 'The National Prosecuting Authority as part of South Africa's integrity and accountability branch and the related case for an anti-corruption redress system' (2022) 12 *CCR* 1 at 5.
[186] Taylor (note 133 above) 258.

a 'searing indictment of SASSA's conduct'.[187] As discussed in Chapter 2, intransigence is in most cases indicative of a need for an adjusted remedial response in the form of a firmer hand taken by the court. While Roach and Budlender suggest that a contempt order may be an appropriate response,[188] the court in *Black Sash Trust 1* chose instead to bring the conduct of SASSA and Dlamini under the court's supervision once again, now with a greater degree of control, by requiring reporting that was more regular and which contained more granular detail. The second facet of the order was a 'bold remedial innovation'[189] – namely, the introduction of monitors appointed by the court.

> 'This innovative remedy demonstrates institutional responsiveness to the reasons underlying SASSA's non-compliance: the independence of the panel of experts offers much-needed accountability in light of SASSA's intransigence, while their technical and legal expertise compensates for the institutional incapacity which has so far prevented SASSA from assuming payment of social grants itself.'[190]

Taylor offers a compelling assessment of the court's use of language in the judgment to justify these intrusive orders. The court powerfully and in clear terms spelled out the intransigence of SASSA and Dlamini. She argues that it went further to insist that this intransigence was not foreseeable, though this was an overstatement as the court itself in *AllPay 2* had deprecated their conduct as 'unhelpful and almost obstructionist'.[191] However, doing this 'added rhetorical force to the Court's defence of the order crafted in *AllPay [2]* and, more importantly, provided a basis for an escalated remedial response in *Black Sash [Trust 1]*' and 'cast its remedial intervention as one of reluctance and last resort'.[192] This is evidence of the court escalating its remedial response in direct proportion to the scale of intransigence by the public officials, but ensuring that its reasons for doing so were clearly justified. At the same time, the court 'carefully prefaced innovation (i.e. continued judicial supervision) with caution'[193] not to overstep the boundaries of the separation of powers by not immediately resorting to intrusive orders of contempt or punitive costs in the officials' personal capacities.

The introduction of independent third party monitors can also be seen as having two

[187] Ibid.
[188] Kent Roach & Geoff Budlender 'Mandatory relief and supervisory jurisdiction: When is it appropriate, just and equitable?' (2005) 122 *SALJ* 325 at 351.
[189] Taylor (note 133 above) 260.
[190] Ibid. Sandra Liebenberg (note 146 above 162–3) also praises the innovation of this order.
[191] *AllPay 2* (note 4 above) para 75.
[192] Taylor (note 133 above) 259.
[193] Sarah McGibbon & Imraan Abdullah 'Belonging in the new South Africa: Justice Froneman's search for a fundamental constitutional identity for the people of South Africa' (2022) 12 *CCR* 289 at 307.

additional purposes: serving as an attempt to fill the accountability vacuum and fortifying the court's protection for its institutional security. As to the former, Kohn correctly observes that

> '[i]t creates a "feedback-loop" that calls on multiple institutions to play their appointed role in a coordinated good-governance effort to check and balance the exercise of public power. As Woolman has noted, "[f]or any democratic project to work, constant collective (political) action beyond the narrow confines of the courtroom must occur". Froneman J's judgment in *Black Sash [Trust] 1* adds the insight that, for political action to do its job in the constitutional scheme, judicial remedies need to facilitate (and not thwart) the collective efforts of a range of constitutional institutions.'[194]

Regarding the court's institutional security, the order had the benefit of ensuring that any further intransigence would then be called out not just by the court, but other institutions as well. Direct attacks on the judiciary alleging that the Constitutional Court was treating SASSA officials and Dlamini unfairly would have been far less plausible in the face of evidence collected from wholly independent bodies. In this way, the court was able to address 'institutional dysfunction and political blockages that . . . undermine[d] the authority of the court and the rule of law, but also harm[ed] the interests of rights-holders'.[195]

(b) Black Sash Trust 2

(i) Factual matrix

Black Sash Trust 2 is a short judgment that concerns the last remedial element of *Black Sash Trust 1*, namely, the question of whether Minister Bathabile Dlamini should not be joined in her personal capacity and pay costs of the application out of her own pocket. In response to the Constitutional Court's order, Dlamini had filed an affidavit apportioning blame to SASSA officials and the Department of Social Development. Two officials – the CEO of SASSA Mr Magwaza, and the erstwhile Director-General of the Department, Mr Dangor – were granted leave to file affidavits to defend themselves. They fired back at Dlamini, claiming that she had 'established parallel decision-making and communications processes that bypassed SASSA and Department officials'.[196]

Dlamini provided evidence on affidavit that her actions were not wilful, and that she had been advised to create the 'work streams' by the Ministerial Advisory Committee. However,

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[194] Kohn (note 185 above) 5, referring to Stu Woolman 'A politics of accountability: How South Africa's judicial recognition of the binding legal effect of the Public Protector's recommendations had a catalysing effect that brought down a President' (2016) 8 *CCR* 155 at 162.
[195] McGibbon & Abdullah (note 193 above) 307.
[196] *Black Sash Trust 2* (note 5 above) para 2.

the court observed that the Minister was not forthcoming regarding her own involvement in the process. Her evidence did not provide any insights regarding what steps she had taken (if any) to keep up to speed with progress between April and October 2016. By her own account, her inaction was based on an assumption that 'the existing reporting chain and communication channels were working and that [she] would be informed if anything of consequence arose'.[197] This was never done, she says, despite SASSA officials becoming aware in April that the deadline would not be met, a legal opinion having been obtained, and the fact that that work streams were appointed in June 2016. Dlamini laid blame generously, naming the then-CEO of SASSA as well as a subsequent acting CEO as having contributed to delays in implementation.

The acting CEO of SASSA, Magwaza, instead pointed to Dlamini's appointment of work streams as the reason for the derailment of SASSA's planned process to pay social grants itself. He also disputed other parts of Dlamini's evidence. Dangor, too, filed an affidavit, which confirmed the creation of parallel reporting structures.

The court considered that the affidavit evidence was untested, and therefore declined to make an order on the evidence before it at the time. Acknowledging the principle of *audi alteram partem*, it felt unable to make a costs order against Dlamini on the basis of untested allegations that she had not been able to challenge.[198] While other parties argued that her own evidence was sufficient to show that she had acted in bad faith, or at least in flagrant disregard for her statutory and constitutional obligations, the court did not wish to dispose of the matter piecemeal.[199] Instead, the court ordered that the parties would be given the opportunity to agree to a process in terms of s 38 of the Superior Courts Act 10 of 2013 in order to determine the issues relating to Dlamini's role and responsibility regarding the establishment and functioning of the work streams referred to in the affidavits, and if they failed to do so, the court would determine the process.[200]

(ii) Analysis of Black Sash Trust 2

Black Sash Trust 2 is a groundbreaking decision in that it quietly ushered in a dramatic development of the law on remedies. It marked the first time that the court acknowledged that punitive costs *de bonis propriis* could be awarded against a state representative not only based

[197] Ibid para 13.
[198] Ibid para 21.
[199] Ibid para 22.
[200] Ibid para 24.

on their conduct during litigation, but also with regard to the exercise of their public duties.[201]

To reach this conclusion, the court confirmed that the 'courts have always set a very high bar before a finding of personal costs orders against public officials'[202] and reiterated established principles: the conduct in question must be mala fide, negligent or unreasonable.[203] The step forward in remedial law is heralded by the court's pronouncement that this principle is 'now buttressed by the Constitution', which prescribes standards for the conduct of public officials, including accountability and responsiveness.[204] The court identified two linked issues that need to be considered when determining whether an official has conducted herself improperly, namely, institutional conduct and constitutional obligations. The former concerns the standard of conduct expected from individual officials 'because of their expertise and dedication to the position'.[205] Further, where the Constitution and legislation lay down specific obligations, then a personal costs order may be founded in the 'vindication of the Constitution, but in most cases there will be an overlap'.[206]

A reader might find the brevity of the judgment surprising, especially as there is little elucidation as to the reasons behind developing the law in this way.[207] Here, a case and article cited by the court provide important context. First, in *MEC for the Department of Welfare v Kate*,[208] the Supreme Court of Appeal outlined non-responsiveness by officials in public administration that led to a familiar pattern of events:

> 'The litigation that has been spawned by . . . administrative failure, with adverse implications for the public purse, ought to be capable of being avoided in most cases at least, because the rights that are in issue are usually not in dispute. Typically what seems to be occurring is that when a demand upon the administration is ignored an application to court spews from a word processor, with adaptations to meet the particular case, which then induces the administration to do something, probably through the intervention of the State Attorney. The administration then does what it ought to have done at the outset leaving it for the court merely to order the government to pay costs that were avoidable.'[209]

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[201] Ibid para 9.
[202] Max du Plessis & Muhammad Zakaria Suleman '*Ethekwini Municipality & Others v Westwood Insurance Brokers (Pty) Ltd*: Personal costs against public officials through the lens of *Westwood*' (2021) 138 *SALJ* 731 at 735.
[203] *Black Sash Trust 2* (note 5 above) para 5.
[204] Ibid para 7.
[205] Ibid para 8.
[206] Ibid.
[207] This portion of the judgment is just five paragraphs long.
[208] 2006 (4) SA 478 (SCA).
[209] Ibid para 6. Footnotes omitted.

Secondly, in an article cited by the court, Plasket observes:

> 'In other words, if administrative conduct is motivated by bad faith of a sufficiently gross degree, it may be appropriate for a court to make an order that the administrative official concerned repay the state for the costs incurred by it in defending his or her actions, in addition to paying the costs of the applicant de bonis propriis.'[210]

These passages suggest that the purpose behind the extension of the remedy in this way is to deter administrators from neglecting their constitutional obligations because it leads to avoidable litigation, and to recover some of the litigation costs that are funded by the public purse. While these aims are not *purely* punitive, they are punitive to some degree. As discussed in Chapter 2, the court unfortunately does not distinguish the broadening of the applicability of this remedy from the its own prior dictum in *Swartbooi*,[211] which held that personal costs orders against public officials in order to 'teach them a lesson' or 'influence what [they] might or might not do . . . constitutes a dangerous intrusion into the legislative and executive domain'.[212] Absent this distinction, this particular act of judicial activism is not fully consonant with the court's own precedent, and neither *Kate* nor Plasket's article offer sufficient explanation.

It is worth considering whether an extra-legal factor, such as the judge's beliefs and attitudes towards the role of the courts in the scheme set out by the Constitution, explains the court's extension of the remedy in that way, and at that particular time. In an interview pre-dating the *AllPay* and *Black Sash* litigation, when asked to identify a challenge facing South Africa, Justice Froneman effectively predicted the rise of lawfare, sharing his concern that in the face of failures by the executive and legislative arms of government to meet their constitutional (and specifically, human rights) obligations, people would increasingly turn to the courts:

> 'I think that if the executive, the legislature, do what the Constitution says they should do, the role of this Court will be less and less. To the extent that it's not done people will turn to the Court in order to try and attain what they might not attain through the ordinary political democratic process. I think it is better for the country that it is done through the political and the democratic processing in elections and representation and the like, but I think that if it's not

[210] Clive Plasket 'Protecting the public purse: Appropriate relief and costs orders against officials' (2000) 117 *SALJ* 151 at 158.

[211] *Swartbooi v Brink* (2) 2006 (1) SA 203 (CC). The case is cited elsewhere in *Black Sash Trust 2* (note 5 above) for an unrelated reason.

[212] *Swartbooi* ibid para 25.

> done then the Constitutional Court is the last resort and it has to do what it has to do. But there are some people who are saying that we are moving in that direction. I hope not. Because I think once you get to that situation then the tension between the courts and the other arms of government become very great, and the dangers associated with that become more acute.'[213]

Justice Froneman's statement was prescient, because only a few years later, these were the very issues that confronted the court in *AllPay* and later, *Black Sash Trust.* It may have been that he (and the other justices of the unanimous court) regarded the need to create a powerful means to 'pierce the political veil'[214] and thus keep individual public representatives in check as greater than the need to engage squarely with the dictum in *Swartbooi* at that time.

Black Sash Trust 2 is notable for another reason: it serves as a further illustration of the court's restraint when applying punitive costs orders. It does this in three ways. The first is that the court declined to make any order until the officials singled out by Dlamini were able to be heard.[215] Secondly, the court refused to entertain the argument that Dlamini had hoisted herself by her own petard in her submissions to the court: a further display of caution before subjecting a high-ranking member of the executive to a punitive remedy in her personal capacity.[216] Lastly, its invocation of s 38 of the Superior Courts Act gave the parties the illusion of choice. The court remarked that they were 'given the opportunity to agree to a process' to determine the questions of fact that had arisen, but in reality, had they not done so, the court would have 'determine[d] the process to be followed' in any case.[217] While s 38 frames the referral process as conditional upon the parties' consent, the court was clear that it retained control. This was a subtle indication that it would not leave room for Dlamini to engage in Stalingrad legal tactics by refusing to reach an agreement. All of these decisions are examples of strategic restraint in order to protect the court's institutional security because they showed the court's respect for proper process, such as the *audi alteram partem* rule, and its unwillingness to make quick conclusions without a measured consideration of all the facts and submissions by the parties. At the same time, the court showed that it would maintain a firm hand over the process.

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[213] Interview with Johan Froneman, 'Justice Johan Froneman' *Constitutional Court Oral History Project (6 December 2011)*, last accessed from http://historicalpapers-atom.wits.ac.za/uploads/r/historical-papers-research-archive-library-university-of-witwatersrand/8/6/3/8630b98a37dd1ae90297 afc17a192074a853c13b6e6a8185953d26dc3074ce26/AG3368-F27-001-jpeg.pdf on 10 February 2025.
[214] Taylor (note 133 above) 249.
[215] *Black Sash Trust 2* (note 5 above) para 20.
[216] Ibid para 22.
[217] Ibid para 23.

(c) Black Sash Trust 3

Black Sash Trust 3 dealt with the issue of costs that was left open in *Black Sash Trust 2*. The judgment heralded a groundbreaking application of the court's remedial discretion in that it was the first time a personal costs order was awarded against a government Minister 'for conduct in the course of litigation associated with the performance of her duties'.[218]

The relevant facts concerned the events after *Black Sash Trust 2*, where the parties agreed that retired Judge President Ngoepe would be appointed as referee in the fact-finding inquiry. Its purpose was to investigate whether Dlamini had sought the appointment of parallel work streams that would report directly to her; and if the individuals were so appointed, to investigate further details relating to their appointment, their reporting, and the reason why Dlamini did not disclose to the court why these individuals were appointed to report directly to her.

After considering the evidence, Ngoepe found that Dlamini had indeed appointed individuals to lead parallel work streams. The individuals did not file any written reports, but reported directly to Dlamini.[219] Ngoepe also found that Dlamini had failed to make full disclosure to the court regarding the work streams she had appointed.[220] In a 'diplomatic but nevertheless damning' report, he found her explanation for failing to disclose the parallel work streams to be unconvincing and to be rejected, as their work was central to the effort to meet the deadline and could not have been omitted in a full account of steps being taken to meet the deadline.[221] Ngoepe found that the reason for failing to provide information regarding the work streams could only be related to her fear of being joined and mulcted in costs in her personal capacity. Disclosing that information would be inimical to her case and 'the fear of them as the reason for the non-disclosure therefore commends itself more readily to mind than any other reason'.[222] These findings were accepted by the Constitutional Court.

With the threat of a personal costs order looming over her, Dlamini argued that such an order would amount to a breach of the separation of powers and that the court lacked the authority to hold a Cabinet Minister to account by ordering them to pay costs out of their own pocket.[223] The Black Sash Trust and Freedom Under Law submitted that Dlamini's non-

[218] Theunis Roux 'The Constitutional Court's 2018 term: Lawfare or window on the struggle for democratic social transformation?' (2020) 10 *CCR* 1 at 23–4.
[219] *Black Sash Trust 3* (note 5 above) para 5.
[220] Ibid para 6.
[221] Ibid.
[222] Ibid.
[223] Ibid para 7.

disclosure was evidence of her bad faith.

The court dismissed Dlamini's claim that the separation of powers principle precluded it from making a personal costs order against her. Its reasoning was that

> '[w]hen courts make costs orders they do not make judgments on the political accountability of public officials. They do so only in relation to how the rights of people are affected by the conduct of a public official who is not open, transparent and accountable and how that impacts on the responsibility to a court by those involved in the litigation. And as explained in *Black Sash [Trust] 2*, the common-law rules for holding public officials personally responsible for costs are now buttressed by the Constitution'.[224]

The court's careful choice of language to frame punitive costs orders as not relating to the *political* accountability of public officials is important. It asserts that the court's role in making such orders is solely as the defender of rights, and suggests that the court is agnostic towards the political consequences of such decisions.

That cannot be wholly true in real-world circumstances. While the court was seized with a legal test (albeit one now steeped in constitutional values) – that is, did the SASSA officials and Dlamini act in bad faith or grossly negligently? – the effects of its judgment reverberated far beyond Constitution Hill. Kohn regarded Froneman J's statement that from the executive officials' transgressions 'consequences must follow' as a 'powerful judicial rallying cry at this "catalytic moment" in [South Africa's] constitutional trajectory'.[225] Roux observed that *Black Sash Trust 3* was 'about enforcing ministerial accountability in a dominant-party democracy where the electorate does not routinely sanction non-performance'.[226] This makes sense in context: the test for costs orders sets a high bar such that they are awarded in only the most egregious circumstances.[227] Political consequences should, and in many cases, do undoubtedly

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224 *Black Sash Trust 3* (note 5 above) para 10.
225 Kohn (note 185 above) 6.
226 Roux (note 218 above) 32.
227 See, for instance, *South African Social Security Agency v Minister of Social Development* 2018 (10) BCLR 1291 (CC), which arose from the *AllPay* set of facts as well. The circumstances of this case concerned the conduct of SASSA officials and Dlamini, which had the effect of forcing the court's hand to grant an urgent request for the extension of the suspension of invalidity of the contract between SASSA and CPS for a further six months. Despite the court's finding that SASSA officials had self-created the urgency in the application and failed to supply adequate reasons for this, the 'unsatisfactory explanation [fell] short of gross negligence or bad faith which would warrant a personal costs order' (para 4). It also found that Dlamini had not 'appl[ied] an effective supervisory role' over the SASSA officials, but that too did not constitute bad faith or gross negligence. No costs were awarded against them, despite their conduct being described as 'effectively [holding] the Court to ransom' and putting 'the Court over a barrel' by 'repeatedly failing to implement its orders or bringing last-minute urgent applications to extend them' (Roux ibid 40).

flow.[228] The executive may choose to remove the responsible official from office[229] or take other disciplinary steps. If the executive does not do so, this can precipitate a shift in how the ruling party is perceived with regard to holding its officials accountable, and suggest that there is tension between the judiciary and the executive. While it is true that courts themselves do not decide on political accountability measures, such judgments have significant political consequences. Judges may apply legal standards objectively, but must surely know that the effects that flow from this are felt beyond the courtroom.

That the judicial activism displayed in *Black Sash Trust 3* was buoyed by a current of political considerations can be explained by reference to Dixon and Roux's argument that the case falls within the period marking the second of the two 'overarching posture[s]' adopted by the Constitutional Court post-1994.[230] The authors argue that in new democracies, judges' choices are influenced by an unarticulated extra-judicial factor, being the

> 'overarching choice about the general posture they wish to adopt towards major political actors and other potential partners in the constitutional project, whether those be dominant political parties, civil society organisations, business organisations, or the public more generally'.[231]

The newly established Constitutional Court's first 'posture' was one that operated from a good-faith assumption that the executive and legislature were committed to the constitutional project, and so the court adopted a more deferential stance that allowed those branches space to implement laws and policies with little direct confrontation.[232] However, 'over time, as the ANC became less committed to the constitutional project, the Court gradually assumed a more active role in encouraging political pluralism and accountability, both within the ANC and more broadly (the second constitutional period)'.[233] In the second period, the court saw the

[228] When they do not, this is an indicator of democratic erosion, a situation where 'a democratically elected incumbent substantially undermines democratic institutions (that is, causes autocratization) by expanding or abusing their powers, but does not suspend or abolish them altogether'. See Melis G Laebens & Anna Lührmann 'What halts democratic erosion? The changing role of accountability' (2023) 28 *Democratization* 908 at 910.

[229] The social grants crisis precipitated under her watch was very likely a contributing factor to the ending of Dlamini's career in government. By the time *Black Sash Trust 3* was handed down, Dlamini had been removed as Minister for Social Development and assigned to another ministry. After the general election the following year, she was not appointed to any role in Cabinet and resigned as a member of Parliament shortly thereafter. See 'Bathabile Olive Dlamini, Ms' *South African Government Website* (undated), last accessed from https://www.gov.za/about-government/contact-directory/bathabile-olive-dlamini-ms on 12 February 2025.

[230] Rosalind Dixon & Theunis Robert Roux 'Marking constitutional transitions: The law and politics of constitutional implementation in South Africa' *UNSW Law Research Paper* (2018), last accessed from https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3251131 on 6 March 2025, 1 at 5.

[231] Ibid. They identify the first period as roughly falling between 1995 and 2007, and the second period following thereafter.

[232] Ibid.

[233] Ibid.

elected branches (or more specifically, the ANC as the dominant party) as less of an ally in advancing constitutionalism and instead turned to 'a more diverse set of partners, apparently sensing that South Africa's dominant-party democracy [was] the major threat to the consolidation of liberal democratic constitutionalism'.[234] One of the indicators of this shift identified by the authors was the 'more direct targeting of the pathologies of nepotism and corruption'.[235] To these examples can be added the egregious maladministration of the sort by perpetrated by the SASSA officials and Dlamini.

If these types of concerns motivated the court's development of the remedy of costs orders against public officials *de bonis propriis*, why did it not say so expressly? Dixon and Roux argue that the court was under 'constitutional-cultural constraints' in the form of the legal tradition governing the acceptable interplay between law and politics, particularly as it relates to judicial review.[236] They observe that '[p]recisely because it threatens to politicize their role, courts with the power of judicial review need to work hard to maintain an impression of themselves as legal actors'.[237] Applied to *Black Sash Trust 3*, this is a plausible explanation for the court's immense care to ground its costs order in the failure to meet constitutional obligations. To be clear, this is not to suggest the court's concern was the political dominance of the ANC per se, but rather that such dominance enabled corruption and maladministration to flourish in an accountability vacuum. Its development of the law on personal costs orders was one manifestation of its adoption of an 'overarching posture' to address that concern.

Ultimately, the court accepted the Inquiry Report's finding regarding the reasons Dlamini failed to disclose the information, and found that she had indeed acted in bad faith. At best, 'her conduct was reckless and grossly negligent'.[238] This justified a personal costs order against her. The tone of Froneman J's judgment made the court's disapproval clear: the conclusion reached was a 'serious and sad one, especially in the context of provision of social grants to the most needy in our society.'[239] It concluded that in order to bring accountability in the context of this 'sorry saga', Dlamini must bear a portion of the costs.[240] Doing so would

> 'account for her degree of culpability in misleading the Court — conduct which is deserving of censure by this Court as a mark of displeasure — more so since she held a position of

[234] Ibid.
[235] Ibid 8.
[236] Ibid 11.
[237] Ibid 12.
[238] *Black Sash Trust 3* (note 5 above) para 12.
[239] Ibid para 13.
[240] Ibid para 14.

> responsibility as a member of the Executive. Her conduct is inimical to the values underpinning the Constitution that she undertook to uphold when she took up office.'[241]

The last four paragraphs of *Black Sash Trust 3* are damning. Ngoepe's finding that Dlamini had misled the court to avoid accountability was a clear indication that she had not met the standards of commitment to ethical behaviour and public service required of her office. She had 'used her position as Minister of the Department to place herself between constitutionally enshrined rights and those entitled to them'.[242]

The court went on to determine what the proper extent of the personal costs order should be. It considered her personal responsibility 'arising from the parallel process she set in motion, and her shielding this truth from the court' and balanced that against the typical position that 'state officials do not bear personal responsibility for the good faith performance of their official functions'.[243] The conclusion it reached was that it was appropriate to order Dlamini to pay 20% of the taxed costs in her personal capacity.[244] The CEO of SASSA and SASSA itself were ordered to pay 80% of the costs of the Black Sash Trust and Freedom Under Law.

Lastly, the court took seriously the indications in the Inquiry Report that Dlamini had lied under oath in the affidavits before the Constitutional Court and orally before the enquiry. It therefore directed that the Registrar forward a copy of the Inquiry Report and its judgment to the National Director of Public Prosecutions, to consider whether she had indeed lied under oath, and if so, whether she should be prosecuted for perjury.[245]

Following the landmark decision in *Black Sash Trust 3*, Dlamini employed dilatory tactics to avoid payment of the legal fees ordered by the Constitutional Court, eventually paying the R650 000 owed only in May 2021.[246] This was not the end of her legal woes: she was later successfully prosecuted for perjury for statements she made under oath during the Ngoepe Inquiry and opted to pay a fine of R200 000 to avoid imprisonment.[247]

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241 Ibid.
242 Ibid para 15.
243 Ibid para 16.
244 Ibid. This excluded the costs of the Ngoepe JP Inquiry.
245 Ibid paras 17 and 18.
246 Liezl Human 'Dlamini finally pays R650 000 owed legal costs' *GroundUp* 13 May 2021, last accessed from https://www.groundup.org.za/article/dlamini-finally-pays-r650000-owed-legal-costs/ on 13 October 2022.
247 Lee-Anne Bruce 'Former Minister Bathabile Dlamini must pay for perjury' *CALS* 1 April 2022, last accessed from https://www.wits.ac.za/news/sources/cals-news/2022/former-minister-bathabile-dlamini-must-pay-for-perjury.html

5 RECEPTION AND AFTERMATH OF THE *ALLPAY* AND *BLACK SASH* CASES

The judgments of Froneman J in the *AllPay* and *Black Sash* cases have rightly received wide acclaim. They have been credited with 'effectively restor[ing] stability in the relationship between the institution and the public, where stability in that relationship is very important for ensuring a sense of belonging'[248] and 'br[eaking] new ground in our remedial jurisprudence through its innovative response to persistent non-compliance'.[249] Liebenberg credits the judgments as giving

> 'the imprimatur of our highest Court to a range of innovative tools to redress structural human rights violations. Equally important is the symbolic power of the apex Court being willing to grapple directly with the challenges of redressing systemic governance dysfunctions that imperil socio-economic rights.'[250]

The innovativeness of the judgments, their unwavering focus on the overarching concern for the need to protect social grants recipients, and artful balancing of restraint displaying concern for the separation of powers make them a remarkable feat of judicial decision-making.

Unfortunately, while the judgments set groundbreaking legal precedent, the circumstances surrounding them demonstrate the limitations of the court's ability to guard against wrongdoing, ameliorate harms once they occur, and ensure that wrongdoers are held accountable for their actions. While corruption was not formally alleged and never proved in the courts, the investigative work of several journalists point towards this conclusion.[251] It was alleged that, while performing the irregular contract, CPS took advantage of its position to sell vulnerable grants recipients financial products, many of which were unwanted, deducting the costs from beneficiaries' social grants payments.[252] However, no further investigations nor prosecutions have flowed from the alleged wrongdoing, meaning that the accountability vacuum present at the time of the irregular award of the contract to CPS was never truly filled.

This was not the end of the malfeasance. Two further instances of lawfare in relation to this matter are worth mentioning here. Both of these cases illustrate civil society organisations

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[248] McGibbon & Abdullah (note 193 above) 307.
[249] Taylor (note 133 above) 248.
[250] Liebenberg (note 146 above) 163.
[251] See Craig McKune 'Serge Belamant, SASSA and the "useful Blacks"' *amaBhungane* 15 December 2016, last accessed from https://amabhungane.org/serge-belamant-sassa-and-the-useful-blacks/ on 14 February 2025; Erin Torkelson, Abby May & Michael Marchant 'Unaccountable 00038| Net 1 and CPS- Welfare Profiteers' *Open Secrets* 24 May 2023, last accessed from https://www.opensecrets.org.za/unaccountable-00038-net1-cps/ on 14 February 2025.
[252] Torkelson, May & Marchant ibid.

stepping in to prevent CPS from unduly profiting from the irregular contract that it was ordered to perform by the Constitutional Court as a bearer of constitutional obligations. The first of these, *Corruption Watch (NPC) (RF) v Chief Executive Officer of SASSA*,[253] concerned the variation of the contract concluded between SASSA and CPS. Corruption Watch had become aware, via a stock exchange announcement, that SASSA had agreed to disburse an additional R275 million to CPS for the registration of 'additional' social grants beneficiaries.[254] This was on the basis that the contract had contemplated that only social grants 'recipients' would be registered – being those who would receive social grants payments – and that this group did not include several million 'beneficiaries' such as children, whose grant payments would be received on their behalf by others. Corruption Watch, suspecting irregularity in this variation, engaged with SASSA and ascertained that this additional payment had been agreed upon in a meeting between SASSA officials and CPS managers. No minutes of the meeting were made available. Despite Corruption Watch's concerns and attempts to engage with SASSA, the latter thereafter made payment of some R316 million to CPS. Corruption Watch challenged this decision in the High Court on the basis that it contravened s 6 of PAJA in that it was unlawful. The High Court concluded that the original contract did in fact contemplate the registration of children into the social grants payment system, and as such the payment made to CPS was 'unjustified, unlawful . . . and reviewable in terms of PAJA'.[255] It set aside SASSA's decision to pay CPS the additional R316 million, and ordered that the funds be repaid with interest.[256] The High Court's order was subsequently confirmed by the Supreme Court of Appeal.[257]

The circumstances giving rise to this case are indicative of most egregious maladministration at the least and at the worst, corruption. The timing of the alleged variation decision was suspicious because it appears to have been taken after *AllPay 1*,[258] when CPS was facing the possibility that the contract could be set aside imminently, pending the Constitutional Court's decision on remedy. Further, the lack of proper record-keeping by SASSA, including the failure to formalise a written agreement of the terms and instead stating that it had 'unilaterally' agreed to vary the contract, point to significant malfeasance that may well have

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[253] [2018] ZAGPPHC 7.
[254] Ibid para 7.
[255] Ibid para 29.
[256] Ibid para 36.
[257] *Cash Paymaster Services (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency* [2019] 4 All SA 327 (SCA).
[258] While CPS alleged it was taken in 2012, the High Court found that the minutes of the meeting provided did not support the conclusion that the parties had agreed to vary the contract. CPS had submitted an invoice for the additional funds on 10 March 2014.

been signs of a corrupt relationship. However, this (as was the case in *AllPay*) was not raised before the High Court and it made no finding as to corruption. This case illustrates the lack of propriety and respect for process by SASSA officials at the time, as well as the vastness of the accountability vacuum. No SASSA official stepped forward to halt the unlawful decision internally, nor did any exercise of oversight by the Minister or even Parliament succeed in preventing the egregious misappropriation of funds intended to support social grants beneficiaries. Rather, it fell to an outsider organisation to engage the courts in an act of lawfare to do so. It bears noting that while this action was successful in securing the invalidation of the varied agreement and obtaining an order that it be repaid, the court did not do more to hold those responsible accountable. Nor could it: limited by the case before it, the court could not order an investigation into the suspicious circumstances surrounding the variation, nor that the responsible officials be disciplined for violating their s 217 obligations. It would have impermissibly contravened the separation of powers to do so. It was simply not within the courts' powers (nor indeed, its mandate) to take the matter further in order to root out the source of the malfeasance in SASSA. The court was able to take accountability only so far and no further.

The second instance of lawfare concerned the Constitutional Court's order that CPS account for the profits it earned under the irregular contract.[259] CPS had failed to provide full records to the firm of auditors appointed by SASSA to verify its statement of profits, which even in spite of the lack of full disclosure, indicated a possible understatement of CPS's profits by some R800 million. Freedom Under Law took up the charge to ensure compliance with the court's order and once again approached the Constitutional Court for relief. The court issued an order with respect to all of the unopposed relief requested in Freedom Under Law's notice of motion, requiring CPS to furnish relevant documents to the auditors to enable verification of its profits.[260]

Two relevant points flow from this matter. The first is that, once again, SASSA displayed a concerning lack of interest in ensuring that its contracting partner CPS obeyed the court's order, and was content for a report without all relevant information to be furnished to National Treasury.[261] Instead, Freedom Under Law was obliged to raise the non-compliance

[259] See para 4.2 of the order in *AllPay 2* (note 4 above), and the more granular order contained in paragraphs 6.4 – 6.7 of the order in *Black Sash Trust 1* (note 5 above).
[260] *Freedom Under Law v Minister of Social Development and Others* 2021 (6) BCLR 575 (CC).
[261] Ibid paras 5–6.

with the courts by engaging in lawfare in the public interest.

The second point concerns the opposed part of the order sought by Freedom Under Law in its notice of motion, declaring 'that CPS is liable to repay to SASSA all profit it is found to have earned pursuant to the unlawful social grants contract as determined by . . . the audit verification . . . and approval by National Treasury'.[262] The Constitutional Court deferred the determination of this question pending the auditors' findings,[263] and, at the time of writing, there had been no further judgment dealing with this issue. However, it is important to note that that this matter was in dispute *at all* is cause for concern. In *AllPay 1,* the court observed:

> 'It is true that any invalidation of the existing contract as a result of the invalid tender should not result in any loss to Cash Paymaster. The converse, however, is also true. It has no right to benefit from an unlawful contract. And any benefit that it may derive should not be beyond public scrutiny. So the solution to this potential difficulty is relatively simple and lies in Cash Paymaster's hands. It can provide the financial information to show when the break-even point arrived, or will arrive, and at which point it started making a profit in terms of the unlawful contract . . . [I]ts assumption of public power and functions in the execution of the contract means that, in respect of its gains and losses under that contract, Cash Paymaster ought to be publicly accountable.'[264]

In *Black Sash Trust 1*, Froneman J further stated:

> 'There was much debate during the oral hearing on whether it would be just and equitable to order that those reciprocal obligations should be same as that of the contract that expires on 31 March 2017. I consider that it should be. No party has any claim to profit from the threatened invasion of people's rights. At the same time no one should usually be expected to be out of pocket for ensuring the continued exercise of those rights. That equilibrium was the premise of the Court's previous remedial order. It is just and equitable to continue on that basis. Our order below reflects that SASSA and CPS should continue to fulfil their respective constitutional obligations in the payment of social grants for a period of 12 months as an extension of the current contract . . . In the event that CPS wishes to alter the content of its financial obligations or entitlement, the order makes provision for it to approach National Treasury for its consideration and approval, to be confirmed after a report on the issue to this Court.'[265]

These are the only passages that address the question of CPS's profits. In neither of these cases did the Constitutional Court order that CPS should repay any profits derived from the irregular

[262] Ibid para 9.
[263] Ibid para 13.
[264] *AllPay 2* (note 4 above) para 67.
[265] *Black Sash Trust 1* (note 5 above) para 50.

contract to SASSA. While the indication that this was the position is quite strong from its statement in *AllPay 1* that '[CPS] has no right to benefit from an unlawful contract', this is immediately mitigated by the next line: '*And any benefit it may derive* should not be beyond public scrutiny'.[266] This suggests that CPS may indeed derive benefit, and that the public bears the responsibility to scrutinise this and hold CPS accountable. This in itself is vague, especially in a climate where accountability institutions had been weakened by state capture and Parliament did so little to hold those responsible to account. It suggests that accountability may fall to the 'public' in the form of civil society organisations and the citizenry, rather than law enforcement or Parliament. So, despite the remedial innovation in the *AllPay* and *Black Sash* cases, the court did not go so far as to use its discretion to ensure, by clear and unequivocal express statement, that CPS would never profit from the irregular contract. The reasons for this are perhaps made clearer by the following paragraph in *Black Sash Trust 1*:

> '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. But these are exceptional circumstances. Everyone stressed that what has happened has precipitated a national crisis. The order we make imposes constitutional obligations on the parties that they did not in advance agree to. But we are not ordering something that they could not themselves have agreed to under our supervision had an application been brought earlier, either by seeking an extension to the contract that would have expired on 31 March 2017 or by entering into a new one.'[267]

The court, having pushed the limits in some instances in order to ensure the continued protection of human rights, may therefore have chosen not to take up an opportunity to vindicate the public's interest in accountability in circumstances that were indicative of gross impropriety. Doing so would have sent a strong message that it is not necessary to prove corruption: there would be no ill-gotten gains from irregular contracts, no matter what other considerations come into play.

In practical terms, the result is that there is some doubt as to whether CPS is liable to repay the profits it earned from the irregular and invalid contract, which were estimated to be as much as R1 billion.[268] Concerningly, even if this question is eventually answered in the

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[266] *AllPay 2* (note 4 above) para 67. Emphasis added.
[267] *Black Sash Trust 1* (note 5 above) para 51.
[268] Zoë Postman 'SASSA determined to get back "every cent" owed by Cash Paymaster Services' *GroundUp* 20 October 2020, last accessed from https://groundup.org.za/article/sassa-determined-to-get-back-every-cent-owed-by-cash-paymaster-services/ on 18 February 2025.

affirmative, it is unlikely that the full profits will be repaid. After *Corruption Watch*, SASSA applied for the liquidation of CPS in order to satisfy its R316 million debt.[269] Once CPS is finally liquidated, it remains to be seen what, if anything, can be recovered.

4.7 CONCLUSION

This chapter has discussed how abuses in public procurement processes have manifested as egregious public maladministration to the detriment of the general public interest. First, the public procurement legal framework was described, highlighting how fragmentation has led to weaknesses that have enabled corruption and maladministration. Next, the insidious proliferation of corruption in public procurement was discussed. In particular, it was noted that procurement corruption has been a key factor in state capture, having been used as a means to extract rents from public resources. However, the complex nature of public procurement introduces difficulties in determining whether irregularities arise from wrongful conduct or from other systemic issues, such as incompetence due to a lack of proper training, for example. This makes the task of addressing endemic corruption very difficult. As a further consequence of this, courts are more likely to exercise deference in procurement decisions.

From this flowed a detailed analysis of the *AllPay* and *Black Sash Trust* cases. Considered on their own, these cases broke new ground in several legal respects. Taken together, they illustrated vividly the tension between judicial activism and restraint. *AllPay 1* provided much-needed clarity regarding reviewable irregularities in procurement processes, establishing important precedent affirming the significance of procedural requirements. *AllPay 2* saw the Constitutional Court eschewing an all-or-nothing approach to remedy. Instead of setting aside the irregular tender or confirming its validity, the court embraced nuance and made full use of its remedial powers to craft a remedy that guided the executive firmly towards a resolution of the issue, without usurping its powers. Unfortunately, a swift resolution was not forthcoming due to the conduct of Minister Dlamini and officials from SASSA, and matters arising from the facts in *AllPay* were again litigated in the three *Black Sash Trust* cases.

Black Sash Trust 1 also dealt masterfully with remedy by providing for a detailed order. It inter alia ordered parties into a contractual relationship to ensure the continued payment of social grants, maintained supervisory jurisdiction over the matter, and took the first step to hold the public officials to account in their personal capacities; though at the same time was careful about the effects of its order on the separation of powers. *Black Sash Trust 2* broke new ground

[269] *Cash Paymaster Services (Pty) Ltd v Freedom Under Law NPC* 2022 (6) BCLR 661 (CC).

in developing the law on remedy to enable the courts to mulct public officials in costs *de bonis propriis* for their conduct in performing their duties, though the Constitutional Court may have avoided engaging with its own precedent to do so. Lastly, *Black Sash Trust 3* followed through by ordering that Dlamini pay costs in her personal capacity. The court took care to frame its order as arising from concern for the rights of social grants recipients rather than being a form a political accountability.

Each of the *AllPay* and *Black Sash Trust* judgments displays the Constitutional Court's deep awareness and respect for the gravity of the situation before it, being the threat to the survival of social grants beneficiaries. The orders granted are activist in their creative use of remedy to resolve a particularly complicated set of factual circumstances. Had the executive complied in good faith with the order in *AllPay 2*, the social grants system could well have been improved, perhaps by awarding the tender to a capable, efficient and cost-effective service provider who would have managed the social grants payment system well. That was not to be, necessitating a heightened and more intrusive remedial response from the Constitutional Court.[270]

At the same time, the remedies awarded were cautious, with an eye not to overstep the separation of powers. The court gave many opportunities for SASSA and Dlamini to do what was right in the circumstances, but did not use its remedial powers to order specific action. The court could perhaps have gone further in certain instances, such as expressly ordering that CPS would not profit from the extended contract with SASSA. Ultimately, it declined to do so.

While serving as an insightful case study in navigating judicial activism and restraint, the high-level view of the effects of the *AllPay* and *Black Sash Trust* cases demonstrates that the court's intervention is no panacea. Social grants recipients still faced many years of instability in the social grants payment system, CPS may ultimately derive millions of Rand in profit from performing an unlawful contract for several years, and there were no investigations or prosecutions of alleged corruption in the tender award process. The court's intervention could not stave off these ill effects.

Could the individual justices of the court have foreseen this? As discussed above, the facts of the *AllPay* and the *Black Sash Trust* cases do not draw clear lines between the conduct

[270] Chuks Okpaluba & Mtendeweka Mhango 'Between separation of powers and justiciability: Rationalising the Constitutional Court's judgement [sic] in the Gauteng e-tolling litigation in South Africa' (2017) 21 *Law, Democracy & Development* 1 at 13.

of the parties and corruption. Coutsoudis and Du Plessis remark that

> '[i]t is impossible to know whether the Constitutional Court was indeed privately motivated in arriving at its merits judgment . . . and its remedy judgment . . . precisely because it was mindful of the lurking issues of corruption that had been raised around the tender award. This would be at least one explanation for why, unlike the SCA, the Constitutional Court endorsed in its judgment rigorous fealty to the requirements for procedural fairness and constitutionally compliant tender processes, even if it held out publicly in its judgment that it was agnostic as to whether there was or was not corruption involved in the tender.[271]

If the justices of the Constitutional Court held any such private notions as to whether CPS, the tender evaluation officials and even Dlamini engaged in or endorsed corruption in the award of the tender to CPS, it is not reflected at any point in any of the *AllPay* and *Black Sash Trust* cases. Coutsoudis and Du Plessis characterise this as 'judicial nose-holding' in order to ignore the 'whiff of corruption' in the facts before them.[272] Even if this was the case, as has been discussed above, such an approach was justified in the circumstances: the evidence of corruption sought to be admitted was not material to the outcome of the matter. Furthermore, the statement of the law regarding the import of procedural irregularities affirmed the virtues of fidelity to process-based requirements.

What the *AllPay* and *Black Sash* cases do show, however, is the Constitutional Court's responsiveness and commensurate restraint concerning the question of remedy, particularly where its orders were not complied with. In each successive case, the court responded to recalcitrance by scaling up its oversight. It adjusted its escalation to ensure appropriate respect for the separation of powers. This included deference to the executive, allowing it the space to craft its own solution and implement it. The full extent of the court's punitive remedial powers was only brought to bear on members of the executive after their bad-faith conduct was clearly established and they had been given a full opportunity to account for their actions.

At the same time, these cases illustrate that judicial activism is no silver bullet for accountability against maladministration and corruption. Used within appropriate limits, it can only take the cause for accountability so far. This is in keeping with South Africa's constitutional design and the purpose of judicial review contemplated by it. The *AllPay* and *Black Sash* decisions display great respect for such constitutional design. Absent a concomitant concern from the executive and legislative branches to hold those responsible to account,

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[271] Du Plessis & Coutsoudis (note 69 above) at 762.
[272] Ibid 759.

however, the judiciary is unable to hold back the tides of malfeasance.

CHAPTER 5

'THIS WATCHDOG SHOULD NOT BE MUZZLED'[1]: THE COURTS AND THE POWERS OF THE PUBLIC PROTECTOR

5.1 INTRODUCTION

As was highlighted in Chapter 3, issues concerning the powers and functioning of key anti-corruption institutions were brought to the fore during the height of state capture. The constitutional architecture that had entrenched accountability mechanisms by means of certain institutions was stress-tested against the forces of state capture through the courts. These cases often involved separation of powers concerns. These were also demonstrated in several cases concerning the office of the Public Protector, the 'Chapter 9' institution mandated to investigate, report on, and take remedial action in response to alleged impropriety by state actors.[2] The Public Protector is an independent institution not subject to political control, and as such the separation of powers arose in a slightly different context to the other cases. Whereas cases involving the powers and functioning of the National Prosecutions Authority and the Independent Police Investigative Directorate, for example, were about attempts by politically connected actors to wield their power to undermine these institutions from within, the litigation concerning the Public Protector pertained to the extrinsic impacts of that body's findings – in essence, whether the Public Protector had the 'teeth' to stand up to state capture.

At the height of the state capture years, which coincided with the tenure of Ms Thuli Madonsela as Public Protector,[3] the office was seen by some as a means to address the accountability vacuum caused by the failure of office-bearers in the executive and legislature to act against impunity within their ranks using political mechanisms. Several complaints were laid, giving rise to numerous investigations against key governmental institutions and which were damning in their findings. These findings presented a political challenge to the implicated officials, but more importantly for these purposes, a legal challenge as well. The question was raised whether, and if so, to what extent those falling under scrutiny in the Public Protector's report were duty-bound to take action to enforce the prescribed remedial action. That the

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[1] *South African Broadcasting Corporation Soc Ltd v Democratic Alliance* 2016 (2) SA 522 (SCA) (*SABC v DA*) para 53.
[2] Section 182 of the Constitution.
[3] Ms Madonsela served as Public Protector from October 2009 to October 2016.

judicial arm of government was called upon to decide on the legal enforceability of the Public Protector's decisions was taken as an opportunity to criticise the judiciary for overreach,[4] once again highlighting how the separation of powers not only infuses but also shapes litigation that is highly political in nature.

This chapter explores these separation of powers considerations by discussing the judgments affirming the nature of the Public Protector's recommended remedial action as binding until set aside by a court following judicial review, most notably *Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly*[5] (*Economic Freedom Fighters 1*).[6] It describes the context giving rise to those decisions and their reception by legal scholars who, for the most part, welcomed these decisions.[7] Others predicted that it would lead to the Public Protector's exercising powers beyond those envisaged in the Constitution.[8] The net effect of these judgments was to cement the Public Protector's office as a key anti-corruption institution that had the power and the means to hold the executive to account. Unsuccessful attempts to hold the President accountable politically pursuant to the Public Protector's report led to opposition parties, in an instance of lawfare, turning to the courts once again in *Economic Freedom Fighters 2*[9] – a case which sharply divided the court and legal commentators on the question whether the judiciary had overstepped the boundaries of the separation of powers.

This chapter also examines how the role of the Public Protector may have been overstated to the detriment of established principles regarding the separation of powers. This is done with reference to *President of the Republic of South Africa v Public Protector* (*President of RSA*).[10] Taken together, the cases discussed affirm the courts' care not to overstep the boundaries of the separation of powers, while at the same time not shrinking from constitutional obligations to

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[4] Such criticism was made by none other than the Chief Justice himself, in a minority judgment in *Economic Freedom Fighters v Speaker of the National Assembly* 2018 (2) SA 571 (CC) (*Economic Freedom Fighters 2)* para 223.
[5] 2016 (3) SA 580 (CC).
[6] The other cases include *SABC v DA* (note 1 above). In *Minister of Home Affairs v The Public Protector of the Republic of South Africa* 2018 (3) SA 380 (SCA) para 37, the Supreme Court of Appeal affirmed that the Promotion of Administrative Justice Act 3 of 2000 does not apply to reviews of exercises of power by the Public Protector. Rather, the principle of legality applies.
[7] See Stu Woolman 'A politics of accountability: How South Africa's judicial recognition of the binding legal effect of the Public Protector's recommendations had a catalysing effect that brought down a President' (2016) 8 *CCR* 155.
[8] Michael Tsele '"Coercing virtue" in the Constitutional Court: Neutral principles, rationality and the Nkandla problem' (2016) 8 *CCR* 193 at193.
[9] Note 4 above.
[10] 2018 (2) SA 100 (GP).

ensure that the Public Protector, as a key anti-corruption institution, remained sufficiently armoured against impunity.

5.2 CONTEXT

The high point in the recognition of the Public Protector's role and powers is *Economic Freedom Fighters 1.* The full import of this decision is appreciated only when understood together with the context and factual matrix within which it arose. The matter is inextricably intertwined with the broader state capture narrative and brings to the fore the fraught political environment at the time; an environment which no doubt had bearing on the ultimate decision and judgment of the Constitutional Court.[11]

The relevant facts are as follows: in 2011, several complaints were laid with the Public Protector's office in terms of the Public Protector Act 24 of 1994 concerning 'opulent or excessive expenditure at the private residence of President Zuma'[12] as detailed in several media reports[13] from as early as 2009.[14] Such expenditure related to several improvements made to Zuma's private homestead, the cost of which was placed initially at R65 million at the time of the 2009 media reports, but in subsequent years ballooned to at least R246 million in public funds. Identified ostensibly as 'security improvements', the developments included a 'network of air-conditioned living quarters, a clinic, gymnasium, numerous houses for security guards, underground parking, a helicopter pad, a playground, . . . a Visitors' Centre'[15] and amphitheatre, as well as a swimming pool, cattle kraal and a chicken run.[16]

The news of these developments caused a public outcry, with many calling for accountability from the President and the officials who had approved the project. The Public Protector investigated whether these property upgrades were effected in accordance with

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[11] The broader context of state capture at the time includes a number of examples of undue influence and maladministration in many state institutions, including the state broadcaster. Those circumstances gave rise to the litigation in *SABC v DA*, which is discussed in more detail below.

[12] The Public Protector of South Africa 'Secure in comfort: Report into an investigation of allegations of impropriety and unethical conduct relating to the installation and implementation of security measures by the Department of Public Works and in respect of the private residence of President Jacob Zuma at Nkandla in the KwaZulu-Natal province' (2014) (Secure in Comfort), last accessed from https://www.gov.za/sites/default/files/gcis_document/201409/public-protectors-report-nkandlaa.pdf on 8 January 2023 at 5.

[13] See, for instance, Matuma Letsoale & Charles Molele 'Bunker bunker time: Zuma's lavish Nkandla upgrade' *Mail & Guardian* 11 November 2011, last accessed from https://mg.co.za/article/2011-11-11-bunker-time-for-zuma/ on 30 October 2022.

[14] See Mandy Rossouw 'Zuma's R65m Nkandla splurge' *Mail & Guardian* 4 December 2009, last accessed from https://mg.co.za/article/2009-12-04-zumas-r65m-nkandla-splurge/ on 30 October 2022.

[15] Secure in Comfort (note 12 above) 81.

[16] Ibid 425.

prescribed laws and policies. Even prior to the conclusion of her investigation, the strained relationship between the ruling party and the Public Protector in relation to this issue was apparent. Officials in the security cluster and public works Ministers launched an interdict to prevent Madonsela from releasing her provisional report pending the resolution of so-called 'security' concerns, which was withdrawn six days later in what was generally regarded to be a delaying tactic.[17] In November 2013, a provisional version of the Public Protector's report into the matter was leaked, which the ANC alleged was done by Madonsela's office.[18] The provisional report made many unfavourable findings, which may have prompted Zuma to initiate an investigation by Special Investigating Unit (SIU) into the Nkandla upgrades in December 2013, saying that he would respond to both reports at once.

In March 2014 the Public Protector published her final report, 'Secure in Comfort',[19] which made a number of damning findings about the manner in which the 'security improvements' had been carried out. These included that several of the improvements did not relate to the security of Zuma's residence and that he had 'tacitly accepted the implementation of all measures at his residence and has unduly benefited from the enormous capital investment in the non-security installations at his private residence',[20] that he had violated the Executive Members Ethics Code for failing to act in protection of state resources,[21] and that he was liable for the costs of the non-security improvements. She also found that Ministers involved in the project had conducted themselves in 'an appalling manner' by involving themselves in the abuse of state funds.[22] In addition, proper tender processes had not been followed in procuring the building works at any stage, which was against Treasury regulations.[23]

[17] Lindiwe Mazibuko 'Security cluster drops interdict attempt against Public Protector – Lindiwe Mazibuko' *Politicsweb* 14 November 2013, last accessed from https://www.politicsweb.co.za/politics/security-cluster-drops-interdict-attempt-against-p on 8 January 2023.
[18] Sarah Evans 'ANC still insists Madonsela leaked Nkandla report' *Mail & Guardian* 4 December 2013, last accessed from https://mg.co.za/article/2013-12-04-anc-insists-madonsela-responsible-for-nkandla-report-leak/ on 8 January 2023.
[19] Note 12 above.
[20] Ibid 63.
[21] Ibid 439.
[22] Ibid 442.
[23] Ibid 411.

The report, described as 'damning',[24] 'scathing'[25] and 'explosive',[26] was widely praised following its publication for its uncompromising stance in evaluating the upgrades. The report also had the effect of raising Madonsela's profile by crediting her as responsible for 'expos[ing] the rot at Nkandla'.[27] Accolades followed, including her being named as one of *Time* magazine's 100 most influential people in 2014.[28] The political effect of the report was to place the Public Protector's office at odds with the President, adding weight to growing calls by the public for him to take responsibility for the ostensible security improvements.[29]

The reaction of Zuma and the various Ministers implicated in the Nkandla developments to the initial media reports as well as the Secure in Comfort report did not show concern for accountability. Political commentator Marianne Merten observed that

> '[b]y the time Madonsela's report dropped, the political manoeuvring to absolve Zuma for the taxpayer-funded Nkandla upgrades had unfolded over almost two years. It was a highly charged, acrimonious period in South African political life that not only saw personal insults hurled at Madonsela, but also smear campaigns tarring critics of Zuma and the ANC as spies.'[30]

Two reports preceded the release of Madonsela's 'Secure in Comfort' – a special report issued in early November 2013 by Parliament's Joint Standing Committee on Intelligence, which

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24 Ranjeni Munsamy 'Nkandla Report: The end of innocence, enter the period of consequences' *Daily Maverick* 20 March 2014, last accessed from https://www.dailymaverick.co.za/article/2014-03-20-nkandla-report-the-end-of-innocence-enter-the-period-of-consequences/ on 8 January 2023; Greg Nicolson 'Nkandla report: Opposition targets Msholozi' *Daily Maverick* 19 March 2013, last accessed from https://www.dailymaverick.co.za/article/2014-03-19-nkandla-report-opposition-targets-msholozi/ on 8 January 2023; *Al Jazeera Reporter* 'South Africa's Zuma slammed for $23M home makeover' *Al Jazeera America* 19 March 2014, last accessed from http://america.aljazeera.com/articles/2014/3/19/south-africa-s-zumaslammedfor23millionhomemakeover.html on 8 January 2023.

25 Woolman (note 7 above) 155.

26 Andrew England 'Thuli Madonsela, anti-corruption crusader' *Financial Times* 11 December 2015, last accessed from https://www.ft.com/content/ce61dc2c-9d1a-11e5-b45d-4812f209f861 on 8 January 2023.

27 Phillip de Wet & Sarah Evans 'Madonsela exposes the rot at the heart of Nkandla' *Mail & Guardian* 19 March 2014, last accessed from https://mg.co.za/article/2014-03-19-madonsela-exposes-the-rot-at-the-heart-of-nkandla/ on 20 March 2025.

28 Ranjeni Munsamy 'Honour for Thuli Madonsela – The woman who took on Jacob Zuma' *The Guardian* 25 April 2014, last accessed at https://www.theguardian.com/world/2014/apr/25/thuli-madonsela-south-africa-took-on-jacob-zuma on 30 October 2022.

29 This can also be placed in context of other significant events involving Zuma that had drawn public ire, including allegations that he had authorised the landing of a private plane at the Waterkloof Air base. The plane had carried guests for a wedding of a member of the Gupta family. Brij Maharaj 'Waterkloof Air Force Base, 30 April 2013: South Africa is invaded, violated and captured' *Daily Maverick* 29 April 2021, last accessed from https://www.dailymaverick.co.za/opinionista/2021-04-29-waterkloof-air-force-base-30-april-2013-south-africa-is-invaded-violated-and-captured/ on 20 March 2025.

30 Marianne Merten 'The unfinished business of the Nkandla debacle and Parliament' *Daily Maverick* 7 October 2021, last accessed from https://www.dailymaverick.co.za/article/2021-10-07-the-unfinished-business-of-the-nkandla-debacle-and-parliament/ on 14 January 2022.

concluded that the upgrades to the Nkandla homestead were indeed required for security reasons, and a government task team report issued on 19 December 2013 by the then public works Minister, Mr Thulas Nxesi, which 'essentially absolve[ed] Zuma' and 'shifted blame to about 11 departmental officials and the architect'.[31] A further report was finalised by the SIU in August 2014, and Zuma submitted it to Parliament in September of that year.[32] Also in August 2014, Zuma called upon the Minister of Police as the implementing Minister of the National Key Points Act 102 of 1980 to

> 'report to Cabinet on a determination to whether the President is liable for any contribution in respect of the security upgrades having regard to the legislation, past practices, culture and findings contained in the respective reports'.[33]

Madonsela expressed concern about Zuma's response, noting that his intended reliance on the Minister of Police's report 'gives [the Minister of Police] power he does not have under law, which is to review my decision taken in pursuit of the powers of administrative scrutiny I am given . . . by the Constitution'.[34]

In the realm of politics, the Nkandla matter raised tensions in Parliament. The opposition Economic Freedom Fighters (EFF) party set off a shouting match between officials from the ANC and themselves by querying it. The fight escalated when armed riot police were brought into the House while Parliament was still in session, ostensibly with the aim of removing EFF members from the House, although this removal did not materialise.[35] Three ad-hoc committees were established in Parliament in relation to the Nkandla matter. The ANC, which

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[31] Ibid.
[32] Uncredited author 'SIU report on Nkandla submitted to Parliament' *South African Government News Agency* 11 September 2014, last accessed from https://www.sanews.gov.za/south-africa/siu-report-nkandla-submitted-parliament on 20 March 2025.
[33] 'Report by the Minister of Police to Parliament on security upgrades at the Nkandla private residence of the President' *South African Government Website*, last accessed from https://www.gov.za/sites/default/files/gcis_speech/201505/REPORT%20BY%20THE%20MINISTER%20OF%20POLICE%20TO%20PARLIAMENT%20ON%20SECURITY%20UPGRADES%20AT%20THE%20NKANDLA%20PRIVATE%20RESIDENCE%20OF%20THE%20PRESIDENT.pdf on 20 March 2025.
[34] SAPA 'Nkandla report: Madonsela 'concerned' over Zuma's response' *Mail & Guardian* 24 August 2014 accessed from https://mg.co.za/article/2014-08-24-nkandla-report-madonsela-concerned-over-zumas-response/ on 8 January 2023.
[35] Ranjeni Munsamy 'The day madness ruled: Mayhem in Parliament as EFF demands Zuma #PayBackTheMoney' *Daily Maverick* 22 August 2014, last accessed from https://www.dailymaverick.co.za/article/2014-08-22-the-day-madness-ruled-mayhem-in-parliament-as-eff-demands-zuma-paybackthemoney/ on 14 January 2023.

held the majority in the House, 'carried the resolution to absolve Zuma from any payment,'[36] though it was ultimately set aside by the Constitutional Court.[37]

The Nkandla scandal proved to be the start of a politically tumultuous period in relation to Zuma's presidency, culminating in his removal from office. A stark contrast was evident between Madonsela's report and the findings of enquiries conducted by bodies that were not insulated from political influence, as well as the parliamentary ruling in Zuma's favour. The political reaction to the Public Protector's report concerning the Nkandla improvements was taken by various groups – civil society, media commentators, and opposition parties – as an instance of the ANC wielding its majority party status to shield Zuma from accountability. These sentiments and the tensions that flowed from them would no doubt have been well known to members of the judiciary as the matter came before the courts.

5.3 LEGAL DEVELOPMENTS DURING MADONSELA'S TENURE

The cases discussed in this section, *SABC v DA*,[38] *Economic Freedom Fighters 1*,[39] *Economic Freedom Fighters 2*[40] and *President of RSA*,[41] together establish a key principle in relation to the powers and functioning of the Office of the Public Protector – namely, that the remedial action determined by the Public Protector is generally binding upon the subjects of such remedial action, until set aside by a court of law. This was achieved incrementally: the findings in *SABC v DA* were built upon in the ground-breaking judgment in *Economic Freedom Fighters 1,* which clarified the binding nature of the Public Protector's remedial action, and then affirmed in the *Economic Freedom Fighters 2* and *President of RSA*. For this reason, and in a similar fashion to the approach taken in Chapter 4, the discussion of the cases is presented chronologically. It is worth bearing in mind, however, that while these issues were being discussed and determined in the courts, the heated political climate surrounding the Nkandla scandal as described above was increasing in intensity at the same time. This caused greater scrutiny of the judiciary as the institution capable of supporting (and willing to support) the Public Protector's actions seeking accountability for the egregious expenditure of public funds on the upgrades to the Nkandla homestead. The discussion of these cases reveals how the courts championed the Public Protector's constitutional role in holding those in public office to

[36] Merten (note 30 above).
[37] *Economic Freedom Fighters 1* (note 5 above) para 105.
[38] Note 1 above.
[39] Note 5 above.
[40] Note 6 above.
[41] Ibid.

account while balancing this against the need to ensure that the separation of powers was not unduly trenched upon.

(a) SABC v DA

Prior to the matter concerning the 'Secure in Comfort' report being adjudicated by the Constitutional Court, the import of the powers conferred upon the Public Protector in the Constitution was considered in *SABC v DA*.[42] In an appeal from a decision by the High Court, the Supreme Court of Appeal had to decide a particularly egregious instance of poor administration concerning the appointment of Mr Hlaudi Motsoeneng to high office within the state-owned South African Broadcasting Corporation (SABC). This appointment had been made despite damning findings by the then Public Protector, Ms Madonsela, against Motsoeneng and the Board of the SABC, in a report following an investigation.[43] These included that there were 'pathological corporate governance deficiencies at the SABC' and that Motsoeneng had been permitted by various boards of the SABC to operate above the law.[44] The report detailed various irregularities in relation to his appointment as acting Chief Operating Officer (COO) in the SABC, that he had made fraudulent misrepresentations about his educational qualifications, and that he had committed several irregular acts while holding high office within the SABC.[45]

The Public Protector directed the Board to take several steps to hold Motsoeneng accountable, including that disciplinary action be taken against him for misrepresenting his qualifications and for his 'abuse of power and improper conduct', as well as the recovery of 'fruitless and wasteful expenditure' that had occurred as a result of irregular salary increments that had been paid to him.[46] This remedial action was wholly ignored. Not only was the recommended action not taken, but a decision was subsequently made to appoint Motsoeneng as COO permanently. His appointment was approved by the Minister of Communications,

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[42] Note 1 above.
[43] The Public Protector of South Africa 'When Governance and Ethics Fail: A report on an investigation into allegations of maladministration, systemic corporate governance deficiencies, abuse of power and the irregular appointment of Mr Hlaudi Motsoeneng by the South African Broadcasting Corporation (SABC)' (2014) *South African Government*, last accessed from https://www.gov.za/sites/default/files/gcis_document/201409/when-governance-fails-report-exec-summary17feb2014.pdf on 20 March 2025.
[44] *SABC v DA* (note 1 above) para 6.
[45] Ibid para 6.
[46] Ibid para 8.

Ms Dina Pule.[47] This decision was taken on review by an opposition party, the Democratic Alliance.

This set of facts before the court demonstrated a disturbing lack of concern for accountability. Not only had the Board failed to visit any consequences on Motsoeneng for his evident misdeeds, but it had also favoured him with a permanent position in high office. At the time, the public broadcaster was in a state of decline. The Board's disregard for proper governance in appointing Motsoeneng was perceived as a symptom of this. The court acknowledged the poor state of the SABC, occasioned in large part by poor governance, in its judgment.[48]

This context is important because it establishes the background against which the court made its findings about the way the constitutional and legislative scheme envisages that the Office of the Public Protector should achieve its aims:

> 'The Public Protector cannot realise the constitutional purpose of her office if organs of State may second-guess her findings and ignore her recommendations. Section 182(1)(c) must accordingly be taken to mean what it says. *The Public Protector may take remedial action herself. She may determine the remedy and direct its implementation*. It follows that the language, history and purpose of s 182(1)(c) make it clear that the Constitution intends for the Public Protector to have the power to provide an effective remedy for State misconduct, which includes the power to determine the remedy and direct its implementation. All counsel before us rightly accepted that the Public Protector's report, findings and remedial measures could not be ignored.'[49]

In reaching this conclusion, the Supreme Court of Appeal departed from the High Court's position that remedial action is not binding against those to whom it is directed. It corrected various findings of the High Court, including by explaining the import of how the first and most prominent *Oudekraal* principle (that is, a decision by an organ of state 'exists in fact and has legal consequences that cannot simply be overlooked'[50] unless set aside by a court) applies to decisions of the Public Protector. This interpretation was later accepted by the Constitutional Court, as will be discussed in the following sections.

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[47] Ibid para 9.
[48] See ibid para 49 where the court observed that the Board had to be dissolved multiple times and that a loan of R1 billion had to be raised to ensure its survival.
[49] Ibid para 52. Emphasis added.
[50] *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 6 SA 222 (SCA) para 26.

(b) Economic Freedom Fighters 1

Several months after *SABC v DA*, the Constitutional Court had to decide whether the Public Protector's Nkandla findings were binding until reviewed and set aside. As discussed above, the case was brought before the courts amid intense public concern about the wrongdoing in relation to the Nkandla affair as well as the political tensions occasioned by it. Other corruption and state capture-related scandals also gave rise to public dissatisfaction and calls for greater accountability.[51]

The court's judgment spoke to this context not by acknowledging it expressly but rather by giving strong textual indications. The judgment began with a warning that 'constitutional office-bearers ignore their constitutional obligations [to uphold accountability, the rule of law and constitutional supremacy] at their peril'.[52] It then immediately located the 'heart' of the application as one that considers 'the role of these foundational values in helping to strengthen and sustain our constitutional democracy'[53] before framing the matter as having profound import beyond the particular dispute before the court.

Early in the judgment, the court referred obliquely to the efforts of Zuma's supporters to shield him from being held accountable by asserting that it was his subordinates who had commissioned the 'security enhancements' and overseen their construction.[54] The court gave this contention short shrift, stating that the President had a duty to understand that those working under him would be tempted to overstep the rules to please him, and that he ought to

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[51] This included, for instance, the poor governance at the SABC as discussed above. Other examples include two revelations forming the subject of damning reports by the Public Protector: first, the theft of billions of Rand from the Passenger Rail Association of South Africa due to procurement fraud (Public Protector of South Africa 'Derailed: A report on an investigation into allegations of maladministration relating to financial mismanagement, tender irregularities and appointment irregularities against the Passenger Rail Agency of South Africa (PRASA)' *South African Government*, last accessed from https://www.gov.za/sites/default/files/gcis_document/201508/publicprotectorinvestigationreportno3of201516prasa24082015a.pdf on 8 July 2023. See also Ivor Chipkin et al *Shadow State: The Politics of State Capture* (2018) 70), and secondly, the egregious fees paid by Transnet to management consulting firm McKinsey, which benefited Gupta-linked firms Trillian and Regiments Capital. This and other instances of state capture under the Zuma administration that ignited public ire were detailed in the Public Protector's report 'State of Capture: Report on an investigation into alleged improper and unethical conduct by the President and other state functionaries relating to alleged improper relationships and involvement of the Gupta family in the removal and appointment of Ministers and Directors of State-Owned Enterprises resulting in improper and possibly corrupt award of state contracts and benefits to the Gupta family's businesses' (2016) *South African Government* (State of Capture report), last accessed from stateofcapturereport14october2016_1.pdf (www.gov.za) on 8 July 2023.

[52] *Economic Freedom Fighters 1* (note 5 above) para 1.

[53] Ibid.

[54] Ibid para 8. See SAPA 'Zuma is not responsible for Nkandla – ANC' *TimesLive* 30 September 2014, last accessed from https://www.timeslive.co.za/amp/politics/2014-09-30-zuma-is-not-responsible-for-nkandla-anc-/ 20 December 2022.

have guarded against this happening.[55] The duty was a positive one; he could not merely remain passive. Secondly, he had, contrary to s 96(2)*(b)* of the Constitution, exposed himself to a 'situation involving the risk of a conflict between [his] official responsibilities and private interests'.[56] This framing is important even though this was not a specific question the court was called upon to decide. It immediately closed off any opportunity to draw upon Zuma's subjective intention in respect of the upgrades and prevented the deflection of accountability to lower-ranking officials. *Economic Freedom Fighters 1* concerned the objective determination of constitutional obligations and their application. Dispensing with this side-issue at the outset allowed for the focus to remain squarely on the obligations of the President and the National Assembly.

In its unanimous judgment penned by Mogoeng CJ, the court took time to describe the constitutionally mandated purpose of the Public Protector in lofty terms, characterising the office as an 'invaluable constitutional gift' that was 'conceived . . . to give even to the poor and marginalised a voice, and teeth that would bite corruption and abuse excruciatingly'.[57] These value-laden passages were crafted to set the foundation for the following conclusion:

> 'If compliance with remedial action taken were optional, then very few culprits, if any at all, would allow it to have any effect. *And if it were, by design, never to have a binding effect, then it is incomprehensible just how the Public Protector could ever be effective* in what she does and be able to contribute to the strengthening of our constitutional democracy . . . The Public Protector is a critical and indeed indispensable factor in the facilitation of good governance and keeping our constitutional democracy strong and vibrant.'[58]

This binding nature of the Public Protector's powers was affirmed with the court's observation that

> 'to achieve [the curing of impropriety, prejudice, unlawful enrichment or corruption in government circles] requires a difference-making and responsive remedial action. Besides, one cannot really talk about remedial action *unless a remedy in the true sense is provided to address a complaint in a meaningful way*'.[59]

Turning to the obligation in s 181 of the Constitution, the court remarked that:

[55] Ibid paras 8–9.
[56] Ibid.
[57] Ibid para 52.
[58] Ibid para 56. Emphasis added.
[59] Ibid para 65. Emphasis added.

> ‘The obligation to assist and protect the Public Protector so as to ensure her dignity and effectiveness is relevant to the enforcement of her remedial action. *The Public Protector would arguably have no dignity and be ineffective if her directives could be ignored willy-nilly.* The power to take remedial action that is so inconsequential that anybody, against whom it is taken, is *free to ignore or second-guess, is irreconcilable with the need for an independent, impartial and dignified Public Protector* and the possibility to effectively strengthen our constitutional democracy.’[60]

Shortly thereafter, the court stated that ‘remedial action must be suitable and effective’ and in order to be so, ‘it often has to be binding’.[61] Whether the Public Protector’s remedial action is binding or not differs from case to case and is ‘a matter of interpretation aided by context, nature and language’.[62] Regarding how to determine whether the remedial action is binding, the court invited consideration of the following factors:

> ‘Every complaint requires a practical or effective remedy that is in sync with its own peculiarities and merits . . . [I]t is the nature of the issue under investigation, the findings made and the particular kind of remedial action taken, based on the demands of the time, that would determine the legal effect it has on the person, body or institution it is addressed to.’[63]

This position does not lend itself to legal certainty. The effect of these two findings is that any person or body aggrieved by a decision of the Public Protector must go to court to ascertain whether, firstly, the remedial action is binding and if it is, then argue as to why it should be set aside.

The core finding of *Economic Freedom Fighters 1* – that is, that the remedial action taken by the Public Protector in this case (and indeed most cases) is binding – has been subject to criticism by several commentators, as will be discussed below.[64] The main thrust of such criticism, based on legal grounds, is that holding that such remedial action is binding until set aside by a court places that office in a quasi-judicial position.[65] This criticism finds its suitable response in principles of public law.[66]

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[60] Ibid para 67. Emphasis added.
[61] Ibid para 68.
[62] Ibid para 71.
[63] Ibid para 70.
[64] Tsele (note 8 above); Mtendeweka Mhango & Ntombizozuko Dyani-Mhango ‘The powers of the South African Public Protector: A note on *Economic Freedom Fighters v Speaker of the National Assembly*’ (2020) 12 *African Journal of Legal Studies* 23.
[65] This concern was raised by the President and the National Assembly in *Economic Freedom Fighters 1* (note 5 above) para 72.
[66] See the discussion below regarding *Oudekraal* (note 50 above).

Beyond this criticism is a deeper concern as to the state of South Africa's constitutional democracy. This is the wilful disregard not only by the President, but also the National Assembly, of damning findings of a body mandated by the Constitution to defend against abuses of public power. This speaks to broader political concerns about whether, contrary to the Constitution, Zuma conducted himself as above the law, and more troublingly, whether the elected body mandated to exercise oversight over such maladministration deliberately failed to do so. This is especially where the facts (including the assertion that a cattle kraal and pool were 'security features') could not have borne out any rational interpretation that the Public Protector was incorrect in her findings.

The drafters of the Constitution may have opted not to prescribe the 'bindingness' of the Public Protector's remedial action expressly on the assumption that findings of the Public Protector would be impactful in a political sense. Holders of high political office like the President should (at a minimum) be embarrassed by a finding that they had acted improperly.[67] Even without the findings having binding effect, any officials sensitive to the need to uphold their reputation would, as a matter of course, seek review of findings and remedial action that they deem incorrect or abhorrent. Simply to ignore the findings would not be an option.

Further, they should face real risk of political consequences within their political party, who would act to protect the party's reputation against being associated with representatives who have adverse findings against their name. If the political party of the subject of the Public Protector's adverse findings chooses not to act, the National Assembly, as a multi-party deliberative body, is obliged to hold that person accountable.[68] However, in this case, these political safeguards were not exercised, leaving a profound accountability vacuum that threatened a constitutional crisis.

This is demonstrated by the fact that it was two minority opposition parties, the EFF and the Democratic Alliance, that brought *Economic Freedom Fighters 1* before the court. These parties were vociferous in their opposition to the President's conduct in relation to Nkandla but were politically inert owing to the ruling ANC's overwhelming dominance in the National Assembly. In the founding papers in *Economic Freedom Fighters 1*, the deponent on behalf of the EFF stated:

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[67] *Economic Freedom Fighters 1* (note 5 above) para 53.
[68] Section 181(3) and (5) of the Constitution. Section 181(3) obliges organs of state to ensure the (inter alia) effectiveness of the Public Protector.

> 'Unfortunately, neither the President nor the National Assembly has carried out the findings and determinations of the Public Protector. It was with this background that the EFF took the political campaign – through the parliamentary procedures – to ensure that the President complies with the findings and determinations of the Public Protector. That campaign also included the specific requirement that the National Assembly must give effect to the findings and determinations of the Public Protector.'[69]

This campaign was unsuccessful. This provides an indication of the reason that the EFF and Democratic Alliance turned instead to the judicial system in an instance of lawfare. The choice to use the Public Protector's credible findings from a thorough investigation as the basis for the cause of action was no doubt a legally strategic one.

Economic Freedom Fighters 1 has drawn criticism from some constitutional theorists. A prime issue is whether the court's reasoning justified its conclusions fully, suggesting that the court had an outcome in mind and set out to reach it. Mhango and Dyani-Mhango express concern that the court's judgment was not supported by the constitutional text, nor by established conventions of constitutional interpretation.[70] They argue that as the Constitution itself prescribes the 'bindingness' of certain powers expressly in various instances, such as in s 165(5) of the Constitution, the choice not to do so in the case of the Public Protector is instructive.[71] Further, the court's own jurisprudence has affirmed the value of looking to the history of the provision when its meaning is in doubt, but in doing so for the purposes of s 181, Mogoeng CJ failed to refer to the Constitutional Assembly Committee report and flesh out the role it played in determining the Public Protector's powers and functions in contrast to previous, similar institutions such as the Advocate-General and the Ombudsman.[72] To these authors, this failure points to a concerning misstep by the court in that it 'preferred the meaning of the powers of the Public Protector that was in line with public opinion at the time of the case, something that the Court itself has previously cautioned against'.[73] There is little evidence to support this idea in the judgment itself. However, given the extreme circumstances in which this matter was brought before it, the court would have been well aware of the need for accountability. The result of *Economic Freedom Fighters 1* was that this was achieved (to some extent) by Zuma's repaying of the costs of the unlawful improvements to the Nkandla

[69] Founding affidavit in CCT 143/15 *Economic Freedom Fighters v The Speaker of the National Assembly of South Africa and President Jacob Gedleyihlekisa Zuma* para 33.
[70] Mhango & Dyani-Mhango (note 64 above) 33–40.
[71] Ibid 34.
[72] Ibid 37.
[73] Ibid 39.

residence.[74] However, according to Mhango and Dyani-Mhango, this came at a significant price: *Economic Freedom Fighters 1* had, effectively, transformed the Public Protector into a court, as the decisions of this office were binding pending intervention by a court to set them aside.

This argument is not supported in law. It ignores the established legal principle that until an 'act' is 'set aside by a court in proceedings for judicial review it exists in fact and it has legal consequences that cannot simply be overlooked'.[75] The meaning of 'act' is neutral[76] in that it is not constrained to administrative action. Rather, it extends to all decisions grounded in the Constitution and the law, as noted by the Constitutional Court in *Economic Freedom Fighters 1*.[77] The Public Protector's findings are made pursuant to the fulfilment of a constitutional mandate and in terms of governing legislation, and there is nothing in the law that sets the institution apart in this regard from other official actors. Not expressly stating the 'bindingness' of the Public Protector's decisions in the Constitution and Public Protector Act did not, as Mhango and Dyani-Mhango suggest, mean that they were not intended to be binding – rather, that they were only as binding as any other official act in terms of administrative law. Contrary to the assertion that this finding makes the Public Protector equivalent to a court, Govender and Swanepoel's approach, to characterise the institution as 'straddl[ing] the continuum'[78] between the courts and the bureaucracy, is preferred. This characterisation logically flows from application of the first *Oudekraal* principle discussed above. It also acknowledges that the Public Protector's role is fundamentally different to that of a court because it conducts investigations while courts do not.[79]

Perhaps a more fitting criticism would be concerns related to uncertainty introduced by the Constitutional Court's statements about the bindingness of the Public Protector's decisions

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[74] *News24* Reporter 'Breaking: Zuma has paid back the money' *News24*, last accessed from https://www.news24.com/news24/zuma-has-paid-back-the-money-20160912 on 27 March 2025.
[75] *Oudekraal* (note 50 above) para 26.
[76] Cora Hoexter & Glenn Penfold *Administrative Law in South Africa* 3 ed (2021) 760.
[77] *Economic Freedom Fighters 1* (note 5 above) para 74.
[78] Kathy [sic] Govender & Paul Swanepoel 'The powers of the Office of the Public Protector and the South African Human Rights Commission: A critical analysis of *SABC v DA* and *EFF v Speaker of the National Assembly* 2016 3 SA 580 (CC)' (2020) 23 *PELJ* 14.
[79] Ibid. See *South African Association of Personal Injury Lawyers v Heath* 2001 (1) SA 883 (CC) para 40, which compares the functions of a court against a different investigating body, the Special Investigating Unit (SIU). While the SIU is not an independent constitutional entity like the Public Protector is, the argument that investigating bodies may later have to defend their work in court applies in the same way. Further, the Public Protector and the courts also differ in their structure and functioning. See Omphemetse S Sibanda 'The public protector's call to be accorded the status of a judge is nonsensical — to a certain degree' *Daily Maverick* 7 August 2019, last accessed from https://www.dailymaverick.co.za/article/2019-08-07-the-public-protectors-call-to-be-accorded-the-status-of-a-judge-is-nonsensical-to-a-certain-degree/ on 24 March 2025.

depending on the context of the remedial action proposed. The court suggests that the remedial effect of certain measures 'may simply be that those to whom they are directed are to consider them properly, with due regard to their nature, context and language, to determine what course to follow'.[80] This is apparently an objective enquiry, determined by the 'nature of the issues under investigation and the findings made'[81] and not the Public Protector's subjective intention. There may be instances where it is not possible to determine from the context whether the remedial action is binding, requiring the parties to take the matter to the courts to settle the question. Such cases would be in the minority. Even so, Govender and Swanepoel offer suggestions to address potential problems, including that the Public Protector should decide whether the remedial measure she intends to prescribe is a recommendation or binding as the next step after accepting the complaint, and having this decision shape the approach to the investigation and eventual remedial action. Their view is that as the question whether remedial action is binding is a 'matter of interpretation determined by its context, nature and language,'[82] the prudent approach would involve the Public Protector showing that she has taken these criteria into account when determining remedial action. They also propose that the Public Protector devise rules of practice that set out internal procedures to 'ensure that processes that lead to recommendations are distinct from processes that lead to binding remedial actions'.[83] It is not likely that these proposals would be feasible practically, as they suggest that the Public Protector would, in a sense, pre-determine the outcome of the investigation based purely on the nature of the complaint. Remedial action is the *outcome* of an investigation. The Public Protector's electing the 'bindingness' of the remedial action prior to the investigation anticipates where the investigation will lead based on no further information than what is contained in the complaint. The authors unfortunately do not develop their suggestions fully enough to address these questions about practicability.

Another argument worth exploring is Tsele's overt criticism of *Economic Freedom Fighters 1* as being consequentialist and 'outcome-based' in nature.[84] Tsele recognises that judges are, at times, pulled towards making decisions that are 'morally or socially desirable' and which conduce towards the public good, even when the path in terms of sound legal

[80] *Economic Freedom Fighters 1* (note 5 above) para 69.
[81] Ibid.
[82] Govender & Swanepoel (note 78 above) 19.
[83] Ibid.
[84] Tsele (note 8 above) 193. Tsele also takes issue with the tone of the judgment, deeming it patronising and sanctimonious, an argument that need not be explored here.

reasoning is not always clear.[85] His primary concern is that, in seeking an outcome where Mr Zuma was held accountable for the Nkandla homestead upgrades, the court 'coerc[ed] virtue' rather than employing neutral legal principles to reach its decision. This was evidenced by the court's rejection of the reasoning of Schippers J in the High Court in the case *Democratic Alliance v South African Broadcasting Corporation Limited* which had preferred rationality as the basis for determining whether compliance with the Public Protector's remedial action was required.[86] Tsele's reasoning for reaching this conclusion can be summarised as follows: first, the court's imprecise reasoning created a standard for the Public Protector that, following from the first *Oudekraal* principle, should apply equally to other Chapter 9 institutions, though this is not the case.[87] Secondly, that *Economic Freedom Fighters 1* assumes that public officials are 'generally prone to act in bad faith or are averse to corrective counsel'.[88] Tsele points out that this appears to reject the court's prior view set out in *Glenister*[89] that public officials 'who have taken an oath to uphold the Constitution, will be presumed to act in good faith unless the contrary is shown' and that this can be explained by the court's seeking to achieve a certain outcome.[90] Thirdly, Tsele argues that the court conflated the rationality standard as set out in *DA v SABC* (*GP)* with self-help, taking the approach in that judgment to mean that a subject will be allowed to disregard or ignore decisions of the Public Protector'.[91] Fourthly, Tsele suggests that the court adopts the stance that the only effective remedy is one that is binding, though this is not necessarily true – something borne out by the fact that the Public Protector's reports have been effective in the past despite their bindingness not being confirmed in law. Lastly, Tsele argues that the requirement that the Public Protector perform her functions without 'fear, favour or prejudice' has no bearing on the question on whether her remedial orders are binding.

The third criticism regarding the court's rejection of the rationality standard is worth exploring in more detail. Tsele makes a bold claim that by

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[85] Tsele acknowledges that he 'welcomed the outcome in *Nkandla* as a citizen, but…dislike[s] it as a scholar'. Ibid 194.
[86] 2015 (1) SA 551 (GP) (*DA v SABC (GP)*) paras 65–74.
[87] Govender and Swanepoel make a compelling case that the reasoning in *Economic Freedom Fighters 1* should apply with equal force to the South African Human Rights Commission in certain instances. See Govender & Swanepoel (note 78 above) 23–9.
[88] Tsele (note 8 above) 213.
[89] *Glenister v President of the Republic of South Africa* 2009 (1) SA 287 (CC) para 56.
[90] Tsele (note 8 above) 213.
[91] Ibid 214.

> 'devoting no more than a paragraph to the [*DA v SABC (GP)*] decision, and then tersely rejecting it based on shaky logic, the Court undermined its own practices and constitutional principle. This was arguably attributable to its desire to achieve a particular outcome. Conduct of this sort violates the concept of neutral and principled adjudication.'[92]

This remark and others[93] display scathing and unwarranted criticism of the court. The reliance on rationality as conceived by Tsele and indeed in the reasoning of Schippers J in the High Court can be understood as reflecting the narrower, pre-democratic principle of legality – which was the '"obverse facet" of the ultra vires doctrine'.[94] The constitutional conception of legality, as affirmed by *Fedsure*[95] and *Pharmaceutical Manufacturers*[96] (two cases to which the court referred in rejecting the reasoning of Schippers J) holds that 'the exercise of public power is only legitimate where lawful'.[97] No law grants the subjects of the Public Protector's remedial orders authority to decide for themselves whether to follow or reject the remedial action – and in the absence of such a law, the Constitution must provide the guiding principles. These principles were elucidated by the court. The argument that the court's rejection of the reasoning in *DA v SABC (GP)* in the High Court evidences its rejection of established principle to achieve a particular outcome is unsupported in law.

However, Tsele does raise an important issue, namely, the role in which courts are placed due to the prevailing socio-political climate in South Africa: that of 'social and political forums' rather than strict arbiters of the law.[98] He also points to the view held in certain 'legal and political circles that because the other political branches are dysfunctional, the courts have somehow become a legitimate last resort'.[99] This argument is valid, and is indeed explored in this thesis, specifically in respect of 'good' lawfare discussed in Chapter 2.[100] Parpworth goes further by equating South Africa's political climate when dominated by the ANC as an 'elective dictatorship', arguing that

> 'when the legislative branch of government has shown itself unwilling to comply with its constitutional obligation to hold the executive branch to account, it is incumbent on judges to

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92 Ibid 217.
93 Ibid 214.
94 Hoexter & Penfold (note 76 above) 157.
95 *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC) (*Fedsure*).
96 *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* 2000 (2) SA 674 (CC).
97 *Fedsure* (note 95 above) para 56.
98 Tsele (note 8 above) 197.
99 Ibid.
100 At 2.4*(c)*(ii).

> have the courage, conviction and independence to reach decisions like that in *Economic Freedom Fighters [1]*.'[101]

Considerations such as these could well have been a motivating factor behind the court's reasoning in *Economic Freedom Fighters 1*. Even if so, it seems clear that the court nevertheless reached its decision by faithful adherence to established legal principles.

(c) Economic Freedom Fighters 2

Several political consequences followed *Economic Freedom Fighters 1*. These included Zuma's professed acceptance of the Constitutional Court's judgment and order and his intention to abide by it – though this intention was not given effect to by any material action on his part at the time. Opposition parties then tabled a motion for Zuma's removal as President on the grounds that he had 'committed a serious violation of the Constitution in failing to implement the Public Protector's remedial action'.[102] This motion failed in the National Assembly when the required votes were not obtained. This was followed by the moving of two successive motions of no confidence in the President, brought in terms of s 102 of the Constitution, which were similarly defeated. The applicants then turned to the Constitutional Court based on its exclusive jurisdiction in terms of s 167(4)*(e)* of the Constitution,[103] arguing that the National Assembly had failed to meet its constitutional obligation to hold Zuma accountable for his failure to implement the Nkandla report.[104] They also prayed for an order directing the Speaker to 'put the requisite processes and mechanisms in place to hold [Zuma] accountable for his conduct' and

> 'to convene a committee of Parliament . . . to conduct an investigation into the conduct of the President and, in particular, whether . . . the President has made himself guilty of an offence or inability which would warrant the exercise of the powers of Parliament, in terms of section 89(1) of the Constitution'.[105]

The two main issues before the Constitutional Court were first, whether the National Assembly had failed to institute 'mechanisms and processes for holding the President accountable in

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[101] Neil Parpworth 'The South African Constitutional Court: Upholding the rule of law and the separation of powers' (2017) 61 *Journal of African Law* 273 at 286.
[102] *Economic Freedom Fighters 2* (note 6 above) para 8.
[103] Section 167(4)*(e)* provides that 'only the Constitutional Court may . . . decide that Parliament or the President has failed to fulfil a constitutional obligation'.
[104] *Economic Freedom Fighters 2* (note 6 above) para 18.
[105] Ibid.

terms of section 89 of the Constitution'[106] and secondly, whether the National Assembly had 'failed to hold the President to account in that it failed to scrutinise the violation of the Constitution by the President'.[107] Similarly to *Economic Freedom Fighters 1,* the case before the court was therefore deeply political, but unlike that case, it divided the court along ideological lines relating to the separation of powers.

The majority judgment written by Jafta J dealt with the first issue by examining the meaning of s 89 of the Constitution. He emphasised that the exercise of this provision must be facilitated by defined procedural steps from the preliminary stage to the actual impeachment and the eventual voting on whether or not the President should be removed from office.[108] The majority concluded that the ad-hoc processes that had been used to implement s 89 were not enough to meet the procedural demands of the provision owing to several shortcomings. These included inconsistency in approach after s 89 was invoked,[109] that the proposed use of ad-hoc processes lacked a 'sifting mechanism' to determine whether the President did indeed commit serious misconduct or a serious violation of the Constitution or the law,[110] and that ad-hoc committees did not have predetermined procedures to follow.[111] Crucially, from a political standpoint, the rules governing ad-hoc committees in the National Assembly did not specify that committees be large enough to allow for minority parties to be represented proportionally, nor did they provide for representation by all parties. The import of this is that the majority party could use its status as such to vote against the impeachment at the committee stage, thus preventing the matter from being determined at the National Assembly.[112] For these reasons, the majority concluded that the Assembly was required constitutionally to 'make rules specifically tailored for an impeachment process contemplated in [s 89]' and that it had failed to do so.[113]

The second question for determination was whether the Assembly had failed to hold Zuma accountable for ignoring the remedial action taken against him by the Public Protector, as determined by the Constitutional Court in *Economic Freedom Fighters 1*. The National Assembly was the only institution mandated to act against Zuma.[114] The court concluded that

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106 Ibid para 130.
107 Ibid para 131.
108 Ibid para 181.
109 Ibid para 182.
110 Ibid para 189.
111 Ibid para 190.
112 Ibid para 192.
113 Ibid para 196.
114 Ibid para 199.

Zuma's answering of questions put to him by the Assembly and the tabling of a motion of no confidence in terms of s 102(2) were not sufficient to fulfil the Assembly's s 89(1) obligations. The more salient question pertained to a motion to remove Zuma that the leader of the opposition in the Assembly had tabled in March 2016 (and which had ultimately failed). The majority held that this motion did not determine the crucial question whether one of the grounds listed in s 89(1) indeed existed.[115] Without any such determination, any process to remove the President under this provision would have been unconstitutional.[116] Accordingly, the Assembly was found to have failed to hold the President accountable as required by *Economic Freedom Fighters 1*.[117]

The court then turned to remedy. The emphasis on the court's wide remedial powers was notable, particularly as they were interpreted as being so wide so as to include issuing orders that the applicants had not prayed for, 'enabl[ing] courts to address the real dispute between the parties by requiring them to take steps aimed at making their conduct to be consistent with the Constitution'.[118] Firstly, the court was bound to declare the Assembly's failures to comply with its obligations to be inconsistent with the Constitution.[119] The second, and more contentious, question was whether the court could use its wide remedial powers to direct the National Assembly to comply with its constitutional obligations. As to the obligation to devise a process to implement s 89(1), the court reflected that some progress was already underway at the time, with draft rules having been circulated for comment.[120] However, the majority considered it just and equitable to require that the Assembly exercise its powers to devise the s 89(1) process without delay, though it was at pains to point out that this did not usurp the Assembly's powers to do so.[121] Additionally, the court ordered the Assembly to determine whether Zuma had breached s 89(1)*(a)* or *(b)* of the Constitution.[122]

Two dissenting judgments, penned by Zondo DCJ and Mogoeng CJ respectively, disagreed strongly with the majority. At the heart of both dissents was the question whether the majority had offended the separation of powers doctrine in its judgment and order.

115 Namely, that Zuma had committed serious misconduct or a serious violation of the Constitution or the law.
116 *Economic Freedom Fighters 2* (note 6 above) para 206.
117 Ibid para 208.
118 Ibid para 211.
119 Ibid para 209.
120 Ibid para 212.
121 Ibid para 216.
122 Ibid para 222.

Mogoeng CJ's opposition went so far as to castigate the majority for committing a 'textbook case of judicial overreach'.[123]

These criticisms emanated from several key disagreements. The first was on the question whether the appointment of the ad-hoc committee was sufficient as a mechanism by which s 89(1) could be exercised effectively. Zondo DCJ's view was that this was so,[124] placing some reliance on factual aspects of the dispute to reach this conclusion.[125] The applicants' failure to participate in a procedure (namely, a parliamentary subcommittee mandated to consider the issue of an appropriate mechanism by which s 89 could be exercised) and their election to further their cause through the courts was deemed objectionable.[126] The minority's view was that

> 'the most sensible response by this Court to this is to insist that the applicants go back to that sub-Committee and make their proposals to it and see whether any unconstitutional obstacles are put in their way. This approach shows respect for a parliamentary process and seeks to discourage litigants from approaching this Court or any court for that matter in regard to an issue which is capable of being resolved without going to court'.[127]

Throughout Zondo DCJ's judgment is woven a high regard for the democracy-enforcing principles of majoritarian decision-making[128] and proportional representation[129] in the National Assembly, even as these are applied in smaller forums such as ad-hoc committees. The judgment stridently rejected the notion that the court should order the Assembly to conduct a s 89 inquiry by convening a committee, as this would 'bypass a democratic process of which such a Committee is constitutionally required to be the product'.[130] Zondo DCJ observed that '[a] litigant cannot . . . ask a court to make a decision that should be the outcome of votes cast in the National Assembly when he or she fears that the majority in the National Assembly might not support the decision he or she wants'.[131]

The minority therefore took a more constrained view of the court's powers to intervene in this case. This was emphasised by Zondo DCJ's observation that the court's role is to

[123] Ibid para 223.
[124] Ibid paras 42–3.
[125] Ibid paras 47–52.
[126] Ibid para 59.
[127] Ibid para 60.
[128] Ibid para 62.
[129] Ibid para 65.
[130] Ibid para 73.
[131] Ibid.

adjudicate disputes, and in this case, there was none: opposition parties had not moved a motion to establish a committee to investigate Zuma's conduct, and there was accordingly no refusal by the Assembly to litigate against.[132] Another role is to be the objective arbiter of fact. In *Economic Freedom Fighters 1* the Constitutional Court had determined that Zuma had violated the Constitution, and therefore 'nobody . . . could conduct an investigation whether, indeed, that was so,' meaning that there was no need for a further fact-finding enquiry.[133] However, it was for the majority of the Assembly to decide what to do with that information; the majority could decide not to remove Zuma from office, which it ultimately did.

Again, on the question whether the court should order the National Assembly to put a special mechanism in place to give effect to s 89, the minority's view was that 'this Court would infringe the doctrine of the separation of powers if it were to prescribe to the National Assembly which option or model the National Assembly should adopt. That is not the role of courts'.[134]

After observing that the applicants had not explained why they did not make proposals to the subcommittee, the minority's view was that the majority's overlooking of this 'encourages political parties . . . to ignore internal remedies and Parliamentary structures and processes' which is 'bad for our constitutional democracy'.[135] Even on the question whether the National Assembly failed to hold Zuma to account, the minority would have held that it was sufficient that motions of no confidence in Zuma as President were defeated.[136]

These findings and sentiments are reflected in Mogoeng CJ's separate dissenting judgment, albeit by employing far more forceful and emphatic language. The real nub of the disagreement between the majority and minority of the court was that several attempts had been made to hold Zuma accountable by removing him from office, but to no avail – leading to 'relentless efforts being made to find another and even more onerous way to remove him'.[137] Further,

> '[i]t cannot therefore objectively and justifiably be said that there is any available constitutional ground on which the President has never been held accountable for the non-security upgrades at his Nkandla private residence. That position would be sustainable only if the constitutionally

[132] Ibid para 74.
[133] Ibid para 111.
[134] Ibid para75.
[135] Ibid para 82.
[136] Ibid para 93.
[137] Ibid para 93.

> accepted notion of holding him accountable for Nkandla were nothing short of his actual removal from office.'[138]

The core dispute was therefore between the majority's more interventionist and prescriptive approach, which sought to ensure a more robustly defined institutional framework within which s 89 is exercised, and the minority's approach, which put first the latitude given to the National Assembly to determine its own processes. However, in thrashing out this ideological disagreement, there is crucial subtext running through the four judgments: that the exercise of democratic processes in the Assembly had yielded the result that Zuma faced no *material* repercussions for his misconduct in relation to the improvements to his Nkandla homestead. Moreover, that opposition parties, even working together, were effectively politically inert in this regard. The ANC's majority representation in the National Assembly (and proportional representation in relevant committees) meant that absent conscientious objections within the party that went against the party line, Zuma's egregious misuse of public funds would face no consequence. The question was, therefore, how far was the court willing to go to address this?

The majority was willing to go considerably further than the minority by requiring the National Assembly to make rules for the removal of the President under s 89(1) of the Constitution. The minority's view was that courts should adopt a restrained approach in these circumstances by requiring aggrieved political parties to invoke the mechanisms and processes already existing within the National Assembly to hold the President accountable. As Froneman J pointed out in his separate concurring judgment, this difference of opinion was reasonable and a result of 'serious attempt[s] to grapple with the important constitutional issue at hand'.[139] However, Mogoeng CJ's branding of the majority's position as a 'constitutionally impermissible intrusion by the Judiciary into the exclusive domain of Parliament'[140] is a serious allegation indeed.

Mogoeng CJ's concerns are shared by several commentators. These include Nyane, who observes that the majority opinion suggests that 'although the Constitutional Court usually makes cursory comments about the need to respect the National Assembly and the executive, it does not always seem to observe the boundaries between its work and the work of the other branches'.[141] Magabe and Odeku also express concern that the majority went beyond merely

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138 Ibid para 241.
139 Ibid para 281.
140 Ibid para 223.
141 Hoolo Nyane 'The judicialisation of politics in South Africa: A critique of the emerging trend' (2020) 36 *SAJHR* 319 at 331.

interpreting s 89(1) of the Constitution, and consider its unnecessary to order the National Assembly to 'put "requisite processes and mechanisms" in place to hold the President accountable because there is evidence on record that there are already mechanisms and processes through which the President was held accountable'. [142]

Gildenhuys joins these commentators in scepticism regarding the majority's approach for several reasons worth traversing here. She argues that the majority was selective as to what facts it relied upon, choosing to overlook that it was EFF and DA representatives on the subcommittee who had arrested the process to draft rules for a procedure in terms of s 89.[143] Further, the majority

> 'drew a superficial distinction between the responsibilities of the [National Assembly] and of political parties. The majority also failed to address the minority argument that, on the facts of the case, it would be inappropriate for the [National Assembly] to begin investigations into the impeachment grounds, since the Court had already held that President Zuma's conduct constituted a violation of the Constitution. However, one factual element that the Court did seem to take into account was the ANC's electoral dominance in the [National Assembly].'[144]

Gildenhuys argues that despite the majority's concern for the ANC's dominance in the legislature and how this would impact on the work of the parliamentary committee concerned with the s 89 process, the majority did not sufficiently justify its position that would entitle minority parties to be 'disproportionately represented in a parliamentary committee mandated to evaluate the misconduct of the President', a position which 'depart[ed] from the fundamental constitutional principles of representative democracy and constitutionalism'.[145] Gildenhuys also argues that the majority interpreted the prayers of the applicants to go further than what they had asked for – whereas the applicants had requested a declaratory order that the National Assembly had failed in its duty to hold the President to account, the majority ordered the National Assembly to 'determine whether the President has breached section 89(1)(a) or (b) of the Constitution'. She goes on to consider the majority's decision in unflinching terms within its political context:

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[142] Thabo T Magabe & Kola O Odeku 'Concurring with the minority judgment which finds the majority judgment to be judicial overreach to the doctrine of separation of powers accentuated in the case of *Economic Freedom Fighters vs. Speaker of the National Assembly* 2018 (2) SA 571 (CC)' (2021) 10 *Perspectives of Law & Public Administration* 69 at 78.
[143] Lauren Gildenhuys 'Esoteric decision-making: Judicial responses to the judicialisation of politics, the Constitutional Court and *EFF II*' (2020) 36 *SAJHR* 338 at 355.
[144] Ibid.
[145] Ibid.

> 'It is possible that the majority read the political context, characterised as it was by the declining support for Zuma's presidency, and took the opportunity to hand down a judgment that would hasten the termination of a presidency that had overseen the systematic erosion of democratic institutions and the abuse of public resources – even though the express provisions of the Constitution arguably did not entitle it to do so on the facts of the case before it.'[146]

This characterisation, if true, would be indicative of concerning expediency on the part of the majority – a case of pushing the limits of judicial creativity beyond what the Constitution envisages. This would indeed be worthy of 'serious consideration', as Gildenhuys suggests.[147] As the truth has never been established, however, it remains as no more than a speculative proposition. Nevertheless, Gildenhuys's criticisms of *Economic Freedom Fighters 2* are certainly credible, and are illustrative of the fine line upon which the court trod in the matter.

Cachalia offers a response to the criticisms of the majority in *Economic Freedom Fighters 2* from a higher vantage point, namely, that of 'democratic process theory'.[148] He constructs his argument by starting from a view that the very 'health of democracy as a system of self-government and democratic representation' is endangered when 'self-dealing'[149] representatives in government engage in corruption or fail to prevent it. This situation calls for 'democracy reinforcing review' that can override separation of powers limitations on the judiciary's powers, even when such review '"interfere[s] in the internal functioning" of constitutionally autonomous representative bodies'.[150] This may be justified on the basis that it is a safeguard to 'vindicate the constitutional promise of self-government'.[151] In short, Cachalia argues that the judiciary is constitutionally permitted to craft remedies to resolve political dysfunction that puts the proper functioning of democracy at risk. Self-dealing by representatives is one such form of dysfunction. However, dominance of a party can be abused to circumvent accountability, as was demonstrated by the defeat of three motions to hold Zuma accountable following the judgment in *Economic Freedom Fighters 1*.[152] This was something that the court was acutely aware of, having acknowledged this in *United Democratic Movement*

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[146] Ibid 356.
[147] Ibid.
[148] Firoz Cachalia 'Precautionary constitutionalism, representative democracy and political corruption' (2019) 9 *CCR* 45.
[149] Cachalia understands 'self-dealing' to be a form of 'political dysfunction' that needs a judicial remedy. It includes, for instance, cases where incumbents prioritise party interests over the public interest. Ibid 48 fn 8.
[150] Ibid 52.
[151] Ibid.
[152] *Economic Freedom Fighters 1* (note 5 above) paras 8–13.

v Speaker of the National Assembly[153] several months prior to *Economic Freedom Fighters 2*, as follows:

> 'A political party virtually determines who goes to Parliament and who is no longer allowed to represent it in Parliament. Members' fate or future in office depends largely on the party. The Deputy President, Ministers and Deputy Ministers who are also Members of Parliament, are presidential appointees. The ruling party has a great influence on, or dictates, who gets appointed or elected as senior office-bearers in Parliament. Almost invariably the President – although not a Member of Parliament – is the leader of the ruling party. It would be quite surprising if the senior office bearers in Parliament were not appointed or elected with a significant input by the President and other senior party officials. *There are therefore institutional and other risks that Members, particularly of any ruling party, are likely to get exposed to when they openly question or challenge the suitability of their leader(s) for the position of President*.'[154]

As such, opposition parties lacked the representation to take the matter forward,[155] giving rise to the need to turn to the courts to ensure that representatives were held to 'constitutional standards governing the relationship between representatives and voters (a "principal/agent" relationship) in a representative democracy'.[156] This, taken together with the principle of accountability as contained in the Constitution, was sufficient to justify the majority's seemingly intrusive order in *Economic Freedom Fighters 2.*

Cachalia's reasoning is compelling, and indeed serves as a cogent substantiation of the majority's order. It remains unclear whether this line of thinking (or something similar to it) was indeed the motivation behind the majority's decision: both Gildenhuys and Cachalia are aligned in criticising the majority for not fully explaining its reasoning for departing from the principle of majoritarian decision-making.[157] This is a significant omission, one which invites speculation of the sort expressed by Gildenhuys.

Nevertheless, support for Cachalia's argument can be discerned from the order in *Economic Freedom Fighters 2* itself. As Froneman J rightly observed, the National Assembly

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153 2017 (5) SA 300 (CC).

154 Ibid para 76. Emphasis added.

155 Kate Dent 'Lawfare and legitimacy: The wicked problem of judicial resilience at a time of judicialisation of politics in South Africa' (PhD Thesis, University of Cape Town, 2021) 91.

156 Cachalia (note 148 above) 45.

157 Cachalia describes the majority's justifications as 'opaque' (ibid 64); Gildenhuys (note 143 above) at 355 notes that despite 'concern for the ANC's political dominance in the legislature clearly featured in the majority's reasoning . . . it failed to provide adequate justification for its departure from the fundamental constitutional principles of representative democracy and majoritarianism'.

was ordered to comply with its constitutional obligations, but the majority did not prescribe *how* it should do so. The order was to the effect that steps be taken to engage constitutional accountability mechanisms, not that a specific outcome (such as Zuma's impeachment) should obtain. The court's order could be seen as counteracting the abuse of dominance to avoid accountability.

This is certainly an example of judicial innovation in service of the interests of accountability. Opinion is clearly divided as to whether the court navigated the tensions between activism and restraint successfully in this case. What is relevant, however, is that the deep schism between the majority and minority opinions – and the vehemence with which the opposing views were defended[158] – is evidence of significant concern within the Constitutional Court for the impact on its decisions for the separation of powers. It also shows the discomfort that the court experienced in being called upon to intervene in a highly politicised case such as this one.

Economic Freedom Fighters 2 is notable for at least two reasons that are relevant here. First, the majority's decision struck a forceful blow for accountability. It enforced the Constitution's requirement that positive obligations to seek accountability be fulfilled, including by ensuring that the necessary mechanisms are in place to enable such exercises. The court itself rightly did not wade into the question of holding Zuma accountable for his conduct in relation to the Nkandla upgrades, but went as far as the separation of powers would allow to make an order ensuring that the National Assembly exercised its constitutional powers to hold the President accountable without delay. Secondly, the judgments demonstrate the extent to which justices of the court are keenly aware of political considerations at play, with the minority stating these expressly. Mogoeng CJ recognised that *Economic Freedom Fighters 2* 'has never been about impeachment in general. It has always been about the impeachment of President Zuma. It is context-sensitive or situation-specific.'[159] Acknowledging this (and the minority opposition parties' prior failed attempts to remove Zuma from office politically) did not weaken the minority judgment by exposing a hint of political favour. Rather, they showed real engagement by the members of court with the Constitution's vision for political accountability, and the extent of the court's role in achieving that vision.

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[158] Mogoeng CJ uses highly emotive language at times, such as referring to his 'deep seated agony and bafflement about the second judgment's refusal to recognise the discretion the Assembly obviously has' in *Economic Freedom Fighters 2* (note 6 above) para 267. See also para 270.
[159] Ibid para 278.

(d) President of the Republic of South Africa v Office of the Public Protector[160]

The political tensions that were evident in *Economic Freedom Fighters 2* were even more pronounced in *President of RSA.* This is because the court was required to adjudicate a dispute concerning the Public Protector's remedial action, which no less than called on the President to use his prerogative powers to appoint a commission of enquiry that that would later transpire to be his political undoing. One of the final reports issued by the Public Protector's office under Madonsela's tenure, 'State of Capture', provided for remedial action requiring the President to appoint a commission of enquiry. The commission would be headed by a judge selected by the Chief Justice and would be bestowed with 'powers of evidence collection no less than that of the Public Protector'.[161] The purpose of the Commission was to investigate matters in the State of Capture report, including

> 'complaints of alleged improper and unethical conduct by the President, certain State functionaries and the Gupta family, relating to the appointment of Cabinet Ministers and Directors of State-owned entities (SOEs), which possibly resulted in the improper and corrupt award of state contracts and other benefits to businesses of the Gupta family'.[162]

The remedial action provided that the Commission would have to present its findings and recommendations to the President, after which he would have to report to Parliament regarding his intentions as to implementing the report.[163]

Zuma sought an order from the Gauteng Division of the High Court sitting in Pretoria to review and set aside part of the Public Protector's remedial action relating to the appointment of the commission of enquiry. This was based on several grounds of review, including that it was unconstitutional for the Public Protector to direct, first, that the President exercise his constitutional power to appoint a commission of enquiry; secondly, that the Chief Justice select the chairperson of the Commission; and thirdly, the manner in which the Commission would be implemented. Zuma also argued that it was 'impermissible for the Public Protector to order the President to exercise an executive power as this offends against the separation of powers doctrine'.[164] The court considered that the key question in this matter was whether the

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[160] Note 10 above.
[161] State of Capture report (note 51 above) 25.
[162] *President of RSA* (note 10 above) para 2.
[163] Ibid para 3.
[164] Ibid para 59.

‘President's constitutional power to appoint a commission of inquiry can permissibly be limited by remedial action taken by the Public Protector’.[165]

The court answered this question in the affirmative. Its reasoning can be summarised as follows: the powers afforded to the President under s 84(2) of the Constitution should be considered in the context of the broader constitutional scheme and the obligations imposed on the President, who is duty-bound to uphold the rule of law.[166] It is implied that his s 84(2) powers are not untrammelled as they are accompanied by a duty.[167] Regarding the power to appoint a commission of enquiry, this does not refer to a duty specifically imposed on a President that requires him to perform specific conduct; rather, it is something else.[168]

Slade is highly critical of this statement, arguing that the court did not clearly identify what this ‘duty’ is.[169] In his view, this opens the door to serious separation of powers concerns because the court did not explore ‘whether the exercise of a discretionary constitutional power may be usurped by another branch of government’ and whether there was any offence against the separation of powers.[170] With respect, Slade perhaps fails to locate this duty in the judgment because he is in search of a general principle rather than the context-specific circumstances of the case. It is apparent throughout the judgment that the court was mindful of the extraordinary situation of the President holding exclusive powers to appoint (or not appoint) a commission of enquiry that could have serious deleterious personal consequences. The duty, then, is for Zuma, as President, to exercise this power *without constraint*; if he is unable to do so (as he is in this case), this ‘brings him into conflict with his obligations under the Constitution’.[171] This is the duty that is justiciable under s 172(2)*(a)* of the Constitution: the courts are entitled to ‘make orders concerning the constitutional validity of any conduct of the President’.[172] It seems that this would include an order endorsing the Public Protector’s remedial action encroaching on the President’s s 84(2) powers, if the circumstances demand it. But while there is reason to disagree with Slade’s assertion that the court did not identify the duty at all, he is correct in his assessment that it did not set out a fully reasoned basis for reliance on this ‘duty’, nor explore

[165] Ibid para 60.
[166] Ibid paras 63–71.
[167] Ibid para 68.
[168] Ibid para 60.
[169] Bradley V Slade ‘The implications of the Public Protector’s remedial action directing the exercise of discretionary constitutional powers: Separation of powers implications’ (2020) 4 *Law, Democracy and Development* 364 at 370.
[170] Ibid 372.
[171] *President of RSA* (note 10 above) para 71.
[172] Ibid para 70.

the impact on the separation of powers in the required detail. This is an important omission, one that suggests that the court's point of departure may have been the need for the commission of enquiry rather than established principles regarding presidential powers, and the failure to reason out separation of powers implications could have been purposeful elision by the court towards that end.[173]

Going on to consider the Public Protector's powers, the court made several observations: that her investigative powers are 'of the widest ambit';[174] that her powers to take appropriate remedial action 'connotes providing a proper, fitting, suitable and effective remedy for whatever complaint and against whomsoever the Public Protector is called upon to investigate'.[175] It adopted a purposive interpretation of s 182(1)*(c)* of the Constitution and the Public Protector Act, finding that in order for the Public Protector to fulfil her role, she is 'empowered to take binding remedial action that is capable of remedying the wrong in the particular circumstances', which includes instructing members of the executive to exercise their powers in a specific manner if it is necessary to address the harm.[176] The court considered that the circumstances of this case called for the application of this principle. In particular, concerning the question whether the remedial action was 'appropriate', the court had regard to some of the more damning findings in the 'State of Capture' report, especially as they relate to Zuma. The report detailed *prima facie* findings of an improper relationship between Zuma and the Gupta family, such that the latter had

> 'power to influence the appointment of Cabinet Ministers and directors in boards of SOEs and leveraging these relationships to get preferential treatment in state contracts, access to state-provided business finance and the award of business licences'.[177]

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[173] Slade (note 169 above at 374) refers to the observation by Hodgson that in South African constitutional jurisprudence, the separation of powers 'seems to appear, disappear, reappear, and evolve at the Court's convenience and whim'. Tim Fish Hodgson 'The mysteriously appearing and disappearing doctrine of separation of powers: Toward a distinctly South Africa doctrine for a more radically transformative Constitution' (2018) 34 *SAJHR* 57. This is one such case where separation of powers was treated with a lighter hand. However, as Slade points out, separation of powers concerns were advanced as reasons to set aside the Public Protector's remedial action in two cases concerning remedial action taken by Madonsela's successor, Ms Busisiwe Mkhwebane, in *South African Reserve Bank v Public Protector* 2017 (6) SA 198 (GP) and *President of the Republic of South Africa v Public Protector* 2020 (5) BCLR 513 (GP). It is beyond the scope of this thesis to consider the many cases arising from Mkhwebane's tenure as Public Protector.
[174] *President of RSA* (note 10 above) para 76.
[175] Ibid para 80.
[176] Ibid para 82.
[177] Ibid para 128.

Zuma's employment of 'Stalingrad' tactics during the Public Protector's investigation did not help his cause in the review: he had attempted to raise technical objections and asked for more time to respond. The court took a dim view of this conduct and concluded that Zuma's failure to address the complaints raised by the Public Protector when he was requested to do so only strengthened the *prima facie* case that had been made out against him in the report.[178] This was sufficient to justify the Public Protector's remedial action as appropriate.[179]

The court also roundly rejected the contention that it was inappropriate for the Public Protector to instruct that the Chief Justice select the judge that would be appointed to lead the commission. The President and relatives such as his son were identified as central subjects of the investigation.[180] These circumstances meant that absent the President's recusal, the commission would not inspire public faith that it was not biased in his favour.[181] Further, the court found that the Public Protector had not overstepped into the President's prerogative powers to direct the manner in which the commission would be implemented. The significant public interest in the matter required that 'an effective, suitable, proper or fitting remedy to redress the prejudice, impropriety, unlawful enrichment or corruption that may have occurred in a particular case'[182] was required, and in this case, that meant that the Commission had to commence expeditiously.[183] The court alluded to the fact that Zuma's being implicated in the findings of the report may have been the motivation for the review, though it did not make the connection expressly.

The High Court also made a bold statement in awarding costs in this matter. It excoriated the President for bringing this review, deeming his actions to be 'seriously reckless' because he knew that the matter was a non-starter.[184] As his conduct had fallen far short of what is required under s 195 of the Constitution and the expectations of a head of state, the court saw fit to mulct him with costs in the matter in his personal capacity.[185] Mr Zuma unsuccessfully challenged this costs order in the Supreme Court of Appeal.[186]

[178] Ibid paras 108–13.
[179] Ibid paras 137–40.
[180] Ibid para 142.
[181] Ibid paras 143–4.
[182] Ibid para 154.
[183] Ibid para 159.
[184] Ibid para 188.
[185] Ibid para 190.
[186] *Zuma v Office of the Public Protector and Others* [2020] ZASCA 138.

5.4 CONCLUSION

Economic Freedom Fighters 1 was a momentous judgment in many ways, not least because it was a decision of a unanimous court making a memorably bold statement against impunity and locating accountability as no less than a constitutional imperative:

> 'One of the crucial elements of our constitutional vision is to make a decisive break from the unchecked abuse of State power and resources that was virtually institutionalised during the apartheid era. To achieve this goal, we adopted accountability, the rule of law and the supremacy of the Constitution as values of our constitutional democracy. For this reason, public office-bearers ignore their constitutional obligations at their peril. This is so because constitutionalism, accountability and the rule of law constitute the sharp and mighty sword that stands ready to chop the ugly head of impunity off its stiffened neck.'[187]

Taken together, *SABC v DA, Economic Freedom Fighters 1, Economic Freedom Fighters 2*, and *President of RSA* ushered in a new era for the office of the Public Protector, cementing it as a key anti-corruption institution entitled to exercise real power over the conduct of errant state institutions. In these judgments, the tension between judicial activism and restraint is laid bare. The path to the conclusion reached in *Economic Freedom Fighters 1* may have been clearer than, for example, that of *Glenister II*,[188] which relied on more overtly creative interpretation by the court. Owing to the principle established in *Oudekraal*, the court in *Economic Freedom Fighters 1* was able to reach a result that was highly supportive of the Public Protector's ability to act against impunity, but also was based on well-established precedent. That is not to say that it was not a creative decision: the absence of a constitutional provision affirming the binding nature of the Public Protector's remedial power introduced uncertainty into the law. The court addressed that uncertainty by expansively applying the law to answer a novel legal question in a way that fortified the impact of a key accountability institution.[189]

Economic Freedom Fighters 2 was similarly innovative, though in a manner that grappled with the effects of majoritarian decision-making on the proper functioning of accountability processes. The creativity of the majority was somewhat less well-received,

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187 *Economic Freedom Fighters 1* (note 5 above) para 1.
188 *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC), as discussed at 3.4*(c)*.
189 The effects of this innovation potentially resonate beyond the Public Protector – as Govender and Swanepoel argue, the decision could apply to other constitutional institutions supporting democracy such as the South African Human Rights Commission. Govender & Swanepoel (note 78 above) 23–9.

inspiring fierce debate regarding whether the courts had intruded too far into the realm of the legislature. The court itself was also deeply divided on the issue. Legitimate questions were raised regarding whether the court's decision was motivated less by the prudent application of the law, and more by the need to respond to political dysfunction. Even so, the restraint exercised by the majority to extend its order only as far as it did kept the decision credibly within the boundaries of its powers.

Lastly, *President of RSA* emphasised the practical import of constitutional supremacy by confirming that even the executive powers afforded to the President are not untrammelled. Rather, they are accompanied by a duty to exercise these powers in fulfilment of constitutional obligations. This was a transformative interpretation of the executive powers of the President, which generally are regarded 'with a high degree of deference because of their highly political character'.[190] This principle was applied in a highly contextual manner to Zuma's circumstances, specifically, allegations of his involvement in state capture. This resulted in an order upholding the Public Protector's remedial action pertaining to the appointment of a commission of enquiry including several safeguards to ensure its independence, capacity and capability to perform its function.[191]

While the outcome of the litigation regarding the Public Protector's powers has been interpreted as a victory for accountability, the reality is more nuanced. These judgments marked a decisive break with the notion that the Public Protector exerts a softer power of influence, as is the case in other jurisdictions, where adverse findings and recommendations are enough to raise public ire and spark action by the subjects of investigations to save political face. The practical consequence of these judgments is that the Public Protector's work often does not end after the report of the investigation is issued. Instead, the office must often respond to judicial reviews of the remedial action by those aggrieved by the report. This is a poor use of the institution's resources.

Govender and Swanepoel correctly observe that 'these judgments were in part dictated by the context and by the cynical attempts to ostensibly comply with the findings of the [Public Protector].'[192] This was because those implicated in the reports expended every political and legal effort, including the Stalingrad litigation approach, to avoid having to comply with the

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[190] Hoexter & Corder (note 76 above) 46.
[191] *President of RSA* (note 10 above) para 191.
[192] Govender & Swanepoel (note 78 above) 23.

Public Protector's remedial action, and as such, accountability for their actions. They point out that a greater concern was that there was a pattern of such behaviour, and if it

> 'had gone unchecked, it would have fundamentally eroded the rule of law and undermined the efficacy of the [Public Protector] and other Chapter 9 institutions. *It is also apparent that the various courts had the common purpose of ensuring that findings of the [Public Protector] could not be disdainfully ignored. The difficulty was to achieve this in a manner that was consistent with the constitutional and statutory obligation of the [Public Protector] and in accordance with the doctrine of the separation of powers.*'[193]

As has been discussed above, this was achieved to a greater extent in the two *Economic Freedom Fighters* judgments and less so in *President of RSA*. Nevertheless, the net effect has been the affirmation of the Public Protector's role as a key accountability institution in terms of South Africa's constitutional dispensation.

[193] Ibid. Emphasis added.

CHAPTER 6

CONCLUSION:

LOOKING BACK AND AHEAD

> 'The major issues for me are social equity and corruption. Those are the big ones now, and I think they're still racialised issues in some sense because our racial past has not been dealt with fully and effectively. But these are also, in an important sense, post-racial issues. Because they are issues of the new order: corruption and social equity, because we have the power . . . we, including myself, as Constitutional Court judges, as members of the executive, as members of the legislature, to take very vigorous positive action.'[1]

6.1 INTRODUCTION

Justice Edwin Cameron's candid response to a question about current challenges in terms of the transition to democracy and the role of the Constitutional Court brings together the central themes of this thesis in several ways. It reflects the extent of corruption as one of the most significant challenges in post-apartheid South Africa standing in the way of the full achievement of the constitutional vision of an equal and just society. It also reflects how a judge sitting in the highest court of the land appreciated that judges themselves are potential changemakers: that judges have agency to 'take action' to alleviate or prevent some of the harms of corruption. Lastly, Justice Cameron's call to action was made not only to fellow members of the judiciary, but to the other branches of government as well – demonstrating a subtle acknowledgement of the accountability vacuum together with an appeal that it be filled. Although he was speaking in 2012, his remarks were prescient in light of subsequent events, including the revelation of the breadth and depth of state capture and corruption that followed in the ensuing decade.

This thesis has explored how the courts have responded to exhortations like that expressed by Justice Cameron by using their powers to act as a bulwark against conduct seeking to further state capture, enabling corruption, and allowing egregious public maladministration to go virtually unchecked. It has, at the same time, explored how this power was not exercised without limitation: in order to remain within constitutional constraints on judicial power,

[1] Interview with Edwin Cameron 'Justice Edwin Cameron' *Constitutional Court Oral History Project*, last accessed from http://historicalpapers-atom.wits.ac.za/uploads/r/historical-papers-research-archive-library-university-of-witwatersrand/c/b/6/cb68c38582d1ca598bdd87b2ffc58657a9f6ad97842faebea80e19d7de6703f8/AG3368-C13-001-jpeg.pdf 41 on 17 March 2025.

maintain comity with the other branches of government, and preserve its institutional security, the courts have had to be careful not to overstep the boundaries of the separation of powers – even if that meant, in certain cases, that the courts' interventions were less successful in preventing continued malfeasance.

The aim of this concluding chapter is to provide a brief overview of the material traversed in the preceding chapters of this thesis and to reflect critically on what it has revealed in relation to the specific research questions set out in Chapter 1. This chapter also makes recommendations to address some of the concerns that have been highlighted throughout this thesis.

6.2 CHAPTER REFLECTIONS

(a) Chapter 1: State capture, corruption, egregious public maladministration, and the courts

Chapter 1 laid the foundation for this thesis by setting out key background information about how state capture, corruption, and egregious public maladministration have manifested in South Africa in recent times.[2] More specifically, it set out how the courts were increasingly called upon to adjudicate matters that arose because there was insufficient action from the political branches of government to hold accountable those involved in furthering state capture, engaging in corruption, or deliberately failing to perform their administrative role to the standard required by law. Key terminology was defined and contextualised,[3] and the nature and scope of this thesis was described.[4] In expounding on the methodology used in this thesis, care was taken to explain the relevance of court judgments as an indicator of judicial attitudes which very often inform the manner in which judges interpret the law and make their decisions.[5] Lastly, a brief overview of the ensuing chapters of this thesis was provided.[6]

The main purpose of Chapter 1 was to describe the purview of this thesis: namely, how judges have responded to the unique challenges arising from state capture, corruption and egregious public maladministration by way of their reasoning and decisions in cases pertaining to these issues. Specifically, it focused on how courts have managed the opposing forces of judicial activism and restraint acting upon them in such cases in the context of the accountability vacuum.

[2] At 1.1.
[3] At 1.2.
[4] At 1.3.
[5] At 1.4.
[6] At 1.5.

(b) Chapter 2: A theoretical lens

The discussion of the cases relevant to this thesis in Chapters 3, 4 and 5 was informed by the theoretical scaffolding raised in Chapter 2. At the base of this lies principles discerned from the study of judicial behaviour by proponents of American legal realism.[7] Legal realism acknowledges that the act of adjudication is not a type of mechanical process whereby facts of particular disputes are applied to law and can be expected to yield certain objective results, regardless of who is judging. Rather, factors unique to individual judges, such as their 'legal and political experience, political affiliations and opinions, and intellectual and temperamental traits'[8] inform the outcomes of cases, more often where there is indeterminacy in the law. An extra-legal factor that has been highlighted throughout this thesis is judges' awareness of and concern regarding the accountability vacuum in government, and the effect that this vacuum had on good governance, proper administration and, consequently, the fulfilment of the rights in the Bill of Rights and the vision for South Africa set out in the Constitution.

Chapter 2 also sets out an important factor pulling judges towards more activist decision-making that advances positive social outcomes, namely, transformative constitutionalism.[9] Even though accountability-vacuum cases do not always directly involve human rights, where there are potential rights implications, courts can be more willing to engage in reasoning that creatively interprets the law towards certain outcomes, or to engage their broad constitutional remedial powers to craft an order that is protective of human rights.

At the same time, courts are cognisant of the limitations on what they may order in terms of the separation of powers.[10] This important principle, implicitly woven into the Constitution, has a special significance in light of South Africa's historical context, where white minority rule in a legal system subject to parliamentary sovereignty enabled the apartheid government to enact and enforce repressive and unjust laws largely unchecked by legal means. The interim Constitution[11] and later, the 1996 Constitution, provided for a check on the powers of the elected branches of government in the form of judicial review of law and conduct against the provisions of a supreme constitution. Thus, the courts were established firmly as the 'ultimate guardians of the Constitution',[12] empowered with the authority and burdened with

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[7] At 2.2.
[8] Charles Grove Haines 'General observations on the effects of personal political and economic influences in the decisions of judges' (1922) 17 *Illinois Law Review* 96 at 116.
[9] At 2.3.
[10] At 2.4.
[11] Act 200 of 1993.
[12] Dikgang Moseneke 'Oliver Schreiner Memorial Lecture: Separation of powers, democratic ethos and judicial

the responsibility to declare laws and conduct inconsistent with the Constitution to be invalid and liable to be set aside.

The exercise of this judicial power always takes place in context – specifically, the political context surrounding matters brought before the courts. As Klug suggests, 'institutional pragmatism' – that is, deciding cases strategically with the court's interest in mind – is also an extra-legal factor that can have some bearing on how judges decide cases, such as influencing the extent to which they embrace transformative adjudication in a particular case.[13] Thus, the courts may refuse to adopt an interpretation of the law which could expose the judiciary to criticisms of overreach, even if doing so could allow it to make an order with good public outcomes, such as protecting rights or punishing the corrupt.

Institutionally pragmatic considerations become all the more important in light of the rise in lawfare, where litigants turn to the courts to resolve political disputes.[14] Chapter 2 also delved into debates regarding the distinction between 'good' and 'bad' lawfare, ultimately concluding that it is a legal strategy that can benefit litigants who are hamstrung by the accountability vacuum, but it nevertheless carries risks.

Litigants resorting to lawfare are often motivated by the opportunity to persuade the court to engage the wide remedial discretion afforded to it in s 172 (1) of the Constitution.[15] Chapter 2 discussed how courts tailor their orders to the circumstances before them. In cases of government non-compliance, courts adjust the level of intervention – such as when making supervisory orders – based on whether non-compliance arises out of inattentiveness, incompetence or intransigence. With respect to accountability-vacuum cases, orders that 'pierce the political veil' can be effective to hold individual officials and political office-bearers to account for malfeasance.[16] Two types of such orders, contempt orders and *costs de bonis propriis*, were discussed in Chapter 2, including the Constitutional Court's development of the law in *Black Sash Trust 1*[17] to allow public officials to be mulcted in costs owing to failures to perform their constitutional obligations in certain circumstances.

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function' (2008) 24 *SAJHR* 341 at 349.

[13] Heinz Klug 'Finding the constitutional court's place in South Africa's democracy: The interaction of principle and institutional pragmatism in the court's decision making' (2010) 3 *CCR* 1 at 2. See at 2.4*(c)*(i).

[14] At 2.4*(c)*(iii).

[15] This subsection is reproduced at 2.4*(d)*.

[16] Helen Taylor 'Forcing the court's remedial hand: Non-compliance as a catalyst for remedial innovation' (2019) 9 *CCR* 247 at 274.

[17] *Black Sash Trust v Minister of Social Development (Freedom Under Law NPC Intervening)* 2017 (3) SA 335 (CC).

Lastly, Chapter 2 applied these principles relating to judicial decision-making specifically to accountability-vacuum cases.[18] It was observed that judges have applied transformative constitutionalism to make activist decisions in accountability-vacuum cases. This is done in performing their role to 'temper power' by 'determining the allocation of constitutional authority and resolving conflicts that might be brought to the courts as different institutions struggle to ensure that there is legal accountability for governmental failures as well as individual malfeasance'.[19] It is this struggle that makes the need to respect the separation of powers, while at the same time maintaining the institutional security of the courts, all the more acute. How the courts balanced these considerations was discussed in Chapters 3, 4, and 5.

(c) Chapter 3: Criminal justice institutions

Chapter 3, the first of the three substantive chapters in which specific cases were discussed, considered one of the key elements of the state capture project as furthered by President Jacob Zuma during his tenure: undermining the criminal justice system. When considered from a high-level vantage point, this attack had several goals:

> '- Ensuring impunity – protecting Zuma, his family, and other allies and associates from prosecution. This extended to generalised impunity for the political class and those associated with state capture.
>
> - Promoting Zuma's control of the [African National Congress (ANC)] – Zuma's control of the ANC was the pivotal enabler of state capture. State intelligence capacity, including the SAPS crime intelligence division, were used to promote control of the ANC for Zuma and his allies.
>
> - Neutralising criminal justice officials who posed a threat to impunity, and administrators and politicians, including members of his own cabinet, who did not cooperate with the state capture agenda.'[20]

To achieve these ends, it was necessary to destabilise several institutions at the same time to ensure a general weakening of the criminal justice system. The easiest way to achieve this was to appoint leaders willing to act under political direction. Chapter 3 discussed how this was done with respect to the National Prosecuting Authority and the Directorate of Priority Crime

[18] At 2.5.
[19] Heinz Klug 'Transformative constitutions and the role of integrity institutions in tempering power: The case of resistance to state capture in post-apartheid South Africa' (2019) 67 *Buffalo Law Review* 701 at 703.
[20] David Bruce, David Lewis & Gareth Newham 'State capture and Zuma's criminal justice agenda' in Nina Callaghan, Robyn Foley & Mark Swilling *Anatomy of State Capture* (2021) 269 at 270–1.

Investigations (DPCI), where Mr Menzi Simelane and Mr Berning Ntlemeza were appointed to key leadership roles in those respective institutions.[21] The courts' intervention in both these cases, *Simelane*[22] and *Ntlemeza*,[23] ensured that both of these appointments were set aside. The bases upon which the courts' decisions rested were indicative how great the accountability vacuum had become: Simelane's egregious conduct meant that his appointment was patently irrational; Ntlemeza's conduct (which had evidenced bias, dishonesty and decisions taken in bad faith) was similarly excoriated by the court and deemed sufficient to justify an order that he not be permitted to return to his role, even temporarily.

It is relevant that the test applied in both these cases – that of rationality – is 'relatively deferential'[24] and as such, a lower bar to clear than for example, the test for reasonableness.[25] These two particular appointments were so egregious that they could not be upheld. The facts of these matters did not call for activist decision-making by the courts – the appointments were very plainly irrational – but they are demonstrative of the caution exercised by the courts when deciding matters steeped in political considerations. As discussed in Chapter 3, in *Simelane* the court restrained its decision to questions of rationality only, as the application of legal tests such as reasonableness would have invited considering Simelane's actions in a broader context, which would have included state capture.

Judicial activism is more apparent in the *Glenister II*[26] decision of the Constitutional Court.[27] Here, provisions of the Constitution were considered creatively in non-obvious ways, by allowing international-law obligations to influence the interpretation and application of domestic legislation establishing a corruption-fighting institution. The political ramifications of this judicial choice were characterised by Dixon and Roux as follows:

> 'Rather than confronting head-on the politically explosive allegation that the disbanding of the [Directorate for Special Operations] had been motivated by a corrupt desire to incapacitate it, the majority reached for a strained deduction from general international-law norms to develop specific constitutional duties. In South Africa's legal tradition, this kind of reasoning, which may seem highly formalistic to an American observer, is seen to be more authentically legal,

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[21] At 3.3.
[22] *Democratic Alliance v President of South Africa* 2013 (1) SA 248 (CC).
[23] *Ntlemeza v Helen Suzman Foundation* 2017 (5) SA 402 (SCA).
[24] Cora Hoexter & Glenn Penfold *Administrative Law in South Africa* 3 ed (2021) 466, citing Davis J in *Nieuwoudt v Chairman, Amnesty Subcommittee, Truth and Reconciliation Commission* 2002 (3) SA 143 (C) at 155G–H.
[25] *Simelane* (note 22 above) para 44.
[26] *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC).
[27] Discussed at 3.4.

and thus carries greater authority, than substantive constitutional policy analysis.'[28]

Their use of 'strained' is worth highlighting: *Glenister II* may have pushed the boundaries of constitutional interpretation, but it did not exceed them. This is shown by the Constitutional Court's not going so far as to invalidate the legislation establishing the DPCI and dismantling the Directorate for Special Operations (DSO). Doing so would likely have been supported by the public: years later, speaking after the conclusion of the State Capture Commission[29] where something close to the full extent of state capture had been laid bare, Chief Justice Raymond Zondo remarked that the decision to disband the DSO was one of the 'worst decisions we've ever taken as a country in our fight against corruption'.[30] Even if the judges hearing *Glenister II* had had a sense of the impact of the loss of the DSO on South Africa's anti-corruption effort at the time, they could not have gone any further than they did without offending the separation of powers. To do so would have opened the judiciary up to legitimate claims of overreach, and weakened its institutional legitimacy – putting at risk its ability to act decisively against corruption in cases to come.

As pointed out in Chapter 3, the judicial innovation in *Glenister II* that relied on contrasting features of the DSO and DPCI may have had the effect of elevating appointment procedures contained in the constitutive statute of the DSO to a gold standard. This effectively meant that the court had tied its own hands in the future case of *Helen Suzman Foundation (2015)*[31] with respect to its ability to enquire into the appointment procedures for the head of the DPCI. In this case, separation of powers considerations prevailed.

Lastly, the suspension and/or removal of heads of key anti-corruption institutions was considered.[32] *McBride v Minister of Police*[33] was, in some ways, a product of the interpretive creativity in *Glenister II* and the caution in *Helen Suzman Foundation (2015)*. It allowed the Constitutional Court to strike down those aspects of the Independent Police Investigative Directorate Act 1 of 2011 that had rendered it insufficiently independent and thus susceptible to capture, and to order that the legislature remedy the defects in the legislation without

[28] Rosalind Dixon & Theunis Roux 'Marking constitutional transitions: The law and politics of constitutional implementation in South Africa' (2018) 64 *UNSW Law Research Paper* 1.
[29] Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State.
[30] Sinesipho Shrieber 'Zondo says disbanding Scorpions was the "worst decision ever"' *BusinessLive* 9 November 2023, last accessed from https://www.businesslive.co.za/bd/national/2023-11-09-zondo-says-disbanding-scorpions-was-the-worst-decision-ever/ on 10 March 2025.
[31] *Helen Suzman Foundation v President of the Republic of South Africa; Glenister v President of the Republic of South Africa* 2015 (2) SA 1 (CC) (*Helen Suzman Foundation (2015)*).
[32] At 3.5.
[33] 2016 (2) SACR 585 (CC).

prescribing specifically how to do so. This approach showed appropriate respect for the separation of powers. Lastly, *Nxasana*[34] illustrated a shift in the court's approach that reflected a change in the broader political context, where the court was able to make full use its remedial powers to create a clear pathway to restoring stability in the leadership of the National Prosecuting Authority.

These cases illustrate that the opposing pulls of judicial activism and restraint tend to be expressed differently in each case. There is no uniform way to resolve them. Rather, the courts have shown that applying their powers in a careful and context-sensitive manner can often yield results that generally serve the public interest, such as by protecting the integrity of criminal justice institutions. However, history has shown that this is not enough to insulate such institutions against all possible harms occasioned by the accountability vacuum.

(d) Chapter 4: Public procurement

Chapter 4 was concerned broadly with how state capture, corruption and egregious public maladministration have manifested in the public procurement system. More specifically, it discussed the extensive litigation[35] arising from a particular set of facts, being the award by the South African Social Security Agency (SASSA) of a massive tender to Cash Paymaster Services for the payment of social grants throughout the country.

The groundwork of the chapter was laid by describing the legal framework for public procurement.[36] Historically, the fragmented system and other systemic flaws have created points of weakness that have been exploited by malign actors seeking to use procurement as a means illegitimately to direct public funds towards private interests. Newer developments, including the enactment of the Public Procurement Act 28 of 2024, were also discussed, although it is still too early to determine whether these reforms will bring the necessary change. The discussion in Chapter 4 also drew linkages between corruption or maladministration in public procurement and state capture by highlighting the common types of corruption that may occur, efforts made to root it out, and the observations of the State Capture Commission made

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[34] *Corruption Watch NPC v President of the Republic of South Africa; Nxasana v Corruption Watch NPC* 2018 (2) SACR 442 (CC).

[35] The *AllPay* cases are: *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency* (2014 (1) SA 604 (CC) (*AllPay 1*) and *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency (No 2)* 2014 (4) SA 179 (CC) (*AllPay 2*). The *Black Sash Trust* cases are: *Black Sash Trust 1* (note 17 above); *Black Sash Trust v Minister of Social Development (Freedom Under Law NPC Intervening)* 2017 (9) BCLR 1089 (CC) (*Black Sash Trust 2*); and *Black Sash Trust v Minister of Social Development and Others (Freedom Under Law Intervening)* 2018 (12) BCLR 1472 (CC) (*Black Sash Trust 3*).

[36] At 4.2.

in relation to procurement corruption.[37]

Chapter 4 went on to discuss and analyse the *AllPay* and *Black Sash Trust* cases.[38] It is not necessary to provide an overview of the key aspects of each of those judgments here as this was done in the conclusion to Chapter 4.[39] However, it is important to reiterate what these cases illustrate when taken as a whole. First, they illustrate the Constitutional Court's prioritisation of the rights of a vulnerable group in society, that is, social grants recipients. Secondly, they show the court's willingness to use its powers creatively ensure their protection, such as by declaring a private entity to be the bearer of constitutional obligations in performing a contract for the payment of social grants; as well as *not* setting aside an irregular tender but instead putting in place a framework by which it could continue subject to certain conditions. They demonstrate a measured use of remedies such as structural interdicts that was not too onerous on SASSA. The development of the law regarding punitive costs orders made with respect to the conduct of public officials in performing their constitutional roles was a step forward for accountability – underscored by the fact that Minister Dlamini eventually did pay the costs as ordered by the court. Thirdly, they show the court's restraint: although the court ordered that the tender process be run afresh, it allowed SASSA space to determine how best to proceed by not prescribing that a new tenderer be appointed. The court demonstrated its willingness to engage in a 'dialogic partnership'[40] with the executive through its orders, even though the conduct of the respective officials showed that this was not necessarily reciprocated.

Thus the tensions between judicial activism and restraint were particularly acute in the *AllPay* and *Black Sash Trust* cases. However, as discussed in Chapter 4,[41] despite the court's performing its constitutional role ably in the context of very difficult circumstances with little margin for error, it was not able to mitigate all the ill effects of the accountability vacuum on the facts. The tender giving rise to these cases was intended to introduce technological innovation to the social grants system, reducing wasteful expenditure and bringing much-needed efficiency that would benefit social grants recipients. Despite the court's best efforts to protect social grants recipients, the outcome of the litigation was years of uncertainty and instability in social grants payments that had, at the time of writing this thesis, still not been

[37] At 4.3.
[38] At 4.4 and 4.5.
[39] At 4.7.
[40] Catherine Albertyn & Dennis Davis 'Legal realism, transformation and the legacy of Dugard' (2010) 26 *SAJHR* 188 at 215.
[41] At 4.6.

resolved completely.[42] More than a decade after the *AllPay* judgments were handed down, there are still calls for accountability regarding vulnerabilities in the social grants system.[43] If there was indeed corruption in the award of the tender to CPS, no person has been held accountable for this, and CPS has (so far) retained any profits it earned.

The *AllPay* and *Black Sash Trust* judgments may have had many important features in that they were innovative, bold, and appropriately deferential while remaining firm in prioritising the rights of social grant recipients. However, even such ground-breaking judgments could not be nostrums to cure all the ills caused by the accountability vacuum in the public procurement system.

(e) Chapter 5: The Public Protector

As discussed in Chapter 1, the state capture narrative was complex, involving many parties and their actions, at times connected and sometimes disparate, which served to advance the state capture project. Chapter 2 discussed how the accountability vacuum impacted efforts to identify the perpetrators of state capture and corruption and hold them to account. Chapter 3 highlighted how criminal justice institutions, charged with enforcing anti-corruption laws, were themselves brought under the influence of state capture and thus weakened in their ability to carry out their mandate. Chapter 5 was concerned with another critical element of the efforts against state capture and corruption: the office of the Public Protector and in particular, its role to investigate, make findings, and make remedial recommendations regarding alleged corruption and malfeasance. The focus was on several cases: *SABC v DA,*[44] *Economic Freedom Fighters 1,*[45] *Economic Freedom Fighters 2*,[46] and *President of RSA*.[47]

The chapter first set out crucial context forming the background of these decisions, specifically, complaints made to the Public Protector regarding alleged excessive expenditure on improvements to then-President Zuma's private residence situated at Nkandla in KwaZulu-Natal.[48] The Public Protector's subsequent investigation and report set off a chain of events in

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[42] Soyiso Maliti 'Grant crisis: Postbank, UK-based legal firm's legal spat puts 3.6 million grant payments at risk' *News24* 7 March 2025, last accessed from https://www.news24.com/news24/politics/grant-crisis-postbank-uk-based-firms-legal-spat-puts-36-million-grant-payments-at-risk-20250307 on 13 March 2025.
[43] Marecia Damons 'MPs demand probe into "entire social grants payment system"' *GroundUp* 16 January 2025, last accessed from https://groundup.org.za/article/social-development-portfolio-committee-chair-demands-investigation-into-entire-grant-payment-system/ on 11 March 2025.
[44] *South African Broadcasting Corporation Soc Ltd v Democratic Alliance* 2016 (2) SA 522 (SCA).
[45] *Economic Freedom Fighters v Speaker of the National Assembly, Democratic Alliance v Speaker of the National Assembly* 2016 (3) SA 580 (CC).
[46] *Economic Freedom Fighters v Speaker of the National Assembly* 2018 (2) SA 571 (CC).
[47] *President of the Republic of South Africa v Office of the Public Protector* 2018 (2) SA 100 (GP).
[48] At 5.2.

the political realm, setting the office at odds with the President and those loyal to him. While other accountability institutions, such as the National Prosecuting Authority, had been subject to capture, it became clear that the Public Protector, as a state institution supporting constitutional democracy that was independent of political control,[49] was going to stand firm.

The question was: would the courts assist the office to do so? Specifically, would the courts confirm that recommendations made by the Public Protector following an investigation could not be ignored? As discussed in Chapter 5,[50] these questions were answered in the affirmative: the Constitutional Court ultimately interpreted the Constitution in context to conclude that 'remedial action must be suitable and effective' and in order to be so, 'it often has to be binding'.[51] Whether or not it is binding is a matter of interpretation. The role of the courts as the ultimate arbiters of this question was also asserted: the remedial action was binding until set aside by a court of law.

Economic Freedom Fighters 2 also dealt with politically sensitive questions regarding the National Assembly's failure to hold the President accountable for conduct relating to the Nkandla property upgrades. That the Constitutional Court was deeply concerned with the potential implications for the separation of powers was reflected in the disagreement between the judges, including Mogoeng CJ's forceful criticism that the majority position was a 'textbook case of judicial overreach'.[52] The resulting order reflected the court's considered use of its remedial powers, in that it ordered the National Assembly to comply with its constitutional obligations but did not prescribe specifically how it should do this.

President of RSA likewise involved searching questions regarding the separation of powers: specifically, whether the Public Protector could make a binding recommendation that the President use his presidential power to appoint a commission of inquiry. The Constitutional Court ultimately concluded that this was possible, taking the position that Public Protector is 'empowered to take binding remedial action that is capable of remedying the wrong in the particular circumstances' in fulfilling her role, which includes instructing members of the executive to exercise their powers in a specific manner if needed to address the harm.[53]

The effect of these judgments reverberated politically, forming part of a series of events that built pressure ultimately leading to Zuma's removal as President. The Public Protector's

[49] See Chapter 9 of the Constitution, specifically s 181 and s 182.
[50] Specifically, at 5.3.
[51] *Economic Freedom Fighters I* (note 45 above) para 68.
[52] *Economic Freedom Fighters II* (note 46 above) para 223.
[53] *President of RSA* (note 47 above) para 82.

office was cemented as a vital institution in a constitutional scheme that provides for the 'tempering' of power held by the executive.[54] Commentators have pointed out that the outcome of the judgments was influenced by the political context surrounding them, including the accountability vacuum. As was discussed in Chapter 5, the practical effect of these judgments has not necessarily benefited the Public Protector's office, which has since been mired in litigation aimed at reviewing and setting aside recommended remedial action.[55] This has had a significant effect on the institution's resources and its ability to fulfil its constitutional role.[56]

The cases discussed in Chapter 5 are illustrative of judicial innovation in politically fraught circumstances that produced an outcome fortifying the institutional architecture intended to hold to account those seeking to abuse their powers. They also show how individual judges can disagree strongly on exactly how far that innovation can legitimately go, revealing dissonances in how the separation of powers is understood even within the courts themselves.

6.3 REFLECTIONS ON RESEARCH QUESTIONS

At the outset, this thesis posed the question: Have the courts have successfully navigated judicial activism and restraint in the accountability-vacuum cases surveyed in this thesis? It is worth restating that for this purpose, 'success' was taken to mean advancing constitutional imperatives but respecting constitutional limits, such as the separation of powers. From the analysis in this thesis, this question can be answered, broadly speaking, in the affirmative. The cases in the three subject-matter areas defined here are replete with examples of expansive interpretations of law[57] and novel applications of remedial discretion.[58] This thesis has also highlighted several examples where judges – both in their judgments and in statements made outside the court – have expressed a deep disquiet about the escalation of state capture and corruption, as well as the concomitant harms linked to these issues.[59] Awareness of the prevailing political climate, especially that which allowed the accountability vacuum to arise

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[54] See Klug (note 19 above) 724–40.
[55] This is not to suggest that such litigation is frivolous. The tenure of Busisiwe Mkhwebane, who succeeded Thuli Madonsela as Public Protector, gave rise to highly contentious reports and remedial recommendations which were taken on review. Mkhwebane was later impeached. For a detailed account of Mkhwebane's tenure, see Jan Gerber & Karyn Maughn 'Impeached: Seven years of Busisiwe Mkhwebane' *News24* (undated), last accessed from https://specialprojects.news24.com/impeached-seven-years-of-busisiwe-mkhwebane/index.html#article on 16 March 2025.
[56] See Jan Gerber 'After spending R30 million on lawyers for Mkhwebane, Public Protector operations "stagnated"' *News24* 4 May 2023, last accessed from https://www.news24.com/news24/politics/after-spending-r30-million-on-lawyers-for-mkhwebane-public-protector-operations-stagnated-20230504 on 16 March 2025.
[57] See, for example, at 3.4*(c)* and 5.3*(b)*.
[58] See, for example, at 4.5*(a)* and 5.3*(c)*.
[59] See, for example, at 1.2*(b)*, 5.4 and the quote by Cameron J (note 1 above).

and be sustained, did not only extend to the courts but also informed their approach to their decisions. As demonstrated in this thesis, Justice Cameron's call for judges to act against corruption was answered by judges of the High Court, Supreme Court of Appeal, and Constitutional Court in many pivotal cases.

At the same time, the cases surveyed illustrate the very serious consideration given to separation of powers questions at every turn. At times, this led to disagreement between the judges in matters such as *Glenister II*,[60] *Helen Suzman Foundation (2015)*,[61] and *Economic Freedom Fighters II*.[62] The courts did not shy away from separation of powers questions, with the Constitutional Court even going so far as to admit when its order pushed at the limits of its remedial powers.[63]

This thesis has also demonstrated that, in certain instances, the deference shown in the context of the accountability vacuum could have allowed space for preventable harms to eventuate[64] – though this, it must be emphasised, is owed to dysfunction in the legislature and executive, rather than any dereliction of the courts' duties. Had the courts made more direct, interventionist orders, the institutional legitimacy of the courts would been imperilled. Members of the elected branches involved in state capture and corruption would have been able to call the courts into question for overstepping their mandate. The courts, as those charged with pronouncing on infringements of the Constitution, were duty-bound to display the utmost respect for the rule of law – including ensuring that the constitutional division of powers was respected and upheld.

It follows then that, even in the context of the accountability vacuum, the courts conceived of their role with a keen focus on the Constitution; no more, no less.[65] They regarded themselves as responsible to interpret its provisions and enforce them within the limits of their powers. Human rights considerations were treated with great assiduousness where they arose in the context of the accountability-vacuum cases analysed in this thesis.[66] The cases discussed in Chapters 3, 4, and 5 show that in general, the courts were not excessively deferential and employed expansive interpretations where they could. At the same time, they did not usurp the

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[60] Note 26 above, as discussed at 3.4*(c)*.
[61] Note 31 above, as discussed at 3.4*(c)*.
[62] Note 46 above, as discussed at 5.3*(c)*.
[63] *Black Sash Trust 1* (note 35 above) para 51.
[64] See, for example, at 4.6 and 3.4*(b)* and *(c)*.
[65] See, for example, at 3.4*(c)*, 4.4*(c)*, and 5.3*(b)*.
[66] See, for example, the cases discussed in Chapter 4 concerning the right of access to social security.

role of the executive by substituting the court's wisdom for that of relevant officials;[67] nor did they prescribe with specificity how the legislature should amend legislation in need of correction to meet constitutional requirements.[68]

6.4 RECOMMENDATIONS

This thesis has found that with respect to the cases considered in this thesis, the courts have navigated the tensions between judicial activism and restraint successfully. While the cases surveyed have inspired robust scholarly debate, where commentators defend positions that specific decisions should have been more expansive or restrained as the case may be, this thesis has shown that this conclusion is defensible as a general proposition. The recommendation to the judiciary, then, is to continue to engage with these considerations in future cases with the same or higher degree of care that has been highlighted in this thesis.

Nevertheless, several recommendations can be made to ensure that the courts are better able to fulfil their constitutional role so as to reduce the deleterious impact of state capture and corruption.

The first of these is within the power of the courts themselves as well as other key stakeholders: in matters determining their answerability for wrongdoing, to hold respondents accountable for abusing the court system by engaging in Stalingrad tactics. The harms of this legal approach are manifold: applicants are unable to obtain a swift resolution of their disputes, which requires expending resources that not even a favourable costs order could recoup;[69] the courts are burdened by cases that remain in the system for years with little progress; and respondents may eventually escape being held liable for their wrongdoing. The courts should not hesitate to mulct in costs in such cases, and where officials are litigating in a representative capacity, to consider mulcting them in costs *de bonis propriis.*[70] More systemic changes that have been suggested to address this issue include holding legal practitioners accountable for unethically carrying out their client's whims where this results in the abuse of the courts; and even rethinking the adversarial system.[71]

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[67] See, for example, 4.4*(b)*.
[68] See, for example, 3.4*(c)* and 3.5*(a)*.
[69] Such as the time involved in litigation.
[70] Charles Tumo Maloka '*Biowatch* shield, costs liability for abuse of process and crossfire litigation - *Biowatch Trust v Registrar Genetic Resources* 2009 (6) SA 232 (CC)' (2020) 41 *Obiter* 186 at 193–5.
[71] Helen Acton 'Lawfare: How to approach it in South Africa's constitutional democracy' (2022) 1 *The Africa Governance Papers* 48 at 63–72.

A second recommendation is of a more general nature: the accountability vacuum must be filled. Achieving this goal would be an extensive, country-wide project, and it is beyond the scope of this thesis to attempt to describe how to do so with any specificity. However, it is possible to identify some high-level initiatives in a non-exhaustive list, including:

- Addressing deficiencies in the criminal justice system, including by ensuring that internal measures are taken to fortify anti-corruption institutions against capture and ensuring adequate capacitation to investigate and prosecute corruption. Measures to ensure that the independence of these institutions meets accepted standards should be taken. Care must also be taken to appoint leaders who are committed to fulfilling the mandate of the institution rather than serving extraneous interests.
- Parliament should exercise its oversight powers fully,[72] ensuring that Cabinet members are called to account for decisions taken by them and within their departments, including the impact of those decisions on human rights.[73]
- Accountability should also be practised within the executive branch of government, where even high-ranking political office-bearers should be subject to discipline and, where appropriate, removal, for engaging in corruption or failing to act against corruption.
- Political parties should hold their members to high ethical standards and ensure that any members compromised by the influence of state capture or engaging in corrupt activities be disciplined. Rules should be articulated clearly and enforced consistently. Only persons of unimpeachable integrity should be recommended to hold positions in public office.
- The independence of so-called integrity institutions, such as the Public Protector and the Auditor-General, should be protected, including by ensuring that they are adequately resourced to perform their functions.
- While the above suggestions pertain to state or political initiatives to address the accountability vacuum, accountability in general is enhanced by initiatives that involve society as a whole. This includes *inter alia* independent, adequately resourced and free media; a robust whistleblower protection system;

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[72] Some of these powers are discussed in greater detail in Chapter 2 at 2.4*(a)*.
[73] While this thesis has considered cases that pertain to national government, this can be applied *mutatis mutandis* to provincial legislatures (see, for instance, s 114(2) of the Constitution).

effective access to information, and the like. In this regard, policy initiatives such as the National Anti-Corruption Strategy[74] should be implemented.

- Work should continue to ensure that the recommendations made following the conclusion of the State Capture Commission are considered, developed into law and policy, and implemented effectively.

Ultimately, the success of these initiatives rests on the presence of adequate political will to execute them, at all levels of government.[75] Filling the accountability vacuum would have the effect of reducing lawfare as there would be no reason for parties to litigate to ensure that those furthering state capture, corruption and egregious public maladministration are held to account. These matters would be dealt with in appropriate forums, including, where necessary, the criminal justice system.

The final recommendation pertains to areas of further study. The first suggestion relates to a broader exploration of the courts' decisions involving the Public Protector. This thesis has limited its scope to the decisions made by Thuli Madonsela. Litigation regarding the conduct of her successor, Busisiwe Mkhwebane, was also steeped in politics, but from a different angle: Mkhwebane was seen less as a champion for accountability and more as someone willing to use their office to further political agendas.[76] Further study could examine these cases[77] to highlight the shift in the court's role, from expansively interpreting the law to ensure that the watchdog had 'teeth' to remedying abuses of power by the Public Protector herself.

The cases surveyed in this thesis are but a small subset of the multitude of cases pertaining to state capture and corruption that have been heard in the superior courts. Many of these grappled with similar questions and arise from similarly fraught political contexts. Potential subject matter areas could include, for instance, a detailed examination of all

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[74] National Anti-Corruption Strategy 2020-2030 *South African Government*, last accessed online at https://www.gov.za/sites/default/files/gcis_document/202105/national-anti-corruption-strategy-2020-2030.pdf on 16 March 2025.

[75] Regarding political will, see in general, Moses Phahlane 'Political will to fight corruption in the South African public service: An ethical political leadership perspective in line departments' (unpublished PhD thesis, Stellenbosch University 2021).

[76] See, for example, Cathleen Powell 'A public protector's job is to make sure people stick to the law - not to change it' *The Conversation* 22 June 2017, last accessed from https://theconversation.com/a-public-protectors-job-is-to-make-sure-people-stick-to-the-law-not-to-change-it-79931 on 22 March 2025; and Sarah Evans & Kyle Cowan 'ANALYSIS | Insurgent or independent: The many lives of Busisiwe Mkhwebane' *News24* 13 March 2020, last accessed from https://www.news24.com/news24/opinions/analysis/analysis-insurgent-or-independent-the-many-lives-of-busisiwe-mkhwebane-20200312 on 22 March 2025.

[77] For example, *ABSA Bank v Public Protector* 2017 (6) SA 198 (GP); *Public Protector v South African Reserve Bank* 2019 (6) SA 253 (CC); *Gordhan v Public Protector* 2019 (3) All SA 743 (GP) and *President of the Republic of South Africa v Public Protector of the Republic of South Africa* [2019] ZAGPPHC 368.

corruption cases involving former President Zuma,[78] as well as a study of cases dealing with corruption in state-owned enterprises, a key element of state capture.[79] Such categories of cases are ripe for exploration in terms of how the courts navigated judicial activism and restraint.

6.5 CONCLUDING REMARKS

There is no silver bullet to resolve problems associated with the deeply ingrained influence of state capture, corruption and egregious public maladministration in South Africa. There is no single institution that can do it all. The courts especially are not capable – or indeed mandated – to fulfil this role. However, as this thesis has shown, the courts have displayed considerable care when asked to decide such cases, in general navigating the competing tensions between judicial activism and restraint successfully by maintaining a keen focus on what the Constitution requires. This has been achieved even when the political circumstances surrounding the matters before them were particularly contentious. This is to be commended.

The Constitutional Court, in *Glenister II*, warned of the risks of corruption to achieving the vision for South Africa contained in its Constitution.[80] Ultimately, the burden of ensuring that those engaging in state capture and corruption, thereby failing in their roles as bearers of constitutional obligations, are held to account is one that must be borne primarily by the state and its relevant organs, as well as by society as a whole.

[78] See Bruce, Lewis & Newham (note 20 above) 269–70 for a high-level summary of litigation arising from allegations of corruption against Zuma.
[79] For example, *Democratic Alliance v Minister of Public Enterprise; Economic Freedom Fighters v Eskom Holdings Limited*; *Solidarity Trade Union v Molefe* [2018] ZAGPPHC 1;and *Eskom Holdings SOC Limited v McKinsey and Company Africa (Pty) Ltd* [2019] ZAGPPHC 185.
[80] 'There can be no gainsaying that corruption threatens to fell at the knees virtually everything we hold dear and precious in our hard-won constitutional order. It blatantly undermines the democratic ethos, the institutions of democracy, the rule of law and the foundational values of our nascent constitutional project. It fuels maladministration and public fraudulence and imperils the capacity of the state to fulfil its obligations to respect, protect, promote and fulfil all the rights enshrined in the Bill of Rights. When corruption and organised crime flourish, sustainable development and economic growth are stunted. And in turn, the stability and security of society is put at risk.' *Glenister II* (note 26 above) para 166.

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