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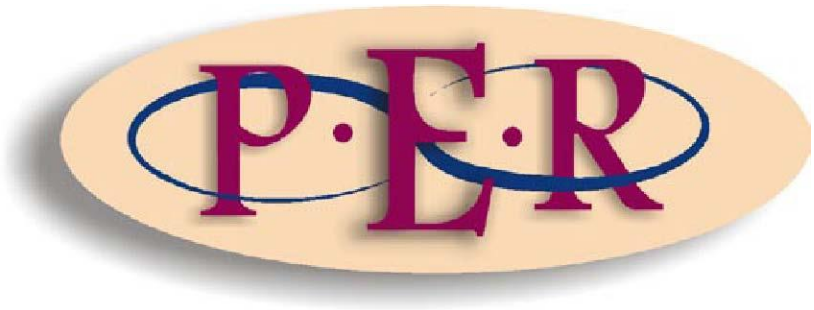
eISSN 1727-3781



2015 VOLUME 18 No 7

http://dx.doi.org/10.4314/pelj.v18i7.08

WHEN THE JUDICIARY FLOUTS SEPARATION OF POWERS: ATTENUATING THE CREDIBILITY OF THE NATIONAL PROSECUTING AUTHORITY

L Maqutu*

1 Introduction

Reported interference with the functions of the National Prosecuting Authority (hereafter the NPA) is an apt illustration of the breach of the limits of their authority by the implicated state organs. An analysis of selected court judgments which have called into question the adherence to the NPA's constitutionally mandated operational independence in the context of the surrounding political events exposes the fact that the doctrine of separation of powers is a fiction.

At first it appeared that violations of this principle had been perpetrated only by the executive. However, an unravelling spectacle of corruption charges against Jacob Zuma resulted in the court's descending into the political arena, beyond the scope of its jurisdiction. Beginning with the dismissal of the charges against Mr Zuma and the ensuing Nicholson judgment, the court took an arguably activist approach by allowing political considerations to taint the impartiality of its decisions on NPA performance.[1] The Natal Provincial Division weighed in on political discourse by declaring that there had been ongoing intrusion of the executive upon NPA operations.[2] Then in *Democratic Alliance v President of South Africa*[3] the expansion of the ambit of legality was effectively used to frustrate the appointment of what was deemed an unsuitable National Director of Public Prosecutions (hereafter the NDPP). More recently the decision of Murphy J in *Freedom Under Law v National Director of Public Prosecutions*[4] has seen the court declare indolent inaction on the

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1 Judicial activism is associated with a deliberate departure from legal precedent in order to fulfil the judge's concept of justice rather than merely acceding to political pressure - Schu 2014 *California Legal History* 427.

2 *Zuma v National Director of Public Prosecutions* 2009 1 All SA 54 (N).

3 *Democratic Alliance v President of the Republic of South Africa* 2013 1 SA 248 (CC).

4 *Freedom Under Law v National Director of Public Prosecutions* 2014 1 SACR 111 (GNP).

part of the NDPP and in effect take over some functions of the prosecution by ordering immediate prosecutions.

For the purposes of this article a few cases[5] have been selected to illustrate how political events may endanger judicial independence, on the one hand, and the authoritative sway court judgments can wield in the political arena, on the other hand. At the outset the article explores the extent to which political forces endeavoured to weaken the stature of the courts as the Zuma saga unfolded, through the use of sustained pejorative rhetoric and the mobilisation of civil society. It argues that notwithstanding the methods used by some political groups to undermine the separation of powers, it was a judicial decision that lent credence to the eventual outcome. In juxtaposition to this, other cases illustrate that lately the courts appear to be interfering with executive authority, treading on the boundaries of separation of powers.

While the judiciary is the ultimate arbiter on the constitutionality of conduct, this article reveals that the supremacy of the *Constitution* does not provide a cocoon within which the judiciary operates, unaffected by political events. The immense powers afforded the judiciary may be effectively exercised only while society retains respect for the integrity of the courts. A judiciary constantly depicted as a yet to be transformed remnant of the apartheid past is left vulnerable to attempts by the executive to fetter its powers. In response, attempting to rein in executive authority through law, the judiciary appears to have overstepped the boundaries of separation of powers. The crucial question is whether the inroads of the courts into the constitutional powers of other functionaries may validate the accusation that the judiciary is complicit in "a minority tyranny that is using state institutions to undermine democratic processes".[6]

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5 *S v Zuma* 2006 ZAKZHC 22 (20 September 2006); *Zuma v National Director of Public Prosecutions* 2009 1 All SA 54 (N); *Democratic Alliance v President of the Republic of South Africa* 2013 1 SA 248 (CC); *Freedom Under Law v National Director of Public Prosecutions* 2014 1 SACR 111 (GNP).

6 Mokone 2012 http://www.timeslive.co.za/thetimes/2012/06/07/ramatlhodi-flays-the-judiciary.

2 The doctrine of separation of powers and the need to maintain judicial legitimacy

The doctrine of separation of powers refers to the distinct functions given to the three organs of state concerning the exercise of governing power.[7] The legislature makes law, the judiciary interprets the law, and the executive must implement the law.[8] A complete separation of powers between the organs of state is unattainable, because the legislature enacts legislation in terms of which the courts must operate and the executive formulates policy on the implementation priorities, along with being tasked to enforce court judgments.[9] Also embedded in the doctrine is the principle of checks and balances which accommodates the "unavoidable intrusion of one branch on the terrain of another" in order to prevent misuses of power.[10] Langa CJ confirmed that:

> It is a necessary component of the doctrine of separation of powers that courts have a constitutional obligation to ensure that the exercise of power by other branches of government occurs within constitutional bounds. But even in these circumstances, courts must observe the limits of their powers.[11]

Judges are not elected democratically and, as Rosenberg observes, because the judiciary does not have to account to an electorate it enjoys some measure of insulation from the political process when fulfilling its constitutional mandate.[12] The notion of judicial independence thus aims to forestall overt government influence on the judiciary.[13] It means to ensure that the judiciary makes decisions in accordance with the rule of law and the requirements of justice.[14]

The judiciary relies on the other organs of state, which are accountable to the citizenry, for ensuring obedience to and enforcement of the law. The court is therefore inclined to take the politics surrounding an issue into consideration to

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7 "[T]he structure of the [constitutional] provisions entrusting and separating powers between the legislative, executive and judicial branches reflects the concept of separation of powers" - *Doctors for Life International v Speaker of the National Assembly* 2006 6 SA 416 (CC) para 37.

8 Ngang 2014 *AHRLJ* 659

9 Goldsworthy 2003 *Wake Forest L Rev* 453.

10 *Ex Parte: Chairperson of the National Assembly. In re: Certification of the Constitution of the Republic of South Africa* 1996 4 SA 744 (CC) para 109.

11 *Glenister v President of the Republic of South Africa* 2009 1 SA 287 (CC) para 33.

12 Rosenberg 1992 *Review of Politics* 369.

13 Rosenberg 1992 *Review of Politics* 370; Kaufman 1980 *Colum L Rev* 691.

14 Cross 2003 *Ohio St LJ* 195.

determine whether its ruling will be obeyed.[15] While "contemporary attitudes within society" evinced in political discourse may be relevant, the task of the court is to deliver unbiased adjudication.[16] Political considerations should be "at the periphery – not the core – of the judicial process".[17] Invariably the duty of the courts is to give effect to the rule of law in a manner consistent with constitutional prescripts.

Albie Sachs cautions against a judiciary that is remote from the society it serves and advocates "a judiciary that evolves to inhabit the world as it is".[18] At all times the court must be aware of the dominant opinions of the society over which it presides and balance this with its constitutional mandate.[19] What is expected is that decisions of court be "minimally affected" by the politics of the day.[20] When courts are drawn into the political arena, they should take cognisance of the opposing political interests and weigh them in the light of dominant public opinion in order to maintain relevance and legitimacy.[21] This should not unduly affect the impartiality of the adjudicative process.

In constitutional democracies, the interpretation of rights made by the courts prevails and is often given greater stature than that of the political community.[22] In the light of this, Justice Moseneke explained that "courts are bound by the democratic will of the people as expressed in legislative instruments that are constitutionally compliant".[23] Public opinion should not be a deciding factor in adjudication;[24] however, decisions that go against public opinion place the courts at

15 Tushnet 2003 *Wake Forest L Rev* 823-824.
16 *S v Makwanyane* 1995 3 SA 391 (CC) paras 87-88.
17 *Furman v State of Georgia* 408 US 238 (1972) 443.
18 Tolsi 2012 http://mg.co.za/article/2012-96-14-judicial-autonomy-frightens-the-JSC.
19 Moseneke 2009 http://lectures.nmmu.ac.za/getmedia/7eb1c53b-9e83-40a3-a6df-c9c065cdc090/Inagural-Griffiths-And-Victoria-Mxenge-Memorial-Lecture?disposition=attachment 23.
20 Rosenberg 1992 *Review of Politics* 371.
21 Davis and Le Roux *Precedents and Possibility* 188.
22 Neocosmos "Rethinking Politics" 66-67.
23 Moseneke 2009 http://lectures.nmmu.ac.za/getmedia/7eb1c53b-9e83-40a3-a6df-c9c065cdc090/Inagural-Griffiths-And-Victoria-Mxenge-Memorial-Lecture?disposition=attachment 19.
24 *S v Makwanyane* 1995 3 SA 391 (CC) para 88: "If public opinion were to be decisive, there would be no need for constitutional adjudication. The protection of rights could be left to Parliament.. The very reason for establishing the new legal order, and for vesting the power of judicial review of all legislation in our courts, was to protect their rights adequately through the democratic process."

risk of losing public support.[25] Mindful of this, in order not to diminish their authority courts endeavour to make decisions that are likely to be respected and implemented.[26] Judges venture to justify unpopular decisions in their judgments in order to persuade the public of the correctness and constitutionality of the stance taken.[27] The aim is to build up and fortify "institutional legitimacy"; support for the courts that is not easily shaken or demolished when the court makes unpopular decisions.[28] Nonetheless a number of strategies have been used by the political sphere to influence court judgments.

3 Threats to the independence of the judiciary

3.1 Proposed legal measures

The legal and political happenings surrounding the levelling of corruption charges against Jacob Zuma coincided with several measures proposed by the executive, in an effort to alter the demographically unrepresentative composition of the judiciary. As early as 2003, the executive and the judiciary were thrashing out appropriate measures for achieving a transformed judiciary, with the executive proposing measures that would effectively inhibit the independence of the courts and increase executive control.[29]

On the 8th of January 2005, then President Mbeki in an address remarked as follows:

> [W]e are confronted by the ... important challenge to transform the collective mind set of the judiciary to bring it into consonance with the vision and aspirations of the millions who engaged in the struggle to liberate our country from white minority domination. The reality can no longer be avoided that many within our judiciary cannot see themselves as being part of these masses, accountable to them ... [i]f this persists too long, it will inevitably result in popular antagonism towards the

25 Du Plessis 2002 *SAJHR* 9.

26 Roux "Assessing the Social Transformation Performance" 225.

27 According to Du Plessis "[t]he process of reasoning adopted by judges must be informed by the eventual goal of reaching a judgement that may command the allegiance, upon deeper reflection, even of those who find a result disagreeable ..." - Du Plessis 2002 *SAJHR* 34.

28 Roux "Assessing the Social Transformation Performance" 225.

29 Albertyn 2006 *SAJHR* 126; Rosenberg believes that the purpose behind such changes is usually to direct courts towards decisions that the dominant polity prefers - Rosenberg 1992 *Review of Politics* 378.

> judiciary and our courts, with serious negative consequences for the democratic system as a whole.[30]

Subsequently in April 2005 draft Bills[31] which included a proposed constitutional amendment were put forward. Essentially these proposed constitutional and legislative amendments would have:-

- placed the judiciary under the authority of the Minister of Justice with regard to the "administration and budget of all courts";
- allowed the minister almost unchecked power to make rules of court;
- required judges to undergo government-controlled judicial training; and
- allowed for the lodging of complaints against judges, where the complaints were not decided upon by their peers.[32]

The Bills were resisted by the legal fraternity on the basis that they would undermine judicial independence.[33]

Legislative measures aimed at enhancing executive control over judicial appointments and the overall administration of the courts effectively weaken the independence of courts. Comaroff and Comaroff coined the term "lawfare"[34] to describe such instances, where the primary mission of the introduction of legal measures is to cloak the misuse of power by embedding it in the legitimacy of the legal order.[35] Similarly, Davis and le Roux point out that constitutionalism has created a "juridification" of the political realm, where the executive uses the law to legitimise or "launder brute power".[36] It is against this looming backdrop of the threat of legal measures to curtail judicial independence that the NPA story of corruption charges against Jacob Zuma unfolded.

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30 ANC 2005 http://www.anc.org.za/show.php?id=55.

31 *Constitution Fourteenth Amendment Bill (Draft)* (GN 2023 in GG 28334 of 14 December 2005); *Superior Courts Bill* B52 of 2003 (Working Draft of 19 October 2005).

32 Section 165 *Constitution Fourteenth Amendment Bill (Draft)* (GN 2023 in GG 28334 of 14 December 2005); *Superior Courts Bill* B52 of 2003 (Working Draft of 19 October 2005); Nyalunga 2006 *INGOJ* 030-031; Jeffery *Chasing the Rainbow* 53.

33 Spilg 2006 *Advocate* 5-7.

34 Defined as "the resort to legal instruments, to violence inherent in law, to commit acts of political coercion, even erasure" - Comaroff and Comaroff 2007 *Social Anthropology* 144.

35 Comaroff and Comaroff 2007 *Social Anthropology* 145.

36 Davis and Le Roux *Precedents and Possibility* 189.

3.2 Political methods employed

The pending prosecution of Mr Zuma was politicised to such an extent that even the courts, where much of the fracas took place, were indicted as having a partisan interest when deciding the outcome. In this instance the court served as a theatre for political strife.[37] During the heated exchange of opinions, the integrity of the court could not remain unscathed - whatever decision it reached. When decisions were out of favour with the popular mind-set the reputation of the courts became even more precarious.

The politicisation of the Zuma tale in the public discourse commenced with the enigmatic statement of the NDPP in 2003, to the effect that while the prosecution had a *prima facie* case against Mr Zuma, it lacked sufficient evidence to prosecute him.[38] The implication was that Mr Zuma was guilty of criminal wrongdoing even though he was not going to be charged. Bekink speculates that the decision not to prosecute Mr Zuma with Mr Shaik may indicate that as early as 2003 there was already political interference at play.[39] Nicholson J commented as follows:

> Given that a decision was made to prosecute Mr. Shaik and his corporate entities, the decision not to prosecute [Mr. Zuma], when there was a *prima facie* case and bribery is a bilateral crime, was bizarre to say the least.[40]

In June 2005 when Mr Shaik was convicted of corruption, the court found that Mr Shaik and Mr Zuma had had an unbecoming "mutually beneficial symbiosis".[41] The subsequent dismissal of Mr Zuma as deputy president of South Africa ignited fervent protest from the ANC Youth League and COSATU, that Mr Zuma was being

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37 Davis and Le Roux *Precedents and Possibility* 191.

38 Suttner 2010 *Concerned African Scholars* 21. In the Nicholson judgement the press statement is quoted as follows: "After careful consideration in which we looked at all the evidence and facts dispassionately, we have concluded that, whilst there is a *prima facie* case of corruption against the Deputy President, our prospects of success are not strong enough. That means that we are not sure if we have a winnable case." - *Zuma v National Director of Public Prosecutions* 2009 1 All SA 54 (N) para 147.

39 Bekink 2009 http://blogs.up.ac.za/ipoj.php 2.

40 *Zuma v National Director of Public Prosecutions* 2009 1 All SA 54 (N) para 150. In contrast Harms DP in *National Director of Public Prosecutions v Zuma* 2009 2 SA 277 (SCA) para 43 stated: "… *prima facie* [may connote that there is] evidence of the commission of a crime which is nonetheless insufficient to satisfy the threshold of a reasonable prospect of success, [regard being had to] the burden of proof in a criminal case … while corruption involves two people [the fact that one is guilty is not evidence of the guilt of the other]".

41 *S v Shaik* 2007 1 SACR 142 (D) 190H.

subjected to a "trial by the media," a conviction by proxy through his association with Mr Shaik.[42] The judiciary was criticised by COSATU and the ANC Youth League respectively in the following manner:

> ... the trial of Shabir Shaik was nothing but a political trial of the Deputy President *in absentia*. The choice of a long retired judge who is a former Justice Minister of the then Rhodesia indicates the extent to which the country have not succeeded to transform its judicial system.
>
> ... we have come to the conclusion that the judge himself, by unduly pronouncing on the guiltiness of the Deputy President in his *absentia*, is in fact issuing a political verdict.[43]

The reference to Judge Squires' position as Minister of Justice in Rhodesia depicted the learned judge as a colonial relic whose judgment was premised on an exploitative and racist mentality; the implication being that lack of transformation had rendered the South African courts much the same.[44] Shortly after the Shaik conviction, Mr Zuma was in fact charged with a number of corruption-related charges. However, the relentless criticism which followed the Shaik conviction fuelled suspicions that Mr Zuma could not be afforded a fair trial before South Africa's judiciary in its current form. The next court ruling which significantly affected the political tide was issued by judge Msimang.

4 Political undertone in dismissal of charges fuels the narrative

In September 2006, following a request by the state for a postponement of the hearing of charges against Mr Zuma, the Natal Provincial Division (as it then was) per Msimang J struck the corruption case off the court roll. In doing so, Judge Msimang noted that the "struggle credentials" of Mr Zuma were "legendary and impeccable," ensuring that he was "respected and idolised" by a significant portion of the community.[45] This apparently reverent attitude towards Mr Zuma contradicts the notion that "litigants, irrespective of their status," are viewed as having equal

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42 Lodge 2009 *Representation* 129; Matshiqi 2007 http://www.csvr.org.za/archive/index.php/publications/1512-undamaged-reputations-implications-for-the-south-african-criminal-justice-system-of-the-allegations-against-and-prosecution-of-jacob-zuma.html 10.

43 COSATU 2005 http://www.cosatu.org.za/show.php?ID=1133; Bruce 2007 http://www.csvr.org.za/old/wits/articles/artdb31.htm.

44 Hammett 2010 *Political Geography* 92.

45 *S v Zuma* 2006 ZAKZHC 22 (20 September 2006) 5, 12.

status before the courts.[46] The court bemoaned the fact that the prejudice suffered by Mr Zuma caused by the negative publicity "engendered" by his prosecution resembled:

> ... the kind of punishment that ought only to be imposed on convicted persons and [the prejudice was] therefore inimical to the right to be presumed innocent enshrined in the Constitution.[47]

Judge Msimang declared that the premature and "ill-advised" charging of Mr Zuma, only twelve days after the conviction of Mr Shaik, was characterised by a situation in which "the state case limped from one disaster to another";[48] which the court resolved should not be visited on the accused. The justification of the court for its decision was viewed by Zuma supporters as confirmatory of the alleged persecution of Mr Zuma by the NPA at the behest of the Presidency.[49]

Following his election as ANC president at the 2007 Polokwane ANC conference, Mr Zuma was arraigned afresh on a range of charges including money laundering and fraud. Again disparaging remarks were levelled against the integrity of the judiciary.[50]

In July 2008 the Constitutional Court confirmed the validity of the search-and-seizure warrants executed against Mr Zuma, and ruled that the evidence collected was admissible.[51] In the wake of this decision, there was a concerted effort from supporters of Mr Zuma to discredit the NPA and the courts, which were referred to as "counter revolutionary".[52] The use of the term positioned the judiciary in the

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46 *S v Zuma* 2006 ZAKZHC 22 (20 September 2006): "[h]is standing in the community will not alter his position in the eyes of the law"; *National Director of Public Prosecutions v Freedom Under Law* 2014 4 SA 298 (SCA) para 19.

47 *S v Zuma* 2006 ZAKZHC 22 (20 September 2006) 20.

48 *S v Zuma* 2006 ZAKZHC 22 (20 September 2006) 22.

49 Following the dismissal COSATU General Secretary Zwelinzima Vavi said to a crowd of supporters there was "... a difference between rumouring and actual justice ... [f]or today justice has prevailed". - Mail & Guardian Staff Reporter 2006 http://mg.co.za/article/2006-09-20-zuma-case-struck-from-the-roll. The SACP stated "... we always have maintained that comrade Jacob Zuma has not been treated fairly by the national prosecuting authority". - Anon 2006 http://www.news24.com/SouthAfrica/Archives/ZumaFiles/Zuma-can-be-charged-again-20060920.

50 Le Roux 2008 http://mg.co.za/article/2008-01-12-zuma-backers-put-sa-judges-on-trial.

51 *Thint (Pty) Ltd v National Director of Public Prosecutions* 2008 12 BCLR 1197 (CC).

52 Anon 2008 http://www.bdlive.co.za/articles/2008/07/18/to-which-revolution-are-they-counter?service=print.

alleged conspiracy, taking instructions from those who are resisting inevitable change.[53] The June 2008 statement of then ANC Youth League President, Julius Malema, that he was prepared to "kill for Zuma", was followed by the COSATU general secretary announcing "for our revolution we are prepared to shoot to kill";[54] the cumulative threat of which was aimed at putting pressure on the judiciary and the prosecution to halt the Zuma corruption proceedings.

5 The Nicholson judgment: a political statement

Analysing and critiquing the decisions of the bench by lawyers and society in general is expected in a healthy democracy. Such debate ensures that the requisite standard of adjudication is maintained at a high level. Left unchecked and accompanied by threatening ultimatums, it places judicial authority in jeopardy. Raging criticism lowers the stature of the courts in the eyes of the public and may place the court in the untenable position of attempting to garner favour with the dominant political mindset in order to save itself from being rendered irrelevant. Rosenberg identified the following conditions which can give rise to just such judicial capitulation:

- following the political victory, endorsed by the electorate, of forces critical of previous court decisions or fearful of decisions to be made by the courts;[55]
- where there has been intense displeasure with court decisions;
- where the faction opposed to the court has enough power to bring into being measures that curb judicial independence.

In these situations the judiciary either avoids decisions in opposition or makes a strategic retreat in the face of extreme hostility.

It was just such a "climate of menace" which prevailed in the days leading to the Nicholson hearing.[56] An application was brought before Nicholson J wherein it was argued that the NPA decisions to prosecute Mr Zuma, taken in June 2005 and again

53 Southall "Zunami!" 21. The term "counter revolutionary" was used by former president Thabo Mbeki when describing accusations levelled against him; that he was behind a plot to stand in the way of Mr Zuma's political aspirations.

54 Mail & Guardian Staff Reporter 2008 http://mg.co.za/article/2008-06-17-we-are-prepared-to-die-for-zuma.

55 Rosenberg 1992 *Review of Politics* 378.

56 Jeffery *Chasing the Rainbow* 71; Davis and Le Roux *Precedents and Possibility* 192.

in December 2007, ought to be declared invalid.[57] In essence Mr Zuma (the applicant) contended that the decision to prosecute him was a review of the 2003 decision not to prosecute, and that prior to the decision being made Mr Zuma was entitled to make representations to the NPA in terms of section 179(5)(d) of the *Constitution*.[58] The state (as respondent) argued that the court was precluded from considering the matter because a decision to institute prosecution does not amount to administrative action under the *Promotion of Administrative Justice Act* (hereafter PAJA).[59] Section 1(ff) of PAJA states that an administrative action, a decision taken by an organ of state which adversely affects the rights of any person, does not include a decision to institute or to continue prosecution.[60]

In its judgment the court held that the review was based on the inadequacies of the process[61] and not the merits of the actual decision made;[62] that the jurisdictional facts[63] in section 179(5)(d) required consultations and representations from the accused to precede the decision. Therefore, since the procedure was flawed, the decision to prosecute was not made in terms of section 179(5)(d), thus making it reviewable under PAJA.[64] The court held that the NDPP was obliged to hear representations from the applicant prior to making the decision to prosecute.[65]

Judge Nicholson then turned to the argument (put forward by the applicant) that the NDPP had in 2003 made an invitation to the applicant, or in the alternative society at large, to make representations on the prosecution of the applicant; thus creating a legitimate expectation that representations would be heard prior to any decision

57 *Zuma v National Director of Public Prosecutions* 2009 1 All SA 54 (N) (hereafter *Zuma v NDPP*) para 18.
58 *Zuma v NDPP* paras 52-53.
59 *Zuma v NDPP* para 57.
60 Section 1(ff) *Promotion of Administrative Justice Act* 3 of 2000.
61 In that Zuma was not given the opportunity to make representations to the NPA before the decision was taken to launch a prosecution.
62 *Zuma v NDPP* para 63.
63 Criticism of this doctrine of jurisdictional facts used by the court is that it permits courts to increase their review powers at will - Klaaren and Roux 2010 *J Afr L* 147.
64 *Zuma v NDPP* para 64.
65 *Zuma v NDPP* para 126.

being made.[66] The press statement referred to as the invitation includes the following:

> We have never asked for nor sought mediation. We do not need mediation ... However, we have no objection to people making representations to us, be it in respect of prosecutions or investigations. In terms of section 22(4)(c) of the Act, we are bound to consider representations.[67]

The court held that this was a promise, "a solemn undertaking" to consider representations, which was never withdrawn.[68] Furthermore, according to Nicholson J the statement also amounted to an invitation which afforded the applicant a legitimate expectation to make representations which the NDPP told the applicant he (the NDPP) was duty bound to consider.[69]

Under the guise of evaluating the legitimacy of the expectation of the applicant to be heard by the NPA, the court embarked on an exploration of the background and context in which the decisions whether or not to prosecute the applicant were made.[70] In reality, the court recounted events which in its view were spearheaded by the executive branch of government and amounted to deliberate compromising of the independence of the NPA. Nicholson J departed from the issues placed before him for determination and proceeded to make judicial findings upon the politics surrounding the charging of Mr Zuma. In doing so, the learned judge made it clear which side of the "titanic political struggle between the applicant and the President"[71] was favoured by the court.

The court made a number of findings in order to buttress its conclusion of executive interference aimed at the political castration of Mr Zuma. Nicholson J pointed out that the decision to fire Mr Zuma from the deputy presidency of the country, following the conviction of Mr Shaik, was, though not illegal, unfair and unjust when one considered that Mr Zuma had not been given an opportunity to defend

66 *Zuma v NDPP* para 127.
67 *Zuma v NDPP* para 128
68 *Zuma v NDPP* para 131
69 *Zuma v NDPP* para 224.
70 *Zuma v NDPP* para 163.
71 *Zuma v NDPP* para 170.

himself.[72] The court remarked that the decision of then president Mbeki to stand as party leader for the ANC, when the *Constitution* barred him from seeking a third term as president of the country, did not accord with the "Westminster system we espouse."[73] The response of the Supreme Court of Appeal (SCA) to these findings per Harms DP highlights the fact that the "propriety and legitimacy" of the two decisions was not in issue before Nicholson J.[74] Furthermore, former president Mbeki had not been called upon to explain or justify them.

The press conference where the NDPP thanked the minister for his support led judge Nicholson to infer that there was political meddling in the decision of the NPA not to prosecute Mr Zuma.[75] The court was bold in its assertion that it was unlikely that the Minister of Justice acted without the knowledge of the President.[76] Beyond this, the court looked to the suspension of the NDPP, Mr Pikoli, on an unrelated matter, as cause for the "inescapable conclusion that" former president Mbeki routinely interfered in the decisions of the NPA.[77] Based on this, the court took the view that the next NDPP had to have been aware that disobedience of the former president would amount to professional suicide.[78]

Nicholson J found merit in the argument that the timing of the charging of Mr Zuma coincided with "critical moments in the political process", the latest indictment having followed a political defeat of former president Thabo Mbeki in Polokwane, a clear sign of pervasive political interference.[79] The court concluded that "all the machinations ... form part of some great political contest".[80]

By entangling findings of political manipulation with the charges brought against Mr Zuma, the learned judge all but obliterated the distinction between evidence of a political conspiracy and the cogency of the evidence of corruption. The fact that there may have been a conspiracy is not evidence of Mr Zuma's innocence; nor does

72 *Zuma v NDPP* para 158.
73 *Zuma v NDPP* para 173.
74 *National Prosecuting Authority v Zuma* 2009 2 SA 277 (SCA) para 18.
75 *Zuma v NDPP* paras 189, 190, 191.
76 *Zuma v NDPP* para 196.
77 *Zuma v NDPP* para 201.
78 *Zuma v NDPP* para 207.
79 *Zuma v NDPP* paras 209, 210.
80 *Zuma v NDPP* para 237.

the lack of a conspiracy prove his guilt.[81] After effectively employing "Stalingrad"[82] legal tactics to delay his prosecution, Mr Zuma had finally succeeded in obtaining judicial backing for the claim that his prosecution was a political persecution.

There is no measurable divide between law and politics such that a court judgment can be entirely devoid of political considerations.[83] Rather, there is a continuum along which decisions range, from complete disregard of political preferences to total subservience to them. That said, the Nicholson judgment was short on evidence and legal justification for its findings of political interference in the legal process, as described above. Klareen and Roux warn that this type of partisan activist judgment, a dramatic attempt to restore the sagging reputations of the court, in fact damages the reputation of political neutrality that is necessary for the courts.[84] Matshiqi echoes this sentiment, pointing out that caving in to political pressure could do "irreparable harm to the independence and integrity of our judicial system"[85] and sets a dangerous precedent; the message being that political demands backed by the threat of mass dissent in civil society holds sway with the courts.

5.1 Aftermath of the judgment

The Nicholson judgment set in motion the ousting of former president Mbeki as president of the country, and effectively positioned Mr Zuma as president in waiting. It gave a judicial stamp of approval, in other words legitimacy, to the ANC decision to recall Mr Mbeki, effectively ending any significant opposition to Mr Zuma's ascension to the presidency. Even with an appeal pending, it was patently obvious that the Nicholson judgment had ended any hope of prosecuting Mr Zuma prior to the April 2009 election. For this reason, it is arguable that this judgment marks a

81 Matshiqi 2007 http://www.csvr.org.za/archive/index.php/publications/1512-undamaged-reputations-implications-for-the-south-african-criminal-justice-system-of-the-allegations-against-and-prosecution-of-jacob-zuma.html 8.

82 The term was coined from the Russian defence of the German siege of the city during World War II and refers to a strategy of wearing down your opponent by tenaciously fighting anything presented by whatever means available; Southall "*Zunami!*" 4.

83 "[I]n practice ... the boundaries between these 'spheres of governance' are in reality contingent and permeable" - Stenning 2009 *Can J L & Soc'y* 340; Rosenberg 1992 *Review of Politics* 371.

84 Klaaren and Roux 2010 *J Afr L* 150.

85 Matshiqi 2007 http://www.csvr.org.za/archive/index.php/publications/1512-undamaged-reputations-implications-for-the-south-african-criminal-justice-system-of-the-allegations-against-and-prosecution-of-jacob-zuma.html 16.

judicial capitulation and laid the ground for the so-called political solution. The authoritative voice of the court had cast the NPA as a mere pawn in political machinations, powerless to execute its mandate with the requisite neutrality and fearlessness.

In January 2009 the SCA overturned the Nicholson judgment, casting it as unsound in law.[86] The SCA held that the findings of the High Court of political interference were unsupported by evidence, thus making them gratuitous. The ANC showed scant regard for the SCA judgment; despite the decision Mr Zuma was put forward as its presidential candidate in the impending 2009 elections. The "zunami" that followed the Nicholson judgment continued unabated. Coupled with this, increasing calls were made for a political solution[87] which would ensure that Mr Zuma did not stand trial.

Consequently, on 6 April 2009 the acting NDPP announced that he had obtained damning information that the former head of the Directorate of Special Operations and the former NDPP had conspired to pervert the prosecution process.[88] The NDPP was at pains to clarify that, on the merits, the integrity of the case against Mr Zuma was not compromised by the shenanigans he described.[89] Nonetheless he called a halt to the prosecution of Mr Zuma.

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86 *National Director of Public Prosecutions v Zuma* 2009 2 SA 277 (SCA) (hereafter *NDPP v Zuma*) - the high court was lambasted for "... failure to confine the judgment to the issues before the court ... failing to distinguish between allegation, fact and suspicion ... and transgressing the proper boundaries between judicial, executive and legislative functions" (para 15). The SCA held that s 179(5)(d) did not apply to the decision of the NDPP not to prosecute Mr Zuma, meaning that he was not entitled to make representations prior to being charged by the NPA. Consequently the charges against Mr Zuma were held not to be invalid; the prosecution was at liberty to press on with its case (para 70).

87 Zapiro 2008 http://www.zapiro.com/cartoon/122794-080907st#.VP6iEE0cTIU.

88 The misuse of the process was evidenced by recordings of telephonic conversations between the two protagonists. According to the statement issued, the reprehensible "conduct consists in the timing of the charging of [Mr Zuma]" - Mpshe 2009 http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71619?oid=124273&sn=Detail.

89 Mpshe 2009 http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71619?oid=124273&sn=Detail; on this issue the SCA had already found that: "[a] prosecution is not wrongful merely because it is brought for an improper purpose. It will only be wrongful if, in addition, reasonable and probable grounds for prosecuting are absent ... [this] can only be determined once criminal proceedings have been concluded ... the worst motive does not render an otherwise legal arrest illegal" - *NDPP v Zuma* para 37.

The manner in which the Jacob Zuma corruption saga unfolded is only one facet of a continuing struggle for supremacy between political forces and the rule of law under the constitutional dispensation. In this instance, under pressure, the judiciary traversed the limits of separation of powers in a manner that affected the trajectory of political events.[90] Clearly, judges are not entirely divorced from the practical realities of life in South Africa. Perhaps the more pragmatic view of the Nicholson judgment would be that it demonstrated that the marshalled forces of the masses in favour of a Zuma presidency in the run-up to national elections could not be ignored by dogmatic adherence to the legal process. The criminal justice system, somewhat blemished, had to yield in order that it could live to fight another day.[91] Indeed, in the aftermath the enacted legal amendments did not drastically curtail the powers and functions of the courts. Rather, the judiciary has been able to expand its powers of review, allowing it to intrude on the discretionary exercise of executive power on the appointment of the NDPP.

6 Judicial review of exercise of public power affecting the NPA

Judicial review of the exercise of discretionary executive functions stems from the notion that within a constitutional structure "there is no such thing as absolute untrammelled 'discretion'".[92] In terms of the rule of law, a discretion must be exercised in accordance with legal principles. While courts will ordinarily defer to expertise and the wide ranging factors considered by functionaries, discretion must be exercised "in a manner that is within a reasonable interpretation of the margin of manoeuvre contemplated by the legislature".[93] The principle of legality, a component of the rule of law,[94] has become a method of subjecting to judicial scrutiny the exercise of executive power which does not amount to administrative action in terms

90 The SCA held that the High Court transgressed the "... proper boundaries between judicial, executive and legislative functions" - *NDPP v Zuma* para 15.

91 Davis and Le Roux *Precedents and Possibility* 193.

92 *Roncarelli v Du Plessis* 1959 SCR 121, 16 DLR (2d) 689 para 4; Cartier 2010 *McGill LJ* 389; Sossin 2002 *Can Publ Adm* 468.

93 *Baker v Canada (Minister of Citizenship and Immigration)* 1999 2 SCR 817 para 53; "... the exercise of public power [has] ... to be carried out lawfully and consistently with the provisions of the Constitution in so far as they may be applicable to the exercise of such power" - *Pharmaceutical Manufacturers Association of South Africa: In re Ex parte President of South Africa* 2000 2 SA 674 (CC) para 79.

94 *Democratic Alliance v eThekwini Municipality* 2012 2 SA 151 (SCA) para 21.

of the law. In terms of this principle the exercise of public power must not be arbitrary or exhibit preferences that cannot be equated to a legitimate government purpose, for this does not accord with the constitutional framework within which it must operate.[95] Any decisions made must therefore be rationally connected to the purpose for which the power was given.[96]

In *Democratic Alliance v President of South Africa*,[97] the court considered the boundaries of judicial review of an executive decision within the framework of constitutional supremacy. In this matter the Democratic Alliance challenged the decision of the state president to appoint Menzi Simelane as NDPP, an executive act, as being irrational, based on the principle of legality which derives from the rule of law.

The Constitutional court set about determining the ambit of an enquiry into the rationality of the exercise of public power in terms of the principle of legality. The two-stage enquiry considers whether the power or conduct...

> (1)serves a legitimate government purpose – the "purpose requirement" and
> (2)in fact serves that purpose in a constitutionally permissible manner, adhering to the standard of rationality – the "effect requirement".[98]

Initially, in *Masetlha v President of the Republic of South Africa*, the court held that procedural fairness "which is a cardinal feature in reviewing administrative action" did not apply to the executive conduct of the president in dismissing the head of the National Intelligence Agency as it would unduly "constrain" the ability of the president to fulfil his executive duties.[99] Subsequently, the court decided in *Albutt v Centre for the Study of Violence and Reconciliation* that rationality required that the president afford victims a hearing prior to commencing a special pardon dispensation process. Courts were permitted to enquire into the methods used or substance of

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95 *Prinsloo v van der Linde* 1997 3 SA 1012 (CC) para 25.

96 *Pharmaceutical Manufacturers Association of South Africa: In re Ex parte President of South Africa* 2000 2 SA 674 (CC) paras 85, 90.

97 *Democratic Alliance v President of the Republic of South Africa* 2013 1 SA 248 (CC) (hereafter *DA v President RSA*).

98 Price 2010 *SALJ* 580-591.

99 *Masetlha v President of the Republic of South Africa* 2008 1 SA 566 (CC) para 77; *Premier Mpumalanga v Executive Committee, Association of State-Aided Schools, Eastern Transvaal* 1999 2 BCLR 151 (CC).

the decision-making process in order to establish whether they are in fact rationally related to goal.[100]

In *Democratic Alliance v President of the Republic of South* Africa the constitutional court again considered the scope of the rationality review of executive conduct. At stake was the rationality of the decision by the president to appoint Menzi Simelane as NDDP without first considering evidence of his duplicity. Yacoob ADCJ confirmed the earlier finding in *Albutt* that "both the process by which the decision is made and the decision itself must be rational".[101] The learned judge declared:

> Not only the decision employed to achieve the purpose, but also everything done in the process of taking that decision, constitute means towards the attainment of the purpose for which the power was conferred.[102]

The court held that the qualifications for suitability to hold the position of NDPP (laid out in section 9(1)(b) of the *National Prosecuting Authority Act* 32 of 1998), which include honesty and conscientiousness among others, were objectively ascertainable.[103] Therefore, a failure to take into account evidence relevant to the integrity of Mr Simelane amounted to irrationality, since the empowering provision required that the national director have integrity so as "to be entrusted with the responsibilities of the office concerned".[104] In effect, the reach of judicial review based on the principle of legality was expanded to include failure to take account of relevant factors; yet another example of aspects formerly confined to assessing administrative action in terms of PAJA being added to the rationality enquiry.[105]

Of concern is the statement of the court that the judicial review of executive conduct on the basis of rationality does not impinge on separation of powers.[106] Tampering with the decision of another branch, no matter how justified, infringes on operational

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100 *Albutt v Centre for the Study of Violence and Reconciliation* 2010 3 SA 293 (CC) para 50; Price 2010 *SALJ* 582; Murcott 2013 *SALJ* 265.

101 *DA v President* RSA para 34.

102 *DA v President RSA* para 36.

103 *DA v President RSA* paras 13-22, 62, 69, 76, 88.

104 *DA v President RSA* paras 52, 13.

105 *Johannesburg Stock Exchange v Witwatersrand Nigel Ltd* 1998 3 SA 132 (A) 152A-D; *DA v President RSA* para 39; Price 2013 *SALJ* 649; s 6(2)(e)(iii) *Promotion of Administrative Justice Act* 3 of 2000 (hereafter *PAJA*) reads "[a] court or tribunal has the power to judicially review an administrative action if the action was taken because irrelevant considerations were taken into account or relevant considerations were not considered".

106 *DA v President RSA* para 44.

autonomy. The rule of law on which the principle of legality rests has been identified by the court as foundational to our constitutional notion of the doctrine of separation of powers.[107] Section 41 of the *Constitution* dictates that all organs of state must ensure that in exercising their powers they do not invade the functions of other spheres.

Invalidating the conduct of the president in exercising his duties in terms of section 179(1)(a) of the *Constitution* is a patent encroachment of the judiciary on the functions of the head of the executive. The power to appoint a national director of public prosecutions has been conferred on the president alone. The rationale for allowing the judicial review of executive action was premised on narrow parameters where the exercise of power was deemed to be arbitrary and *mala fides*. It is within these boundaries that the court ought to justify making any inroads into the exercise of power conferred on the president. In this instance the court added to the legal requirements that satisfy legality in order to justify its findings.

PAJA bars the review among other things of certain executive actions by administrative law review. The common law power of review based on legality appears to be evolving in a manner that circumvents the prohibitions set by the legislature through expanding the scope of the rationality enquiry to include classic administrative law factors. Contrary to the prescripts of the rule of law, the court is expanding its mandate to include an oversight function on the discretionary exercise of public power in a manner which has been explicitly prohibited by PAJA. Neither the *Constitution* nor PAJA envisages the situation where the court may routinely veto an exercise of discretion by the designated functionary. The purpose was not to permit executive powers to be exercised with the concurrence of the judiciary nor should constitutional supremacy morph to judicial supremacy.[108] The law is structured to facilitate the judicial review of executive power only on the narrow parameters laid out by the principle of legality.

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107 *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 1 SA 374 (CC) para 56.

108 Singh 2011 *SAYIL* 298-307.

As seen in the earlier judgments discussed, the belief that judges are removed from the political process is incorrect and misleading. Judicial appointments themselves have overt political undertones.[109] The influence of the changing mores of the community can be seen in judicial decisions just as in other public institutions.[110] Before a final determination is made by the apex court a matter will ordinarily have been considered by lower courts allowing at times for a diversity of conflicting legal views. Unfortunately, it is not necessarily the case that the decision that holds sway and galvanises political change is correct, therefore a desire to educate society on the part of the judiciary ought not to be seen as entirely apposite.

While it is desirable that the arbitrary exercise of power be constrained through judicial review, a unilateral bestowal of power which has been specifically withheld by the legislature does not accord with our constitutional matrix. The legislature through PAJA places designated executive conduct outside the ambit of administrative law regulation. The adjudicative function of the courts must operate in terms of the enacted national legislation. In effect the current development of a system of review for legality by our courts has created a parallel legal process comprised in essence of evolving judge-made law. Whenever the court deems it necessary and requires justification to restrain the exercise of public power this law is expanded and increasing factors are being attributed to the rationality enquiry. The ever-present fear that the court may "stray too far into the legitimate constitutional spheres of the executive and legislative branches of government"[111] was actualised in the decision of *Freedom Under Law v National Director of Public Prosecutions* (hereafter *FUL v NDPP*).[112]

In *FUL v NDPP* the court was petitioned to review and set aside the decisions of the NPA and to direct the NPA to reinstate some withdrawn criminal charges. The Constitutional Court has stated that "the prosecuting authority is not part of the judiciary" and that in order to ensure sufficient independence national law was to be

109 Daniels "Counter-Majoritarian Difficulty" 6.
110 Daniels "Counter-Majoritarian Difficulty" 7.
111 Price 2013 *SALJ* 657.
112 *Freedom Under Law v National Director of Public Prosecutions* 2014 1 SACR 111 (GNP) (hereafter *FUL v NDPP*).

crafted in a manner that facilitated the exercise of its mandate "without fear, favour or prejudice".[113] Thus, the judiciary has not been assigned the task of determining whether or not to initiate or withdraw pending prosecutions. In practice the judicial review of prosecutorial discretion must therefore be "a highly exceptional remedy".[114] According to Lord Bingham

> [t]he reasons why the courts are very slow to interfere are well understood. They are, first, that the powers in question are entrusted to the officers identified, and to no one else. No other authority may exercise these powers or make the judgments on which such exercise must depend. Secondly, the courts have recognised ... "the polycentric character of official decision-making in such matters including policy and public interest considerations which are not susceptible of judicial review because it is within neither the constitutional function not the practical competence of the courts to assess their merits".[115]

The intervention of the court in prosecutorial functions is limited also in order to safeguard the independence of the NPA.[116]

The court in *FUL v NDPP* alluded to the fact that in terms of South African law a breach of the principle of legality, on which judicial review of prosecutorial discretion rests, may occur where there was an improper exercise (illegal and irrational), *mala fides* or decisions based on ulterior purposes.[117] The learned judge erroneously dissociated a decision to discontinue prosecution from a decision to prosecute,[118] and therefore held that PAJA was applicable to the case at hand. The learned judge then characterised calls for judicial deference to prosecutorial discretion as "misplaced".[119] The court ultimately concluded that the NDPP did not exercise her

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113 *Ex Parte: Chairperson of the National Assembly. In re: Certification of the Constitution of the Republic of South Africa* 1996 4 SA 744 (CC) paras 141, 146; s 179(4) *Constitution of the Republic of South Africa*, 1996.

114 *Sharma v Brown-Antoine* 2006 UKPC 57 para 14; *Marshall v Director of Public Prosecutions (Jamaica)* 2007 UKPC 4 para 17; *R (On the Application of Corner House Research) v Director of the Serious Fraud Office* 2008 UKHL 60 para 30.

115 *R (On the Application of Corner House Research) v Director of the Serious Fraud Office* 2008 UKHL 60 para 31; *FUL v NDPP* paras 122-123.

116 *National Director of Public Prosecutions v Freedom Under Law* 2014 4 SA 298 (SCA) (hereafter *NDPP v FUL*) para 25.

117 *FUL v NDPP* para 124.

118 *FUL v NDPP* para 132; on appeal the SCA held that "... decisions to prosecute and not to prosecute are of the same genus ..." therefore s 1(ff) of PAJA "incorporates" both - *NDPP v FUL* para 27.

119 *FUL v NDPP* para 138.

discretion and thus failed to react as a responsible public official in terms of the constitution.

In terms of section 179(5)(c) and (d) of the *Constitution* the NDPP may intervene in the prosecution process or review a decision not to prosecute. The high court concluded that the outcry "in the media and other quarters" should have prompted the NDPP to intervene.[120] Prescriptions from the court on when an appointed functionary ought to exercise a particular discretion to intervene impinge on the freedom granted by the law (to the designated functionary) to determine the appropriate response to particular circumstances. It is not desirable that an uproar from the media and certain sections of the community which have the ear of the court should require action from the national director. Inquiries into prosecutorial decision-making threaten to "chill law enforcement" by subjecting the prosecutor's motives to outside query.[121]

The high court reviewed and set aside decisions of prosecutors subordinate to the NDPP and went further, ordering the reinstatement of charges along with expeditious prosecutions.[122] That the court was unhappy with what it determined to be the NDPP's "supine" attitude was no licence to pre-judge that referral to the national director would be a foregone conclusion.[123] If indeed the circumstances of this particular matter were such that the NDPP ought to have applied her mind and provided the requested reasons for the failure to intervene, it was the duty of the court to direct that the NDPP apply her mind in the manner required. Once the discretion had been exercised by the NDPP, the court would then have the authority to determine whether or not the decision (on whether or not to intervene or review the prosecutorial decisions made) was rational in terms of the principle of legality. The power to determine whether or not to intervene rests in and may be properly exercised by the NDPP only.

120 *FUL v NDPP* para 196.
121 *Marshall v Director of Public Prosecutions (Jamaica)* 2007 UKPC 4 para 17.
122 *FUL v DPP* para 241.
123 *FUL v DPP* paras 196, 237.

The court traversed the boundaries of separation of powers by usurping the powers of the prosecution. The adjudicative function of the court is restricted to determining whether a public power is exercised in terms of the rule of law. Once this has been pronounced upon, the court is not at liberty to cloak itself with that power and determine how the discretion of another functionary should be exercised and then order that office to act in the manner desired by the court. On appeal the SCA affirmed that the doctrine of separation of powers had been violated by the court *a quo*.[124] However the SCA remained uncomplimentary of the inaction of the NDPP in the face of wide-spread media coverage of the dispute relating to the withdrawal of charges, prior to the *FUL* application.[125] Thus the characterisation of the NDPP of irresponsibly abdicating her constitutional responsibilities remains.

7 Conclusion

The aim of this article was to consider some instances where the judiciary may have crossed the boundaries of separation of powers. At the outset it was clear that NPA credibility has been compromised by interference with its independent exercise of power. Rather than considering the role of political forces, the focus was on the interference of the judiciary. Specific court judgments relating to NPA operations and conduct were analysed to determine whether or not the judiciary had acted improperly.

High-profile corruption charges levelled against Jacob Zuma were used to demonstrate the political minefield the court has to navigate at times in order to sustain or repair its integrity. The events and cases examined show that there is no finite divide between law and politics. The methods employed in order to persuade courts to align judicial decisions with the dominant political sentiments placed the legal process and the rule of law in peril. Ultimately, the court departed from its mandate, audaciously crossing into the political arena, and defused the threat. In so doing, the court made a finding of habitual meddling in the functioning of the NPA, thus further blighting the repute of the NPA. While the decision was overturned on appeal its effect on subsequent developments was not. The SCA declaration that the

124 *NDPP v FUL* para 51.
125 *NDPP v FUL* para 37.

alleged executive interference with the NPA was not an issue before the court *a quo* did not restore NPA credibility.

The court then considered if the executive power to appoint the NDPP had been properly exercised by President Zuma. In order to facilitate a review of the decision in terms of the principle of legality, the court opted to extend the ambit of the rationality enquiry to include failure to take account of relevant factors. By doing this the court extended its powers of review in a manner that was withheld by the legislature. Essentially the court violated separation of powers by operating outside of the parameters set by the law (in terms of PAJA). Furthermore, regardless of whether or not it was justified, judicial interference with the appointment of a NDPP contributed to the disgrace of the NPA.

Finally, in *FUL v NDPP* the court declared that the outcry from certain quarters should have prompted the NDPP to exercise a discretionary review power and therefore concluded that the NDPP had failed to conduct her duties in a responsible manner. The prosecution and the judiciary have separate spheres of operation which have been enunciated in the *Constitution*. It is not desirable that the court direct the NDPP on which circumstances should elicit a response from the NDPP. As discussed above, the decisions of prosecution often require a systemic view of interrelated variables. Having proclaimed the NDPP irresponsible and essentially spineless, the court seized the power of the NDPP and exercised it itself. While the SCA overturned the mandatory interdicts (to reinstate withdrawn charges) it repeated criticism of the inaction of the NDPP in the face of negative publicity. Because of the statements in these judgments the already tarnished image of the NPA deteriorated even further.

This article has revealed that courts are not immune from politics and at times judges have to make decisions which affect political processes in a significant way. The cases discussed demonstrate that when confronted with such issues courts have not been reluctant to extend the boundaries of their authority in order to dispense justice. Principled as this stance may be, it does not always accord with the prescripts of the doctrine of separation of powers under our constitutional legal framework. Therefore, while attempting to restrain unjustifiable exercises of

executive power, the judiciary has unwittingly contributed to the damage brought about.

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LIST OF ABBREVIATIONS

AHRLJ	African Human Rights Law Journal
ANC	African National Congress
Can J L & Soc'y	Canadian Journal of Law and Society
Can Public Adm	Canadian Public Administration
Colum L Rev	Columbia Law Review
COSATU	Congress of South African Trade Unions
INGOJ	International NGO Journal
J Afr L	Journal of African Law
McGill LJ	McGill Law Journal
NDPP	National Director of Public Prosecutions
NPA	National Prosecuting Authority
Ohio St LJ	Ohio State Law Journal
PAJA	Promotion of Administrative Justice Act 3 of 2000
SACP	South African Communist Party
SAJHR	South African Journal on Human Rights
SALJ	South African Law Journal
SAYIL	South African Yearbook of International Law
Wake Forest L Rev	Wake Forest Law Review

WHEN THE JUDICIARY FLOUTS SEPARATION OF POWERS: ATTENUATING THE CREDIBILITY OF THE NATIONAL PROSECUTING AUTHORITY

L Maqutu*

SUMMARY

The stature of the National Prosecuting Authority (NPA) has been subverted through highly publicised political interference by the executive. Beginning with the marathon legal entanglements of the current South African president the decisions of sitting National Directors of Public Prosecutions (NDPP) on high-profile criminal matters, particularly those involving prominent members of the political leadership, have been marred with controversy. Undoubtedly unwarranted intrusion into the prosecutorial domain, at the behest of key political protagonists, has blighted the repute of the NPA. The judiciary too has played a pivotal, if lesser role, in eroding the sagging reputation of the NPA.

This article charts the narrative of judicial influence on the diminishing credibility of the NPA, using selected cases from the recent past. It shows that key political events such as the Zuma corruption saga have placed the judiciary together with political forces at centre stage where the focus is their culpability for exceeding their lawful mandate. Finding itself vulnerable as a result of its being the target of rhetoric casting doubt on its integrity and threatening its independence, the judiciary (through a crucial judgment) entered the political fray and positioned itself behind what it judged to be the pervasive political sentiment of the day. The article examines whether, subsequently, in an effort to curb undue political influence of the executive on the NPA, the Constitutional Court in *Democratic Alliance v President of South Africa* interpreted and extended judicial authority in a manner that violated the doctrine of separation of powers. Furthermore, the article argues that in *Freedom Under Law v National Director of Public Prosecutions* the court again misconstrued its powers by unduly interfering with the discretionary decision-making powers of the NDPP. These cases illustrate that, once they have been issued, the far

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reaching consequences of judicial decisions may not be erased by corrections during the appellate process. Far from being an impartial adjudicator, the judiciary has played a significant role in attenuating the stature of the NPA.

KEYWORDS: National Prosecuting Authority reputation; judicial review of executive conduct; review for legality; separation of powers.