

# CHAPTER 4: THE PRESIDENT AND THE NATIONAL EXECUTIVE

*Scott Roberts*

## 1. INTRODUCTION

The national executive is the branch of national government that is responsible for exercising day-to-day governmental authority. It consists of the President, the Deputy President and the other members of the Cabinet. In essence, while the legislature – the National Assembly and National Council of Provinces – makes the law and the judiciary interprets it, the executive enforces the law and puts it into effect. Although the focus of this chapter is the executive's role in national government, it is useful to note that similar structures are replicated at the provincial and local levels of government.

This chapter focuses first on the powers and functions of the President, both in his role as head of state and as head of the national executive. Because the executive authority of the country is vested in the President,<sup>1</sup> and other members of the executive derive their powers from the President, the President is central to our discussion of the powers of the executive branch of national government. It then moves on to a discussion about how the President and the rest of the executive are elected, appointed and removed. Finally, it places the national executive within the doctrine of the separation of powers and describes the checks and balances that exist to limit executive power and hold it to account.

---

<sup>1</sup> Section 85(1) of the Constitution.

## 2. POWERS AND FUNCTIONS OF THE PRESIDENT

The President is both head of state and head of the national executive.<sup>2</sup> While some countries divide these two roles between two different people (e.g. a Queen and Prime Minister or a President and Prime Minister), in South Africa, the roles of head of state and head of government are vested in one person. The President's ultimate responsibilities are to uphold, defend and respect the Constitution,<sup>3</sup> and to promote the unity of the nation and that which will advance the Republic.<sup>4</sup>

### (a) Head of state functions

When exercising his functions as head of state, the President acts alone, and need not consult the other members of the Cabinet.<sup>5</sup> The President acts as head of state when he exercises any of the powers listed in section 84(2), and his powers as head of state are presumably limited to those in this list.<sup>6</sup> Some notable examples of powers contained in this list are:

---

<sup>2</sup> Section 83(a) of the Constitution. See Murray & R Stacey 'The President and the National executive' in Section Woolman & M Bishop (eds) *Constitutional Law of South Africa 2 ed* (RS 6, 2014) at 1.

<sup>3</sup> Section 83(b) of the Constitution.

<sup>4</sup> Section 83(c) of the Constitution.

<sup>5</sup> Murray & Stacey op cit note 2 at 2; P de Vos & W Freedman *South African Constitutional Law in Context (2014)* at 117; *President of the Republic of South Africa and Another v Hugo* 1997 (4) SA 1 at para 14.

<sup>6</sup> *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC) at para 144; but see Murray & Stacey op cit note 2 at 7.

- Assenting to and signing Bills to bring them into law;<sup>7</sup>
- Overseeing the democratic process by referring a Bill back to the National Assembly for reconsideration of its constitutionality,<sup>8</sup> or referring it to the Constitutional Court for a decision on the Bill's constitutionality;<sup>9</sup>
- Appointing commissions of inquiry;<sup>10</sup>
- Pardoning or relieving criminals;<sup>11</sup> and
- The ceremonial powers of receiving and recognising foreign diplomatic and consular representatives,<sup>12</sup> and conferring honours.<sup>13</sup>

In general, the President's powers as head of state can be distinguished from his decisions as head of the national executive by a lack of political discretion.<sup>14</sup> This does not, however, mean that all the President's powers as head of state are mere formalities. For example, on receiving a Bill from the legislature, the President may either assent to and sign the Bill,<sup>15</sup> or decide to refer it back to the National Assembly<sup>16</sup> or the Constitutional Court<sup>17</sup> if he doubts the Bill's constitutionality. While this seems

---

<sup>7</sup> Section 84(2)(a) of the Constitution.

<sup>8</sup> Section 84(2)(b) of the Constitution.

<sup>9</sup> Section 84(2)(c) of the Constitution.

<sup>10</sup> Section 84(2)(f) of the Constitution.

<sup>11</sup> Section 84(2)(j) of the Constitution.

<sup>12</sup> Section 84(2)(h) of the Constitution.

<sup>13</sup> Section 84(2)(k) of the Constitution.

<sup>14</sup> Murray & Stacey op cit note 2 at 8; de Vos & Freedman op cit note 5 at 178.

<sup>15</sup> Section 84(2)(a) of the Constitution.

<sup>16</sup> Section 84(2)(b) of the Constitution.

<sup>17</sup> Section 84(2)(c) of the Constitution.

to suggest the existence of a discretionary power, it is important to note that the President may only make this decision on the grounds of constitutional reservations only, and not political ones.<sup>18</sup>

The powers of the head of state listed in section 84(2) have their origins in the so-called 'prerogative powers' exercised under former constitutions by heads of state.<sup>19</sup> In the past, South African heads of state enjoyed certain wide-ranging prerogative powers derived from the immense discretionary powers of the British monarchy. While some royal powers were brought under parliamentary control, others were not and were instead vested in the President as head of state. Thus, the executive was able to carry out some acts without the authority of an Act of Parliament.<sup>20</sup> Historically, these prerogative powers were not justiciable – courts had no power to examine the way in which they were exercised or declare the resulting actions invalid or set them aside.<sup>21</sup> This is no longer the case. The Constitution now governs all acts of state power, including the powers exercised by the President as head of state, and these powers are subject to judicial review. This means an act of the President as head of state can be declared invalid and set aside if it is found to be unconstitutional or otherwise unlawful.<sup>22</sup>

The case of *Hugo* discusses the emergence of head of state powers in South African law, as well as the limits of these powers in our constitutional dispensation. While this case was decided under the interim Constitution, it is helpful to bear in mind that the powers enumerated in section 82(1) of the interim Constitution are

---

<sup>18</sup> Murray & Stacey op cit note 2 at 8–9.

<sup>19</sup> *Mohamed and Another v President of the Republic of South Africa and Others (Society for the Abolition of the Death Penalty in South Africa and Another Intervening)* 2001 (3) SA 893 (CC) at para 31, quoted in Murray & Stacey op cit note 2 at 11.

<sup>20</sup> Ibid.

<sup>21</sup> Ibid.

<sup>22</sup> Hugo op cit note 5 at para 13; sections 2 and 83(b) of the Constitution.

substantively similar to the head of state powers contained in section 84(2) of the final Constitution. The *Hugo* case is thus useful in understanding the powers and limitations of the President as head of state under the final Constitution.

*President of the Republic of South Africa and Another v Hugo*

1997 (4) SA 1 (CC)

**Facts**

Hugo was a prisoner serving an effective sentence of 15<sup>1</sup>/<sub>2</sub> years. He was a single father of a child who was about nine years old at the time of his incarceration. In 1994, acting in terms of section 82(1)(k) of the interim Constitution, President Mandela and his two Deputy Presidents signed a document called the Presidential Act No. 17, which granted a special remission of the remainder of the sentences of certain categories of prisoners. One such category was all mothers in prison on a certain date who had minor children under the age of 12 years. Hugo would have qualified for a remission of sentence had he been a woman. He argued that the Presidential Act violated the equality provisions (section 8(1) and (2)) of the interim Constitution insofar as it unfairly discriminated against him on the ground of sex or gender and indirectly against his son because his incarcerated parent was not female.

**Judgment**

Section 82(1) contains powers which are historically derived from the so-called prerogative powers of the English monarch. These powers were not derived from statute but rather from tradition and they belonged to the monarch by virtue of their position. Traditionally, the exercise of prerogative powers by the monarch was not subject to judicial review, since the Crown had ultimate absolute discretion to exercise these powers as it wished – that is to say, without interference by the courts.

Many countries that derived their systems of government from the British system, including South Africa, retained some of these powers in their constitutions. In South Africa, they vested in the State President in his capacity as head of state. They included the power to confer honours, pardon and reprieve offenders, and to enter into and ratify international treaties. Unlike the prerogative powers of the English

monarch, the President's head of state powers are not vested in him by virtue of his position. Rather, he derives his section 82(1) powers from the interim Constitution. Furthermore, these are a kind of executive power, and do not fall into a special category of non-executive presidential power. Whether the President is exercising constitutional powers as head of the national executive or as head of state, he is acting as an executive organ of state. Since all organs of state are subject to the supreme Constitution, all exercises of presidential power are subject to the provisions of the interim Constitution, including the Bill of Rights. In turn, this means that the President's exercise of constitutionally derived powers is subject to review by the courts:

'The interim Constitution obliges us to test impugned action by any organ of state against the discipline of the interim Constitution and, in particular, the Bill of Rights. That is a fundamental incidence of the constitutional state which is envisaged in the Preamble to the interim Constitution.' [Para 26]

However, this does not mean that the Constitution will always provide grounds for an effective review of such powers. For example, in cases where the President pardons a single prisoner, it would be difficult to attack that exercise of power, even on equality grounds. This is because no prisoner has the right to be pardoned and so is not treated unfairly when another, single prisoner is pardoned, and he is not.

In the present case, the President did not exercise his power to pardon a single person but rather specified classes of people. Where one category of persons is pardoned and another is not, discrimination (or differentiation) is, of course, inherent. The Presidential Act indeed discriminates on at least one of the grounds prohibited in section 8(2) of the interim Constitution — sex. Section 8(4) requires the court to presume such discrimination is unfair until the contrary is proved. In order to prove that discrimination was not unfair, the President had to show in the context of this particular case that the impact of the discrimination on the persons who were discriminated against was not unfair.

The majority of the court held that the discrimination was not unfair. While it was clearly disadvantageous to the fathers concerned that they would not be afforded an early release from prison, it did not restrict or limit their rights or obligations as fathers in any permanent manner. For example, it cannot be said that the effect of the denial of pardon limited their freedom — their freedom was limited as a result of their

conviction, not as a result of the Presidential Act. The Act merely deprived them of an early release to which they had no legal entitlement. Moreover, fathers were not prohibited from applying directly to the President for a remission of sentence based on their own, unique circumstances. Finally, while the Presidential Act may deny fathers an opportunity it afforded mothers in similar circumstances, it did not impair their rights to dignity nor their sense of equal worth. The impact upon the group discriminated against in the circumstances was, therefore, not unfair, and the Presidential Act was constitutional.

### **(b) Functions of The President as Head of the National Executive**

The Constitution vests the executive authority of the Republic in the President.<sup>23</sup> While the President performs his head of state functions alone, when acting as head of the national executive, the President exercises his authority together with the rest of the Cabinet.<sup>24</sup> The Cabinet comprises the President and the Deputy President and other cabinet ministers; who are all appointed by the President and may be dismissed by him.<sup>25</sup> As of November 2019, there are 30 Cabinet members – the President and Deputy President and 28 ministers.

The Deputy President is always appointed from among the members of the National Assembly,<sup>26</sup> and the Cabinet Ministers are usually appointed from among the members of the National Assembly, too. However, the Constitution allows the

---

<sup>23</sup> Section 85(1) of the Constitution.

<sup>24</sup> Section 85(2) of the Constitution.

<sup>25</sup> Section 91(1) and (2) of the Constitution.

<sup>26</sup> Section 91(3)(a) of the Constitution.

President to appoint two Cabinet Ministers who are not elected members of the National Assembly.<sup>27</sup>

While the Constitution does not define the term ‘executive authority’, section 85(2) provides some clarity by envisaging four main functions of the President and the Cabinet, and thus the national executive:

- (a) implementing national legislation;
- (b) developing and implementing national policy;
- (c) co-ordinating the functions of state departments and administrations;
- (d) preparing and initiating legislation.

Section 85(2)(e) contains a catch-all provision, which allows the President and executive to perform ‘any other executive function provided for in the Constitution or in national legislation’. The executive authority contemplated in this section appears to be broader than the core role of the executive described above, i.e. implementing the laws made by Parliament. The executive also has some power to further the political agenda of the ruling party, provided it acts constitutionally in doing so.<sup>28</sup>

Furthermore, the Constitution allocates some specific powers and responsibilities to the President as head of the national executive.<sup>29</sup> Some notable examples of these powers and responsibilities are as follows:<sup>30</sup>

- To appoint the Justices of the Constitutional Court as well as the President and Deputy President of the Supreme Court of Appeal;<sup>31</sup>

---

<sup>27</sup> Section 91(3)(a) and (b) of the Constitution.

<sup>28</sup> Murray & Stacey op cit note 2 at 2.

<sup>29</sup> Murray & Stacey op cit note 2 at 17.

<sup>30</sup> See complete list in Murray & Stacey op cit note 2 at 17–18.

<sup>31</sup> Section 174(3) and (4) of the Constitution.

- To appoint the National Director of Public Prosecutions;<sup>32</sup>
- To appoint the National Commissioner of the South African Police Service;<sup>33</sup> and
- To authorise the deployment of the South African National Defence Force.<sup>34</sup>

To reiterate, since these powers are powers of the President which vest in him as head of the national executive, the President must exercise them together with the other members of the Cabinet. This means that the President must have the support of the Cabinet when making a decision related to the exercise of executive powers in terms of section 85.<sup>35</sup>

The Deputy President and Cabinet Ministers are responsible for the powers and functions of the executive assigned to them by the President.<sup>36</sup> When the President assigns powers and functions as such, this is referred to as the allocation of portfolios.<sup>37</sup> Members of the Cabinet must act in accordance with the Constitution,<sup>38</sup> and provide Parliament with full and regular reports concerning matters under their control.<sup>39</sup>

---

<sup>32</sup> Section 179(1)(a) of the Constitution.

<sup>33</sup> Section 207(1) of the Constitution.

<sup>34</sup> Section 201(2) of the Constitution.

<sup>35</sup> Murray & Stacey op cit note 2 at 18.

<sup>36</sup> Section 92(1) of the Constitution.

<sup>37</sup> Murray & Stacey op cit note 2 at 20.

<sup>38</sup> Section 92(3)(a) of the Constitution.

<sup>39</sup> Section 92(3)(b) of the Constitution.

<b>Comparison: President's powers as head of state and head of the national executive</b>	
<b>Head of state</b>	<b>Head of the national executive</b>
Assenting to and signing Bills	Implementing national legislation
Referring Bills back to the National Assembly for reconsideration of their constitutionality	Developing and implementing national policy
Appointing commissions of enquiry	Coordinating the functions of government departments and administrations
Calling a national referendum	Preparing and initiating legislation
Pardoning or relieving offenders and remitting any fines, penalties or forfeitures	Appointing: The National Director of Public Prosecutions The heads of the intelligence services The Justices of the Constitutional Court and the President and Deputy President of the Supreme Court of Appeal The National Commissioner of the South African Police Service
Conferring honours	Any other executive function provided for in the Constitution or in national legislation

### 3. APPOINTMENT, END OF TERM AND REMOVAL OF THE PRESIDENT AND HIS CABINET

The President is elected by the National Assembly from among its members at its first sitting after its election or whenever necessary to fill a vacancy.<sup>40</sup> When elected President, that person ceases to be a member of the National Assembly and, within five days, must assume office by swearing or affirming faithfulness to the Republic and obedience to the Constitution.<sup>41</sup>

The President's term of office is usually tied to the duration of the National Assembly: five years.<sup>42</sup> This is because the President's term of office begins on assuming office and ends either upon a vacancy occurring or when the person next elected President by the National Assembly assumes office.<sup>43</sup> No one may hold office as President for more than two terms.<sup>44</sup> However, when a person is elected to fill a vacancy in the office of President, the period between that election and the next election of a President by the National Assembly is not regarded as a term.<sup>45</sup> Thus, a person could, in theory, serve for longer than 10 years as President.

The resignation or death of a President terminates his term of office. The National Assembly can also terminate the President's term of office by removing him, either through impeachment in terms of section 89, or a vote of no confidence in terms of section 102(2).

---

<sup>40</sup> Section 86(1) of the Constitution.

<sup>41</sup> Section 87 of the Constitution.

<sup>42</sup> Murray & Stacey op cit note 2 at 23.

<sup>43</sup> Section 88(1) of the Constitution.

<sup>44</sup> Section 88(2) of the Constitution.

<sup>45</sup> Section 88(1) of the Constitution.

Impeachment is more punitive. Having established that the President has either seriously violated the Constitution or the law,<sup>46</sup> has committed serious misconduct<sup>47</sup> or is unable to perform the functions of office,<sup>48</sup> the National Assembly must take a vote on a resolution to remove the president. If two-thirds of the National Assembly vote in favour of the resolution, the President is removed from office. A president removed by this mechanism may not receive any benefits of the office in future (including a presidential pension, to which he would usually be entitled), nor may he serve again in public office.<sup>49</sup>

Misconduct or wrongdoing need not, however, be established to enable the National Assembly to remove the President by means of a vote of no confidence in terms of section 102(2). Practically, this means that the National Assembly may remove a President in terms of this section for purely political reasons.<sup>50</sup> Another difference is that the majority required for a motion of no confidence is a simple majority – a significantly lower threshold than the two-thirds required for impeachment. If the National Assembly passes a motion of no confidence, both the President and the rest of the Cabinet members must resign. The National Assembly may also elect to keep the President and vote no confidence in the other members of the Cabinet in terms of section 102(1). When this happens, the President must reconstitute the Cabinet.<sup>51</sup>

---

<sup>46</sup> Section 89(1)(a) of the Constitution.

<sup>47</sup> Section 89(1)(b) of the Constitution.

<sup>48</sup> Section 89(1)(c) of the Constitution.

<sup>49</sup> Section 89(2) of the Constitution.

<sup>50</sup> De Vos & Freedman op cit note 5 at 174.

<sup>51</sup> Section 102(1) of the Constitution.

## The National Assembly's executive removal mechanisms

Mechanism	Section 89(1) – removal of President (impeachment)	Section 102 – motions of no confidence
Majority required	Two-thirds majority	Simple majority (one-half)
Removes	President alone	Cabinet excluding the President – section 102(1) President, other members of Cabinet and any deputy ministers — section 102(2)
Grounds	A serious violation of the Constitution or the law; serious misconduct; or inability to perform the functions of office	Any, including political grounds
Special consequences	Person removed may not receive any benefits of the office (including pension benefits) and may not serve in any public office again	None

## 4. CHECKS AND BALANCES AND THE SEPARATION OF POWERS

Fundamental to the South African system of democratic government, with its three separate branches, is the doctrine of the separation of powers. The different branches of government keep each other accountable through a variety of mechanisms, sometimes referred to as 'checks and balances'. One of these mechanisms, which applies specifically to the executive, is the National Assembly's power to remove the President (and/or the rest of the Cabinet) from office, as described above.

The lawfulness of presidential acts can also be challenged in court and set aside if found constitutionally deficient. This process is often referred to as judicial review. The judiciary's power of review is a powerful restraining force on executive power. This power flows from the supremacy of the Constitution and the principle of legality, which holds that there is no legitimate exercise of state power save for that sourced in law.<sup>52</sup>

However, where the judiciary intervenes in the acts and decisions of the executive branch of government, this invariably raises concerns about the separation of powers and the risk of judicial overreach. While the judiciary has a duty to enforce the supreme Constitution and ensure the lawfulness of all state actions, it must also respect the political nature of the decisions taken by the President and the rest of the executive, who are ultimately the elected representatives of the people. De Vos et al submit that 'as a general rule, the more directly political the discretion is that the President (or other members of the executive) exercises, the more hesitant the courts will be to intervene.'<sup>53</sup>

---

<sup>52</sup> De Vos & Freedman op cit note 5 at 183.

<sup>53</sup> Ibid.

As held in the *Hugo* case discussed above, acts of the President are subject to the Bill of Rights, and any act which unjustifiably infringes on a right in the Bill of Rights may be set aside by a competent court.<sup>54</sup> A second ground of review, upon which a court may pronounce upon the validity of executive action flows from the principle of legality.<sup>55</sup>

To repeat, under our Constitutional dispensation, every exercise of public power must be lawful, in accordance with the principle of legality. This principle holds that state functionaries, including the President and other members of the executive, may exercise no power and perform no function beyond that conferred upon them by law.<sup>56</sup> If it can be shown that the executive either had no power in law to make a decision or perform an action, or that it did not meet the specified requirements for the exercise of a power, such a decision or action may be set aside on grounds of legality.

Parliament cannot delegate a power to the President if that delegation is not authorised by the Constitution. In *Justice Alliance*,<sup>57</sup> a case concerning the validity of a decision by the President to extend the term of office of the Chief Justice, the court held that section 176(1) the Constitution did not empower Parliament to delegate the power to extend the term of service of any member of the Constitutional Court. The words 'Act of Parliament' in that section meant that only Parliament had the power to extend the term of the Chief Justice. Thus, the President can only act in terms of a power that is delegated to him from the legislature if that delegation itself is permitted by the Constitution and does not infringe the separation of powers.

---

<sup>54</sup> Hugo op cit note 5 at para 28.

<sup>55</sup> De Vos op cit note 5 at 187.

<sup>56</sup> *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 at para 58.

<sup>57</sup> *Justice Alliance of SA v President of the RSA and Others and Two Similar Applications* 2011 (5) SA 388 (CC).

A third ground of review upon which the exercise of executive power might be challenged in court flows from the principle that when (lawfully) exercising any power the President must act rationally.<sup>58</sup> This is a minimum threshold requirement that applies to all exercises of public power in South Africa.

This chapter concludes with a discussion of two cases, *Albutt*<sup>59</sup> and *Democratic Alliance*,<sup>60</sup> in which the Constitutional Court explained the rationality standard and set parameters for a rationality review of executive action. In essence, rationality requires that when public power is exercised, the means chosen for the exercise of the power must be rationally connected to the purpose for which the power was conferred. In *Albutt*, the decision to exclude victims of politically-motivated crimes from the process of awarding presidential pardons was found not to be rationally connected to the purpose of granting such pardons, which, as the President stated, was to aid nation-building and reconciliation. Thus, the decision fell to be set aside. In *Democratic Alliance*, the President's decision to appoint Mr Menzi Simelane as National Director of Public Prosecutions after a commission of inquiry had cast doubt upon his conscientiousness and integrity was found to be irrational. This is because the purpose of the power was to appoint a fit and proper person to the office of NDPP.

---

<sup>58</sup> De Vos op cit note 5 at 189.

<sup>59</sup> *Albutt v Centre for the Study of Violence and Reconciliation and Others* 2010 (3) SA 293 (CC).

<sup>60</sup> *Democratic Alliance v President of South Africa and Others* 2013 (1) SA 248 (CC).

## **Facts**

On 21 November 2007, President Mbeki announced a special dispensation for applicants for pardon who claimed they had been convicted of politically motivated offences. This was aimed at dealing with the 'unfinished business' of the Truth and Reconciliation Commission (TRC), including the question of amnesty for South Africans who had not participated in the TRC's processes. The President explained that his use of the presidential pardon was 'in the interest of nation-building, national reconciliation and the further enhancement of national cohesion.' The President also announced the establishment of a Pardon Reference Group (PRG) to assist him in considering applications for pardon by offenders.

Several NGOs made attempts to secure the participation of the victims of the relevant crimes in the special dispensation process. The PRG rejected these attempts, claiming that it was not compelled by law to consider input from the public, including the victims. The President also declined requests for victim participation in the process. The NGOs launched an application challenging the decision to exclude victims from participating in the pardon process.

## **Judgment**

The Constitution is supreme, and the President derives the power to grant pardon from the Constitution. One of the standards the Constitution demands of any exercise of a power of this nature is rationality. Thus, the exercise of the power to grant pardon must be rationally related to the purpose sought to be achieved by its exercise. In other words, the means selected when exercising the power must be rationally related to the end objective sought to be achieved. When undertaking a rationality enquiry, the court's purpose is not to determine whether there are other means that could have been used, but rather whether the means that were in fact chosen are rationally related to the objective. (This brings into perspective the judiciary's role in maintaining the separation of powers: while courts will be hesitant to tell the other

branches of government 'how to do their jobs' by prescribing a certain approach to decision-making, an inquiry into whether the means chosen were rationally connected to the state's objectives is far less invasive).

The objectives that the special dispensation for pardon sought to achieve were national unity and national reconciliation and were informed by the principles underlying the process of the TRC. These were nation-building and national reconciliation. While the TRC sought to achieve these aims using amnesty, the special dispensation sought to achieve them using presidential pardons.

The participation of victims was a fundamental part of the TRC's amnesty process, along with the participation of the perpetrators. The participation of both groups was necessary to achieve the objectives of nation-building and promoting reconciliation.

The President undertook to apply the same principles and values that underpinned the amnesty process to the special dispensation process. Since these required the participation of victims in the process, it can hardly be suggested that the exclusion of the victims from the special dispensation process is rationally related to the achievement of the process's objectives.

The decision to exclude the victims was therefore irrational and fell to be set aside.

## **Facts**

Adv Vusi Pikoli was suspended by President Mbeki from his role as National Director of Public Prosecutions (NDPP) in September 2007. Shortly after that, the President appointed a commission of inquiry to be chaired by Dr Frene Ginwala ('the Ginwala Commission') to inquire into Adv Pikoli's fitness to hold office. Mr Menzi Simelane, then the Director-General of the Department for Justice and Constitutional Development, presented the government's submissions to the Ginwala Commission and did so under oath.

In its report, the Ginwala Commission heavily criticised Mr Simelane's submissions, characterising much of his evidence as 'inaccurate or without any basis in fact and law'. Several of the allegations he made against Adv Pikoli were without foundation. The commission labelled these as 'spurious', rejected them as being 'without substance', and considered that they 'may have been motivated by personal issues'.

The Public Service Commission was requested to investigate Mr Simelane's conduct during the Ginwala Commission. In its report it recommended disciplinary proceedings against Mr Simelane. The Minister for Justice and Constitutional Development rejected these recommendations. Two days later, Jacob Zuma, who had become President in the interim, appointed Mr Simelane as NDPP. The Democratic Alliance approached the courts, seeking to review the decision of the President to appoint Mr Simelane as NDPP.

## **Reasoning and holding**

The National Prosecuting Authority Act, the legislation enacted to give effect to section 179 of the Constitution, prescribes that a person appointed as NDPP must be 'a fit and proper person, with due regard to his or her experience, conscientiousness and integrity, to be entrusted with the responsibilities of the office concerned.' Whether a person meets this requirement is an objective fact that can be adjudicated upon by the Courts.

The executive is constrained by the principle of rationality: a decision of the executive must be rationally related to the purpose for which the power was conferred.

Reasonableness and rationality are conceptually distinct tests. Reasonableness is generally concerned with the decision itself: if an administrative decision is one that a reasonable decision maker could not reach, it will be reviewable on grounds of reasonableness. A rationality enquiry, on the other hand, is not concerned with whether there are other means that could have been used, but whether the means selected are rationally related to the objective sought to be achieved. Both the process by which the decision is made and the decision itself must be rational.

A purely executive (as opposed to an administrative) action need not be reasonable, nor procedurally fair. Once rationality is established, an executive decision is likely to be constitutional. This deferent approach has been adopted to protect and give effect to the doctrine of the separation of powers. If executive decisions were too easily set aside, this would give rise to the danger of judicial overreach.

Rationality must be established with respect to every step in the process; if a step bears no rational relationship to the purpose for which the power is conferred, and if the taking of that step colours the entire decision with irrationality, then the decision as a whole may be rendered irrational. In certain cases, failure to take into account relevant material can render the decision irrational.

It is clear that the purpose of the power of the President to appoint the NDPP was to ensure that the person appointed is sufficiently conscientious and has the

integrity required to be entrusted with the responsibilities of that office. Furthermore, it is clear that dishonesty is inconsistent with the standards of conscientiousness and integrity that are prerequisites for proper performance of the duties of an NDPP.

The President failed to take into account obvious warning signs in the Ginwala Commission report that cast doubt on Mr Simelane's suitability for appointment. The report raised concerns about Mr Simelane's credibility, integrity and conscientiousness. The President's decision to ignore the contents of the report and appoint Mr Simelane without further consideration was not rationally related to the purpose of the power to appoint a suitable NDPP, so much so that it coloured the entire process with irrationality which thus fell to be set aside.

## 5. REVISION QUESTIONS

1. In the United States, presidents are directly elected by voters every four years. Is this the case in South Africa? If not, from where does the President derive his democratic legitimacy to govern?
2. Until 1984, South Africa had both a State President and a Prime Minister. The Constitution no longer provides for the office of Prime Minister. Why is this significant, and what does it tell us about the nature of presidential power in South Africa?
3. Sometimes the President exercises his powers alone, and at other times, he must consult with members of his Cabinet when making decisions. How does the President know whether he must consult with other members of the national executive before he acts?
4. Explain the historical development of the President's head of state powers and highlight differences in the Constitution's contemporary approach to these powers. Why is this significant for the doctrine of the separation of powers?
5. Does the President have the power to veto legislation passed by the Parliament? If not, what power does he have when he is dissatisfied with the contents of a Bill, and what are its limits?
6. What important principle relating to the doctrine of the separation of powers emerges from the *Hugo case*?
7. Discuss the various ways in which the exercise of executive power is constrained by the Constitution.
8. May the National Assembly remove a sitting President for purely political reasons? How?

9. Is it possible for a South African court to declare a decision of the President invalid if he was acting in his capacity as head of state when he made the decision? Explain.
10. Are decisions of the President subject to the Bill of Rights? Discuss the implications of your answer with reference to case law.
11. When may Parliament delegate its constitutional powers to the national executive, if ever? Discuss with reference to case law.
12. Judges are not elected members of government. Is it undemocratic, therefore, for judges to be able to review decisions of the national executive? In your answer, make reference to what the Constitutional Court has said about the reviewability of executive action, and the limits of the judiciary's review powers.

## 6. ANSWERS

1. This is not the case in South Africa. According to section 86 of the Constitution, the President is elected by the National Assembly from among its members at its first sitting after its election. Thus, the President is not directly elected by voters. Rather, the ruling party is directly elected by voters and the President is chosen by the ruling party's members of Parliament. The President derives his democratic legitimacy to govern from the fact that the majority of the people have chosen have chosen the ruling party to form the government, and the ruling party has chosen the President. The President's term of office is usually tied to the duration of the National Assembly: five years unless the President is removed from office earlier (either through impeachment or a vote of no confidence). Section 88(2) of the Constitution says that no person may hold office as President for more than two terms, but when a person is elected to fill a vacancy in the office of President, the period between that election and the next election of a President is not regarded as a term.
2. Under the final Constitution, The President is both head of state and head of the national executive (section 85 of the Constitution). Some countries divide these two roles between a President and Prime Minister. Under our Constitution, these two roles are vested in one person. Whether the President is acting as head of state or head of the national executive will depend on the nature of the power being exercised.
3. According to section 85 of the Constitution, the President is both the head of state and head of the national executive. The President acts as head of state when he exercises any of the powers listed in section 84(2) of the Constitution. It is presumed that the head of state powers are confined to this list. When exercising these powers, the President need not consult with anyone. The Constitution also vests the executive authority of the Republic in the President (section 85). When acting as head of the national executive, the President exercises his authority together with the rest of the Cabinet and he must consult them before exercising these powers. In provisions empowering the President with presidential powers, the Constitution specifically states whether the

President is acting as head of state or head of the national executive when exercising the relevant power(s).

4. The *Hugo* case discusses the origin and nature of the President's head of state powers. These powers have their origins in the 'prerogative powers' exercised under former constitutions by heads of state. South African heads of state previously enjoyed wide-ranging prerogative powers derived from the immense discretionary powers of the British monarchy. Some royal powers were brought under parliamentary control, but others were not and were instead vested in the President as head of state. Thus, the executive was able to carry out some acts without the authority of an Act of Parliament. Historically, these prerogative powers were not justiciable — courts had no power to examine the way in which they were exercised or declare the resulting actions invalid or set them aside. This is no longer the case. The Constitution now governs all acts of state power, including the powers exercised by the President as head of state, and these powers are subject to judicial review. This means an act of the President as head of state can be declared invalid and set aside if it is found to be unconstitutional or otherwise unlawful. This is significant for the doctrine of the separation of powers because the judiciary is now able to act as a check on the exercise of all state power.
  
5. No, the President of South Africa has no general veto power over legislation passed by Parliament. See section 79 of the Constitution. The President only has a discretion not to assent to and sign a Bill passed by Parliament if he has reservations about the constitutionality of the Bill. In such a case, he must refer the Bill back to the National Assembly for reconsideration. If, after reconsideration by the NA, the President still has reservations about the Bill's constitutionality, he may refer it to the Constitutional Court for a decision on its constitutionality. If the Constitutional Court decides the Bill is Constitutional, the President must assent to and sign the Bill. The President cannot decide to refer a Bill back for purely political reasons.

6. The *Hugo* case confirmed that all exercises of presidential power are subject to the Constitution. In turn, this means that all exercises of the President's constitutionally derived powers (including head of state powers) are subject to review by the courts. The judiciary is thus a check on the executive branch of government which is integral to the separation of powers doctrine.
7. The Constitution constrains executive power in various ways. First, the Constitution provides certain accountability mechanisms which other branches of government are obliged to use in overseeing the exercise of executive power. For example, in terms of section 55(2)(a)–(b), the National Assembly is obliged to ensure that executive organs of state are accountable to it. The Constitution expressly provides that the NA must establish mechanisms to maintain oversight of the exercise of national executive authority.

Secondly, in terms of section 89(1) and 102, the NA has the power to remove the President (and/or the rest of the Cabinet) from office for either political reasons or an objective finding of wrongdoing, depending on the requirements of each section.

Thirdly, the President is accountable to the judiciary in the sense that presidential acts can be brought under judicial review. The judiciary's power of review flows from the supremacy of the Constitution and the principle of legality, which holds that there is no legitimate exercise of state power save for that sourced in law. If it can be shown that the executive either had no power in law to make a decision or perform an action, or that it did not meet the specified requirements for the exercise of a power, such a decision or action may be set aside on grounds of legality.

A corollary of the principle of legality is the principle of rationality, according to which all exercises of executive power must be rational (*Albutt*). Rationality requires that, when public power is exercised, the means chosen for the exercise of that power must be rationally connected to the purpose for which the power was conferred.

8. The President may be removed on the basis of a vote of no confidence, or through impeachment. A vote of no confidence need not be based on misconduct or wrongdoing on the part of the President. It can be taken for purely political reasons in terms of section 102(2). The National Assembly needs a simple majority vote in favour of removing the President. If the National Assembly passes a motion of no confidence, both the President and the rest of the Cabinet members must resign.
9. Yes, a court can declare a decision of the President invalid even if he was acting in his capacity as head of state. The President's head of state powers are derived from section 82(1) of the Constitution. All exercises of presidential power, whether exercised as head of the executive or head of state, must comply with the constitutional principle of legality. This means that head of state powers could be declared invalid by the courts if it was unlawful or irrational.
10. Yes, decisions of the President are subject to the Bill of Rights. Whether the President is exercising constitutional powers as head of the national executive or as head of state, he is acting as an executive organ of state. Since all organs of state are subject to the supreme Constitution, all exercises of presidential power are subject to the provisions of the Constitution, including the Bill of Rights. In turn, this means that the President's exercise of constitutionally derived powers is subject to review by the courts. This means that any act which unjustifiably infringes a right in the Bill of Rights may be set aside by a court. As illustrated by the *Hugo* case, this means that a court has the power even to set aside presidential acts of powers which seem to be highly discretionary and which historically derive from non-justiciable powers.
11. According to the Constitution, every exercise of public power must be lawful, as per the principle of legality. This principle holds that state functionaries, including the President and other members of the executive, may exercise no power and perform no function beyond that conferred upon them by law (*Fedsure*). Given that the Constitution is the supreme law in South Africa, it follows that whether or not Parliament can delegate a power to the President depends on whether the Constitution permits the delegation in question. If the delegation is not authorised

by the Constitution, then it is constitutionally invalid. In *Justice Alliance*, a case concerning the validity of a decision by the President to extend the term of office of the Chief Justice, the court held that the Constitution did not empower Parliament to delegate the power to extend the term of service of any member of the Constitutional Court. The court held that the words 'Act of Parliament' in section 176(1) of the Constitution meant that only Parliament — in terms of an Act — has the power to extend the term of a judge of the Constitutional Court (in this case, the Chief Justice). Broadly formulated, therefore, unless the delegation of a power to the President is constitutionally permissible in the first place, the President's subsequent exercise of that power will necessarily be invalid.

12. The judiciary is the one branch of government that is not democratically elected. Nonetheless, it still acts as a check on the elected branch of government. The judiciary is empowered to review exercises of executive power through judicial review. It may be argued that this power is inappropriate due to the fact that judges are not democratically elected and accordingly not accountable to the public. However, the Constitutional Court has confirmed that executive action can be reviewed on the basis of the principle of legality. This means it must be sourced in law (*Fedsure*) and rational (*Albutt*). The courts have been careful to protect the separation of powers doctrine by setting parameters for the review of executive action, and case law has warned against judges intruding into the merits of the executive's decisions.

The principle of legality seems to shield the courts from criticisms of lacking democratic legitimacy to some extent, because when adjudicating a matter on these grounds, a court is only interested in whether the relevant organ of state has acted in terms of the laws that were made by the democratically-elected branches of government. The court does not intrude into the law-making or policy-making functions of the other branches.

In essence, rationality requires that when public power is exercised, the means chosen for the exercise of the power must be rationally connected to the purpose for which the power was conferred. This is a low threshold test to ensure the judiciary's power of review is limited and does not infringe the separation of

powers by simply substituting their decisions for the executives'. *Albutt* stated that when undertaking a rationality enquiry, the court's purpose is not to determine whether there are other means that could have been used, but rather whether the means that were in fact chosen are rationally related to the objective. While courts will be hesitant to tell the other branches of government 'how to do their jobs' by prescribing a certain approach to decision-making, an inquiry into whether the means chosen were rationally connected to the state's objectives is far less invasive. *Democratic Alliance* stated that a rationality enquiry is not concerned with whether there are other means that could have been used, but whether the means selected are rationally related to the objective sought to be achieved. Both the process by which the decision is made and the decision itself must be rational.

A purely executive (as opposed to an administrative) action need not be reasonable, nor procedurally fair. Once rationality is established, an executive decision is likely to be constitutional. This deferent approach protects and gives effect to the doctrine of the separation of powers. If executive decisions were too easily set aside, it would give rise to the danger of judicial overreach.