The “deference” of judicial authority to the state

by

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Abstract

The Constitutional Court has developed a “broad-based approach” which requires the Constitution to be interpreted in a manner that gives effect to the values and principles of constitutional interpretation. The basic approach established by the Court in deciding whether a constitutional right has been infringed is that the applicant has to prove whether or not a right has been violated. If the answer is in the affirmative, the burden shifts to the state to justify the “reasonableness” of the alleged unfair conduct. The development of the jurisprudence on constitutional interpretation requires an understanding of the context of the socio-political and historical imbalances that continue to undermine South Africa’s democracy.

The “broad-based approach” in the development of the jurisprudence dealing with the limitation of constitutional rights as envisaged in the Bill of Rights is of the utmost importance in striking an appropriate balance in developing the law through judicial interpretation. This approach, which also entails a “strict constitutional scrutiny”, appears to be limited by the “deference” of the judicial power to the legislature. The “deference approach” does not seem to be establishing, with sufficient certainty, whether the alleged conduct or act by the state is invalid or not, since the norms and standards of constitutional interpretation are influenced by the development of the “political questions doctrine”.

The purpose of this article is to provide a brief overview of the “political doctrine” system as developed by the jurisprudence from the Constitutional Court with particular emphasis on Merafong. It will be argued in this article, that the relaxation of the principles and values of constitutional scrutiny to “political appointees” has ushered in a new process in constitutional interpretation that subordinates the judiciary to the legislative and executive branches of government. The objective is to analyse this doctrine and evaluate it against the development of substantive principles of judicial review.

1 Introduction

The adoption of the Constitution of the Republic of South Africa, 1996 provides an opportune moment for the courts, especially the Constitutional Court, to ensure an appropriate balance in the development of the principles and values of the doctrine of

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1 Hereinafter referred to as the “Constitution” which, in its preamble, is committed to healing the divisions of the past by establishing a society based on democratic values, social justice and fundamental rights.
separation of powers vis-à-vis those of judicial review. The Constitution is framed in a manner that entrenches a system of checks and balances. This system gives the general public a legislative and executive authority that is accountable to them subject to judicial review by an independent judiciary. The system of checks and balances affirms the limited power of the legislative and executive authorities, including the judiciary, which is confined within the constraints of constitutional values and principles.

Furthermore, it is worth noting that it was not until the new constitutional dispensation that the judiciary had the opportunity to recover the judicial teeth it had lost under the supremacy of Parliament during the apartheid era. The impact of Parliamentary supremacy on the functioning of the judiciary is further highlighted by Chaskalson CJ, in *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa and Others* as follows:

> “the exercise of public power was regulated by the courts through the judicial review of legislative and executive action. This was done by applying constitutional principles of common law, including the supremacy of Parliament and the rule of law. The latter had a substantive as well as a procedural content that gave rise to what the courts referred to as fundamental rights, but because of the countervailing constitutional principle of the supremacy of Parliament, the fundamental rights could be, and frequently were, eroded or excluded by legislation”.

The affirmation of the values and principles of judicial authority, therefore, in the limitation of government power in this new constitutional dispensation is advanced by the evolving jurisprudence from the Constitutional Court. This jurisprudence has shown and provided a sound framework in dealing with the historic, socio-political and cultural legacy that

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4 See *Fedsure Life Assurance Ltd and others v Greater Johannesburg Transitional Metropolitan Council and others* 1998 (12) BCLR 1458, as Chaskalson P at para 58, held that it seems central to the conception of the new constitutional order that the legislature and the executive in every sphere are constrained by the principle that they may not exercise the power and perform a function beyond what is conferred by law upon them.

5 See ‘History of the court’ accessed at *ww.concourt.gov.za*, on 18 June 2009, where it is highlighted that even the functioning of the judiciary was tainted by its legitimacy and limited capacity which was dominated by white judges in drawing a sense of justice of all communities and both sexes.

6 2000 (3) BCLR 241.

7 Ibid, at para 37.
subordinated judicial authority to Parliamentary supremacy. Gutto acknowledges the role and the strides taken by the Court in upholding the values and principles entrenched in the South African Constitution when he contends that:

“the historic and revolutionary role that played in South Africa’s political and legal history necessitated the establishment of the Court. The dawn of democracy presented an opportunity for the Court to restore some legitimacy and confidence through its functioning within the judiciary. This has further enhanced the development of sound foundations for constitutional and human rights jurisprudence since its establishment in 1994”.

The Court has since the new dawn of democracy heralded the development of the general tone of jurisprudence that is geared towards the advancement of the “broad-based approach” in constitutional interpretation. This approach focuses on the socio-historical imbalances that South Africa inherited from its past. The historical approach to constitutional analysis seeks to ensure that the democratic and founding values and principles, as entrenched in the Constitution, set the desired requirements for the interpretation, application and operationalisation of the Constitution and everything that depended on the Constitution.

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8 The historic legacy that South Africa inherited from its past is acknowledged in the preamble of the Promotion of Equality and Prevention of Unfair Discrimination Act No 4 of 2000, hereinafter referred to as the “Equality Act” as it affirms that: “the consolidation of democracy in our country requires the eradication of social and economic inequalities, especially those that are systemic in nature, which were generated in our history by colonialism, apartheid and patriarchy, and which brought pain and suffering to the great majority of our people”.


10 ibid.

11 Term extracted from Moseneke DCJ in Minister of Finance v Van Heerden 2004 (11) BCLR 1125 (CC) at para 20.


13 See Nomthandazo Ntliama, ‘Masiya: gender equality and the role of the common law’ (2009) Volume 3 No 1, Malawi Law Journal 117-132 at 127 as she argues that the “historial approach” has the potential to entrench the victimhood approach in the promotion of the foundational and fundamental values entrenched in the Constitution.

14 See section 1 of the Constitution, which provides that: ‘the Republic of South Africa is one sovereign, democratic state founded on the following values:
(a) human dignity, the achievement of equality and the advancement of human rights and freedoms;
(b) non-racialism and non-sexism;
(c) supremacy of the Constitution and the rule of law
(d) universal adult suffrage, a national common voter’s roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.

15 See Francois Venter, ‘Utilizing constitutional values in constitutional comparison’ (2000) Juta Publishers at 7. He argues that history plays an important role in the study of any constitutional system, since it enhances one’s insight into the current state of the law.
Therefore, the purpose of this article is to provide a brief overview of the “political doctrine” system as developed by the jurisprudence from the Constitutional Court with an emphasis on *Merafong Demarcation Forum and others v President of the Republic of South Africa*\(^\text{16}\) judgment. The objective is to analyse this doctrine and evaluate it against the development of substantive principles of judicial review. It appears that the Court is slowly developing a “political doctrine” system in constitutional adjudication which defers its authority to the state at the expense of affirming the principles of judicial review. It will be argued in this article that the “deference” of judicial authority to the state fails to give effect to the Constitution and, furthermore, runs contrary to, both the principles of judicial review and those of the doctrine of separation of powers itself. It further compromises the determination of the principles of judicial review with sufficient certainty whether the alleged conduct of the state runs contrary to the spirit and purport of the Constitution.

In this undertaking, the article is limited to the “political approach” which the Court adopted without much thought, and attempt to address the question of public involvement in legislative processes raised in this case. Furthermore, it acknowledges that the Court has affirmed its independence as the guardian of the Constitution in the protection of human rights and the advancement of the principles of constitutionalism\(^\text{17}\), but its lack of consistency in its adopted approach is a worrying factor and a cause for concern.

2  *Merafong*: constitutional interpretation at the crossroads?

2.1  Background facts

The bone of contention in *Merafong* was the challenge to the validity of a constitutional amendment in terms of the Constitution Twelfth Amendment Act of 2005, as well as the Cross-Boundary Municipalities Laws and Repeal Related Matters Act\(^\text{18}\), which changed provincial boundaries – including the boundary between Gauteng and North West Provinces. One part of the Merafong Local Municipality (Merafong) was thus relocated from Gauteng to North West. The essence of the claim was based on the legitimacy of the decision taken by the Gauteng Provincial Legislature to relocate Merafong to North West. The applicants argued and required the Constitutional Court to declare that:

\(^{16}\) 2008 (10) BCLR 968.


\(^{18}\) No 23 of 2005.
• the Gauteng Provincial Legislature failed to comply with its constitutional obligation to facilitate public involvement in terms of section 118 of the Constitution\(^{19}\), in its processes leading up to the approval of the Twelfth Amendment Bill by the National Council of Provinces (NCOP); 
• alternatively, the legislature failed to exercise its legislative powers rationally when it voted in support of the relevant parts of the Twelfth Amendment Bill in the NCOP.\(^{20}\)

In determining the significance of access to public involvement in legislative processes, the Court had to determine whether the legislature had acted reasonably by not informing or holding further hearings when it established that it could not influence the National Council of Provinces in voting against the Twelfth Amendment. Without providing a background to the review, by the Court, of the manner in which the provincial legislature facilitated the hearings for public involvement in its processes and how the Court framed this process within the constitutional and legislative framework, the Court held that it is “not a sight for a political struggle” and reasoned that:

• the public meeting was not a cynical charade, but held in good faith, hence the mandate was to negotiate, which necessarily implied the possibility of change rather than to take a final position on how to vote\(^{21}\), (author’s emphasis).
• being involved does not mean that one’s views must necessarily prevail and there is no authority that the views expressed by the public are binding on the legislature if they are in direct conflict with the policies of the government;\(^{22}\)
• government certainly can be expected to be responsive to the needs and wishes of minorities or interest groups, but our system of government would not be able to function if the legislature were bound by these views;\(^{23}\)

\(^{19}\) This section requires the provincial legislature to:

\(^{20}\) Merafong, at paras 1 and 41.

\(^{21}\) Merafong, at para 49.

\(^{22}\) Ibid, at para 50.

\(^{23}\) Ibid.
the failure to report back to the Merafong community does not arise to the level of unreasonableness, which would result in the invalidity of the Twelfth Amendment which was properly passed by Parliament;24 and
• in this case, possible discourteous conduct does not equal unconstitutional conduct, which has to result in the invalidity of the legislation. Politicians, who are perceived to disrespect their voters or fail to fulfil promises without explanation, should be held accountable. A democratic system provides possibilities for this, one of which is regular elections25, (author’s emphasis).

In essence, the Court established that the provincial legislature acted reasonable and was therefore, not qualified to deal with issues that had to be resolved “politically”. The relegation of judicial authority to the state, as evidenced by the reasoning of the Court in this case, raises questions on the significance of judicial review in the application of the law without fear or favour.

3 Judicial independence in constitutional interpretation

“The rule of law is at the very heart of our Constitution. It should permeate the way in which we are governed. It requires that those who exercise power over us should be conditioned by law and not to act in an arbitrary or unlawful manner. It should enable us to obtain the protection of the law when this is appropriate. Its proper operation depends upon maintaining a delicate balance between Parliament, the government and the judiciary”.26

It has been noted above, that the dawn of democracy has provided a unique opportunity for the judiciary to determine issues of national interests, such as the upholding of the rule of law, interpretation of the Bill of Rights, etc, in order to give effect to constitutional values and principles. Since the dawn of democracy, the judiciary, especially the Constitutional Court, has had to deal deeply with the major political issues facing South Africa’s new constitutional dispensation. The Court sits at the apex of the judicial review of political decisions, which is intertwined with its power and status of being the Court of last resort. Its decisions on constitutional issues are effectively binding the other branches of government and, indeed,

24 Ibid, at para 56.
the entire nation. The unique position and opportunity presented by the dawn of democracy for the judiciary is entrenched in section 165 of the Constitution, which provides that:

(1) the judicial authority of the Republic is vested in the courts;
(2) the courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice;
(3) no person or organ of state may interfere with the functioning of the courts;
(4) organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence;
(5) an order or decision issued by a court binds all persons to whom and organs of state to which it applies.

This provision affirms the significance of judicial independence and review of state or non-state actions which, in turn, entail the inquiry into the legality of the alleged unfair conduct by the state or private bodies. The significance of judicial independence was affirmed by Chaskalson CJ in *Pharmaceuticals* that it “is an incident of the separation of powers under which the courts regulate and control the exercise of public power by the other branches of government”.27

The Court is further empowered to deal with the most critical areas in the enforcement of the foundational values and principles as envisaged in the Constitution. It is empowered to exercise its exclusive jurisdiction in a number of crucial political areas as entrenched in section 167(4), which include the power to decide:

- disputes between organs of state in the national and provincial sphere28;
- on the constitutionality of any parliamentary or provincial Bill29, and
- on the constitutionality of any amendment to the Constitution….,30

The essence of this provision was given effect by Chaskalson CJ, in *President of the Republic of South Africa v SARFU*31, as he held that

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27 See *Pharmaceutical Manufacturers* (note 6) above at para 45.
28 Section 167(4)(a) and see also *Premier: Western Cape v President of the Republic of South Africa* 1999 (4) BCLR 383 (CC).
29 Section 167(4)(b) and see also *Certification of the KwaZulu-Natal Constitution* 1996 (11) BCLR 1419.
30 Section 167(4)(d) and see also *Certification of the Amended Text of the Constitution of the Republic of South Africa* 1997 (1) BCLR 1.
31 1999 (7) BCLR 725 (CC).
“the entrenchment of the supremacy of the Constitution in this new constitutional order, which was not provided for in the old dispensation, has given the Court the responsibility of being an ultimate guardian of the Constitution and its values”.32

The essence of judicial authority and its independence is similarly expressed by David Law33, who argues that the judiciary performs:

- the functions that are crucial to the maintenance of popular sovereignty; and
- the monitoring, signalling and coordination functions that facilitate the exercise of popular control over the government.34

He substantiates his argument by holding that the relationship between judicial power and popular rule is not antagonistic but symbiotic and, by conveying the relevant information about government misconduct in a very public way, enables the people to control their government in an informed and coordinated manner.35 The development of an informed citizenry depends on the judiciary being placed in a better position and having access to valuable information in its adjudicative role. The unique position of the judiciary means that it has to deal with tensions between the commitment to democratic procedures and its judicial authority which includes the authority to overrule the decisions made by the elected legislature.36

The principles of judicial independence are intertwined with the principles of separation of powers as they signify the deep-rooted values that affirm:

- the supremacy of the Constitution as a sound framework for the regulation of state authority amongst the three branches of government;
- the judiciary as having an upper echelon in the interpretation, application and the enforcement of constitutional provisions in order to give effect to the basic principles of the constitutional democracy; and
- the entrenchment of judicial authority, which is advanced through its reasoned judgements, is binding on the state and all other related state organs.

34 Ibid at 730.
35 Ibid.
36 See also Kui Shen, ‘Democratisation of judicial interpretation and the Supreme Court’s political function’ (2008) Volume 29 No 4, Social Science in China, at 33-47.
The unique character of the principles of judicial independence in ensuring the effective functioning and exercise of public power is endorsed by Marmor as:

- the entrenchment of the rights in the Constitution which requires protection from the vagaries of momentary political pressures and short-sighted political temptations; and
- the judicial authority that ensures, as far as possible, the protection of those rights and principles which are, in fact, widely shared by the community.37

Furthermore, Gibson et al38 affirm the significance of judicial authority as they refer to the Court as the “veto player”. They contend that the judiciary is designed to protect the democracy from the excesses of executive power, majority tyranny, corruption and a myriad of social and political ills. They further argue that the courts in all young democracies, as is the case in South Africa, have started “out of the gate” with effective decisions of enormous political consequence.39 Whilst the courts do not have the purse or the sword to enforce their orders as they depend on the other branches to enforce their decisions, they have the potential to effectively make their decisions stick, even if these decisions go against popular opinion.40

The Court has since established the significance of judicial review, given that, in *Pharmaceutical Manufacturers*, it held that:

“the control of public power by the courts through judicial review is and always has been a constitutional matter. Prior to the adoption of the interim Constitution this control was exercised by the courts through the application of common law constitutional principles. Since the adoption of the interim Constitution such control has been regulated by the Constitution which contains express provisions dealing with these matters. The common law principles that previously provided the grounds for judicial review of public power have been subsumed under the Constitution, and in so far as they might continue to be relevant to judicial review, they gain their force

from the Constitution. In the judicial review of public power, the two are intertwined and do not constitute separate concepts”.41

But the guarantee of judicial independence leaves open the question of how this review and or independence should be exercised in the light of the lack of consistence by the Court in order to give effect to the Constitution. This question is quite complex, given that it touches on the approach the Court has to adopt in the interpretation of the Constitution. It has been emphasised above that the judiciary has demonstrated its adherence to the interpretation of the Constitution which is “generous and purposive” in giving effect to the underlying constitutional values42, but the question which arises is: how has this approach fared in Merafong?

4 Vote them out of office43: judicial authority red-carded44 to the legislature

Although the Court was highly divided on this matter, the majority view, which stressed that the Court is not a site for a political struggle, is a cause for serious concern. This view raises the question of what would qualify as a judicial question that would need to be resolved through judicial enforcement. It also raises an uncertainty on the essence of judicial review and has the potential to bring to the fore the argument that judges are not elected and therefore, cannot invalidate the laws passed by the elected representatives in Parliament.45

The counter-majoritarian argument is informed by the fact that general members of the public, including the legislature, do not have control over the courts, which are protected by the Constitution. In addition, the courts are empowered to promote the constitutional values and principles, not the moral or public views of the general public.46 Furthermore, it raises the question of whether our new democracy has lost its innocence, as Moseneke DCJ contends and attributes this loss to the intemperate excitement of the youth.47

41 Pharmaceuticals at para 33.
43 See Merafong (note 24) above.
46 See Sachs J in Minister of Home Affairs v Fourie 2006 (3) BCLR 355 (CC), as he held that the Court would be out of order to employ the religious sentiments of some as a guide to the constitutional rights of others, at para 92.
These questions impact on the ability of the Court in translating the political questions into substantive judicial questions. The Court simply cannot simply shun away from decision-making on hard and controversial questions. The Merafong judgement is one of the worst decisions that the Court has ever delivered. It has deeply wounded its status and authority by abdicating its judicial responsibility to the state. The truth of this contention is supported by the brazen wave of violence that continued to plague the Merafong community, which resulted in the petrol bombings of houses owned by municipal councillors. Even though this was a once-off incident in South Africa, it set the country’s tongues wagging, since as the Merafong community threatened to make their area ungovernable and also threatened not to vote in the 2009 elections, which were to be held on 22 April. The violence and the lack of respect for the Court’s decision undermines an argument made above with reference to Stoutenborough, namely, that court orders will be given effect even if they are against popular opinion. In fact, the “deferring” of judicial authority to the legislature does not even qualify as the decision of the Court as it refrained to deal with the substance of the alleged claim by the Merafong community.

The Court’s reasoning in Merafong differs greatly in tone and content from its previous approach in dealing with the right of public access to legislative involvement in Doctor’s for Life v Speaker of the National Assembly. The Court in the latter case dealt with the scope and content of the right in question in a more meaningful way, when it established that public participation:

- encourages citizens of the country to be actively involved in public affairs, identify themselves with the institutions of government and become familiar with the laws as they are made;
- enhances the civic dignity of those who participate by enabling their voices to be heard and taken account of;
- promotes a spirit of democratic and pluralistic accommodation calculated to produce laws that are likely to be widely accepted and effective in practice. It strengthens the legitimacy of legislation in the eyes of the people;
- because of its open and public character it acts as a counterweight to secret lobbying and influence peddling; and therefore

48 See the report by Mandy Rossouw entitled: ‘The ANC wants our votes, say Khutsong residents’ Mail & Guardian Newspaper dated 23 February 2009.
49 See Stoutenborough, (note 39) above.
50 2006 (12) BCLR 1399 (CC).
• participatory democracy is of special importance to those who are relatively
disempowered in a country like ours, where great disparities of wealth and influence
exist.51

These factors contribute to the meaningful participation in democratic processes as the
Court in Merafong developed an “arms-length approach”52 and relegated the essence of
judicial review in resolving this matter to political appointees. These factors limit the pre-
empting and imagination of the public views as the Court in this case held that it was unlikely
that the majority could have been sufficiently impressed by the explanation to change their
strongly held views not to be relocated to North West.53 They further affirm that the
“deference” of judicial authority to the state undermines the content of the right to
participation in legislative processes as argued by Ngcobo J in Doctors for Life that it:

“does not require less of a government than provision for meaningful exercise of
choice in some form of electoral process and public participation in the law-making
process by permitting public debate and dialogue with elected representatives. In
addition, this right is supported by the right to freedom of expression, which includes
the freedom to seek, receive and impart information. In our country, the right to
political participation is given effect not only through the political rights guaranteed in
section 19 of the Bill of Rights, as supported by the right to freedom of expression
but also by imposing a constitutional obligation on legislatures to facilitate public
participation in the law-making process”.54

The relegation of judicial authority to the state by the Court has actually compromised its
own status and constitutional mandate as Chaskalson P in Pharmaceuticals Manufacturers,
argued that:

“the Constitutional Court occupies a special place in this new constitutional order. It
was established as part of that order as a new court with no links to the past, to be
the highest court in respect of all constitutional matters, and as such, the guardian of
our Constitution.”55

51 Doctors for Life, at paras 115-116. See also Matatiele Municipality v President of the Republic of
South Africa 2006 (5) BCLR 622 (CC).
52 As Madala J in Merafong held that the Court should not rely only on technicalities to dismiss
matters but should weigh all the circumstances, legal and otherwise, on the scales of justice, at para
199.
53 Merafong at para 59.
54 See Doctors for Life, at para 106.
55 Pharmaceuticals at para 55.
In this regard, the essence of judicial review was substantiated by Harms JA in *King v Attorneys Fidelity Fund Board of Control*\(^{56}\) as he held that:

> “the failure to facilitate public involvement is a “crucial political question” which is reserved for the Constitutional Court by the Constitution in terms of section 167(4)(e)”\(^{57}\)

In addition, the Court has itself in *Pharmaceuticals* affirmed that it cannot allow itself to be diverted from its main function as the final and independent arbiter in the contest between the state and its citizens.\(^{58}\) This argument is of greater relevance to this article as the Court in *Merafong* appears to have misconstrued its main purpose and the objectives it has to fulfil. In addition, the “deference” of judicial responsibility to the state demonstrates what Tushnet\(^{59}\) describes as an “inability to do a decent job of interpreting the Constitution”.\(^{60}\) Furthermore, it narrows the “broader approach” it has developed to ensure that the legislature conforms to certain predetermined channels, according to certain pre-arranged procedures.\(^{61}\) The relegation of judicial authority to political appointees constrains the significance of participatory democracy which is central to the advancement of social justice in the mission of the state and sovereignty.\(^{62}\) In essence, it disables the Court from determining, with sufficient certainty, the constraints placed upon the legislature on the exercise of public power.

Furthermore, even though the Court did acknowledge the history of this country as it held that it was:

> “sadly – one of the balkanisation of our country, as well as the separation and the forcible removal and relocation of our people. This often happened in order to entrench and to further differentiate and discriminate between races, between urban and rural, between rich and poor and between classes of citizens. Therefore, the

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56 2006 (1) SA 474 (SCA).
57 Ibid, at para 23.
58 *Pharmaceuticals* at para 55.
60 Ibid at 1395.
struggle against colonialism and the apartheid regime’s Bantustan policy was also a struggle for one united country as well as for the recognition of the dignity of individuals and communities\(^{63}\), (author’s emphasis),

the relegation of its judicial authority appears to reinforce the “divide and rule” of the apartheid order which many South Africans experienced under this period. It brought to the fore the pain and suffering which was characterised by Mokgoro J in *Van Heerden* as follows:

“apartheid was not merely a system that entrenched political power and socio-economic privilege in the hands of a minority nor did it only deprive the majority of the right to self actualisation and to control their own destinies. It targeted them for oppression and suppression. Not only did apartheid degrade its victims, it also systematically dehumanised them, striking at the core of their human dignity. The disparate impact of the system is today still deeply entrenched\(^{64}\).

She further held that the political oppression that characterised the years of apartheid was coupled with the systemic entrenchment of economic disadvantage for millions of South Africans. As a result, of this entrenched disadvantage, the wealth of this country remains in the hands of the minority\(^{65}\), wealth that the people of Merafong need to enjoy, given that the province of Gauteng is the hub of economic activity, not only in comparison with the North West Province, but South Africa as a whole. It is therefore, worth noting that the claim by the Merafong community was motivated by the socio-economic factors than the right to public participation itself.

In addition, the Court downplayed its own jurisprudence on the limitations of the right to public involvement in legislative processes that public views are not a final determinant on the extent to which the government may implement its programmes as it held in *Makwanyane*:

“public opinion may have some relevance to the enquiry, but in itself, it is no substitute for the duty vested in the Courts to interpret the Constitution and to uphold its provisions without fear or favour. If public opinion were to be decisive there would

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\(^{63}\) *Merafong*, at para 23.


\(^{65}\) Ibid at para 73.
be no need for constitutional adjudication. The protection of rights could then be left to Parliament, which has a mandate from the public, and is answerable to the public for the way its mandate is exercised, but this would be a return to parliamentary sovereignty, and a retreat from the new legal order established by the 1993 Constitution”.

In essence, it appears that the Court is failing its constitutional duty by relying on the pretext of adhering to the doctrine of separation of powers and therefore claiming that it is unable to intrude into the domain of the legislature. In so doing, it compromises and undermines the already developed jurisprudence that affirmed its role as the guardian of the Constitution as it was expressed in Minister of Health v Treatment Action Campaign as follows:

“although all the branches of government have to be sensitive to the doctrine of separation of powers does not mean that courts cannot or should not make orders that have an impact on policy as it is mandated by the Constitution itself”.  

The dissenting opinion of Moseneke DCJ in this matter, affirming the TAC judgment, suggests a more appropriate role for the Court in ensuring a proper balance in the maintenance of the principles of separation of powers and judicial review. He argued that the exercise of judicial review recognises an important sphere of constitutional politics outside the judiciary as he established and concluded that:

“the legislature had acted without a proper appreciation of its powers and duties and therefore irrationally and must be given an 18 months period to ensure an effective and substantive translation of the right of access to public involvement”.

Therefore, the Court in this matter missed an opportunity for the development of a shared and common understanding of the significance of the principles of judicial review in ensuring the substantive translation of the right to public involvement and deferred its authority to the state.

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66 Makwanyane at para 88.
67 2002 (10) BCLR 1075.
69 Moseneke DCJ, at paras 124, 192 and 196.
5 The development of the “political doctrine” system in constitutional adjudication

The development of the “political doctrine” system, which Whittington refers to as “the road not taken” in answering hard constitutional cases,70 appears to be gaining momentum in South Africa. Apparently, the Court has since established the “road not taken doctrine” in *Ferreira v Levin*71, when Chaskalson P held that:

“whether or not there should be regulation and redistribution is essentially a political question which falls within the domain of the legislature and not the court. It is not for the courts to approve or disapprove of such policies. What the courts must ensure is that the implementation of any political decision to undertake such policies conforms with the Constitution. It should not, however, require the legislature to show that they are necessary if the Constitution does not specifically require that this be done”, (author’s emphasis).

The doctrine was further affirmed in *UDM v President of the Republic of South Africa*72, when the Court held that the:

“issue before the Court was a political question that was not of concern to the Court as it did not deal with the merits or de-merits of the challenged provision”,73 (author’s emphasis).

The “doctrine” leaves much to be desired, because it is the Court that is empowered to declare invalid any legislation or conduct which is inconsistent with the values and principles of the Constitution. It is the Court that has to examine and review government conduct and evaluate it against the ethos and principles as envisaged in the Constitution. The contention is expressed by Mojapelo DJP in *Hlophe v The Constitutional Court*74 as follows:

“when courts are approached by litigants who complain of violation of their rights and there is a clear indication that such violation has taken place the courts should not

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71 1996 (1) BCLR 1.
72 2002 (11) BCLR 1179.
73 *UDM*, at para 11.
74 2009 (2) All SA 72 (W).
lightly defer their jurisdiction to another tribunal not having such authority. Courts have an obligation in the exercise of their judicial authority to develop binding judicial precedents to guide future conducts in similar circumstances.”

Effectively, the “political doctrine” undermines the widest possible powers that the Court has in developing and forging appropriate remedies for the protection of constitutional rights and the enforcement of constitutional duties. It limits the essence of judicial review as Moseneke DCJ gives an account made by the former President: Nelson Mandela as to why he appeared before a High Court judge in his capacity as the President of the country. He highlights that President Mandela said that his appearance:

“symbolic and important act because it underscored the rule of law and the principle that we are all equal before the law and it is the Constitution that requires us to obey, respect and support the courts not because the judges are important or entitled to special deference but because the institution they serve in has been chosen by us collectively in order to protect the very vital interests of all and in particular of those who are likely to fall foul of wielders of public or private power”.

The symbolic act shown by the former President affirms the independence of the judiciary. It further endorses that it is not denied that it is the legislature that is in the frontline and a great teacher that establishes public norms that need to become assimilated into our daily living. Nor is it disputed that there is no total separation of powers as the Court in the Certification judgement held that there is no scheme that can reflect a complete separation of powers as it is always one of partial separation.

The primary concern is the dispute relating to this role that requires the Court to exercise its judicial authority and determine the extent to which democratic values have been compromised or not. It is the Court that has to review and analyse the impact of the alleged

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75 Ibid, at para 104.
76 See section 172 of the Constitution which provides that:

(1) When deciding a constitutional matter within its power, a court-
(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its consistency, and
(b) may make any order that is just and equitable, including-
(i) an order limiting the retrospective effect of the declaration of invalidity; and
(ii) an order suspending the declaration of invalidity for any period ad on
an conditions, to allow the competent authority to correct the defect.

77 See Moseneke (note 45) above, at 352.
78 See Sachs J in Fourie (note 44) above, at para 138.
conduct, legislation or policy on the applicants in order to establish its rational connection with the purpose sought to be achieved.80

It is, therefore, quite striking that the affirmation of judicial review could be relegated to “political doctrines”. The relegation of judicial review to “political resolves” relaxes the rules of constitutional interpretation and does not adequately address the Court’s role in the maintenance of democratic values. It was, therefore, incumbent upon the Court to be decisive in the Merafong matter and not let its adjudicative authority “hang in the balance” by relegating it to “political appointees” and fails to reconstruct the state and South African society.

6 Conclusion

In this article, the concern relates to the Court’s apparent deviation from its own previous record and abdicated its authority to political appointees. While the maintenance of separation of powers is a delicate matter, the Court should always ensure that its duty towards the community is not easily eroded by consideration of legislative deference. It is incumbent upon the Court to ensure that law is not isolated from politics, since the two are interdependent, intertwined and interrelated.

Basically, the Court voluntarily abdicated its judicial function in total disregard of its independence and the distribution of state authority between itself and the legislature. As has been emphasised above, Langa CJ contends that it is the Court that bears the ultimate responsibility for justifying its decisions – not only by reference to authority, but also by reference to the ideas and values entrenched in the Constitution.81 The Constitution makes an important distinction between the constitutional roles of the different branches of government. This distinction ensures the independence of these various branches, which is of particular importance for the functioning and the development of a healthy democracy. Of utmost importance is the centrality of the judiciary as a “safety valve” for the maintenance of power balances to ensure the efficiency and institutional integrity of each branch.

80 See Harksen v Lane 1997 (11) BCLR 1489 at paras 51-55.