The Justiciability of Cabinet Appointments in South Africa*

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SUMMARY

For most democracies, Cabinet appointments form part of a plethora of powers that are entrusted to the President alone. Courts are naturally cautious about interrogating the exercise of the power. In South Africa, courts confine themselves to the narrower legal question of how the power was exercised, not whether the President's decision was correct or incorrect. This is because the courts are wary of second-guessing the decisions of other branches of government, lest they fall foul of the doctrine of separation of powers. This article probes the President's power to appoint Cabinet members, and whether a court may set aside any unlawful exercise of the power without encroaching on the separation of powers. Owing to inadequate political oversight mechanisms over Cabinet appointments, the President's power is too broad and should be curtailed to enhance accountability for the exercise of the power. To this extent, the President's appointment of Cabinet members should be subject to parliamentary confirmation.

Keywords: Cabinet Appointments, Discretionary Powers, Justiciability, Separation of Powers

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1 INTRODUCTION

In South Africa, the President is the Head of State and head of the national executive.[1] As head of the national executive authority, he acts together with other members of the Cabinet,[2] which consists of the President, the Deputy President and Ministers.[3] The President appoints Cabinet members, assigns their powers, and may dismiss them.[4] He makes any appointment that the Constitution or legislation requires, other than as head of the national executive.[5] As a sovereign and democratic country, South Africa is founded on, *inter alia*, the principles of supremacy of the Constitution and the rule of law.[6] This means that law or conduct inconsistent with the Constitution is invalid, and the obligations imposed by it must be fulfilled.[7] While there are no express oversight mechanisms over the appointment of Cabinet members, the exercise of the power must be consistent with the precepts of the Constitution. The appointment of Cabinet members is part of a plethora of powers bestowed on the President as Head of State in section 84(2), read together with the applicable constitutional provisions.[8] Most of the powers conferred upon the President by the Constitution are discretionary and political in nature.[9] As Head of State, the President has more discretion than in his role as head of the national executive authority.[10] As head of the national executive, the President's discretion is limited by the constitutional obligation to consult other arms of the State such as Parliament. He exercises the executive authority together with the other members of the Cabinet.[11] The sweeping nature of the President's appointment powers has had several serious ramifications for South Africa, ranging from economic loss, opening the gates to perceptions of state capture, and threats to the doctrine of the separation of powers.

The President's decision to reshuffle the Cabinet in 2021 and appoint then-Speaker of the National Assembly Thandi Modise as the Minister of Defence illustrates the sweeping nature of his appointive powers as Head of

1 S 83(*a*) of the Constitution of the Republic of South Africa, 1996 (the Constitution).

2 S 85(2) of the Constitution.

3 S 91(1) of the Constitution.

4 S 91(2) of the Constitution.

5 S 84(2)(*e*) of the Constitution.

6 S 1(*c*) of the Constitution.

7 S 2 of the Constitution.

8 Slade "The Implications of the Public Protector's Remedial Action Directing the Exercise of Discretionary Constitutional Powers: Separation of Powers Implications" 2020 24 *Law Democracy and Development* 364 367.

9 De Vos "Why It Is Unlikely the Court Will Review and Set Aside the Cabinet Reshuffle" (5 May 2017) https://constitutionallyspeaking.co.za/why-it-is-unlikely-the-court-will-review-and-set-aside-the-cabinet-reshuffle/ (accessed 2022-06-20). See also Mufamadi "Constitutional Handbook for Members of the Executive" (July 1999) https://www.ndi.org/sites/default/files/1614_za_constPDF_5.pdf (accessed 2022-06-20).

10 International Institute for Democracy and Electoral Assistance (IDEA) "Non-Executive Presidencies in Parliamentary Democracies" (August 2014) https://constitutionnet.org/sites/default/files/non-executive_presidencies_0.pdf (accessed 2022-06-20).

11 S 85(2) of the Constitution. This the President does by implementing national legislation, developing and implementing national policy, co-ordinating the functions of state departments and administrations, preparing and initiating legislation and performing any other executive function provided for in the Constitution or in national legislation.

State.[12] While there is no law that prevents him from making such an appointment, it raises questions on whether the appointment does not impinge upon the separation-of-powers doctrine. It is undesirable that the President's powers be so broad that they allow him effectively to remove the head of Parliament without input from the legislative arm of government.

Similarly, the outcry against the December 2024 Cabinet reshuffle to move former Justice and Constitutional Development Minister Thembi Nkadimeng to the Department of Human Settlements is another useful illustration of the need to adequately oversee the power to assemble members of the national executive authority.[13] This is notwithstanding allegations that she received a R500 000 loan from Gundo Wealth Solutions, an entity said to have facilitated unlawful investments by the Polokwane municipality in the now defunct VBS Mutual Bank.[14] Without input from Parliament to test the veracity of the allegations, this leaves lingering doubt on the lawfulness of the appointment. In a reply to the National Assembly in September 2024, the Minister noted that she had repaid the loan to the lender.[15]

This article examines the President's power to appoint Cabinet members and the extent to which he may be held accountable in the process while preserving the essence of the separation-of-powers doctrine. A historical overview of the justiciability of executive powers is conducted in the first section, followed by an analysis of the controversies over separation of powers that have arisen from the exercise of judicial authority *vis-à-vis* executive powers over the years. The justiciability of the appointment of Cabinet members is discussed in the section that follows. Lastly, the article answers the question whether a court of law may interrogate the appointment of a Cabinet member, and whether such an order does not impinge upon the separation-of-powers doctrine. The central thesis of the article is that the President's power to appoint Cabinet members is too broad and should be curtailed to improve presidential accountability for the process and to protect the supremacy of the Constitution and the rule of law.

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12 Merten "Speaker Modise's Surprise Move Is Good for Department of Defence, But a Blow for Parliament" (6 August 2021) https://www.dailymaverick.co.za/article/2021-08-06-speaker-modises-surprise-move-is-good-for-department-of-defence-but-a-blow-for-parliament/ (accessed 2022-05-18). See further Marais "Minister Modise Has Her Work Cut Out for Her to Restore Dysfunctional SANDF" (6 August 2021) https://www.da.org.za/2021/08/minister-modise-has-her-work-cut-out-for-her-to-restore-dysfunctional-sandf (accessed 2022-05-18).

13 TimesLive "Under-Fire Justice Minister Simelane Moved to Human Settlements as Ramaphosa Reshuffles Cabinet" https://www.timeslive.co.za/politics/2024-12-03-under-fire-justice-minister-simelane-moved-to-human-settlements-as-ramaphosa-reshuffles-cabinet/ (accessed 2024-12-05).

14 Politicsweb "Thembi Simelane New Minister of Human Settlements-Cyril Ramaphosa" (04 December 2024) https://www.politicsweb.co.za/documents/thembi-simelane-new-minister-of-human-settlements- (accessed 2024-12-04).

15 Daily Maverick "Thembi Simelane's Unexplained Cash (Part Three) – The Mystery Cash Used to Pay Back R849K for VBS-Linked Loan" (05 December 2024) https://www.dailymaverick.co.za/article/2024-12-05-thembi-simelanes-unexplained-cash-part-three/ (accessed 2024-12-05).

2 THE SEPARATION-OF-POWERS ARGUMENT AND THE POLITICAL-QUESTION DOCTRINE

The appointment of Cabinet members entails the exercise of political power. The power is also discretionary in nature. Cabinet members are appointed by the President in his capacity as Head of State, seemingly without a constitutional obligation to consult any public institution or functionary.[16] Any judicial probe of the power (if it results in setting aside the President's decision) will naturally lead to controversies over whether there has been an overreach by the courts into the autonomy of the executive branch of the State. In the formative years of South Africa's constitutional democracy, the Constitutional Court, in *De Lange v Smuts*,[17] held that

> "over time, the courts will develop a uniquely South African model of separation of powers, one that fits the particular system of government provided for in the Constitution and that reflects a delicate balancing, informed both by South Africa's history and its new dispensation, between the need, on the one hand, to control government by separating powers and enforcing checks and balances, and on the other, to avoid diffusing power so completely that the government is unable to take timely measures in the public interest."[18]

However, it is debatable whether the evolution of this "uniquely South African model of separation of powers" as envisioned by the court in *Smuts* has indeed taken place.[19] Over the years, there has been a view among scholars and politicians alike that the courts are increasingly overreaching in the domain of the executive branch of government, particularly in politically contentious disputes involving one or more of the elected branches of the State.[20] For instance, in advocating for the introduction of the political-

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16 For a discussion of the distinction between the President's respective powers as Head of State and as head of the national executive, and the constitutional obligation to consult other public institutions or functionaries, see *Minister for Justice and Constitutional Development v Chonco* 2010 (1) SACR 325 (CC) par 20. Also refer to *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) par 11 and *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC) par 117. Further, read the *dictum* in *President of the Republic of South Africa v Quagliani* 2009 (4) BCLR 345 (CC) par 12.

17 1998 (3) SA 785 (CC) (*Smuts*).

18 *Smuts supra* par 60.

19 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 *South African Journal on Human Rights* 1 2.

20 Sewpersadh "Judicial Review of Administrative and Executive Decisions: Overreach, Activism or Pragmatism"? 2017 21 *Law Democracy and Development* 201 208. Also refer to the *dictum* of the court in *Hugh Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC) par 67. See also Ngang "Judicial Enforcement of Socio-Economic Rights in South Africa and the Separation of Powers Objection: The Obligation to Take Other Measures" 2014 14 *African Human Rights Law Journal* 655 657 (in reference to the increasing mistrust between politicians and the judiciary). Former ANC Secretary General, Gwede Mantashe, was, in July 2008, quoted accusing the judges of a conspiracy against former President, Jacob Zuma. See, in this regard, Letsoala, Rossouw and Alcock "ANC Boss Accuses Judges of Conspiracy Against Zuma" (4 July 2008) https://mg.co.za/article/2008-07-04-anc-boss-accuses-judges-of-conspiracy-against-zuma/ (accessed 2023-05-24).

question doctrine in South Africa, Mhango[21] ponders whether political questions should not find resolution in the political process. In terms of this doctrine, political questions are non-justiciable and require judicial deference from the courts if deciding them means that the judiciary will interfere with the autonomy vested in the elected branches of the State.[22] The political-question doctrine is premised on the understanding that certain controversies are essentially political and not legal.[23] In the main, the doctrine is a relic of US Supreme Court jurisprudence, in which the American courts' approach to politically contentious disputes was that such issues are not appropriate for judicial resolution.[24]

It is not clear whether the political-question doctrine has been embraced by the courts in South Africa. Judicial deference is a tactic used by the courts to minimise intrusion into the murky terrain of separation-of-powers violation. In *Doctors for Life v Speaker of the National Assembly*,[25] the court held that the exclusive jurisdiction of the Constitutional Court in politically contentious disputes "serves to preserve the comity between the judiciary and other branches of the State". According to the court, the exclusive jurisdiction of the Constitutional Court ensures that "only the highest court intrudes into the domain of the other branches of government".[26] However, the courts are increasingly engaging in judicial activism, in matters pertaining to impugned exercise of executive authority. For instance, while the Constitution entrusts the sphere of foreign policy to the national executive authority,[27] in *Law Society of South Africa v President of the Republic of South Africa*,[28] the court declared the President's decision to participate in the decision-making processes aimed at suspending the operations of the Southern African Development Community Tribunal unconstitutional, unlawful and irrational. The court accepted that as Head of State and of the national executive authority, the President must "of necessity wield enormous power for the effective and efficient coordination of government and State business".[29] Perhaps the court's approach to the interpretation of

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21 Mhango "Is It Time for a Coherent Political Question Doctrine in South Africa?" 2014 7 *African Journal of Legal Studies* 457 459.

22 Brought to the fore by the *dictum* of the U.S. Supreme Court in *Marbury v Madison* 5 US 137 (1803). Also refer to Myers "Transatlantic Perspectives on the Political Question Doctrine" 2020 106 *Virginia Law Review* 1007 1015. The author argues that the foundation for the application of the political question doctrine in the United Kingdom is the same as that in the United States of America (USA). See *Baker v Carr* 369 US 186, 217 (1962), as relied on by the author, where the US Supreme Court provided six characteristics of non-justiciable political questions.

23 Rodriguez "The Political Question Doctrine in State Constitutional Law" 2013 43 *Rutgers Law Journal* 573 573.

24 *Ibid*. See for example *Colegrove v Green* 328 US 1 (1849).

25 2006 (6) SA 416 (CC) par 23.

26 *Ibid*.

27 S 231(1) of the Constitution.

28 2019 (3) SA 30 (CC) (*SADC Tribunal*).

29 SADC Tribunal *supra* par 1. Also refer to *Masetlha v President of the Republic of South Africa* 2008 (1) SA 566 (CC) par 77; *Premier, Province of Mpumalanga v Executive Committee Association of Governing Bodies of State Aided Schools: Eastern Transvaal* 1999 (2) SA 91 (CC) par 41 (*Premier, Province of Mpumalanga*).

presidential powers by Mogoeng CJ can be summed up in the following words:[30]

> "[A] court should be slow to impose obligations upon government which will inhibit its ability to make and implement policy effectively. As a young democracy facing immense challenges of transformation, we cannot deny the importance of the need to ensure the ability of the executive to act efficiently and promptly."[31]

The court further cautioned that "this is not to be understood as an endorsement of, or a solicitation for a licence to exercise presidential or executive powers in an unguided or unbridled way".[32] According to the court, "all presidential or executive powers must always be exercised in a manner that is consistent with the Constitution and its scheme, as well as the spirit, purport and objects of the Bill of Rights, our domestic legislative and international law obligations".[33] The court held that the President does not have the leeway to exercise power that has not been assigned to him and that authority must be exercised within constitutional bounds and in the public interest.[34]

In South Africa, every exercise of public power is subject to the jurisdiction of the courts. This is because South Africa is founded on *inter alia* constitutional supremacy and the rule of law.[35] Law or conduct inconsistent with the Constitution is invalid, and the obligations imposed by it must be fulfilled.[36] In *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council*,[37] the Constitutional Court held that "the legislature and the executive are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law". According to the court, the principle of legality is the mechanism to test the lawfulness of executive conduct.[38] *In Kaunda v President of the Republic of South Africa*,[39] the Constitutional Court affirmed the well-established principle that "all exercise of public power is to some extent justiciable under the Constitution". According to the court, the scope of the justiciability depends on various factors, including the nature of the impugned power.[40] In view of the *dicta* cited previously, the courts generally show deference to the President's discretionary power to appoint Cabinet members. However, where the President exercises the power in a manner that is not sanctioned by the Constitution, the courts should as a matter of law intervene to correct such conduct. However, the extent of the intervention will in all likelihood be contentious, as the appointment of Cabinet members is viewed to be a form of political power. In line with such

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30 *SADC Tribunal supra* par 2.

31 *Premier, Province of Mpumalanga supra* par 41 n1.

32 *SADC Tribunal supra* par 3.

33 *Ibid*.

34 *Ibid*.

35 S 1(*c*) of the Constitution.

36 S 2 of the Constitution.

37 1999 (1) SA 374 (CC) par 58.

38 *Ibid*.

39 2004 (10) BCLR 1009 (CC) par 244. Also see Mhango "Chief Sandile Ngcobo's Separation of Powers Jurisprudence" 2017 32 *Southern African Public Law* 1 2.

40 *Ibid*.

reasoning, the resolution of disputes emanating from the exercise of power should engage the political organs of the State such as the National Assembly.

The intervention of the National Assembly should however be viewed against a backdrop of the legislative body, over years, lagging in its constitutional obligation to perform executive oversight. This is despite the fact that the President, together with the Cabinet, are accountable individually and collectively for the exercise of their powers and the performance of their functions.[41] Any assertion to the contrary would be ignorant of the finding in *Economic Freedom Fighters v Speaker of the National Assembly*[42] (*Nkandla 1*), where the Constitutional Court found that the National Assembly failed to hold the President accountable for failure to implement the Public Protector's remedial action that he must pay back the costs incurred in the renovation of his private homestead. In another sequel to the judgment, *Economic Freedom Fighters v Speaker of the National Assembly* (*Nkandla 2*),[43] the Constitutional Court found that the National Assembly's failure to enact rules governing impeachment proceedings against the President violated its constitutional obligation to hold the executive accountable.

Current scholarly debates on the justiciability of politically contentious disputes focus on the *ex post facto* resolution of politically contentious disputes. They do not provide insight into the mechanisms of oversight over the exercise of political power *ex ante*. For instance, in relation to Cabinet appointments, there is no legislative oversight over the exercise of the power. There are no proactive mechanisms to ensure that the President does not exceed the limits of the authority bestowed upon him to make Cabinet appointments. The only constitutional safeguards are the principles of constitutional supremacy and the rule of law, enshrined in the Constitution.

3 CABINET APPOINTMENTS IN SOUTH AFRICA: CONSTITUTIONAL PROVISIONS

In South Africa, the President has the powers entrusted by the Constitution and by legislation, including those powers necessary to perform the functions of Head of State and head of the national executive.[44] He is responsible for making any appointments that the Constitution or legislation requires, other than as head of the national executive.[45] This includes the appointment of Cabinet members. The South African Cabinet consists of the President, a Deputy President and Ministers.[46]

41 S 92(2) of the Constitution.
42 2016 (3) 580 (CC).
43 2018 (3) BCLR 259 (CC).
44 S 84(1) of the Constitution.
45 S 84(2)(*e*) of the Constitution.
46 S 9(1) of the Constitution.

The President appoints the Deputy President and Ministers, assigns their powers and functions, and may dismiss them.[47] He must select the Deputy President from among the members of the National Assembly.[48] He may select any number of Ministers from among the members of the National Assembly.[49] Whether this *proviso* also extends to the Speaker of the National Assembly is not entirely clear, as witnessed in former Speaker Thandi Modise's appointment's appointment.[50] The President is also empowered to appoint no more than two Ministers from outside the Assembly.[51] He must appoint a member of the Cabinet to be a leader of government business in the National Assembly.[52] The President may appoint any number of Deputy Ministers from among members of the National Assembly,[53] but he may appoint no more than two Deputy Ministers from outside the Assembly.[54]

An examination of the applicable constitutional provisions reveals that the President has two types of appointment powers. He makes unilateral appointments, including Cabinet members in his capacity as Head of State. The President also exercises his appointment authority on recommendation from *inter alia* Parliament, in his capacity as head of the national executive authority.[55] An example of the President's appointment powers as head of the national executive authority includes the power to appoint the heads of Chapter 9 institutions in terms of section 193(4) of the Constitution.

The law in South Africa is silent on whether the President's power to appoint Cabinet members may be fettered by an oversight institution such as a court of law or the Public Protector. Generally, only the President can exercise his powers as Head of State. However, in recent years, there were allegations that the President had outsourced the power to make Cabinet appointments to members of the Gupta family. Following an investigation by the Office of the Public Protector,[56] the institution took remedial action directing the President to probe the allegations further. The President took the report of the Public Protector on review, arguing that in terms of the Constitution, only the President is empowered to establish a commission of

47 S 91(2) of the Constitution.

48 S 91(3)(*a*) of the Constitution.

49 S 91(3)(*b*) of the Constitution.

50 *Ibid*.

51 S 91(3)(*c*) of the Constitution.

52 S 91(4) of the Constitution. In terms of s 91(5), the Deputy President assists the President in the execution of the functions of government. This means he only has power and authority in those functions performed by the President in his capacity as head of the national executive authority.

53 S 93(1)(*a*) of the Constitution.

54 S 93(1)(*b*) of the Constitution.

55 The appointment of judicial officers in terms of s 174(3) is one example. The President appoints the Chief Justice and the Deputy Chief Justice after consulting the Judicial Service Commission and the leaders of the parties represented in the National Assembly.

56 Public Protector South Africa *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* Report No 6 of 2016/2017 (14 October 2016).

inquiry. In *President of the Republic of South Africa v Office of the Public Protector*,[57] the North Gauteng High Court upheld the lawfulness of the Public Protector's remedial action instructing the President to establish a commission of inquiry. The facts of the case were peculiar in that, as the repository of the power to establish a commission of inquiry, the President was also implicated in the allegations probed by the Public Protector. The correctness of this judgment is suspect, as only the President wields the power to establish a commission of inquiry. However, it must be understood in the context of inadequate legislative oversight mechanisms over the President's powers as Head of State. It suffices to say that gaps in the law are not an invitation to the courts to uphold what otherwise amounts to unlawful dictation.

4 THE JUSTICIABILITY OF CABINET APPOINTMENTS

In South Africa, judicial authority is vested in the courts,[58] which are independent and subject only to the Constitution and the law. They are obliged to apply the law impartially and without fear, favour, or prejudice.[59] No person or organ of state may interfere with the functioning of the courts.[60] In addition, organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.[61] An order or decision issued by a court binds all persons and organs of state to which it applies.[62] According to De Beer:[63]

> "a judge's authority is found in the rules of law which stipulate the types of cases a court may hear and decide (subject-matter authority) as well as the rules which specify the kinds of orders that the particular judge is empowered to make (court-order authority). The enquiry into whether a judge has authority for these purposes, concerns not whether she exercises her adjudicative powers appropriately. Rather, it implicates the antecedent question whether the relevant powers are possessed in the first place – a narrower legal question. Whether a court has authority, so defined, to issue an order can be determined simply with reference to the order itself and the law."

There are two schools of thought regarding the extent to which the judiciary may permissibly intrude into the domain of the other branches of the State. The debate weighs justiciability and non-justiciability. Some scholars refer to this divide as judicial activism *versus* deference. Lenta,[64] quoting Posner,[65]

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57 2018 (5) BCLR 609 (GP). For further discussion on the Public Protector's remedial action, see Wolf "The Remedial Action of the State of Capture Report in Perspective" 2017 20 *Potchefstroom Electronic Law Journal* 1 1; Tsele "Observations on the State Capture Judgment" 2021 138 *South African Law Journal* 477 477 and Slade 2020 *Law Democracy and Development* 364 364.

58 S 165(1) of the Constitution.

59 S 165(2) of the Constitution.

60 S 165(3) of the Constitution.

61 S 165(4) of the Constitution.

62 S 165(5) of the Constitution.

63 De Beer "Invalid Court Orders" 2019 19 *Constitutional Court Review* 283 287.

64 Lenta "Judicial Restraint and Overreach" 2004 20 *South African Journal on Human Rights* 544 548.

supports the notion of the existence of a difference between "separation of powers, judicial self-restraint and prudential self-restraint". According to the author, "deference requires judges to be cautious about espousing their views in the course of adjudication and to limit the exercise of their discretion as far as possible".[66] According to Klaasen,[67] "deference recognises the need to protect the institutional character of each of the three arms of government in a manner that will prevent their ability to discharge their constitutional role being undermined". In this context, politically sensitive disputes are, what Mogoeng CJ in *Nkandla 1* described as, the determination of issues pertaining to the exercise of "raw state power".[68] Conversely, Thabo and Odeku[69] acknowledge that the Constitution entrusts enormous power to the judiciary, although they submit that "the judiciary cannot simply declare any constitutional act or action of the executive or Parliament invalid".[70] This averment should be interpreted to mean that the judiciary should not be a mere bystander and that it has proactive power where there is an *ex facie* violation of the Constitution. Fagbadebo and Dorasamy[71] state that a court can either be passive or active in its interpretation of statutes. They describe the viewpoint advanced by proponents of judicial self-restraint as calling for the courts to be reluctant in matters relating to policy issues of the executive branch of government.[72]

The foundational underpinnings of judicial deference cannot be over-emphasised, particularly if a constitutional democracy is to preserve the legitimacy of its judiciary. However, the manner in which the proponents of judicial deference formulate their argument does not provide a satisfactory answer to the following two instances. What should happen when the National Assembly is not willing to comply with its constitutional obligation to hold the executive accountable? Secondly, in the event of inadequate oversight mechanisms over the executive branch of government, what should be the role of the judiciary? It is not sufficient simply to argue that "any oversight in the abuse of power or violation of the Constitution should be an exclusive reserve of the people, through their votes", as suggested by the proponents of judicial self-restraint.[73] The exercise of the right to vote should be conducted subject to the assurance that there are adequate oversight mechanisms put in place by the Constitution to hold those who exceed the limits of their authority accountable, once they have been elected into office.[74]

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65 Posner *The Federal Courts* (1996) 314.

66 *Ibid*.

67 Klaasen "Public Litigation and the Concept of Deference in Judicial Review" 2015 18 *Potchefstroom Electronic Law Journal* 1901 1901.

68 *Nkandla 1 supra* par 55.

69 Thabo and Odeku "Separation of Powers, Checks and Balances and Judicial Exercise of Self-Restraint: An Analysis of Case Law" 2021 42 *Obiter* 547 549.

70 *Ibid*.

71 Fagbadebo and Dorasamy "Judicial Review as an Accountability Mechanism in South Africa: A Discourse on the Nkandla Case" 2022 4 *African Journal of Inter/Multidisciplinary Studies* 126 128.

72 *Ibid*.

73 *Ibid*.

74 Proposals for reform to tackle these lacunae are advanced *infra*.

In order to answer the above questions, guidance can be sought from sections 167[75] and 172[76] of the Constitution. The former section governs the Constitutional Court and bestows the court with the power to decide disputes in the national or provincial sphere concerning the constitutional status, powers, or functions of any of those organs of the State.[77] Only the Constitutional Court may decide, *inter alia*, on any amendment to the Constitution,[78] or on questions relating to whether Parliament or the President has failed to fulfil a constitutional obligation.[79] The Constitutional Court makes the final pronouncement on whether conduct by Parliament or the President is constitutional.[80]

When entertaining a constitutional matter within its power, a court must declare that any law or conduct inconsistent with the Constitution is invalid to the extent of its inconsistency.[81] Pursuant to such a finding, the court may then make any order that is just and equitable.[82] This includes an order limiting the retrospective effect of the declaration of invalidity.[83] The court may also make an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.[84]

The court may therefore make an order limiting the retrospective effect of a finding that an impugned Cabinet appointment is unlawful. It may also suspend the declaration of such a finding for a specified period – to allow the President to remedy the appointment *ab initio*.

5 THE *CABINET RESHUFFLE* TRILOGY

5 1 The High Court decision

In *Democratic Alliance v President of the Republic of South Africa,*[85] the applicants sought to prevent the swearing-in ceremony of the newly appointed Cabinet ministers scheduled to take place on 31 March 2017. They argued that the President exercised his constitutional powers of selection and dismissal in an unlawful manner.[86] According to the applicants, the President took the decision to carry out the Cabinet reshuffle in an irrational manner and in bad faith.[87] They requested the Western Cape High Court to interdict the reshuffle and order the President to reinstate the

75 The provisions that govern the functioning of the Constitutional Court.
76 The powers of courts in constitutional matters.
77 S 167(4)(*a*) of the Constitution.
78 S 167(4)(*d*) of the Constitution.
79 S 167(4)(*e*) of the Constitution.
80 S 167(5) of the Constitution.
81 S 172(1) of the Constitution.
82 S 172(1)(*b*) of the Constitution.
83 S 172(1)(*b*)(i) of the Constitution.
84 S 172(1)(*b*)(ii) of the Constitution.
85 [2017] ZAWCHC 34 (*First Cabinet Reshuffle Case*).
86 *First Cabinet Reshuffle Case supra* par 5.
87 *Ibid*.

previous Cabinet.[88] The court acknowledged that as an exercise of public power, the appointment of Cabinet members may be the subject of judicial review proceedings on the ground of irrationality, having due regard to the purpose for which the power was conferred.[89] According to the court, the threshold at which a court will intervene must be sensitive to the nature of the power.[90] It also found that because the President's power to appoint Cabinet members is highly discretionary, the threshold for interference by a court is likely to be very high.[91] Consequently, the primary consequence of a decision to reshuffle Cabinet ministers, which the public may perceive as a bad decision, is political rather than legal.[92]

Relying on the *dictum* of the Constitutional Court in *National Treasury v Opposition to Urban Tolling Alliance*,[93] the court held that when courts are asked to intervene, in advance of review proceedings to restrain the exercise of statutory powers, there is an additional qualification over and above the conventional test for the granting of interim relief. The question turns to whether the circumstances are exceptional and whether the case for intervention is strong and clear.[94] According to the High Court, this is to prevent the danger of courts being drawn into political matters "in circumstances where the case for judicial interference is not clearly made out, in order to prevent the potential violation of the separation of powers".[95] The court therefore declined to entertain the matter.

Following the decision of the South Gauteng High Court in the *First Cabinet Reshuffle Case*, the question of whether the President can be legally compelled to disclose reasons for conducting a Cabinet reshuffle once again arose for consideration in the North Gauteng High Court. This judgment is discussed in the paragraph below.

5 2 The Second *Cabinet Reshuffle* case

In *Democratic Alliance v President of the Republic of South Africa,*[96] the applicants brought a review application in terms of rule 53 of the Uniform Rules of Court to compel the President to furnish documents containing reasons for the Cabinet reshuffle.[97] The North Gauteng High Court found

88 *First Cabinet Reshuffle Case supra* par 2.

89 *First Cabinet Reshuffle Case supra* par 6.

90 *Ibid*.

91 *First Cabinet Reshuffle Case supra* par 7.

92 *Ibid*.

93 2012 (6) SA 223 (CC) par 41 to 47. This approach was followed with approval by the Constitutional Court in *City of Tshwane Metropolitan Municipality v Afriforum* 2016 (6) SA 182 (CC) par 43.

94 *First Cabinet Reshuffle Case supra* par 15.

95 *Ibid*.

96 [2017] 3 All SA 124 (GP) (the *Second Cabinet Reshuffle Case*).

97 Adopted in terms of s 43 of the Supreme Court Act 59 of 1959. Rule 53(3) of the Uniform Rules of Court reads in relevant part: "The registrar shall make available to the applicant the record dispatched to him or her as aforesaid upon such terms as the registrar thinks appropriate to ensure its safety, and the applicant shall thereupon cause such copies of such portions of the record as may be necessary for the review to be made and shall furnish the registrar with two copies and each of the parties with once copy thereof, in each case certified by the applicant as true copies."

that the power to appoint Cabinet members is wide-ranging, but not as unfettered as the royal prerogatives of the British Monarch.[98] The court acknowledged that this power must be in line with sections 91(2) and 83(*b*) and (*c*) of the Constitution.[99] According to the court, the President's concession that the exercise of the power to appoint Cabinet members must meet the bounds of rationality was well made and in line with the law.[100] This is because it is settled law in South Africa that all exercises of public power must be consistent with the principle of legality.[101]

The court embarked on an exposition of the law relating to the applicability of rule 53 to the President's power to appoint Cabinet members. Relying on an earlier judgment in *Safcor Forwarding Johannesburg (Pty) Ltd v National Transport Commission*,[102] the court noted that the rule was devised in order to regulate the procedure to be followed in all cases of review on a national basis.[103] The High Court conceded that most of the earlier decisions involving the interpretation of rule 53 involved "decisions or proceedings of an inferior court, a tribunal, a board or an officer performing judicial, *quasi*-judicial or administrative functions and not executive decisions". On this point, the President contended that since an executive decision is not expressly referred to in rule 53, it could not fall within the scope of the provision.[104] The court found that rule 53 was promulgated at a time when executive decisions were not justiciable. With the adoption of the Constitution, a purposive and not literal interpretation of the provision had to be followed in order to subject it to the purview of justiciability.[105]

The court also followed with approval the *dictum* in *Democratic Alliance v Acting National Director of Public Prosecutions*,[106] where the Supreme Court of Appeal held that without the rule, a court cannot perform "its constitutionally entrenched review function". According to the Supreme Court of Appeal in the latter judgment, this would infringe on an applicant's right to have a justiciable dispute decided in a fair public hearing in terms of section 34 of the Constitution.[107] In light of the above, the High Court in the *Second Cabinet Reshuffle* judgment found that the President is legally compelled to

98 The *Second Cabinet Reshuffle Case supra* par 18.

99 *Ibid*.

100 The *Second Cabinet Reshuffle Case supra* par 19.

101 *Ibid*.

102 1982 (3) SA 660 (A) 667F–670A.

103 The *Cabinet Reshuffle Case supra* par 21.

104 *Ibid*.

105 *Ibid*.

106 2012 (3) SA 486 (SCA) par 37.

107 The *Cabinet Reshuffle Case supra* par 24. See further the ruling *in Helen Suzman Foundation v Judicial Service Commission* 2017 (1) SA 367 (SCA) par 13. In this case, the Supreme Court of Appeal described the purpose of the rule as being to facilitate and regulate applications for review "by granting the aggrieved party seeking to review a decision of an inferior court, administrative functionary or state organ, access to the record of the proceedings in which the decision was made, to place the relevant evidential material before court". According to the Supreme Court of Appeal, the rule is intended to probe the subject state of mind of the decision-maker at the time the decision was made. The applicant must be granted access to the record to enable the court to test the lawfulness of the decision sought to be reviewed, and whether it accords with the relevant constitutional prescripts. Also see *Turnbull-Jackson v Hibiscus Coast Municipality* 2014 (6) SA 592 (CC) par 37.

furnish the record containing the reasons that led to his decision to conduct a Cabinet reshuffle.

Dissatisfied with the outcome of the High Court, the President then took the matter on appeal to the Supreme Court of Appeal. However, the Supreme Court of Appeal declined to entertain the matter on the grounds of mootness.[108] The President then took the matter to the Constitutional Court in *President of the Republic of South Africa v Democratic Alliance*,[109] which is discussed below.

5 3 The Third *Cabinet Reshuffle* case

In this case, the Constitutional Court was asked to determine:

- whether the decision of the President to appoint and dismiss the Cabinet minister and his Deputy can be reviewed and set aside; and
- whether the President under rule 53 of the Uniform Rules of Court can be legally compelled to disclose the reasons for relieving Cabinet ministers and their deputies of their duties, or whether the arguably raw political character of that decision exempts him from doing so?

Part of the application pertaining to the first question was withdrawn, which means that the question of whether the court can review and set aside a Cabinet appointment and dismissal has not yet been tested before the courts. The President argued that extending the scope of rule 53 to executive decisions is an impermissible encroachment into the executive domain. He further asserted that there was a need for certainty in relation to the obligation to disclose reasons for future Cabinet reshuffles and the relevant part of the record upon which such decisions are taken.[110] The Constitutional Court held that all executive decisions are generally reviewable under the principle of legality or rule 53.[111] According to the court, it is inescapable that the merits would have to be traversed in order to give the President the needed guidance for future cases. The political character of section 91(2) and 93(1) decisions would have to be interrogated in-depth in order to address the President's concerns properly, amid the potentially serious questions of separation of powers.[112]

In the minority judgment, the Constitutional Court, per Jafta J, held that it is not open to the President to take the view that rule 53 is inapplicable and consequently ignore the rule. That is a function reserved exclusively to the courts.[113] He also held that if the President were to fail to dispatch the record after receipt of papers in future proceedings, he would then be violating the earlier judgment of the High Court in the same matter.[114] He would also be in

[108] *President of the Republic of South Africa v Democratic Alliance* [2018] ZASCA 79.
[109] 2019 (11) BCLR 1403 (CC) (*Third Cabinet Reshuffle Case*).
[110] The *Third Cabinet Reshuffle* Case *supra* par 21.
[111] *Ibid*.
[112] The *Third Cabinet Reshuffle* Case *supra* par 33.
[113] The *Third Cabinet Reshuffle* Case *supra* par 62.
[114] The *First Cabinet Reshuffle Case supra.*

violation of section 165(5) of the Constitution, which declares that an order or decision of a court binds organs of state to which it applies.[115]

The minority judgment also found that the President is not one of the functionaries identified in rule 53, nor does he perform one of the functions classified when he appoints or dismisses ministers. This is because, at the time the rule was enacted, the exercise of prerogative powers such as Cabinet appointments and dismissals was beyond the reach of judicial scrutiny. Jafta J also argued that the rule carefully delineates the nature of decisions and proceedings to which it applies, and the decision-makers it calls upon to despatch a record of proceedings to the registrar.[116] He also held that, when understood in its historical context, the rule was not intended to cover decisions taken by the President in the exercise of prerogative powers. Without changes to its language, there was no basis to give it a new meaning now. It has the same meaning regardless of the nature of the proceedings or decision challenged.[117] For the reasons adduced above, the minority judgment found that rule 53 does not apply to the President's decision to appoint and dismiss Cabinet members.[118]

It follows that since the *Third Cabinet Reshuffle Case*, rule 53 of the Uniform Rules of Court can be used to compel the President to disclose the rationale behind a Cabinet reshuffle. However, the courts have not yet pronounced on whether a court of law may set aside an unlawful Cabinet appointment. Equally, the courts are legally competent to enquire into the manner in which the President exercised the power to appoint a Cabinet member. However, the courts are limited to probing the means used to achieve the purpose of the appointment,[119] and not the merits of the President's decision. The identity of who is selected to Cabinet remains the responsibility of the President. The court examines the rationality of the decision itself, and the process used to arrive at the decision.[120]

6 PROPOSED REFORMS

6 1 The current *lacunae*

While the *dicta* above mean that rule 53 of the Uniform Rules of Court can be used to compel the President to furnish records relating to his decision to appoint Cabinet members, it is submitted that the legal framework relating to the President's duty to give reasons for that decision is inadequate because rule 53 is only applicable during litigation. The law should be reformed to enable other oversight institutions, such as parliamentary standing

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115 The *Third Cabinet Reshuffle* Case *supra* par 65.

116 The *Third Cabinet Reshuffle* Case *supra* par 84.

117 The *Third Cabinet Reshuffle* Case *supra* par 85.

118 The Third *Cabinet Reshuffle* Case *supra* par 86.

119 The courts apply the rationality test to inquire into the lawfulness of the President's decision. See Eloff "The Rationality Test in Lockdown Litigation in South Africa" 2021 21 *African Human Rights Law Journal* 1157 1162, in reference to the *dictum in New National Party v Government of the Republic of South Africa* 1999 (5) BCLR 489 (CC).

120 *National Energy Regulator of South Africa v PG Group (Pty) Ltd* 2020 (1) SA 450 (CC) par 117.

committees, to invoke the rule in the performance of their functions. The uncertainty on whether the National Assembly may compel the President to furnish reasons for conducting a Cabinet reshuffle is absurd. This is because he is collectively and individually accountable to Parliament for the exercise of his powers and the performance of his functions.

The National Assembly has the constitutional mandate to provide mechanisms to maintain oversight over the exercise of national executive authority. It must provide mechanisms to ensure that all executive organs in the national sphere of government are accountable to it.[121] It must also provide for mechanisms to maintain oversight of the exercise of national executive authority,[122] including the implementation of national legislation and any organ of state.[123] The National Assembly or any of its committees may summon any person to appear before it to give evidence on oath or affirmation or produce documents.[124] Any person or institution may be required to report to the National Assembly.[125] It may compel, in terms of national legislation or the rules and orders, any person or institution to comply with a summons.[126] The National Assembly may therefore summon the President to appear before it, give evidence on oath or affirmation, and produce documents. This is clear from the use of the phrase "any person" in section 56(*a*) of the Constitution.

The National Assembly is also empowered to receive petitions, representations, or submissions from any interested persons or institutions.[127] If the National Assembly, with a vote supported by its members, passes a motion of no confidence in the Cabinet, the President must reconstitute the Cabinet.[128] Should the National Assembly, through a vote supported by a majority of its members, pass a motion of no confidence in the President, he together with his Cabinet and any Deputy Ministers must resign.[129] Although it seems that sufficient provision is made for instances where members of the Cabinet and the President are not performing, the reality is that it is a cumbersome process fraught with politics that is only available after the damage has been done.

It is recommended that the Constitution be amended to empower the National Assembly to participate in the appointment of Cabinet members. The basis for this statement is the Constitution itself. If the National Assembly is part of the process of appointing ministers, it will assist the President in promoting "that which will advance the Republic"[130] and ensure that all executive organs in the national sphere of government are accountable to it as required by section 55(2)(*a*) of the Constitution. In this way, it may also constitute a mechanism to maintain oversight of the

121 S 55(2)(*a*) of the Constitution.
122 S 55(2)(*b*)(i) of the Constitution.
123 S 55(2)(*b*)(ii) of the Constitution.
124 S 56(*a*) of the Constitution.
125 S 56(*b*) of the Constitution.
126 *Ibid*.
127 S 56(*c*) of the Constitution.
128 S 102(1) of the Constitution.
129 S 102(2) of the Constitution.
130 S 83(*c*) of the Constitution.

exercise of national executive authority,[131] including the implementation of national legislation and any organ of state.[132] There are multiple examples of poor appointments leading to a failure either to implement national legislation or to comply therewith. An example of a failure to implement national legislation is contained in a *dictum* in *#Unitebehind v Minister of Transport*.[133] In this case, the High Court held that the Minister of Transport's failure to appoint a Board of Control for the Passenger Rail Agency of South Africa (PRASA) in line with section 24 of the Legal Succession Act[134] was unlawful and should be reviewed and set aside. Similarly, his decision to appoint Mr Bongisizwe Mpondo as the Acting Group Chief Executive Officer in terms of section 12A(3)(*a*) of the Public Service Act[135] was declared unlawful and set aside by the High Court. The judgment of the Western Cape High Court in *Democratic Alliance v South African Broadcasting Corporation Soc Ltd*[136] also provides a useful illustration of the improper implementation of legislation. In this case, the High Court found that the appointment of Hlaudi Motsoeneng by the Minister of Communications as Group Chief Executive Officer was invalid and should be set aside. An invalid appointment of that nature would lead to improper implementation of the Broadcasting Act.[137]

In terms of the proposed reform, the President should make the initial selection, but his choice should be subject to parliamentary endorsement. It is conceded that in terms of the current constitutional framework, the presidency and the executive branch of government are made up of the majority party in the National Assembly. In practice, the President consults the political party he belongs to before finalising appointments to the Cabinet.[138] This means that the endorsement process is likely to be a mere rubber stamp of previously agreed-upon consultations in the governing party prior to the actual appointments. To mitigate against this possibility, there should be a select committee, representative of all the political parties, that deals solely with the endorsement of nominations to the Cabinet made by the President.[139]

In addition to the *lacuna* identified above, there is no constitutional provision or legislation dealing with the broader question of whether the President may be compelled to furnish reasons for making Cabinet appointments. In this light, the Constitution should be amended to state

131 S 55(2)(*b*)(i) of the Constitution.

132 S 55(2)(*b*)(ii) of the Constitution.

133 [2020] 4 All SA 593 (WCC).

134 9 of 1989.

135 Public Service Act, 1994.

136 [2017] 1 All SA 530 (WCC).

137 4 of 1999.

138 Sowetan Live "Cabinet Reshuffle in a Number of Days, Says Presidency's Vincent Magwenya" (01 March 2023) https://www.sowetanlive.co.za/news/south-africa/2023-03-01-cabinet-reshuffle-in-a-number-of-days-says-presidencys-vincent-magwenya/ (accessed 2024-12-05).

139 Other political parties such as the Democratic Alliance have proposed the establishment of an oversight committee over the presidency. See in this regard News24 "DA to Lobby Parliament to Have Oversight Over the Presidency" (10 December 2020) https://www.news24.com/news24/southafrica/news/da-to-lobby-parliament-to-have-oversight-over-the-presidency-20201210 (accessed 2022-07-04).

expressly the nature and extent of the President's duty to give reasons for making Cabinet appointments. Such an amendment is crucial in light of section 32 of the Constitution, which enshrines everyone's right of access to information that is held by the State. The amendment should detail the manner in which the National Assembly may summon the President and other witnesses to testify on oath or affirmation. It should specify the President's constitutional obligation to comply with an instruction to appear before the National Assembly in relation to allegations of unlawful or harmful conduct during Cabinet appointments. Owing to the discretionary nature of the power to appoint Cabinet members, the President may raise the argument that he is not compelled to divulge the reasons in Parliament. The amendment should also specify the nature of the record that may be asked for in the explanation of the rationale involved in the making of Cabinet appointments, and it should state the type of documents that may be exempt from disclosure in the National Assembly. This is due to the convention of Cabinet secrecy, which may prevent certain documents from being disclosed. The convention was recognised by the Constitutional Court in *President of the Republic of South Africa v SARFU*.[140] In this case, the Constitutional Court held that Cabinet secrecy is relevant for the protection of "robust and uninhibited debate of sensitive and important policy matters in Cabinet".[141]

The section below proposes a formulation of constitutional amendments to achieve the reforms discussed above.

6 2 Proposed constitutional amendments

Currently, section 91(2) of the Constitution reads as follows:

> "The President appoints the Deputy President and Ministers, assigns their powers and functions, and may dismiss them."

The provision should be amended to state:

(a) The President, as head of the national executive, after consultation with the National Assembly, and with a two-thirds majority vote in the National Assembly, appoints the Deputy President and Ministers.

(b) A select committee proportionately representative of all the political parties in the National Assembly must be established for purposes of the consultations and Cabinet endorsements envisaged in paragraph (*a*) of this provision.

(c) In selecting members of Cabinet, the President must have regard to gender and the competence of appointees.

(d) National legislation must provide for the assignment of powers and functions to Cabinet members. In assigning powers and functions to Cabinet members, the President must take into account good governance, the interests of the public, as well as his or her constitutional obligations in terms of section 83(*b*) of the Constitution.

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[140] 1999 (10) BCLR 1059 (CC) par 243. See further Malan "To What Extent Should the Convention of Cabinet Secrecy Still Be Recognised in South African Constitutional Law?" 2016 49 *De Jure* 117 120.

[141] *President of the Republic of South Africa v SARFU supra* par 243. As quoted by Malan 2016 *De Jure* 120.

> *(e)* The President may not assign powers and functions to Cabinet members, other than in line with the provisions of the Constitution, and the relevant legislation. The interests of the public in terms of paragraph (*d*) include the public's interest in knowing the reasons behind Cabinet appointments and dismissals, as provided for in section 32 of the Constitution.
>
> *(f)* Whenever the need arises, including but not limited to occasions when a Cabinet appointment is disputed on account of unlawful conduct by the President, the President has the constitutional obligation to furnish the considerations taken into account in appointing members of Cabinet.
>
> *(g)* National legislation must provide for the President's duty to give reasons in line with the provisions in paragraph (*f*) and other prescripts of the Constitution including but not limited to the foundational principles of the Constitution.
>
> *(h)* National legislation must provide for the establishment of ministries, and the maximum number of Cabinet ministers who may be appointed to such ministries."

The obligation to give reasons for Cabinet appointments should be enshrined in the Constitution, and subsequently in legislation. In line with the National Assembly's power to develop mechanisms to hold the executive accountable for the exercise of national executive authority,[142] the institution should develop internal rules to govern the Cabinet endorsement process. Such rules should also govern the President's constitutional obligation to explain his actions for making Cabinet appointments, and the furnishing of documents detailing the record of the decision by the President. The National Assembly should develop rules to govern any failure to comply with the proposed reforms.

7 CONCLUSION

It is submitted that a court of law can intervene and set aside the unlawful, harmful (or potentially harmful) exercise of the power to appoint Cabinet members, despite its political and discretionary nature. This is because the President must promote "that which will advance the Republic", and the Constitutional Court's power to test the constitutionality of parliamentary or presidential conduct.[143] Similarly, setting aside an unlawful Cabinet appointment does not impinge on the doctrine of separation of powers, as unlawful conduct by any public functionary should have no legal consequence. It is, however, accepted that, when unlawful, harmful (or potentially harmful) conduct is perceived to have taken place during the appointment process, such a decision should remain in place until set aside by a competent court of law.[144]

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142 S 55(2) of the Constitution.

143 S 83(c) of the Constitution.

144 *Oudekraal Estates (Pty) Ltd v The City of Cape Town* 2010 (1) SA 333 (SCA). See further Henrico "The *Functus Officio* Doctrine and Invalid Administrative Action in South African Administrative Law: A Flexible Approach" 2020 34 *Speculum Juris* 116 118.