

THE UNLAWFULNESS OF THE AFRICAN NATIONAL CONGRESS' CADRE
DEPLOYMENT POLICY IN ITS AFFECT ON AN EFFICIENT
ADMINISTRATION: IS AN ADMINISTRATION LOYAL TO THE ANC
COMPROMISING SERVICE DELIVERY IN SOUTH AFRICA?

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LIST OF ABBREVIATIONS

FULL CITATION	ABBREVIATION
African National Congress	ANC
Constitution of the Republic of South Africa 1996	The Constitution
Constitution of the Republic of South Africa 200 of 1993	The Interim Constitution
The Consolidated General Report on National and Provincial Outcomes 2016-2017	2017 Report
The Consolidated General Report on National and Provincial Outcomes 2022-2023	2023 Report
Convention for a Democratic South Africa	CODESA
Democratic Alliance	DA
Deployment Committee	The Committee
Government of National Unity	GNU
Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State	Zondo Commission
National Director of Public Prosecutions	NDPP
National Implementation Framework towards the Professionalisation of the Public Service	The Framework
National Party	NP
Promotion of Access to Information Act 2 of 2000	PAIA
Promotion of Administrative Justice Act 3 of 2000	PAJA
Public Administration Management Act 11 of 2014	PAM
Public Service Act 103 of 1994	PSA
Public Service Commission	PSC
Public Service Commission Act no. 46 of 1997	PSC Act
Public Service Coordinating Bargaining Council	PSCBC
Republic of South Africa Service Charter	Service Charter
Skills Development Act no. 97 of 1998	SDA

CHAPTER 1

ADMINISTRATIVE JUSTICE IN SOUTH AFRICA: AN INTRODUCTION TO THE AFRICAN NATIONAL CONGRESS' CADRE DEPLOYMENT POLICY AND THE NEED FOR AN EFFICIENT ADMINISTRATION

I. INTRODUCTION

The South African Constitution safeguards the right to administrative justice in its provision for just administrative action.¹ Furthermore, the Constitution outlines basic values and principles for the functioning of the public administration and public service.² One such principle is the need for the action to be efficient. This is referenced in the Constitution, as well as in subsidiary legislation. All administrative action is, therefore, required to be carried out and to serve the public in an efficient manner. One way to determine whether the administration is acting efficiently is to assess the purpose of an administrative office and the public services that the office is expected to provide. Examples of services include housing, water, education and electricity.

Efficient service delivery is imperative for the upliftment of the South African people. This is due to the sanctioning of the unequal treatment of people during the colonial and apartheid years. Legislation entrenched divisions along racial lines. This contributed to the imbalanced distribution of resources. In the first democratic election in 1994, the African National Congress (hereinafter referred to as the "ANC"), took majority control of government, inheriting the country's inequities, and endeavouring to overcome them.

The ANC government exercised their policy of cadre deployment (hereinafter referred to as the "Policy"), as a means to centralise their power, protect against the opposition parties, and

¹ Section 33 of the Constitution of the Republic of South Africa, 1996, reads as follows:

- (1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
- (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.
- (3) National legislation must be enacted to give effect to these rights, and must –
 - (a) Provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
 - (b) Impose a duty on the state to give effect to the rights in subsections (1) and (2); and
 - (c) Promote an efficient administration.

² Ibid ss 33, 195, 196 & 197.

to redistribute power.³ The Policy is a product of the Government of National Unity that came into power after the 1994 election. As will be more broadly explained in Chapter Three, it was introduced as a protective mechanism through which the ANC could protect their interests in the coalition government.⁴ The ANC is a private voluntary organisation and the Policy is a contract between members of the ANC.⁵ Constitutions and rules of political parties binding members of the political party are subject to the Constitution as the supreme law.⁶ While the Policy is commendable in its reflection of representative and transformative democracy, there has been increasing evidence to show that the Policy is corrupted and inefficient. These accusations are founded on the Policy's alleged disregard for the qualifications of applicants due to a preference for party loyalty, as well as the appointment of corrupt administrators, both of which result in instability in the administration and mismanagement of resources. This is detrimental to efficient service delivery. If these accusations are correct, the Policy results in a breach of the section 33 right to just administrative action.

This paper aims to address the concerns surrounding the Policy in its impact on administrative justice and an efficient administration. The Policy will be compared against the relevant provisions of the Constitution and the requirements of the subsidiary legislation. Subsidiary legislation includes the legislation that gives effect to provisions in the Constitution. Furthermore, the Policy will be assessed with regard to how it impacts the suitability of the appointed administrator for the position to which they are appointed. This will indicate whether the Policy encourages irrational appointments. In analysing these concepts, it can be shown that cadre deployment has the potential to be unconstitutional, in breach of subsidiary legislation, and has a high risk for encouraging irrational appointments.

Chapter One provides a brief background to demonstrate why this assessment is relevant. Context is given to the requirement of an efficient administration as outlined in the Constitution and legislation. A connection is made between the importance of an efficient administration and adequate service delivery. Furthermore, this chapter outlines why the focus on service delivery is especially relevant for modern day South Africa. Introductions will be made to the

³ A brief discussion of the purpose and aims of the Policy is found in Section Two of this chapter and will be discussed in detail in Chapter Two.

⁴ E Shava & S F Chamisa 'Cadre Deployment Policy and its Effects on Performance Management in South African Local Government: A Critical Review' (2018) 37 *Politeia* 3.

⁵ *Democratic Alliance v African National Congress and Others* (2024) JDR 0826 (GP) at 10.

⁶ *Ramakatsa and Others v African National Congress and Another* 2013 (2) BCLR 202 (CC) at 72.

Policy and the issues it poses for an efficient administration. In this context, the research question is clearly set out. Finally, a selection of articles, reports and case law provide the current views of both academics and the Judiciary regarding the Policy.

Chapter Two outlines the transformation of administrative law and appointment practices in a transitioning South Africa. It briefly assesses the Policy's contributions to a democratic South Africa. As will be demonstrated, not all of the Policy's contributions are positive and the potential harm the Policy is capable of causing will be addressed. Specifically, Chapter Two will relate the Policy to the appointment of corrupted and unskilled administrators, which contributes to the misuse of resources.

How these appointments affect the misuse of resources is elaborated on in Chapter Three. The Chapter applies the relevant law to answer the research question outlined in Chapter One. Chapter Three analyses circumstances when party loyalty has been favoured over merit, jeopardising the purpose or function of the relevant office. This exposition largely relies on the evidence introduced at the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State (hereinafter referred to as the "Zondo Commission"), as well as various reports of the Auditor-General. The findings demonstrate that the Policy promotes unskilled and corrupt appointments. Appointments of this nature are found by both the Zondo Commission and the Auditor-General to impair the efficient functioning of the administration. Chapter Three subsequently analyses relevant legislation, frameworks and policies that contribute to the professionalisation of the public sector. In making concerted efforts to abide by the legislative mechanisms and frameworks already in existence, cadre deployment is demonstrated to be capable of being reconciled with an efficient administration.

II. THE PROBLEM IN CONTEXT

(a) The Importance of Administrative Law in Post-apartheid South Africa

Administrative Law regulates the exercise of public power and the performance of public functions by an organ of state, or natural or juristic persons in their exercise of public power

or a public function in terms of an empowering provision.⁷ These entities or persons, in their exercise of administrative action, are classed as ‘administrators’.⁸ Subsequently, the decisions taken or failed to be taken by the administrators, are defined as ‘administrative action’.⁹ The Promotion of Administrative Justice Act 3 of 2000 (hereinafter referred to as “PAJA”), provides this definition to give substance to just administrative action that is required by the Constitution. The Constitution requires the action to be lawful, reasonable, procedurally fair and to provide reasons if rights have been adversely affected in order to be deemed ‘just’.¹⁰ With regard to the above definition, this paper assesses the decisions taken to appoint administrators, or failure to appoint appropriate administrators, as well as the impact of the various decisions administrators are then capable of making and how this impacts the efficiency of the administration.

Judicial review takes into account the procedural requirements of administrative action, which includes the grounds outlined in section 6 of PAJA.¹¹ PAJA is extensive in its provision for grounds of review, including administrative action being ultra vires, procedurally unfair, irrational, unlawful and unreasonable.¹² The Constitutional Court has ruled that despite the doctrine of Separation of Powers, the Judiciary can grant certain relief when the State does not perform their functions diligently.¹³ The Court in *Minister of Health and Others v Treatment Action Campaign and Others* goes so far as to say that when it is appropriate to do so, the Judiciary can make decisions that affect policy and legislation.¹⁴

In contrast, the apartheid government shielded themselves from the Judiciary by limiting the grounds for review. Justice Chaskalson in *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others* writes that pre-1994, there were only two overarching grounds of review, namely, whether functionaries acted within the power delegated to them and whether delegated action was carried out in a procedurally fair manner.¹⁵ These grounds are known as

⁷ Promotion of Administrative Justice Act 3 of 2000 at s 1(a) & (b).

⁸ Ibid at s 1(ii).

⁹ Ibid at s 1.

¹⁰ The Constitution of the Republic of South Africa op cit note 1 at s 33.

¹¹ PAJA op cit note 7 at s 6.

¹² Ibid at s 6.

¹³ *Minister of Health and Others v Treatment Action Campaign and Others* 2002 (5) BCLR 1033 (CC) at 112.

¹⁴ Ibid at 113

¹⁵ 2006 (1) BCLR 1 (CC) at 101.

the doctrines of ultra vires and procedural fairness.¹⁶ Parliamentary sovereignty made allowances for extensive decision-making powers of the Executive and Legislature, which not only limited the Judiciary in the available grounds of review, but afforded the Legislature the opportunity to enact laws that circumnavigated the existing grounds of review. This is to be exemplified through case law discussed later in this section. Legislative techniques included ouster clauses in legislation, the limitation of legal standing, the restriction of a court's jurisdiction to review, and legislative interference in the appointment, actions and credibility of the Judiciary.¹⁷ The limitations placed on judicial review resulted in fewer preventative measures against the enactment of racist laws.¹⁸ Furthermore, the absence of protective legislature and any document akin to the Bill of Rights that South Africa has today, meant that even if afforded expanded powers of review, the Judiciary did not have sufficient material to review the administrative action or legislation against. Parliamentary supremacy also resulted in fundamental rights being frequently eroded or excluded by legislation.¹⁹ The existence and/or absence of laws that allowed for the different treatment of respective race groups contributed to significant wealth disparity that persists today. This disparity is demonstrated by the discussion to follow on the importance of efficient administrative action and its impact on service delivery. Decisions of the Constitutional Court have subsequently confirmed that questions of legality are to be dealt with under the Constitution and not the limited common law principles, including those mentioned above.²⁰

Despite the Constitution rejecting the doctrine of parliamentary supremacy and including a written Bill of Rights, inequality persists.²¹ There is a lack of opportunity for development. This is perpetuated by unequal access to economic opportunities and necessary amenities.²² Multiple 'distressed areas' have been identified as having the poorest access to basic services

¹⁶ *New Clicks South Africa (Pty) Ltd* supra note 15.

¹⁷ I Steytler 'Striking Back and 'Clamping Down' in South Africa: Responding to Adverse Judicial Decisions Under Systems of Parliamentary Sovereignty and Constitutional Supremacy' (2020) *Hague Journal on the Rule of Law* 12 at 366-67.

¹⁸ *Ibid.*

¹⁹ *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* 2000 (3) BCLR 241 (CC) at 37.

²⁰ *Pharmaceutical Manufacturers Association* op cit note 19 at 41; *President of the Republic of South Africa and Another v Hugo* 1997 (6) BCLR 708 (CC); *Fedsure Life Assurance Ltd & Others v Greater Johannesburg Transitional Metropolitan Council & Others* 1998 (2) BCLR 175 (CC) & *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 1999 (10) BCLR 1059 (CC).

²¹ *Pharmaceutical Manufacturers* supra note 19 at 40.

²² C M Rogerson & E Nel 'Redressing inequality in South Africa: The spatial targeting of distressed areas' (2016) 1-2 *Local Economy* 31 at 30.

and infrastructure as well as the fewest resources.²³ These areas by in large fall into the geographic areas of the former homelands and areas outside urban centres.²⁴ These ‘distressed areas’ are where ‘non-white’ citizens were re-located. The preamble of the Public Administration Management Act 11 of 2014 (hereinafter referred to as “PAM”), states that one of the most pervasive challenges facing South Africa is the need for government to address poverty and marginalisation.²⁵ The PAM Act gives effect to section 195(3) of the Constitution. The PAM Act credits an administration that can ensure efficient, quality, collaborative and accountable service delivery with the alleviation of poverty.²⁶ The correlation between administrative action and service delivery suggests that the redistribution of resources would be aided by an efficient administration.²⁷

(b) Administrative Law in the South African Constitution and Legislation

The South African Constitution speaks of administrative action and public administration in sections 33, 195, 196 and 197 respectively. Below, the relevant constitutional and legislative provisions, and how they relate to the requirement of a qualified, transformative and efficient administration is discussed. This discussion prefaces the application of the relevant law to the Policy in Chapter Three.

Section 33(1) of the Constitution affords every person the individual right to administrative action that is lawful, reasonable and procedurally fair.²⁸ Section 33(3) of the Constitution further requires national legislation to promote the values of administrative justice and public administration.²⁹ The subsidiary legislation is PAJA. PAJA identifies circumstances that give a person a legal right to take an administrative action on review. Reviewable actions include actions influenced by undue or ignorant influences. These circumstances include when the action is biased or reasonably suspected of being biased; the action is for an ulterior purpose; the action is taken in bad faith; or the action is unauthorised or unwarranted due to the dictates of another person.³⁰ Additional reviewable actions provided for in PAJA are actions that

²³ Rogerson & Nel op cit note 22 at 30.

²⁴ Ibid at 31.

²⁵ Public Administration Management Act 11 of 2014 preamble.

²⁶ Ibid.

²⁷ M Asimow ‘Administrative law under South Africa’s Final Constitution: The Need for an Administrative Justice Act’ (November 1996) 113 *South African Law Journal* 4 at 2.

²⁸ The Constitution of the Republic of South Africa op cit note 1 at s 33(1).

²⁹ Ibid at s 33(3).

³⁰ Act 3 of 2000 ss 6(a)(iii); (e)(ii); (e)(iv); (e)(v) & (i).

arguably rely on a certain level of skill or merit. These include decisions taken void of mandatory and material procedures; actions influenced by an error of law; actions taking into account irrelevant considerations; and actions that are unauthorised, irrational or unreasonable.³¹

Furthermore, sections 3 and 4 of PAJA legislate that procedurally fair administrative action requires public participation.³² Specifically, section 3 requires that affected persons be given adequate notice and reasonable opportunity to make representations.³³ Section 4 requires an appropriate mechanism or forum to be implemented by the relevant decision maker, if the action materially or adversely affects the rights of the public.³⁴ Appropriate mechanisms and forums include, but are not limited to, holding public inquiries or implementing a notice and comment procedure.³⁵ These requirements speak to South Africa being a participatory democracy.³⁶ The emphasis on participation in South Africa's democratic process was part of the ANC's rhetoric during the transition period in that 'people who are affected by decisions must take part in making those decisions.'³⁷

The above requirements can be compared to those of a representative democracy. Citizens elect a party with the expectation that they will make decisions on their behalf. These decisions are assumed to be representative in that they align with the mandate that attracted voters to the relevant party.³⁸ Representative democracy is exercised through regular elections. It is considered practical due to the administrative burden otherwise incurred if the public is to take part in the daily management of public affairs.³⁹ Representative democracy, therefore, contributes to an 'efficient administration' as an alternative to burdensome and expensive public participation. This is due to the assumption that the public already participated in the

³¹ Act 3 of 2000 op cit note 30 at ss 2(b);(d); (e)(iii); (f);(g) & (h).

³² Ibid at ss 3 & 4.

³³ Ibid.

³⁴ Ibid at ss 3(b) & 4(1).

³⁵ Ibid at s 4(1).

³⁶ An emphasis is placed on the requirement for both participatory and representative democracy in sections 57(1)(b), 70(1)(b) and 116(1)(b) of the South African Constitution of 1996, with regard to the actions and rulemaking of the National Assembly, National Council and National Council of Provinces respectively.

³⁷ H Brooks 'The mass movement and public policy: discourses of participatory democracy in post 1994 South Africa' (2017) 55 *J. of Modern African Studies* 1 at 109.

³⁸ M R Phooko 'Conflict between participatory and representative democracy: A call for model legislation on public participation in the law-making process in South Africa' (2017) 38 *Obiter* 3 at 519.

³⁹ Ibid.

election. Section Three of this chapter demonstrates that cadre deployment is a tool of representative democracy. Chapter Two addresses whether the Policy is as representative as it purports to be.

Section 195 of the Constitution lists additional requirements for protecting South Africa's democratic values. These requirements include the impartial, fair and equitable distribution of resources without bias; a response to people's needs; an accountable and transparent public administration and a broadly representative public administration determined to redress imbalances of the past.⁴⁰ As mentioned above, Chapter Two will unpack the reality of the appointment processes that impact the public administration and how they are not necessarily representative of the will of the people. Furthermore, the Policy is suggested to result in bias appointments and to shield the administration from accountability mechanisms. For the Policy to impact the administration in any of the aforementioned ways is, therefore, unconstitutional.

The PAM Act, as mentioned briefly above, gives effect to section 195 of the Constitution. PAM makes specific reference to unethical practices and maladministration. An objective of PAM as per section 3(f), is to facilitate the eradication and prevention of unethical practices in public administration.⁴¹ Section 15(5)(a) requires an institution to report any act of corruption to the police immediately.⁴² Chapter Three more specifically identifies how the appointment of cadres can aid corrupt activities of government. This is in part due to the loyalty that a cadre is expected to show to the party before any direct loyalty to the public. In this regard, cadre deployment has been shown to be used as a tool of state capture. 'State capture' has been defined as actions by individuals or groups which are aimed at influencing the actions of government, including asserting influence over legislation, regulations and appointments, for personal gain.⁴³ PAM, as will also be demonstrated in Chapter Three, can be used as a tool to protect the administration from unqualified and corrupt cadres, without eradicating the Policy entirely.

Section 196 of the Constitution establishes the Public Service Commission (hereinafter referred to as the "PSC"). The PSC is an independent and impartial commission tasked with the

⁴⁰ The Constitution of the Republic of South Africa op cit note 1 at ss 195(1)(d), (e), (f), (g) & (i).

⁴¹ Act 11 of 2014.

⁴² Ibid at s 15(5)(a).

⁴³ M.E. Martin & H. Solomon, 'Understanding the Phenomenon of "State Capture" in South Africa' (2016) 5 *Southern African Peace and Security Studies* 1 at 2.

maintenance of efficient public administration.⁴⁴ Despite their suggested impartiality, they are accountable to the National Assembly.⁴⁵ Furthermore, their members are appointed by the President on recommendations from the National Assembly and the Premiers of respective provinces.⁴⁶ The composition of the PSC raises concerns for the efficiency of the public service in the potential for corruption. The power of the Executive and National Assembly to appoint and remove members of the Commission is discussed in Chapter Two. The dominance of the ANC protects their prerogative to appoint members of government and the administration. This in turn affects how representative the administration is, as well as how susceptible the administration is to corruption. Chapter Three addresses how the PSC should be utilised to combat corrupt and unskilled appointments.

Section 197 of the Constitution specifically speaks to the public service. Section 197(1) delegates the regulation of the public service to national legislation, which is implemented by the National Assembly. The representative nature of the National Assembly, in light of the one-party dominance of the ANC, is addressed in Chapter Two. The discussion in Chapter Two demonstrates how acts of the National Assembly inevitably align themselves with ANC policy and motives. Therefore, these policies and motives would regulate the public service. Despite this inevitability, section 197(3) of the Constitution states that no employee of the public service may be favoured or prejudiced on the grounds of their political affiliation.⁴⁷ As will be confirmed in Chapter Three, the breach of section 197(3) contributes to the Zondo Commission's finding of the Policy being unconstitutional. Furthermore, reports of the Auditor-General demonstrate how the regulation of the public service by the ANC negatively impacts an efficient administration. This is due to the Policy's impact on a qualified and ethical public service.

The national legislation that gives effect to section 197 of the Constitution is the Public Service Act of 1994 (hereinafter referred to as the "PSA"). The PSA emphasises the need for an efficient and suitably qualified administration.⁴⁸ Section 3(1)(i) of the PSA requires the Minister to establish norms and standards for the public service relating to transformation,

⁴⁴ The Constitution of the Republic of South Africa op cit note 1 at s 196(2).

⁴⁵ Ibid at s 196(5).

⁴⁶ Ibid at s 196 (7).

⁴⁷ Ibid at ss 197(1) & (3).

⁴⁸ The Public Service Act 103 of 1994.

reform and innovation.⁴⁹ Furthermore, the Minister is responsible for instituting procedures and policies that improve the efficiency of the public service and service delivery to the public.⁵⁰ Section 4 of the Act requires relevant training facilities to be set up when necessary for qualification for appointments.⁵¹ Section 11 states that appointments must have regard to equality and other democratic values and must be based on training, skills, competence, knowledge and transformation.⁵² The PSA is a tool for the protection of an efficient administration, without eradicating cadre deployment. Chapter Three demonstrates the potential of the PSA in this regard.

Therefore, both the Constitution and subsidiary legislation are clear about the need for an efficient and an impartial public service. This requires qualified administrators who can carry out their duties with regard to the purpose of their administrative office. It further requires ethical administrators. However, with the release of the Zondo Commission Report, the Policy was shown to be closely associated with corruption. Furthermore, it was shown that by its very nature, the Policy favours the appointment of party loyalists over otherwise better qualified candidates. This can result in the function of the office being overlooked, and lead to the appointment being irrational. To appoint administrators who are unable to fulfil the needs of their office, is shown to lead to the mismanagement of resources and impaired service delivery. Chapter Three provides evidence of this correlation. In light of the below definition of ‘efficiency’, failure to effectively manage and distribute resources undermines an efficient administration.

(c) ‘Efficient’ in Context

The dictionary definition of ‘efficient’ is that an action is characterised by ‘maximum productivity with minimal wasted efforts.’⁵³ In terms of administrative action, the test could therefore be formulated as whether public officials are making decisions and enacting those decisions in a manner that positively impacts on service delivery to maximum potential, with a minimal strain on public resources. As outlined above, the efficient provision of resources is

⁴⁹ The Public Service Act op cit note 48 at s 3(1)(i).

⁵⁰ Ibid.

⁵¹ Ibid at s 4.

⁵² Ibid at s 11.

⁵³ Merriam-Webster.com Dictionary, s.v. ‘efficient’ accessed on 16 March 2024, available at <https://www.merriam-webster.com/dictionary/efficient>.

an imperative tool for transformation, upliftment and the promotion of substantive equality. This paper subsequently aims to answer whether cadre deployment as a policy passes constitutional muster with regard to its impact, if any, on efficient administrative action.

As per section 33(3)(c) of the Constitution, national legislation is required to ‘promote an efficient administration’.⁵⁴ PAJA was thus promulgated to promote an efficient administration, as acknowledged in its preamble.⁵⁵ Consequently, efficiency serves as an umbrella term for the grounds of review listed in section 6 of PAJA.⁵⁶ Section 195 of the Constitution further places a positive obligation on public administrators to promote the efficient use of resources.⁵⁷

A preliminary observation of the requirement of efficiency is that, while section 33(1) imposes negative obligations, in that these are rights that cannot be restricted, section 33(3)(c) imposes a positive obligation. Section 33(3)(c) only requires the *promotion* of efficient administration.⁵⁸ To ‘promote’ leaves room for a spectrum of effort which, save for the section 6 conditions in PAJA, can allow for minimal effort to be put in for the action to still be considered efficient.⁵⁹ To look at the definition of efficiency, as well as section 195(1)(b) of the Constitution, it is curious as to why the requirement of efficiency is only a positive obligation.⁶⁰ However, in a broader reading of the Constitution as well as subsidiary legislation, it can be shown that the requirement of efficiency is innately tied to additional obligations. These obligations include lawfulness, accountability, and transparency.

There is an additional consideration to the constitutional and legislative requirement of an efficient administration. It could be considered irrational to make appointments without considering how that appointee could impact the efficiency of the office. It would, to some extent, defeat the purpose of the appointment if the appointed administrator does not possess the qualities to promote efficiency. Even if it might not frustrate the purpose of the office or administration, it would not serve as an aid. To ‘promote’ and to ‘aid’ are relatively synonymous concepts with regard to the attainment of a specific goal. If a person is appointed without taking into account how their qualifications, or lack thereof, would impact the efficient

⁵⁴ Act 3 of 2000 s 33.

⁵⁵ Ibid at preamble.

⁵⁶ Ibid at s 6.

⁵⁷ The Constitution of the Republic of South Africa op cit note 1 at s 195.

⁵⁸ Ibid at s 33(1) & 33(3)(c).

⁵⁹ Act 3 of 2000 s 6.

⁶⁰ The Constitution of the Republic of South Africa op cite note 1at ss 33 & 195(1)(b).

functioning of the office, the decision could be considered irrational. As cadre deployment is critiqued as overlooking qualifications and merit in favour of party loyalty, appointments founded on the Policy are at risk of being irrational. A rationality assessment would rely on the needs of the office, the administrator's purpose, the appointee's skill set, and any relevant training programs in place. Chapter Two provides an in-depth discussion on how the ANC's definitions of 'cadre' and 'deployment' do not prioritise the skills and qualifications of administrators.

III. THE INEFFICIENCY OF THE SOUTH AFRICAN ADMINISTRATIVE SYSTEM

(a) The South African Administration and Socio-economic Rights

Just as there is a positive obligation on the South African government to provide an efficient administration, so too is there a positive obligation for the provision of socio-economic rights. These rights include those to housing, water, education, health care and food.⁶¹ The government is required to take reasonable steps within available resources, to achieve the progressive realisation of the rights.⁶² The provision of these rights relies on administrative action in addition to conscious and conservative budget management, as will be demonstrated by the Reports of the Auditor-General discussed in Chapter Three.

There has been a slow realisation of socio-economic rights, demonstrated through the effects of continued spatial apartheid as discussed above. This is, in part, due to the inefficient management of funds. One reason for mismanagement is the corruption of government. Corruption is generally accepted as having a 'direct and negative impact on economic performance.'⁶³ The corruption that exists in government has affected budget availability and the provision of resources.⁶⁴ A reduced budget and limited resources would arguably impair even a qualified and efficient administrator as it would become challenging for them to carry out their duties.⁶⁵ A contributor to corrupt activity is state capture. It is demonstrated throughout this paper that the Policy creates opportunities for influence by private bodies.

⁶¹ The Constitution of the Republic of South Africa op cit note 1 at ss 26, 27 and 29.

⁶² Ibid at ss 26, 27 and 29.

⁶³ A C Drury, J Krieckhaus & M Lusztig 'Corruption, Democracy and Economic Growth' (2006) 27 *International Political Science Review* 2 at 121.

⁶⁴ Ibid.

⁶⁵ CASAC 'The Impact of Corruption on Governance and Socio-economic Rights' 1.

These private bodies have, subsequently, assisted in the corruption of government and the administration.

(b) State Capture's Impact on Cadre Deployment

Cadre deployment has become associated with a civil service that relies on individuals who have greater loyalty to a corrupt party than to the public. This is an act of state capture. While the Policy promotes representative democracy, state capture presents the opportunity for government officials to be influenced by unelected bodies. Influences by private bodies will affect the way in which the mandate of a party will be carried out. A recurring question of the Zondo Commission was whether loyalty should lie with the State or the majority party. Testimony of ANC members in this regard is utilised in Chapter Three to assess the lawfulness of the Policy. The ANC continuously justifies their policy of cadre deployment.⁶⁶ While cadre deployment can be utilised as an effective and efficient tool of government, it is concerning when the actions of private bodies influence appointments to the detriment of the public. The effect of the ANC's dominance and their power to appoint on representative democracy is discussed in detail in Chapter Two.

IV. THE ANC'S CADRE DEPLOYMENT POLICY

The Cambridge Dictionary defines a 'cadre' as 'a small group of trained people who form the nucleus of a military, political or business organisation'. Merriam-Webster defines a 'cadre' as 'a nucleus or core group especially of trained personnel able to assume control or to train others' or 'a cell of indoctrinated leaders active in promoting the interests of the revolutionary party'.⁶⁷ By definition, the Policy ensures loyalty to the Party before loyalty to the State. This has been a longstanding policy of the ANC, utilised as a transitional tool to protect ANC interests in the Government of National Unity (hereinafter referred to as the "GNU").

South Africa's transition to democracy was spearheaded by an ethos of compromise. Multi-party negotiations resulted in the Interim Constitution. Article 235 of the Interim Constitution

⁶⁶ An example of testimony by President Cyril Ramaphosa can be found in Part VI Vol 2 of the Judicial Commission of Inquiry into State Capture Report, where he testifies to the importance of appointments based on party loyalty. He further outlines the cadre deployment policy.

⁶⁷ Merriam-Webster.com Dictionary, s.v. 'cadre' accessed on 16 March 2024, available at <https://www.merriam-webster.com/dictionary/cadre>.

stipulated transitional arrangements for Executive authority.⁶⁸ The electoral formula stipulated that any political party that won at least 80 out of the 400 seats in the National Assembly, was entitled to appoint a deputy president.⁶⁹ Furthermore, the electoral formula stipulated that any political party that won at least 20 seats in the National Assembly could appoint one cabinet minister.⁷⁰ In the 1994 election, the ANC won more than 60 per cent of the vote and the NP won approximately 20 per cent of the vote.⁷¹ As a result, both the ANC and the NP elected a deputy president.⁷² The Inkatha Freedom Party secured the requisite number of votes to appoint three ministers.⁷³ The election subsequently resulted in a GNU.⁷⁴ Despite the ANC's majority, the GNU relied on consultation and consensus. The Policy was implemented as a safeguard against sabotage to government by opposition parties who had been afforded significant power by the Interim Constitution.⁷⁵ The ANC established the Deployment Committee that was to oversee and provide recommendations for administrative appointments. This is an admirable intervention in an attempt to settle fears of potential instability and continued conflict post-apartheid.

The ANC Deployment Committee is headed by the Deputy President and it comprises of fifteen members of the National Executive Committee.⁷⁶ In his testimony before the Zondo Commission, President Ramaphosa stated that the deployment policy that guides the Committee is aimed at ensuring that the person appointed is most 'fit-for-purpose'.⁷⁷ He further testified that when recommending an appointment, the Committee must take into account certain political considerations such as advancing the mandate of the governing party.⁷⁸ In this regard, the Policy is representative in nature. However, the Zondo Commission found that both the ANC and the Deployment Committee have been corrupted, and authorised corrupt appointments rather than prioritise candidates most fit-for-purpose. How this affects the overall efficiency of the administration is discussed in Chapter Three with regard to the Zondo

⁶⁸ The Constitution of the Republic of South Africa Act 200 of 1993.

⁶⁹ L Schreiber 'Reconciling the Impossible: South Africa's Government of National Unity, 1994-1996' (2016) *Global Challenges: Power Sharing* at 3.

⁷⁰ Ibid

⁷¹ Ibid

⁷² Ibid

⁷³ Ibid

⁷⁴ Ibid & O Van Cranenburgh & P Kopecky 'Political Institutions in New Democracies: (Not so) Hidden Majoritarianism in Post-apartheid South Africa' (2004) *Acta Politica* 39 at 279-96.

⁷⁵ E Shava & S F Chamisa 'Cadre Deployment Policy and its Effects on Performance Management in South African Local Government: A Critical Review' (2018) 37 *Politea* 3.

⁷⁶ Judicial Commission of Inquiry into State Capture Report Part VI Vol 2 at para 39.

⁷⁷ Ibid at para 398.

⁷⁸ Ibid at para 398.

Commission's findings, and an investigation of the reports of the Auditor-General on the output of the administration. Prefacing this discussion, Chapter Two will unpack the Policy as it is implemented by the ANC, including its functions and purpose. In understanding the purpose of the Policy, it can be demonstrated that it contributes to the appointment of unqualified and corrupt administrators.

V. RESEARCH QUESTION

With consideration of the concepts and concerns discussed above, the question is whether the ANC's policy of cadre deployment is constitutional, with specific reference to sections 33, 195, 196 and 197 of the Constitution, lawful with regard to subsidiary legislation, and rational, in light of its potential oversight an efficient administrative system when influencing appointments.

In response to the above question, it will be demonstrated that the Policy results in two scenarios that are found to impair the efficiency of the administration. The first scenario is the appointment of unqualified candidates. The second scenario is the appointment of corrupt candidates. The second scenario further speaks to instability in the administration due to sporadic re-shuffles.

VI. CASE STUDIES

There have been judgments in both the High Court and the Constitutional Court that have addressed the constitutionality of the Policy. In addition, there have been judgments on political appointments that failed to take proper cognisance of merit when finalising the appointment.

The judgment of *Mlokoti v Amathole District Municipality & Mlamli Zenzile*, was handed down by the Eastern Cape High Court. The case concerned the appointment of a Municipal Manager. The final two candidates were Mr Mlokoti and Mr Zenzile. Mr Mlokoti launched the application to contest the final appointment of Mr Zenzile. In terms of the Municipality's recruitment policy, all candidates had to be selected objectively and based on merit.⁷⁹ A 'suitably qualified person' was defined as one with formal qualifications, relevant prior

⁷⁹ *Vuyo Mlokoti v Amathole District Municipality and Another* 2009(6) SA 354 (ECD) at 10.

learning, relevant experience and/or capacity to acquire the ability to do a job within a reasonable time.⁸⁰ The Applicant relied on section 195 of the Constitution and the need for governance that promotes the efficient, economic and effective use of resources.⁸¹ Section 67 of the Local Government Municipal Systems Act further states that the administrative body tasked with the appointment must act efficiently in its selection process.⁸² The Applicant's argument further relied on PAJA in that the appointment was irrational, unreasonable and unjustifiable as well as due to unauthorised or unwarranted dictates of another person or body.⁸³

In the case of *Mlokoti*, there was no dispute as to the fact that the Regional Executive Committee of the ANC instructed the appointment of Mr Zenzile.⁸⁴ The argument put forward by the Applicant was that the appointment was anti-democratic as the political body who instructed the appointment was not in possession of the relevant documents to support or reject the appointment.⁸⁵ Furthermore, it was argued that this was a decision abdicated to the political party when it was not their responsibility to choose the best suited candidate.⁸⁶ The court found that the Applicant was objectively the best candidate and that there was no justifiable basis for his rejection in favour of the Second Respondent. As will be demonstrated in Chapters Two and Three, the ANC argues that the Deployment Committee is merely a body that provides *recommendations* on appointments. However, due to the composition and nature of the Committee, their involvement is an example of decisions being unlawfully delegated to private bodies.

The above case is an instance where a court found that merit usurps party politics for appointment decisions. However, cadre deployment still exists and is practiced in terms of the current policy. This case has not been taken on appeal and been given the opportunity to be heard by a higher court to set a broader precedent. Furthermore, even with the Zondo Commission finding the Policy to be unconstitutional and unlawful, the Policy is still exercised by the ANC.

⁸⁰ *Mlokoti* supra note 79 at 10.

⁸¹ *Ibid* & The Constitution of the Republic of South Africa op cite note 1 at s195.

⁸² *Mlokoti* supra note 79 at 39 & Local Government: Municipal Systems Act 32 of 2000 s 67.

⁸³ *Mlokoti* supra note 79 at 11.

⁸⁴ *Ibid* at 36.

⁸⁵ *Ibid*.

⁸⁶ *Ibid*.

The case of *Democratic Alliance v President of the Republic of South Africa* assessed the constitutionality of the appointment of a new National Director of Public Prosecutions (hereinafter referred to as the “NDPP”), namely, Menzi Simelane.⁸⁷ The case speaks to the dangers of cadre deployment and its association with corruption. There were suspicions that Mr Simelane was a convenient candidate to shield President Jacob Zuma from prosecution. The appointment followed on from a decision to remove the previous NDPP, which had also been under investigation. This decision was found to be irrational by the Constitutional Court as evidence was ignored that demonstrated Mr Simelane was not ‘fit-for-purpose’.⁸⁸ This appointment is then in contradiction to President Ramaphosa’s testimony to the Zondo Commission that the Policy and the Deployment Committee aim to appoint persons who are ‘fit-for-purpose’.⁸⁹

The above two cases demonstrate the two outcomes of the Policy that impact an efficient administration, namely unqualified and corrupt appointments.

There are two cases which bring into question the constitutionality of the Policy. In a case before the Johannesburg High Court, the ANC was ordered to make their records regarding cadre deployment public. This was as a result of an application launched by the official opposition party, the Democratic Alliance (hereinafter referred to as the “DA”).⁹⁰ These records have subsequently been released. The released documents are analysed in Chapter Two. In the following year, the DA challenged the constitutionality of the Policy in *Democratic Alliance v African National Congress & Others*.⁹¹ In a unanimous judgment by the full bench of the High Court of Gauteng, Pretoria, the application was dismissed.⁹² This case will be discussed in detail in Chapter Three as it seemingly challenges the arguments put forward in this paper. However, the case does not rule out the arguments being made. This is due to the DA failing to challenge a specific incident as well as its failure to present sufficient evidence to make their case. It can be demonstrated, therefore, that the judgment does not speak to the impact of the Policy in the manner emphasised in this argument.

⁸⁷ *Democratic Alliance v President of the Republic of South Africa, Minister for Justice and Constitutional Development, National Director of Public Prosecutions & Menzi Simelane* 2012 (12) BCLR 1297 (CC) at 24.

⁸⁸ *Ibid* at 78.

⁸⁹ Zondo Commission Report op cit note 76 at 670.

⁹⁰ *Schreiber and Another v African National Congress* (2023) ZAGPJHC 78.

⁹¹ (2024) 2 All SA 382 (GP)

⁹² *Ibid*.

VII. LITERATURE REVIEW

A study done by Harvard University aimed to answer why South Africa was failing to grow and ensure economic equality post-apartheid.⁹³ The authors note that South Africa's global ranking in government effectiveness and control of corruption has steadily declined since the late 1990s.⁹⁴ One of their findings is that the deterioration in service delivery is partly due to abuse by political actors in appointing party loyalists over qualified civil servants.⁹⁵ In their study they focus on the provision of public services such as electricity, transport infrastructure, water and sanitation.⁹⁶ With regard to the findings of mismanagement of public resources and the breakdown of service delivery, the report surmises that improvements can be made to service delivery if appointments are more focused on merit and skills.⁹⁷ These claims are mirrored in reports by the Auditor-General that are discussed in Chapter Three.

Swanepoel, in his article, *The Slippery Slope to State Capture: Cadre Deployment as an Enabler to Corruption*, has interpreted the *Mlokoti* case to determine that cadre deployment is unlawful. Its unlawfulness stems from the Policy involving considerations that stray from the legal framework of the Constitution and related legislation.⁹⁸ However, since *Mlokoti*, no appointment of a lower level administrator has been found unconstitutional. As precedent has not been set by higher courts in terms of day to day functions of the administration, a broader overview will be taken to investigate the issue. Chapter Three addresses the pitfalls of the administration and challenges to service delivery by relying on reports of the Auditor-General. The Auditor-General's findings and recommendations will be compared to what the ANC and the Zondo Commission have revealed about the implementation of the Policy.

In reference to local government institutions, Shava and Chamisa are of the belief that it is in a 'state of disarray' due to cadre deployment.⁹⁹ The first concern that they have with cadre deployment is that it is surrounded by patronage or cronyism.¹⁰⁰ Secondly, they assert that the Policy negatively impacts the desire to train administrators, creating a shortage of skills which

⁹³ R Hausman et al. 'Growth Through Inclusion in South Africa'. The Growth Lab. November 2023 8.

⁹⁴ Ibid at 44.

⁹⁵ Ibid.

⁹⁶ Ibid at 39.

⁹⁷ Ibid at 69 & 75.

⁹⁸ C F Swanepoel 'The Slippery Slope to State Capture: Cadre Deployment as an Enabler of Corruption and a Contributor to blurred party-State lines' (2021) 25 *Law, Democracy & Development*.

⁹⁹ Shava & Chamisa op cit note 75 at 4.

¹⁰⁰ Ibid.

contributes to poor performance.¹⁰¹ Finally, they see the Policy as lacking transparency and accountability.¹⁰² They are, however, not of the opinion that cadre deployment is unconstitutional in its entirety. To be utilised lawfully and effectively, there must be a continual training process, departmental support and certification and education initiatives.¹⁰³ Their argument serves to manage concern regarding cadre deployment usurping a merit-based system of appointments. This argument aligns with the need to professionalise the public service. Chapter Three discusses the recommendations for professionalisation, afforded for by legislation, various frameworks, and government policies.

Mlambo, Zubane and Thusi are of the opinion that, ‘the failure to separate politics from administrative decisions has impeded the effective functioning of the public sector.’¹⁰⁴ They argue further that failure to do this is to the detriment of service delivery in South Africa.¹⁰⁵ While this might prove to be correct, an argument has been made, for example by Shava and Chamisa above, that this is the case only in certain instances. Such instances can include when corruption and external forces are at play. Otherwise, according to principles of representative democracy, people’s expectations are that the party’s mandate will be ‘deployed’.

In the *Roadmap for Effective Cadre Deployment*, the Policy is described as a power-structure parallel to the Constitution.¹⁰⁶ The Policy is recognised as promoting appointments based on party loyalty and not merit.¹⁰⁷ The ANC encourages this in their statement that ‘political performance of cadres should at all times be the guide for placement and promotions’.¹⁰⁸ However, the ANC also draws attention to non-discrimination in the Policy, the upskilling of cadres and the disciplining of cadres that underperform.¹⁰⁹ The intention of the Policy seems to be to strike a balance between political qualifications as well as skills for the job at hand. This is the case whether those skills are present prior to appointment, or whether they are acquired through further training. This is a similar rhetoric to President Ramaphosa in his

¹⁰¹ Shava & Chamisa op cit note 75 at 4.

¹⁰² Ibid.

¹⁰³ Ibid.

¹⁰⁴ V H Mlambo, S P Zubane & X Thusi ‘Interrogating Governance Challenges and Cadre Deployment in South Africa’ (2022) VI *Erbil Journal of Humanities and Social Sciences* 1 at 12.

¹⁰⁵ Ibid at 14.

¹⁰⁶ A Ndedi & L Kok ‘Roadmap for Effective and Efficient Cadre Deployment in South Africa’ (August 25, 2017). Available at SSRN: <https://ssrn.com/abstract=3026392> at 1.

¹⁰⁷ Ibid.

¹⁰⁸ Ibid at 3.

¹⁰⁹ Ibid at 4.

testimony to the Zondo Commission. This suggests that there are aims of the Policy that are constitutional, as has been demonstrated by its representative nature. However, if enacted without regard for the function and purpose of the office, it is unconstitutional, unlawful and irrational, and will put a strain on public resources.

VIII. STRUCTURE OF ARGUMENT

With the context and concerns broadly laid out in Chapter One, Chapter Two addresses the political and legal history from which the Policy developed. It positions the Policy within the history of administrative law in pre-democratic South Africa. The developments of administrative law post-apartheid are shown to be demonstrative of transformative constitutionalism in a transitioning South Africa. Chapter Two further addresses the representative nature of the Policy. The transformative and representative intentions of the Policy are demonstrated in the ANC's deployment policy documents, which were made public in February of 2024. The documents, however, additionally confirm that the Policy favours loyalty to the party over merit-based appointments. This has resulted in instability in government and the administration. Furthermore, despite, the potential for the Policy to promote representativity, the reality of how representative South Africa's government is, is discussed. This is in light of the ANC's one-party dominance and the legislative and constitutional provisions that protect the ANC's prerogative to appoint persons to certain executive, legislative and administrative positions.

Chapter Three engages in an assessment of the Policy's impact on the efficiency of the public service in light of the Zondo Commission's report as well as reports of the Auditor-General. By comparing the findings of the Zondo Commission with the 2017 and 2023 reports of the Auditor-General, the contribution of the Policy to an inefficient administration is demonstrated. The contribution is founded in the findings of Chapters One and Two that associate the Policy with unqualified and corrupt appointments. With an understanding of the current state of affairs of the administrative system in South Africa, a finding is made regarding the constitutionality, lawfulness and rationality of the Policy. Despite the connection between cadre deployment and an inefficient administration, Chapter Three discusses legislative solutions to the current concerns surrounding cadre deployment. Reference is made to the legislative mechanisms as well as to the proposed 'National Framework Towards the Professionalisation of the Public

Sector'. ¹¹⁰ These mechanisms demonstrate how the Policy can promote a representative and transformative administration, without compromising the administration's efficiency.

¹¹⁰ The National Framework towards the Professionalisation of the Public Sector published in the Government Gazette (No. 44031 dated 24 December 2020).

CHAPTER TWO

THE TRANSFORMATION OF ADMINISTRATIVE LAW AND APPOINTMENTS IN A TRANSITIONING SOUTH AFRICA

I. INTRODUCTION

In Chapter One, we discussed briefly the importance of administrative justice and how it has been integrated into South African Law. The specific requirement of an efficient administration was described, as well as the potential impediments to that requirement due to the nature of the ANC's cadre deployment policy (hereinafter referred to as the "Policy"). In turn, the concept of administrative justice was introduced. This chapter undertakes a more detailed assessment of the underlying principles of administrative law and administrative justice in South Africa. First, a brief comparison will be done between administrative law under the NP and administrative law under both the Interim and Final Constitutions. This includes a discussion on the negotiation period in the early 1990s in South Africa. Secondly, the Policy is introduced as one specifically tailored to a transformative administration. Thirdly, the Policy's facilitation of representative democracy is weighed up against concerns surrounding one-party dominance and corruption. This is with regard to the capability of the ANC's one-party dominance to degrade principles of representative democracy and manipulate appointments. The discussion, as outlined above, will lead into Chapter Three's in-depth investigation into the unlawfulness of the Policy and the impact the Policy has on an efficient administration with regard to its facilitation of unqualified and corrupt appointments.

II. ADMINISTRATIVE LAW IN APARTHEID SOUTH AFRICA

(a) The Extent of Judicial Power in the Regulation of Administrative Decisions

Administrative law has consistently been a mechanism to hold the Executive in check. Apartheid was a series of legislative acts that divided South Africa along racial lines. Service delivery was disparate between racial groups, with the prioritisation of people classified as 'white'. Legislation concerning town planning, the provision of education and health services and the allocation of welfare benefits were acts of the administration that were legislated to aid

this inequity.¹¹¹ Prior to the promulgation of the Constitution, judicial review was a significant form of control of administrative power. The Judiciary relied on common law principles to review decisions of the apartheid government. This was in an attempt to restrain the seemingly unfettered power of the Legislature.¹¹² Quinot goes so far as to say that under apartheid, administrative law ‘became the surrogate bill of rights.’¹¹³

However, courts were restricted in their ability to review administrative acts, in that the grounds for review were narrow. In contrast, the Legislature had very wide discretionary powers.¹¹⁴ The Legislature had the ability to override the Judiciary’s power to review through ouster clauses.¹¹⁵ Under parliamentary sovereignty, Parliament had the power to decide what was lawful and what was not.¹¹⁶ Courts’ ability to review administrative action was limited to common law principles of illegality, or actions that were *ultra vires*. Even this limited power of the Judiciary was undermined by a legislature who fettered its own power. This created challenges to making findings of illegality or to order that decisions were *ultra vires*.¹¹⁷ The extent to which the Constitution and subsidiary legislation emphasise and protect the right to just administrative action is a stronger mechanism than the few liberal common law principles that courts otherwise had to rely on.¹¹⁸ The Constitution expands on these common law principles, and provides additional mechanisms of judicial review.¹¹⁹ Furthermore, the common law serves as an interpretive tool.¹²⁰ The value of the common law as a bulwark against an oppressive government should not be underestimated. However, the apartheid government still managed to circumnavigate the common law principles.

The Judiciary under apartheid, at best, only took formal reasoning into account, such as findings of illegality.¹²¹ At worst, the Judiciary used formal reasoning to afford Parliament the

¹¹¹ C Hoexter *Administrative Law in South Africa* 3 ed (2021) Juta, Claremont, South Africa at 12.

¹¹² C Hoexter & G Penfold ‘The Remaking of South African Administrative Law’ 2024 *Journal of South African Law* 8.

¹¹³ G Quinot ‘Substantive Reasoning in Administrative Law Adjudication’ (2010) 3 *Constitutional Court Review* 114.

¹¹⁴ C Hoexter ‘The Principle of Legality in South African Administrative Law’ (2004) 4 *Macquarie Law Journal* 167.

¹¹⁵ K O’Regan ‘Breaking Ground: Some Thoughts on the Seismic Shift in our Administrative Law’ (2004) 121 *SALJ* 425.

¹¹⁶ Hoexter op cit note 111 at 17-18.

¹¹⁷ Ibid at 19.

¹¹⁸ Hoexter & Penfold cit note 112 at 10.

¹¹⁹ Hoexter op cit note 111 at 37-8.

¹²⁰ Ibid.

¹²¹ Ibid.

opportunity to legislate without consideration of the economic and social consequences.¹²² In comparison, the Constitution provides the Judiciary with the ability to take into account political, economic and social considerations.¹²³ With limited restrictions, the NP had the power to override laws and accountability mechanisms in their favour. This was in furtherance of racist policies, ‘corrupting’ human rights in the protection of only the minority of the population. It further allowed for the ‘mismanaging’ of resources, in that a minority was benefited to the detriment of the majority of the population.

(b) Similarities between the Actions of the NP and Current ANC Party Politics

In light of the above, similarities can be drawn between the concerns surrounding the ANC’s cadre deployment policy, and the NP’s system of governance. The legislative schemes of the NP, discussed above, were described as tactics of ‘constitutional manipulation’. The ANC is able to enforce party politics through their power to appoint. This is their attempt at altering the composition of government and the administration. In a later discussion on representative democracy, the reality of proportional representation in modern day South Africa demonstrates an alienation of non-ANC voters. Choudhry goes so far as to ask whether South Africa has ‘exchanged one dominant party for the dominance of another’.¹²⁴ There are, however, two key protective mechanisms that are in place that can counteract repeating patterns of the past. These mechanisms are an elaborate constitution as the supreme law of the country, and the potential of a representative democracy.¹²⁵ Both mechanisms are transformative in nature. These are tools that can counteract the after-effects of the NP’s inequitable system of governance.

¹²² Hoexter op cit note 111 at 37-8.

¹²³ Hoexter & Penfold op cit note 112 at 168.

¹²⁴ S Choudhry “‘He Had a Mandate’; The South African Constitutional Court and the African National Congress in a Dominant Party Democracy’ (2010) *Constitutional Court Review* 10.

¹²⁵ Choudhry elaborates on the relevant constitutional principles that distinguish the capabilities of the dominance of the ANC from the corrupted power of the NP. First, the dominance of the ANC has been secured through free and fair elections. Secondly, there are institutions that have been mandated by the Constitution to keep check on majority powers (Ibid at 10).

III. TRANSFORMATIVE CONSTITUTIONALISM IN A TRANSITIONING SOUTH AFRICA

(a) The Effect of Transformative Constitutionalism on South African Administrative Law

The expansion of the Judiciary's ability to review administrative acts is an example of transformative constitutionalism. In the post-Cold War period, there was a global renewal of democratic constitutionalism.¹²⁶ This presented as an opportunity to elevate the principles of administrative review by entrenching them in democratic constitutions.¹²⁷ This was, in part, to ensure an equitable re-distribution of resources, which was required after segregationist policies had withheld resources from large portions of the population.¹²⁸

The definition of transformative constitutionalism has been debated. A contribution to the definition is the description of transformative constitutionalism as a 'long-term project... committed to transforming a country's political and social institutions and power relationships.'¹²⁹ Additionally, the Constitution of the Republic of South Africa 200 of 1993 (hereinafter referred to as the "Interim Constitution"), described itself as,

a historic bridge between the past of a deeply divided society... and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.¹³⁰

This is a bridge from an inequitable past to a future premised on dignity and equality.¹³¹ The transformative nature of the Constitution is both a social and economic 'revolution' in its inclusion of equal service delivery, and provision of resources.¹³² Equality underlies every constitutional provision, including the need for administrative justice, and the functioning of the administration in general.

¹²⁶ H Corder 'A Right to Administrative Justice: 'New' or Just Repacking the Old?' in A von Arnould, K der Decken & M Susi (eds) *The Cambridge Handbook of New Human Rights: Recognition, Novelty, Rhetoric* (2020) Cambridge University Press 496.

¹²⁷ *Ibid.*

¹²⁸ *Ibid.*

¹²⁹ K Klare 'Legal Culture and Transformative Constitutionalism' (1998) *SAJHR* 150.

¹³⁰ Constitution of the Republic of South Africa op cite note 68 Postamble.

¹³¹ P Langa 'Transformative Constitutionalism' (2006) *STELL LR* 354.

¹³² *Ibid* at 352.

The epilogue of the Interim Constitution states that transformation is the cornerstone of democracy.¹³³ It is a continuous process to move beyond the consequences of parliamentary supremacy and towards a just society. The Constitution specifically includes socio-economic rights. These rights are paramount to the constitutional project.¹³⁴ Socio-economic rights serve as a vehicle for the realisation of political and civil rights in their upliftment of people's health, education and housing circumstances.¹³⁵ The realisation of these rights requires government to prioritise service delivery and infrastructural development.¹³⁶ Administrators are the medium through which the provision of resources is controlled on both a widespread national basis, and a day-to-day basis. The integrity of administrators must therefore be protected to achieve the overall vision of transformation and democracy.

The importance of an effective administration is part of the ongoing project of transformation. Furthermore, it is an aid to the democratic process. There are two understandings of democracy. The first is the realisation of democracy through majoritarianism, which requires a fair electoral process.¹³⁷ A second model describes democracy as related to 'achieving the just distribution of material and resources.'¹³⁸ These two models are not incompatible. Arguably, the inclusion of both makes for a democratic society. With regard to the second model, if there is a failure to achieve the just distribution of resources, South Africa's democracy and constitutional vision are jeopardised. The State largely imbues administrative bodies with the responsibility of resource distribution. The State is further responsible for the formation of these bodies and every act of state power must be justified.¹³⁹ Government's decisions are justified by adhering to their mandate as presented to the voters, which speaks to the first model of democracy. Therefore, it would undermine the principles of democracy if the governing party ignored the will of the voting public.

¹³³ Constitution of the Republic of South Africa op cit note 68, Epilogue & M Rapasta 'South Africa's Transformative Constitution: From Civil and Political Rights Doctrines to Socio-Economic Rights Promises' (2015) 5 *Juridical Trib* 209.

¹³⁴ Ibid at 209.

¹³⁵ Ibid at 215 & The Constitution of the Republic of South Africa op cit note 1 at ss 26-9.

¹³⁶ S Liebenberg & B Goldblatt 'The Interrelationship between Equality and Socio-Economic Rights under South Africa's Transformative Constitution' (2007) 23 *SAFR J on Hum. Rts* 3.

¹³⁷ D M Davis 'Administrative Justice in a Democratic South Africa' (1993) *Acta Juridica* 22.

¹³⁸ Ibid at 22. Section 1(d) of the Final Constitution clarifies that South Africa is founded on universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government. This is to ensure accountability, responsiveness and openness. Section 19(2) affords every citizen the right to free and fair elections in which you can vote for any legislative body.

¹³⁹ E Mureinik 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994) 10 *SAJHR* 32.

The transformation from parliamentary supremacy to democracy has resulted in an individual whose rights have been adversely affected by an administrative act to be able to institute proceedings for the action to be reviewed on the grounds of unconstitutionality, irrationality or illegality. Section 33(1) of the Constitution gives everyone the right to administrative action that is procedurally fair.¹⁴⁰ Section 3 of PAJA lists the requirements in order to give effect to administrative action that is procedurally fair.¹⁴¹ The requirements of PAJA speak to the audi alteram partem principle. This principle concerns a person's right to participate in a decision that adversely affects their rights.¹⁴² Hoexter writes that public participation both enhances the legitimacy of administrative decisions, and improves the rationality.¹⁴³ Irrationality speaks to the decision being made without taking into account the ultimate purpose that the decision facilitates.¹⁴⁴ In other words, the decision must be rationally related to the purpose, 'for which the power was conferred'.¹⁴⁵ It is a minimum threshold requirement applicable to the exercise of all public power.¹⁴⁶ As it is the, 'lowest possible threshold for the validity of executive decisions', it should be easy for decisions to pass a rationality test.¹⁴⁷ Illegality speaks to the decision being unlawful in that it is in breach of the statutory authorization of the administrative action and generally accepted legal principles.¹⁴⁸ Section 1(c) of the Constitution confirms that the Republic of South Africa is founded on the supremacy of the Constitution and the rule of law. The section 33 right to just administrative action is, therefore, protected by the requirement of legality as well as constitutionality. The same can be said for Sections 195 and 196 of the Constitution. Irrationality and illegality are grounds covered by Section 6 of PAJA, the subsidiary legislation that gives effect to Section 33 of the Constitution.¹⁴⁹ These three grounds apply to the decision to appoint an administrative official. If legislation requires an administrative official to be appointed in a certain manner or to have specific qualifications, it would be unlawful to ignore these criteria. If the official is not qualified in the position they are placed in, and there are insufficient mechanisms to train that administrator, the decision to appoint could be irrational. Similarly, if the official was appointed to further party politics, or

¹⁴⁰ The Constitution of the Republic of South Africa op cit note 1.

¹⁴¹ s3(2)(b).

¹⁴² Hoexter op cit note 111 at 502.

¹⁴³ Ibid & *Joseph v City of Johannesburg* 2010 (3) BCLR 212 (CC) at 42.

¹⁴⁴ *Albutt v Centre for the Study of Violence and Reconciliation, and Others* 2010 (5) BCLR 391 (CC).

¹⁴⁵ *Simelane* supra note 87 at 27.

¹⁴⁶ *Pharmaceutical Manufacturers* supra note 19 at 90.

¹⁴⁷ *Simelane* supra note 87 at 42.

¹⁴⁸ Choudhry op cit note 124 at 35.

¹⁴⁹ As legislation, the entirety of PAJA needs to be upheld through the principle of legality. Section 6(2)(f)(ii) of PAJA directly references the ground of rationality.

the corrupted ideals of private bodies rather than to effectively aid the functioning of the specific administrative office, the appointment could be irrational.¹⁵⁰ These instances ignore the purpose and function of the office, as well as the requirements for appointment. The concern of appointments being irrational will be elaborated on later in this chapter.

(b) The Changing Face of The Administration

As part of the transformative process, changes were made to the administration during the negotiation and transition period in South Africa. A brief description of the transition process was discussed in Chapter One. It serves this assessment to elaborate on that process, as it premises the new administrative system. On 14 September 1989, Frederick Willem de Klerk was elected as the former State President of South Africa.¹⁵¹ Once elected, de Klerk proceeded to unban the principal liberation movements, including the ANC.¹⁵² He further assisted in passing legislation that permitted free political activity.¹⁵³ With the release of Nelson Mandela on 11 February 1990, negotiations began for an equal and democratic South Africa.¹⁵⁴ In 1991, representatives from various political parties and liberation movements convened at the Convention for a Democratic South Africa (hereinafter referred to as “CODESA”). The aim was to establish a multi-party democracy in a united South Africa and to draft a supreme constitution inclusive of a bill of rights.¹⁵⁵ CODESA failed when the negotiating parties reached a stalemate, with negotiations only resuming with the adoption of Joe Slovo’s ‘sunset clause’.¹⁵⁶ This power-sharing arrangement ensured that the NP would maintain certain government positions, and the negotiation process continued.¹⁵⁷

¹⁵⁰ As was the case in *Simelane* (supra note 87), the President’s decision to appoint Mr Simelane as the NDPP, was found invalid on the grounds of irrationality as the President had failed to take into account the qualifications and personal circumstances of Mr Simelane. This was in light of the purpose of the position of the NDPP. In the court of public opinion, the decision was widely believed to have been made to protect President Zuma from pending charges and investigations. Mr Simelane was not fit and proper and did not meet the constitutional requirements to be the NDPP. This argument suggests that an unqualified administrator could be seen to be unfit for purpose, resulting in the appointment not only being unconstitutional and unlawful, but also irrational.

¹⁵¹ I Currie & J De Waal ‘A Constitutional History of South Africa’ in *The New Constitutional and Administrative Law Volume I* 1 ed (2001) 59.

¹⁵² *Ibid.*

¹⁵³ *Ibid.*

¹⁵⁴ *Ibid.*

¹⁵⁵ *Ibid.*

¹⁵⁶ *Ibid* at 61.

¹⁵⁷ *Ibid* at 62.

The 1994 election resulted in a GNU, as discussed in Chapter One.¹⁵⁸ The NP appointed one deputy president and various members of the Executive.¹⁵⁹ To protect the Party's interests, the ANC appointed party loyalists in governmental positions, including in the administration.¹⁶⁰ Additionally, as part of the transformative process and in efforts to redistribute wealth, ANC members were favoured as appointees.¹⁶¹ This was to counteract the NP's prior exclusion of 'non-whites' in governmental positions.¹⁶² As such, the Policy was regarded as transformative in nature. While schedule 236 of the Interim Constitution stated that persons employed prior to the promulgation of the Interim Constitution would remain in their position of employment, the expansion of the administration opened up new positions.¹⁶³ This allowed for a larger administrative system with more positions to fill. Administrative agencies would be required to attend to the increased need for housing, the standardisation of education, as well as the expansion of public health care.¹⁶⁴ The administration is the vehicle for the distribution of resources, the importance of which has been emphasised in both Chapter One and in the above discussion on transformative constitutionalism.

(c) Constitutional Control over the Administration and Executive

The Interim Constitution came into operation on 27 April 1994. The principle of constitutional supremacy was applied to all branches and levels of government.¹⁶⁵ Section 24 of the Interim Constitution reads similarly to section 33 of the Final Constitution in its provisions regarding administrative justice. Section 24, however, did not make provision for the enactment of national legislation to give effect to the constitutional right.¹⁶⁶ PAJA, the subsidiary legislation that was promulgated as a result of the Final Constitution, elaborates on the requirement of an efficient administration, which is not so clearly outlined by section 33 of the Final Constitution.

¹⁵⁸ O van Cranenburgh & Kopecky op cit note 74 at 286.

¹⁵⁹ Ibid.

¹⁶⁰ Shava & Chamisa op cit note 75 at 3.

¹⁶¹ Ibid.

¹⁶² Choudhry op cit note 124 at 17.

¹⁶³ Constitution of the Republic of South Africa op cit note 68 schedule 236. Davis is of the opinion that a rapid expansion in administrative agencies would be necessary in order to deal with the vast social and economic disparities that resulted from apartheid (op cit note 137).

¹⁶⁴ Davis op cit note 137 at 21.

¹⁶⁵ Currie op cit note 151 at 64.

¹⁶⁶ Section 24 of the Interim Constitution affords every person the right to lawful and procedurally fair administrative action where their rights are affected, as well as the right for affected persons to be furnished with reasons. Section 33(3) of the Final Constitution elaborates on this to require that national legislation be enacted to give effect to the rights expressed in section 24. Furthermore, section 33(3)(c), specifically requires that the national legislation promote an efficient administration.

The *First Certification Judgment* tested the draft Final Constitution against the 34 Constitutional Principles.¹⁶⁷ With specific reference to the public service and appointments, the Court had concerns with the regulation of the PSC.¹⁶⁸ The offended principle reads as follows:

There shall be an efficient, non-partisan, career-orientated public service broadly representative of the South African community, functioning on a basis of fairness and which shall serve all members or [sic] the public in an unbiased and impartial manner, and shall, in the exercise of its powers and in compliance with its duties, loyally execute the lawful policies of the government of the day in the performance of its administrative functions. The structures and functioning of the public service, as well as the terms and conditions of service of its members, shall be regulated by law.¹⁶⁹

The Court had specific concerns regarding the role of the PSC in appointing, promoting, transferring and dismissing members of the public service, in that the role was not defined.¹⁷⁰ The Court acknowledged that implicit in the PSC's independence is its duty to keep a check on the Executive.¹⁷¹ Due to the nature of the office, this is with specific reference to the Executive's involvement in the administration of the public service. The Court stated that in order to comply with the Constitutional Principles, the PSC's role needed to be clarified to include mechanisms to check executive power.¹⁷² Furthermore, there needed to be mechanisms to protect the PSC's independence.¹⁷³ This implies that the administration should not be corrupted by undue influence of the Executive. If such influence is to prejudice the administration, then the PSC should have the authority to intervene without fear of retaliation from the Executive. In the *Second Certification* judgment, the Court was satisfied with the amendments in that they clarified the role of the PSC.¹⁷⁴ The importance of the independence of the PSC is discussed later in this chapter with regard to the effect of one-party dominance on appointments. It is further discussed in Chapter Three as a mechanism to facilitate a lawful cadre deployment policy.

¹⁶⁷ *Certification of the Constitution of the Republic of South Africa* 1996 (10) BCLR 1253 (CC).

¹⁶⁸ *Ibid* at 171.

¹⁶⁹ Constitution of the Republic of South Africa op cit note 68 CP XXX.1 schedule 4.

¹⁷⁰ *Certification of the Constitution of the Republic of South Africa* supra note 167 at 170-77.

¹⁷¹ *Ibid* at 171 & 176.

¹⁷² *Ibid* at 176.

¹⁷³ *Ibid*.

¹⁷⁴ *Certification of The Amended Text of The Constitution of The Republic of South Africa* 1997 (1) BCLR 1 (CC) 128-44.

Additional constitutional mechanisms that control and protect the administration were included in the Final Constitution. These mechanisms were discussed in the preceding Chapter and will be re-visited in the following Chapter for purposes of assessment. These are sections 195 and 197 of the Final Constitution.

Therefore, the legacy of the apartheid government necessitated the reformation of the administration of the Country. This was to prevent manipulation by the ruling party, as well as to aid in the equal provision of resources. On the face of it, the Constitution is extensive in its protection of administrative justice. The extent to which the GNU was expected to perform their functions and duties was also clearly defined. Despite this, Choudhry comments that the ANC was of the belief that a

barrier to transformation was office-holders in the broad range of public institutions, who had been appointed by the previous NP government, and who were accused of having had a vested interest against implementing reforms that would undermine their power.¹⁷⁵

The ANC's answer to this concern was cadre deployment which removed, 'any roadblocks to the implementation of ANC policies.'¹⁷⁶

IV. THE IMPLEMENTATION OF THE CADRE DEPLOYMENT POLICY BY THE ANC

The drafters of both the Interim and Final Constitution paid due regard to the fair and efficient working of the administration. The ANC implemented their cadre deployment policy during the transition period in order to ensure an ANC stronghold; to protect against untoward motives of opposition parties; to accommodate for the expansion of the administration; and to aid in transformation. The Policy is relevant to their National Revolutionary Movement and the National Democratic Revolution (hereinafter referred to as the "NDR").¹⁷⁷ To realise the ideals of the NDR, the ANC endeavours to understand the interconnection between political and socio-economic challenges in society; utilise political power to advance the objectives of the

¹⁷⁵ Choudhry op cit note 124 at 17.

¹⁷⁶ Ibid at 17.

¹⁷⁷ The foundation of the National Democratic Revolution is the Freedom Charter which advocated for representative institutions of government, universal and direct adult suffrage, economic emancipation and a South Africa built on democratic and non-racial principles. These are principles that the Constitution has embodied (O' Malley Archive. 'National Democratic Revolution. Accessed on 12 May 2024, available at <https://omalley.nelsonmandela.org/index.php/site/q/031v02424/041v02730/051v03005/061v03132/071v03140/081v03145.htm>).

NDR; wield instruments of the State in line with these ideals; and organise and build partnerships to drive the process of reconstruction and development, nation-building and reconciliation.¹⁷⁸ The intentions of the Policy are further outlined in party documents which were made available as public record in February 2024.

(a) The Democratic Alliance's PAIA Request and Insight into the Cadre Deployment Policy

In the wake of the Zondo Commission and continued controversy surrounding the Policy, the DA launched an application in the Johannesburg High Court. The application was made in terms of the Promotion of Access to Information Act 2 of 2000 (hereinafter referred to as "PAIA"), for the release of records pertaining to the Deployment Committee.¹⁷⁹ This application was launched after the ANC had refused the DA's PAIA request.¹⁸⁰ Judge Wepener recognised that the information was necessary for the opposition party to exercise their duty of oversight over appointments of organs of state.¹⁸¹ It was further required for the DA to effectively draft legislation to govern cadre deployment in an attempt to combat its 'detrimental impact on the public.'¹⁸² The Court subsequently ordered that the decision of the ANC to refuse to provide the requested documents was unlawful and invalid, and directed that the ANC make the requested documents available within five court days of service of the order.¹⁸³ The ANC attempted to appeal the application in the Constitutional Court. Leave to appeal was refused in that it was not in the interests of justice.¹⁸⁴ The ANC complied with the order and the DA published the documents. The documents give insight into the workings of the Policy and the Deployment Committee.

In its 2008 Deployment Policy, the ANC distinguished between a member of the ANC and a cadre. This clarified their understanding of who is considered to be a cadre. Section 3(b)(i) of the 2008 Policy provides a general definition for a 'cadre' in that they are persons with special attributes, best depicted by the descriptors, 'key personnel', 'highly trained', 'a permanent

¹⁷⁸ ANC Deployment Policy (As Adopted by the NEC: 11-13 July 2008) at s 3(b)(iv).

¹⁷⁹ *Schreiber* supra note 90.

¹⁸⁰ The DA relied on section 58 of PAIA in that if the private body from whom the documents have been requested fails to provide their decision within the requisite time period, the request is assumed to have been denied.

¹⁸¹ *Schreiber* supra note 90 at 16-7.

¹⁸² *Ibid.*

¹⁸³ *Ibid* at 23.

¹⁸⁴ *African National Congress v Leon Amos Schreiber & Others* (2023) CC (case no.: 267).

nucleus or framework of a political or military unit’, or ‘special unit’.¹⁸⁵ Furthermore, a ‘cadre’ is defined as a member of the organisation who, ‘is an embodiment of the principles of the organisation, the life, the body and soul of the ANC and the National Revolutionary Movement.’¹⁸⁶ The 2008 Policy required the following traits to be embodied by cadres:

1. Be ready to protect the constitution of the ANC and interpret its provisions and policies in such a way that it encourages and builds unity within the movement.
2. Be committed to collective and organisational processes.
3. Be the custodian and guardian of the organisation at all times wherever and whenever he/she is.
4. Always respond to the call of the ANC.
5. Be able to combat factionalism [and] any attack on the organisation...at all times.
6. Display integrity, humility and commitment to serve the people.
7. Always put the interest of the organisation first.¹⁸⁷

To note for the discussion in Chapter Three on the ANC’s testimony at the Zondo Commission, is that while a cadre must display integrity, humility and commitment to serve the people, they must always put the interests of the organisation first. These requirements appear to contradict each other.

The 2008 Deployment Policy’s definition of ‘deployment’ has a similar contradiction to that of ‘cadre’. The meaning ascribed to ‘deployment’ is ‘identifying individuals with required personal attributes... [and] who are prepared to serve and put the interest of the people first at all times’.¹⁸⁸ The personal attributes of deployed individuals have been outlined above and include service to the people as well as a sense of blind loyalty to the Party. The definition expands on the requirements of a cadre in that relevant academic qualifications of the candidate must be considered prior to deployment.¹⁸⁹ Furthermore, while cadres are preferred, the Party recognises that there are individuals whose talent and skills warrant deployment to specific areas of need and specialty.¹⁹⁰ Both the consideration of academic qualifications and

¹⁸⁵ ANC Deployment Policy op cit note 178.

¹⁸⁶ Ibid at s 3(b)(ii).

¹⁸⁷ ANC Deployment Policy op cit note 178 at s 3(b)(v).

¹⁸⁸ Ibid at s 3(d)(iii).

¹⁸⁹ Ibid.

¹⁹⁰ Ibid at ss 3(d)(v) & (vi).

specialised skill and talent would require the Deployment Committee to take both prior training and merit into account when making deployment recommendations.

A statement of the ANC National Working Committee, dated 1 December 1998, was provided to the DA. The statement by former Secretary General Kgalema Motlanthe instructed that the deployment strategy must develop guidelines for the deployment of cadres to areas crucial for the transformative project.¹⁹¹ During apartheid, ANC members would have had limited career possibilities. The Party praises democracy, the new Constitution and affirmative action as opening career paths for cadres in terms of economic and social advancement.¹⁹² This is through public or civil service positions.¹⁹³ This understanding echoes the sentiments above, in that the Policy is a part of the transformative project in the resultant redistribution of resources and economic upliftment. The ANC attributes the slow pace of transformation in the early years of democracy to a weak and disorganised cadre deployment policy.¹⁹⁴ The ANC relies on the aims of the NDR, as briefly outlined above, inclusive of democracy and human rights, economic and social transformation and transformation of the state machinery, to guide their deployment policy and to strengthen political and administrative control.¹⁹⁵ In order to achieve these goals, the ANC strategised that the Policy is to adopt a maximalist approach in securing cadreship in all key governmental positions.¹⁹⁶

With regard to the above goals and strategies, it is useful to look at some of the reports provided to the Deployment Committee. These reports were made available in order for the Deployment Committee to provide input on appointments. It is the role of the Deployment Committee to merely advise on appointments and make recommendations. The Deployment Committee's role was testified to at the Zondo Commission, to be elaborated on in Chapter Three. Their purpose is not to unilaterally make decisions regarding final appointments. While this was shown to not always be the case, this is nevertheless their function. The ANC released reports regarding multiple appointments, including members of the Independent Regulating Board for Auditors, multiple water boards, the Railway Safety Regulator and the Commissioner for the

¹⁹¹ Statement of the ANC National Working Committee, 1 December 1998.

¹⁹² Cadre Policy and Deployment Strategy: Facing the Challenges: learning from the past and new challenges s 3(d) (This was a document provided to the DA by the ANC as a result of the DA's PAIA request).

¹⁹³ Ibid.

¹⁹⁴ Ibid at s 4(b).

¹⁹⁵ Cadre Policy and Deployment Strategy op cit note 192 s 2.2.

¹⁹⁶ Ibid at s 1.

Police Service. Relevant to note in light of the provision of resources and transformation, is that these are positions relevant to the economic health of the Country, the provision of water, and the overall safety of the public. Each report placed large emphasis on the academic qualifications and experience of the candidates. Little was to be found in the reports regarding party loyalty, aside from candidates who had previous governmental positions. Despite this, it can be assumed that the Deployment Committee, by virtue of their purpose as outlined in the various policies, would take into account the candidates' loyalty to the Party.

(b) The Intentions of Deployment and the Deployment Committee as Required by the Deployment Policy

The above prefaces the findings of the Zondo Commission, and relates the application of the Policy to the mismanagement of resources. In analysing the documents provided by the ANC as a result of the DA's PAIA request, three main goals can be ascertained. These goals are transformation, service to the people, and constructing a government and administration loyal to the ANC. Just as President Ramaphosa does not explicitly rank these goals in his testimony before the Zondo Commission, neither does the Policy. However, with regard to the emphasis that the Policy places on putting the Party above any other duty, the Policy presents itself as prioritising the appointment of ANC loyalists.

In President Ramaphosa's testimony before the Zondo Commission, he admits that the preference for ANC loyalists often results in candidates being appointed who are not necessarily fit-for-purpose.¹⁹⁷ The Deployment Committee's tendency to disregard merit is demonstrated in *Mlokoti*.¹⁹⁸ The Zondo Commission reported that the Deployment Committee assists in the appointment of corrupt officials, aided by the private nature of the Committee. The Auditor-General finds wasted expenditure at fault for failings of the administration, inclusive of fruitless and fraudulent expenditure. It is both the inability to perform the function for which a person is appointed as well as the fraudulent use of funds that contributes to an inefficient administration, as demonstrated by the reports of the Auditor-General which will be discussed in Chapter Three.

¹⁹⁷ This statement by President Ramaphosa is unpacked in greater detail in Chapter Three and can be found in the Judicial Commission of Inquiry into State Capture Report: Part VI, Volume 2 at 398.

¹⁹⁸ *Mlokoti* supra note 79.

(c) Representative Democracy and Judicial Interference in Appointments

Concerns regarding the Policy must be looked at with due regard to representative democracy and proportional representation. A legitimate aim of South Africa's constitutional democracy is representative democracy. Section 19 of the Constitution ensures that every citizen can make free political choices and participate in free, fair and regular elections for any political body.¹⁹⁹ That the political choice is 'free' and that said choice can be made with regard to 'any legislative body' presupposes the representative nature of the Government. Voters have a relatively unencumbered and broad choice of representatives. Voters participate in the elections, assuming that the party that they vote for will serve their best interests. In turn, it is assumed that the voters' interests align with the party they vote for. As it stands, the majority of voters have shown to align themselves with the interests of the ANC by way of the outcome of every democratic election prior to 2024.²⁰⁰

The concept of representative democracy justifies appointments being the prerogative of the ruling party. As the prerogative of the ruling party, appointments are challenging to review. As it is arguably impractical for the public to take part in daily decisions of government, elected representatives are expected to make decisions on the public's behalf.²⁰¹ This is a democratic process as voters are provided with the opportunity to elect their decision makers at regular elections. South Africa's electoral system follows the principle of proportional representation. Proportional systems, in comparison to majoritarian systems, place focus on the inclusion of minority parties in government.²⁰² In theory the system allows for a true representation of the diversity of South African citizens. However, factual proportional representation is arguably not reflected in South African government due to the dominance of the ANC over smaller opposition parties. Furthermore, the ANC exercises strict control over their own representatives who are unable to question the will of the Party without negative consequences.

¹⁹⁹ The Constitution of the Republic of South Africa op cit note 1 at ss 19(1) & (2).

²⁰⁰ During the drafting of this paper South Africa was undergoing a significant electoral shift. The ANC lost its majority for the first time since 1994 in the May 2024 elections. Voters demonstrated that they are unsatisfied with the direction of the Party. Since the 2019 elections, the Country has been victim to corruption scandals and resource scarcity, demonstrated by the consistent load shedding of electricity. Whether the ANC will be able to gain back their majority for the 2029 election remains to be seen.

²⁰¹ Phooko op cit note 38 at 519.

²⁰² Pippa Norris 'Choosing Electoral Systems: Proportional, Majoritarian and Mixed Systems' (1997) 18 *International Political Science Review* 4.

(d) ANC Dominance over Opposition Parties

The ANC, through its consistent and significant majority, has had seemingly complete control over appointments of political actors and civil servants. It has become increasingly popular for opposition parties to review appointments in a court of law. Judicial review is often a lengthy and expensive process and as such, even this mechanism might be out of reach for smaller political parties. Constitutional mechanisms for appointment afford the majority party significant power. When this power is exercised, it often does not require the approval of minority parties. The appointments to be discussed below are demonstrative of the capacity of the ANC to control governmental and administrative positions.

The President is elected by the National Assembly at the first sitting after the election and whenever necessary to fill a vacancy.²⁰³ The National Assembly, while ideally a proportional representation of the voting public, has consisted of a majority of ANC members since 1994. Subsequently, the President has consistently been an ANC member. The President exercises their executive authority together with members of Cabinet.²⁰⁴ Cabinet, namely the Deputy President and Ministers, are appointed by the President.²⁰⁵ There would be a vested interest for the President to appoint ANC members to aid in exercising executive authority. The Executive has significant power over the Cabinet in that they are not only afforded the power to appoint members, but additionally to assign powers and functions and dismiss them.²⁰⁶ The Executive is, therefore, established as an ANC stronghold, who would have a vested interest in protecting that stronghold within every sphere of government. To an extent, this is generously afforded for by the Constitution. The ANC's prerogative is also applicable to Chapter 9 institutions as well as the public service.

The President appoints the Public Protector, the Auditor-General, members of the South African Human Rights Commission, members of the Commission for Gender Equality and the Electoral Commission.²⁰⁷ The caveat is that appointments must be made on the recommendation of the National Assembly. Specifically, decisions are made by a committee

²⁰³ The Constitution of the Republic of South Africa op cit note 1 at s 86(1).

²⁰⁴ Ibid at s 91(1).

²⁰⁵ Ibid at s 85(2).

²⁰⁶ Ibid at s 91(2).

²⁰⁷ Ibid at s 193(4).

of the National Assembly that proportionally represents members of all parties.²⁰⁸ However, as discussed above, the requirement of proportionality does not necessarily outweigh the will of the ANC. The requirement for 60 per cent of members of the National Assembly to approve recommendations of the committee has also been an insufficient representative mechanism.²⁰⁹ This is due to the ANC only occupying less than 60 per cent of the seats for the first time after the 2019 general election. Despite the shift in the percentage of ANC representatives in the National Assembly, the National Assembly is still only required to provide *recommendations* to the Executive for appointments. Furthermore, the tenure of the Public Protector and Auditor-General can outlive an election cycle.²¹⁰ All Chapter 9 institutions are state institutions that support constitutional democracy. The former Public Protector, Thuli Madonsela, played an integral role in initiating the Zondo Commission. The Auditor-General plays a significant role in administrative accountability, as will be demonstrated in Chapter Three. It is therefore necessary for both institutions to be independent and impartial.

The President additionally has significant control over the public service due to their power to appoint members of the PSC. The 14 commissioners that comprise the PSC are appointed by the President.²¹¹ This power is not unfettered in that five commissioners must be approved by the National Assembly, recommended by a proportionally representative committee of the National Assembly.²¹² Additionally, nine commissioners are nominated by the Premier of each Province respectively, recommended by a proportionally representative committee of the Provincial Legislature.²¹³ The proportionality of provincial representation is more nuanced in that not every province is led by an ANC premier or ANC legislative majority. However, prior to the 2024 national election, only the Western Cape Province and KwaZulu Natal had been run by opposition parties. KwaZulu Natal ceded control to the ANC in the 2004 election, while the Western Cape Province has been run by the DA since the year 2009. This has provided for only one commissioner to combat the political will of eight commissioners.

²⁰⁸ The Constitution of the Republic of South Africa op cit note 1 at s 193(5).

²⁰⁹ Ibid at s 193(5)(b).

²¹⁰ Ibid at ss 183 & 189.

²¹¹ Ibid at s 196(7).

²¹² Ibid at s 196(7)

²¹³ Ibid at s 196(8).

The Constitution, therefore, affords extensive power to the Executive to appoint persons in various sectors of government and the administration. It is subsequently challenging for opposition parties to interrogate the Policy. Further challenges are found within the ANC itself.

(e) Political Control over ANC Party Members

The current system of governance in South Africa creates great difficulty for party members, especially those in governmental positions, to deviate from the party line. Therefore, for fear of unemployment or ostracisation, party politics significantly influences how decisions are made. While it would otherwise be expected for there to be consequences for deviating from the mandate presented to voters, extra-governmental persons have infiltrated government and influenced decision makers. This has happened through acts of state capture. There have been challenges in the Constitutional Court with regard to the ability of persons to deviate from the party that they were a member of when they were initially appointed to the Legislature.

In August 2002, an application was heard by the Constitutional Court regarding the lawfulness of legislation that aimed to amend the Constitution and allow members of government to cross the floor without losing their seats.²¹⁴ Two of the challenged Acts, namely the Constitution of the Republic of South Africa Amendment Act 18 of 2002 (“hereinafter referred to as “the First Amendment Act”) and the Constitution of the Republic of South Africa Amendment Act 21 of 2002 (hereinafter referred to as “the Second Amendment Act”), would result in the amendment of the Constitution. The remaining two Acts were the Local Government: Municipal Structures Amendment Act 20 of 2002 (hereinafter referred to as “the Local Government Amendment Act”) and the Loss or Retention of Membership of National and Provincial Legislatures Act 22 of 2002 (hereinafter referred to as “the Membership Act”). The previous rule was that if a councillor ceased to be a member of the political party through which they had gained their seat, they would lose their seat in government.²¹⁵ The amendments provided specific conditions that allowed for floor crossing at certain periods between election cycles.²¹⁶ The arguments put forward by the Applicants centred around the following: the amendments undermined the basic structure of the Constitution; the amendments were unconstitutional in their impact on

²¹⁴ *United Democratic Movement v The President of the Republic of South Africa and Others* (African Christian Democratic Party and Others. Intervening; institute for Democracy in South Africa and Another as Amici Curiae) (No 2) 2002 (11) BCLR 1179 (CC).

²¹⁵ *Ibid* at 4.

²¹⁶ *Ibid*.

proportional representation and anti-defection provisions; the amendments were inconsistent with the founding values of the Constitution, and; the amendments infringed on voters' rights provided for in section 19(3) of the Bill of Rights.²¹⁷ A debate ensued on whether an anti-defection clause was necessary for the realisation of proportional representation.

The Court dismissed the main Application by the UDM which concerned the constitutionality of the legislation, declaring only the Membership Act inconsistent with the Constitution and invalid.²¹⁸ The amendments made it easier to defect from smaller parties, as ten per cent of the party would need to defect in order for the floor crossing to take place.²¹⁹ ANC members would, by virtue of the number of seats in Parliament that the party holds, find it harder to defect. The Court did not take issue with the amendments' impact on proportional representation. This is despite the act of floor crossing being a demonstration of defecting from the mandate that secured one's seat.²²⁰ This is concerning as voters elect a party and not the individual. Subsequently, the Fourteenth Amendment Bill of the Constitution was passed which would ban floor crossing. In terms of the Bill, if a member desires to defect due to differing political views, they would have to give up their seat in Parliament. If a member of Parliament ceases to be a member of their party due to dismissal, they will also lose their position. The threat of expulsion can be reason enough to abide strictly by party politics despite what is thought to be in the best interests of the public.

The discussion above presents pitfalls of the ANC's dominance, while their dominance is arguably a positive product of representative democracy. However, if decisions are motivated by a flawed policy and shielded from public view and critique, as is the case with the current cadre deployment policy and Deployment Committee, they are arguably not as representative as they purport to be. Interference by private persons in government decision making will be discussed in detail in Chapter Three. This is with specific regard to the history of state capture. At this time, it is only necessary to note that ANC cadres are not only subject to the direct will of the Executive or National Assembly. The influence of private bodies can further influence appointments. This is concerning when the ANC has such unfettered appointment powers, as demonstrated above. In addition, accountability mechanisms are diluted by the dominance of

²¹⁷ *UDM* supra note 214 at 14.

²¹⁸ *Ibid* at 121.

²¹⁹ *Ibid* at 46.

²²⁰ A Christmas 'The End of an Era: The Abolition of Floor Crossing' (2008) 10 *Local Government Bulletin*.

the ANC. This is of concern as it creates the opportunity for corrupted appointments, which have been, and will continue to be, a cause of irregular expenditure.

Opposition parties have demanded reasons for appointments as this would aid in reviewing the decisions. Furthermore, reasons assist in the assessment of whether the appointment was unconstitutional, unlawful and irrational. Importantly, to provide the reason for a cadre's appointment would require the suitability of the candidate to be exposed, both in terms of requisite skill and carrying out the ANC's mandate. These are not irreconcilable attributes.

(f) Opposition Parties' Inquisitions into ANC Appointments

The matter of *President of the Republic of South Africa v Democratic alliance and Others* was heard by the Constitutional Court on 14 February 2019.²²¹ The issue at hand was whether the President's powers to appoint and dismiss members of Cabinet were capable of being reviewed and set aside. Furthermore, the Court was asked to decide on whether the President is obligated to disclose the reasons for relieving cabinet ministers of their duties in terms of Rule 53.²²² The reports of the Auditor-General correlate instability in upper levels of government and the administration as a cause of mismanagement. The background of the matter is that on 30 March 2017, former President Jacob Zuma announced that several ministers were relieved of their ministerial duties.²²³ Zuma issued reasons for the re-shuffle on that same day.²²⁴ The DA alleged that the reshuffle was unlawful, unconstitutional, irrational and invalid, and launched an application in terms of Rule 53 in order to obtain record of the proceedings which led to the reshuffle, as well as their reasons for taking such action.²²⁵ When President Ramaphosa succeeded Jacob Zuma, he 'rectified' the appointment scandal and the DA withdrew their application. President Ramaphosa, however, persisted that the appeal be heard on the grounds that the extension of the applicability of Rule 53 to executive decision making is invalid.²²⁶ The Supreme Court of Appeal stated that they did not have authority to make this decision and it should be referred to the Rules Board. President Ramaphosa was not satisfied with this outcome and escalated the matter to the Constitutional Court. One of the ministers in question

²²¹ 2019 (11) BCLR 1403 (CC).

²²² Rule 53 of the Supreme Court Act 59 of 1959 (Uniform Rules of Court) allows for an order in which all relevant information to the proceedings is made available on request.

²²³ *President of the Republic of South Africa* supra note 217 at 4.

²²⁴ Ibid.

²²⁵ Ibid at 5-6.

²²⁶ Ibid at 10.

was the former Minister of Finance. Appointments of this nature would have direct impact on the financial capabilities of the administration and the provision of resources.

The judgment of the High Court indicated that section 91(2) of the Constitution, which gives the President the power to appoint the Cabinet, is fettered by section 83 of the Constitution and the bounds of rationality.²²⁷ Section 83 obliges the President to uphold, defend and respect the Constitution as the supreme law of the republic and promote the unity of the nation.²²⁸ Rule 53 was held to be a device to test the rationality of the President's decisions.²²⁹ A rationality assessment does not assess the merits of the matter, however, evidence needs to be put forward to demonstrate that the means did not meet the ends. An example of an irrational appointment, suspected of being made in bad faith, is that of Menzi Simelane as the NDPP. The judgment declaring the appointment invalid and the nature of the appointment was discussed in Chapter One. Not included in the discussion was that the judgment addressed the need for the Executive to provide reasons for their decision making.

The High Court judgment recognised that section 7 of PAJA requires rules to be made to regulate administrative reviews and disclosure by administrators, however no such rules have come into force.²³⁰ The DA relied on the following observation of the *Jockey Club of South Africa v Forbes* case,

Not infrequently the private citizen is faced with an administrative...decision adversely affecting his rights, but has no access to the record of the relevant proceedings nor any knowledge of the reasons founding such decision. Were it not for Rule 53 he would be obliged to launch such review proceedings in the dark...²³¹

That this reference is made in the review of an appointment suggests that appointments should be subject to Rule 53. Reasons must be presented for the decision to appoint. The benefit this would have to rationality reviews has already been put forward. Furthermore, Rule 53 supports transparency which would assist in holding government accountable for corrupt or unqualified appointments. While the aforementioned rules relating to PAJA are not yet in force, if

²²⁷ *Democratic Alliance v President of the Republic of South Africa* 2017 (4) SA 253 (GP) (High Court judgment) 17 & 18.

²²⁸ The Constitution of the Republic of South Africa op cite note 1 at ss 83(b) & (c).

²²⁹ *Democratic Alliance* supra note 227 at 21.

²³⁰ *Ibid* at 21.

²³¹ 1993 (1) SA 649 (A) at 660D-F.

administrative appointments are considered administrative decisions in themselves, then request for reasons under PAJA is applicable to appointments.²³²

On appeal, the Constitutional Court was asked to decide on whether the President is obligated to disclose the reasons for relieving cabinet ministers of their duties in terms of Rule 53.²³³ The reports of the Auditor-General correlate instability in upper levels of government and the administration as a cause of mismanagement.

The majority judgment dismissed the matter on the grounds that it raised no discrete legal point at that time and would need to be resolved in the future.²³⁴ This was due to the DA's withdrawal of their application. Due to the withdrawal, the majority found that the interests of justice did not 'require... [the court to] exercise [their] discretion to decide a moot issue'. The minority judgment, however, is more insightful into the rights of the public in regard to the President's powers of appointment and removal. Justice Jafta was of the opinion that,

The importance of the matter to the President cannot be questioned. He needs to know what his procedural obligations are under the Uniform Rules of Court in case his decision to appoint or dismiss a Minister is challenged. The matter is also of great importance to the public, not only for the fact that it involves a challenge to the appointment or dismissal from Cabinet that governs the country but also for the need to clarify procedural rights of a party who wishes to impugn such decision.²³⁵

In their assessment of the merits, however, the dissenting judgment found that the text of Rule 53 did not include the appointment of cabinet ministers or deputy ministers by the President.²³⁶ With regard to the question this paper asks, the provision of reasons would be beneficial to the public well-being. The question of a candidate's merit could be answered. The nature of the appointee's affiliation with the party and private bodies might also be revealed. How these two qualities were weighed against each other in the decision-making process would also be of value.

The overarching argument is that the political prerogative of the President and National Assembly is not clearly fettered by the Constitution. This is perhaps due to the assumption of

²³² As outlined in Chapter One, section 5 of PAJA affords persons whose rights have been materially and adversely affected by administrative action to request reasons within a stipulated time period if reasons have not been given.

²³³ Rule 53 of the Supreme Court Act 59 of 1959 (Uniform Rules of Court) allows for an order in which all relevant information to the proceedings is made available on request.

²³⁴ *Democratic Alliance* supra note 227 at 37.

²³⁵ *Ibid* at 68.

²³⁶ *Ibid* at 86.

proportional representation and representative democracy. However, the purpose of the appointment and function of the office does fetter the otherwise wide discretion of the Executive or Legislature when exercising their power to appoint. For example, it is a requirement that both the Public Protector and Auditor-General must be a fit and proper person.²³⁷ It is also necessary for the public service to be efficient, and as such, any person making an administrative appointment must take the efficiency of the office into account.²³⁸ The ANC should be able to provide reasons for their appointment to validate that these criteria have been considered and met. Failure to demonstrate such, creates the assumptions that the candidate is unfit or unqualified.

V. CONCLUSION

Cadre deployment was considered a necessity by the ANC in a transitioning South Africa. This was in order to protect itself from any unwanted interference by opposition parties in a government of national unity. Furthermore, the Policy aimed to encourage economic upliftment for ANC members who had otherwise been excluded from governmental positions. The Policy is described by the ANC as both transformative and representative. However, concerns around the representativity and legitimacy of the Policy have subsequently arisen. These concerns are fueled by the dominance of the ANC and the susceptibility of cadre deployment to be influenced by corruption, whether from inside or outside the Party. As a result, there is a danger that cadres who are not fit-for-purpose or who favour the Party to the public's detriment will be appointed. Both unqualified and corrupt appointments have been demonstrated to result in wasted and irregular expenditure, compromising the administration. The Policy has now been demonstrated to facilitate unqualified and corrupt appointments through various mechanisms of the Policy and the use of the Deployment Committee. The Executive and National Assembly's power to appoint is, however, not unfettered despite the political nature of the appointments. There are instances where members of the Executive or National Assembly will be required to provide reasons for their decision to appoint. Chapter Three assesses the unlawfulness, unconstitutionality and irrationality of the Policy with regard to the constitutional and legislative requirement of an efficient administration. The Zondo Commission Report reveals ulterior motives for appointments and declares appointments made

²³⁷ The Constitution of the Republic of South Africa op cit note 1 at s 193(1)(b).

²³⁸ Ibid at s 195(1)(b).

by the Deployment Committee to be unconstitutional. With the findings of the Zondo Commission in mind, reports of the Auditor-General demonstrate that corruption and mismanagement have compromised the Policy and contributed to an inefficient administration. However, with regard to the representative and transformative nature of the Policy, there are legislative mechanisms and government frameworks that can allow for the continued deployment of cadres without compromising the efficiency of the administration.

CHAPTER THREE

AN EFFICIENT ADMINISTRATION AND THE ANC'S CADRE DEPLOYMENT POLICY: CAN THEY BE RECONCILED?

I. INTRODUCTION

In Chapter Two, the representative nature of the ANC's cadre deployment policy (hereinafter referred to as the "Policy") was emphasised, alongside the reality of how representative South Africa's government is. This discussion had regard to the ANC's one-party dominance and its negative impact on an accountable and representative public administration. In dissecting the purpose and function of the Policy, the connection between the Policy and unqualified and/or corrupt appointments was established. Importantly, mention was also made of how unqualified and/or corrupt appointments result in wasted or irregular expenditure, which compromises the administration. The susceptibility of the Policy to mismanagement, manipulation and abuse by internal and external forces has laid the foundation for answering the research question. The question of whether the Policy is unconstitutional, unlawful and/or irrational in its impact on an *efficient* administration can now be answered.

In order to answer the above question, the following preliminary questions need to be answered:

1. Does the Policy overlook the appointee's qualifications for the respective position in favour of their loyalty to the ANC?
2. Does the Policy facilitate corrupt appointments?

In answering the above two questions, a correlation is established between cadre deployment and an inefficient administration.²³⁹ This is not to say that every cadre that has been deployed has been detrimental to an efficient administration. There is, however, evidence to demonstrate that the Policy, as implemented by the ANC, has facilitated an inefficient administration. First, the efficient functioning of the administration is compromised by civil servants who are

²³⁹ In Section II, Subsection (c) of Chapter One, what it means for an administration to be 'efficient' was defined. In brief, for an administration to be efficient, it realises maximum output with minimal wasted resources. This is inclusive of the financial resources required to implement the administrative action.

unqualified in that they are not fit-for-purpose. Secondly, frequent re-shuffles of ministers and heads of department to suit the governing party and/or the private bodies who influence members of government, creates instability at lower levels of the administration. This instability is shown to compromise the administration's productivity and ability to act efficiently. As the Constitution and subsidiary legislation require the promotion of an efficient administration, for the Policy to compromise efficiency is unconstitutional and unlawful. Furthermore, for the Policy not to take into account how the appointees' qualifications will impact on the efficiency of public administration is irrational.

This chapter is the culmination of Chapters One and Two in its application of the legislative framework to the Policy. First, the background of the Zondo Commission and its findings on cadre deployment are discussed. Secondly, two reports of the Auditor-General on national and provincial audit outcomes will be presented as evidence. The Reports will demonstrate how the application of the Policy has negatively impacted the efficient functioning of the administration. This is with regard to how the Policy is described by the ANC in both their testimony at the Zondo Commission and in their deployment policy documents. The Auditor-General Reports presented are from the years 2016-2017 and 2022-2023, respectively. This is a comparison of the administration under President Zuma with the present state of the administration. Specific regard is had to service delivery outcomes. Thirdly, the relevant sections of the Constitution and subsidiary legislation are applied to assess the current status of the administration. This will include an assessment of the constitutionality, legality and rationality of the Policy. Chapter One paid brief regard to the relevant law, which will now be elaborated on and applied to the Policy. Fourthly, the potential for the Policy to be redeemed within the current legislative framework is assessed. These mechanisms include the training and accountability mechanisms required in legislation, as well as in various frameworks and policies. The continuation of cadre deployment within the confines of the Constitution and legislation is found to be useful due to the representative and transformative nature of the Policy, as presented in Chapter Two.

Finally, Chapter Two made the argument that the dominance of the ANC contributed to unqualified and corrupted appointments and resulted in ANC appointments lacking accountability. The ANC lost their majority in the Legislature for the first time in the 2024 election. How a coalition government could impact the Policy is briefly addressed in light of its pertinence.

II. JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS OF STATE CAPTURE, CORRUPTION AND FRAUD IN THE PUBLIC SECTOR INCLUDING ORGANS OF STATE

(a) Background to the Zondo Commission

The Zondo Commission was prompted by a report that the former Public Protector, Advocate Thuli Madonsela, released in October 2016.²⁴⁰ She began her investigation after the former Minister of Finance, Pravin Gordhan, and the former Deputy Minister of Finance, Mcebisi Jonas, were dismissed.²⁴¹ Gordhan had uncovered an attempted six hundred million Rand bribe aimed at influencing the appointment of the Minister of Finance.²⁴² Former President Zuma and his son were thought to be intricately connected with the bribe and the party who had orchestrated it, namely the Gupta family.²⁴³ Zuma's willingness to allow for a private person to influence government appointments became the subject of investigation.²⁴⁴ The investigation uncovered multiple events in which the Gupta family had influenced President Zuma's decisions to appoint and remove members of government. The events that were the subject of the investigation have been described as serving 'the interests of a closed group rather than the national interest.'²⁴⁵ The 'closed group' references sectors of the ANC who appointed cadres loyal to the cause, which, under Zuma, was influenced by the Gupta family. It is important to note that the ethos of the Policy is party loyalty above all else, as presented in the discussion on policy documents in Chapter Two. As such, the Policy leans towards appointments that favour the ideals of the Party. Certain ideals were found to be fueled by corruption under Zuma. The ANC's actions resulted in promoting private interests at the expense of the national budget. These findings are elaborated on in the discussion on the Zondo Commission.

The former Public Protector's report recommended that a judicial commission of inquiry be established in order to further investigate the acts of state capture and the parties involved.²⁴⁶

²⁴⁰ Zondo Commission Report op cit note 76 at Part 1 para 1.

²⁴¹ R Foley 'State Capture, the Racket and Predatory Power' in M Buthelezi & Peter Vale (eds) *State Capture in South Africa: How and Why it Happened* (2023) 40.

²⁴² *Ibid* at 40.

²⁴³ *Ibid*.

²⁴⁴ *Ibid*.

²⁴⁵ *Ibid*.

²⁴⁶ *Ibid* at 41.

In January 2018, the Zondo Commission was established with former Deputy Chief Justice Raymond Zondo as the Commissioner.²⁴⁷ Of specific relevance is that the Zondo Commission was mandated to investigate the following appointments and removals: the Minister of Finance in December 2015, various members of the Cabinet, and two senior advisors to the National Treasury.²⁴⁸ The Zondo Commission broadened its investigation from the ‘State of Capture’ report compiled by the Public Protector and launched an investigation into allegations of corruption and fraud in every municipal, provincial and national government department.²⁴⁹ The Zondo Commission heard evidence from over 300 witnesses over the course of more than 400 days.²⁵⁰ The Zondo Commission reported their findings on the Policy once the investigation was complete.

(b) Testimony on Cadre Deployment

The Zondo Commission addressed the issue of cadre deployment in Part VI, Volume II of the Report. This section relied largely on evidence put forward by President Ramaphosa who testified in regard to the purpose of the Policy and the role of the Deployment Committee.

Ramaphosa testified to the considerations that the Deployment Committee should take into account when making recommendations. There was no attempt to distinguish between the level of importance of each consideration. First, the Policy is, ‘aimed at ensuring that the person most ‘fit-for-purpose’ is appointed...’.²⁵¹ Secondly, the Policy is transformative in nature, aiming to ensure that the demographics of the country are reflected in government institutions.²⁵² Thirdly, cadres are appointed in efforts to, ‘advance the mandate of the governing party.’²⁵³ The Zondo Commission was mostly concerned with deployment to positions in state institutions and the civil service.

²⁴⁷ Foley op cit note 241 at 41.

²⁴⁸ Zondo Commission Report op cit note 76 at Part 1, Vol 1 3(a), (b) & 4(1.8).

²⁴⁹ Ibid at Part 1, Vol 1 para 5.

²⁵⁰ Ibid at Part 1, Vol 1 para 16.

²⁵¹ Ibid at Part VI, Volume 2 at 398.

²⁵² Ibid.

²⁵³ Ibid.

1. The Deployment Committee

The role of the Deployment Committee was averred to be confined to *recommending* appointees.²⁵⁴ It was contended that they in fact had no power to ‘decide on appointments...’.²⁵⁵ In practice this has not seemed to be the case. With regard to the weight that the Deployment Committee’s recommendations hold, they cannot be said to have *no* power to decide on appointments. The reality of their role in appointments was expressed in the Zondo Commission Report’s findings, as will be discussed below. The case of *Mlokoti* demonstrated that the Deployment Committee failed to take merit into account and rather appointed the candidate most loyal to the ANC, which the Court found to be unlawful. Decisions of this nature taken by the Deployment Committee, a committee which is directly empowered by the Policy, contributes to an unqualified administration. Furthermore, as a private body, they are shielded from accountability mechanisms and susceptible to private influence and corruption, as found by the Zondo Commission below.

The Zondo Commission revealed the role that the Deployment Committee played in practice. In contradiction to the view of Ramaphosa and the ANC, the Zondo Commission found that no appointment should be subject to the Deployment Committee.²⁵⁶ This is due to the Committee having little if any regard for a candidate being ‘fit-for-purpose’ and the Committee’s lack of accountability to the public. Furthermore, the Zondo Commission found appointments based on political affiliations unlawful in terms of section 197(3) of the Constitution.²⁵⁷ The Zondo Commission was of the opinion that prioritising party loyalty as criteria for appointments, risks the appointee not being the best person for the job.²⁵⁸ Furthermore, the appointee is more inclined to serve the interests of the Party rather than the Public.²⁵⁹ That the Committee comprises of high-ranking party members intimidates relevant parties into giving effect to their recommendation.²⁶⁰ In addition to general intimidation, Ramaphosa testified to the concept of ‘democratic centralism’.²⁶¹ He explained that, ‘according to democratic centralism, party members are bound by decisions taken by higher bodies’, such

²⁵⁴ Zondo Commission Report op cit note 76 at Part VI, Volume 2 para 586.

²⁵⁵ Ibid.

²⁵⁶ Ibid at para 657.

²⁵⁷ Ibid at para 615. Section 197(3) of the Constitution states that ‘no employee of the public service may be favoured or prejudiced only because that person supports a particular political party or cause.’

²⁵⁸ Zondo Commission Report op cit note 76 at Part VI, Volume 2 para 610.

²⁵⁹ Ibid.

²⁶⁰ Ibid at Part VI, Volume 2 para 660.

²⁶¹ Ibid at Part VI, Volume 2 para 422.

as the Deployment Committee.²⁶² Therefore, to fail to follow the decisions of the Deployment Committee is a sign of indiscipline.²⁶³ This is similar to the restrictions on floor crossing discussed in Chapter Two with regard to the UDM judgment. While policies of the ANC are private agreements, to go against party policy in relation to decisions of the executive or legislature causes the dissenting member to lose their seat in government. The above concept of ‘democratic centralism’, as Ramaphosa relates it to the Policy in his testimony, leads the Commission to suggest that appointing authorities are, ‘de facto bound by the decisions of the Committee, which means that its ‘recommendations’ are in fact instructions.²⁶⁴ Furthermore, minutes were missing from Deployment Committee meetings between the years 2012 and 2017 which compromises the ability to hold the Committee accountable. In this regard, the discussions of the Deployment Committee were not subject to public review. Appointments that take place ‘behind closed doors’ lack accountability and risk private interference.²⁶⁵

2. The Policy

Ramaphosa testified that the Policy is essential for representative democracy. It allows for the administration’s directives to align with the ruling party.²⁶⁶ While this is, as Ramaphosa phrases it, ‘essential’, it is concerning when government policy is not influenced by the Party, but rather by private individuals. This is to the detriment of a representative administration. This would be the case in instances of state capture, which the Zondo Commission reported to be present in South Africa. Ramaphosa’s own testimony, therefore, signals how cadre deployment is easily susceptible to manipulation.

3. Findings of the Zondo Commission

In light of the above, the Zondo Commission declared that the Policy is unconstitutional in its breach of sections 195(1)(b); 195(4)(c) and 197(3) of the Constitution.²⁶⁷ The published report further referred to a breach of section 11(2)(b) of the Public Service Act of 1994 (hereinafter referred to as the “PSA”), in that when appointing a civil servant, the appointment must be

²⁶² Zondo Commission Report op cit note 76 at Part VI, Volume 2 para 422.

²⁶³ Ibid.

²⁶⁴ Ibid at Part VI, Volume 2 para 424.

²⁶⁵ Ibid at Part VI, Volume 2 para 629.

²⁶⁶ Ibid at Part VI, Volume 2 para 401.

²⁶⁷ Ibid at Part VI, Volume 2 para 643.

based on training, skills, competence and knowledge, as well as the need to redress the imbalances of the past.²⁶⁸ This section of the PSA demonstrates that appointments can be transformative without compromising merit. Furthermore, it demonstrates that relevant qualifications must be taken into account when determining which candidate should be appointed. Section 11(2) of the PSA speaks to the first two purposes of the Policy, addressed at the beginning of this subsection. Specifically, candidates who are ‘fit-for-purpose’ are appointed and the appointment is transformative in nature. With regard to the third purpose, the Zondo Commission Report finds no provision in law for ‘political criteria’ to factor into appointment decisions.²⁶⁹

Therefore, what has been affirmed by the findings of the Zondo Commission is that the Policy is unconstitutional and unlawful in its encouragement of unqualified and corrupt appointments. The description of the Policy by ANC documents, discussed in Chapter Two and below, supports these findings. That the Policy has been found to have such consequences directly relates the implementation of the Policy to the mismanagement of the administration through an inefficient use of human and monetary resources. This is supported by the findings of the Auditor-General, who further claim in their reports that mismanagement and wasted and irregular expenditure are at fault for a failing administration. How mismanagement of resources relates to an inefficient administration will be outlined in greater detail below.

(c) The ANC’s Deployment Policy’s Description of Deployment

In Chapter Two, it was asserted that the ANC’s Deployment Policy contradicted itself in its explanation of both a ‘cadre’ and ‘deployment’. This aligns with the contradictions of Ramaphosa’s testimony, and the ultimate findings of the Zondo Commission. The 2008 Deployment Policy defined a cadre as trained by the organisation; ready to protect the constitution of the ANC; a custodian and guardian of the organisation; always responsive to the call of the ANC; and always putting the interests of the organisation first.²⁷⁰ A cadre is further required to show commitment to serve the people and display integrity. However, if serving the people conflicts with ‘always [putting] the interest[s] of the organisation first’, the

²⁶⁸ Zondo Commission Report op cit note 76 at Part VI, Volume 2.

²⁶⁹ R Brunette ‘Position Paper on Appointment and Removal in Public Service and Municipalities’ (2020) *Position Papers on State Reform* Public Affairs Research Institute 7.

²⁷⁰ ANC Deployment Policy op cit note 178 at s3(b)(v).

ANC will come first.²⁷¹ The definition of ‘cadre’ further conflicts with what the Deployment Policy summarises as the *only* meaning of ‘deployment’.²⁷² The *only* meaning is ‘identifying... individuals with the required personal attributes and the relevant academic qualifications who are prepared to serve and put the interests of the people *first at all times*.’²⁷³ This requirement does not align with the need for cadres to always put the organisation first. The ANC’s own Policy, in its contradictions, justifies the findings of the Zondo Commission despite testimony to the contrary.

While loyalty to the Party is clearly a priority, this does not need to compromise the efficiency of the public service. Furthermore, the Policy is an important demonstration of representative and transformative democracy. However, despite these intentions, the Policy has contributed to a compromised public sector and weak standards of service delivery. This is demonstrated in reports of the Auditor-General.

III. REPORTS OF THE AUDITOR-GENERAL ON THE RELATIONSHIP BETWEEN APPOINTMENT AND REMOVAL POLICIES AND SERVICE DELIVERY

(a) The Role of the Auditor-General

The Auditor-General is a State Institution Supporting Constitutional Democracy.²⁷⁴ Section 188(1) of the Constitution states that the Auditor-General must audit and report on the accounts, financial statements and financial management of all national and provincial administrations, as well as all municipalities.²⁷⁵ Further powers are conferred on the Auditor-General by the Public Audit Act, 25 of 2004, and the Public Finance Management Act, 1 of 1999. The Auditor-General is an accountability mechanism. They are responsible for reporting on the financial status of state institutions. In turn, relevant state institutions are required to cooperate with the Auditor-General by providing them with all necessary documentation for the audit to be accurately completed.²⁷⁶ The Auditor-General subsequently releases an annual

²⁷¹ ANC Deployment Policy op cit note 178 at s3(b)(v).

²⁷² Ibid at s 3(d)(iii).

²⁷³ Ibid.

²⁷⁴ The Constitution of the Republic of South Africa op cit note 1 at s 181(1)(e).

²⁷⁵ Ibid at s188(1)(a) & (b).

²⁷⁶ Section 15 of the Public Audit Act, 25 of 2004 outlines in detail the auditing powers of the Auditor-General. Section 19 of the Public Audit Act requires co-operation from all auditees when requested.

report on the national, provincial and municipal audit outcomes. The reports demonstrate the successes and failures of the management of government finances.

The Auditor-General refers to irregular expenditure, unauthorised expenditure, wasted and fruitless expenditure as well as fraudulent expenditure in their reports. It is useful to understand these concepts prior to unpacking the reports. Irregular expenditure is, ‘expenditure other than unauthorised expenditure, incurred in contravention of or that is not in accordance with a requirement of any applicable legislation’.²⁷⁷ In investigating irregular expenditure, it must be determined whether it was an unintended error, negligent or intentional.²⁷⁸ Fruitless and wasteful expenditure is expenditure, ‘that was made in vain and could have been avoided had reasonable care been exercised.’²⁷⁹ This includes interest, which can be incurred due to delayed projects or delayed payments; the payment of inflated prices; and the cost of litigation caused by mismanagement.²⁸⁰ Failure to take reasonable care, therefore, directly impacts the capacity of the administration to deliver services. Unauthorised expenditure refers to expenditure that is, ‘incurred without provision having been made for it in the approved budget.’²⁸¹ This will reduce the availability of funds for planned projects. Fraudulent expenditure can take the form of either unauthorised, irregular or wasteful expenditure.²⁸² It is often as a result of corruption.²⁸³

(b) The Auditor-General’s Consolidated General Report on National and Provincial Outcomes 2016-17

The 2016-2017 Consolidated General Report on National and Provincial Outcomes (hereinafter referred to as the “2017 Report”), was published in the last year of the electoral term.²⁸⁴ In this regard, it is a reflection of former President Zuma’s administration.²⁸⁵ The former Auditor-General, Kimi Makwetu, stated that the central theme of the 2017 Report was,

²⁷⁷ Public Finance Management Act No. 1 of 1999, definitions.

²⁷⁸ Auditor-General South Africa Kimi Makwetu, ‘Consolidated General Report on National and Provincial Audit Outcomes 2016-2017’ 94.

²⁷⁹ Act No. 1 of 1999, definitions.

²⁸⁰ Consolidated General Report 2017 op cit note 278 at 108.

²⁸¹ Ibid at. 205 & Act No. 1 of 1999, definitions. The PFMA defines unauthorised expenditure more specifically in that it is expenditure not in accordance with the purpose of the public’s vote.

²⁸² Consolidated General Report 2017 op cit note 278 at 112.

²⁸³ Ibid.

²⁸⁴ Ibid at 12.

²⁸⁵ Ibid.

‘accountability for government spending’, for which the administration would account.²⁸⁶ The 2017 Report focused on the management and delivery of water infrastructure and development; the expanded public works programme; school infrastructure; food security and agrarian reform; and housing development finance.²⁸⁷ These are all services provided for in the Bill of Rights.²⁸⁸ Various findings were made with regard to fruitless and wasteful expenditure as well as unauthorised expenditure. The Report further addressed fraud and misconduct in the administration and its impact on expenditure. As the examples below will demonstrate, poor management was found to be at fault for the wasted, unauthorised and fraudulent expenditure.

It was found that there were weaknesses in areas of leadership, oversight, funding and project management in ten water infrastructure projects.²⁸⁹ Delays in procurement as well as with the projects themselves resulted in wasted expenditure. Mismanagement and a lack of oversight resulted in instances of contractors being paid twice or above market rates.²⁹⁰ Projects such as the Mopani Emergency Project were required to be put on hold due to a lack of funding as a result of wasted expenditure.²⁹¹ The former Auditor-General found that there was a ‘breakdown’ in controls and the lack of accountability resulted in an environment, ‘conducive to service delivery failure and corruption’.²⁹²

In an audit of school infrastructure in four provinces, namely the Eastern Cape, Limpopo, Mpumalanga and Kwazulu-Natal, the former Auditor-General identified inadequate record keeping and inadequate project management.²⁹³ As a result, it was reported that multiple projects were delayed and exceeded their allocated budget.²⁹⁴ Furthermore, wasted, unauthorised and fraudulent expenditure were noted to be exacerbated by a lack of

²⁸⁶ Consolidated General Report 2017 op cit note 278 at 12.

²⁸⁷ Ibid at 13.

²⁸⁸ Sections 26 to 29 of the Constitution of the Republic of South Africa, 1996, provide for the rights to housing; health care; food; water and social security; children; and education, respectively. With regard to sections 26 and 27, the State is obligated to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of these rights. Therefore, the provision of these rights relates directly to the management of resources by the administration.

²⁸⁹ Consolidated General Report 2017 op cit note 278 at 26.

²⁹⁰ Ibid.

²⁹¹ Ibid.

²⁹² Ibid at 27.

²⁹³ Ibid at 32.

²⁹⁴ Ibid.

consequences for poor performance.²⁹⁵ Of the twenty five projects audited, only three achieved their targets.²⁹⁶

In the audit of the Department of Human Settlements, only twenty two per cent of targets were achieved.²⁹⁷ The former Auditor-General raised the following concerns: there were significant delays due to inadequate project management; there was overspending; and there were significant quality defects of the infrastructure due to poor workmanship of the contractors and a lack of supervision of the contractors.²⁹⁸

The general consensus of the Report was that poor planning, poor project management, inadequate monitoring of projects and grants, and the lack of corrective action to address these failures were the cause of wasted, unauthorised and fraudulent expenditure. The mismanagement of the budget due to the lack of requisite skills or initiative to manage projects, therefore, impacts the capabilities of the administration to deliver necessary services. As reiterated in Chapters One and Two, not every cadre is a contributor to mismanagement. However, the ANC has significant appointment powers and they apply the Policy when making appointments. Therefore, with regard to the above description of the Policy and the findings of the Zondo Commission, the Policy contributes to the appointment of the unqualified and corrupt appointees which the Auditor-General speaks of. The former Auditor-General recommends that these appointees be held to account. This is due to the former Auditor-General's recognition of these attributes, or lack thereof, contributing to the mismanagement of resources.

(c) The Auditor-General's Consolidated General Report on National and Provincial Outcomes 2022-23

The Consolidated General Report on National and Provincial Outcomes 2022-23 (hereinafter referred to as the "2023 Report"), similarly reported on the last year of the electoral term. The President was Cyril Ramaphosa. The current Auditor-General, Tsakani Maluleke, found that,

²⁹⁵ Consolidated General Report 2017 op cit note 278 at 34.

²⁹⁶ Ibid at 33.

²⁹⁷ Ibid at 40.

²⁹⁸ Ibid at.38.

auditees with the greatest impact on the lives of South Africans and on government finances do not yet display quality service delivery, good performance, and strict financial and compliance discipline.²⁹⁹

The 2023 Report, like the 2017 Report, focused on accountability and how it can improve service delivery.³⁰⁰ This paper has discussed at length how ANC appointments have been shielded from accountability mechanisms, specifically in subsections (c) and (d) of section IV of Chapter Two. Specifically, the Deployment Committee, as a private body, lacks accountability. For this reason, it will not be discussed again. It is only necessary to note that this has afforded for opportunities to appoint corrupt and/or unqualified cadres. The 2023 Report finds that unauthorised, wasted, fruitless and fraudulent spending are often due to mismanagement and a lack of oversight. The first recommendation put forward by the Auditor-General in the 2023 Report is the professionalisation of the public sector.³⁰¹ Professionalisation includes appointing qualified and competent administrators with a strong sense of public service.³⁰² In light of the findings of the Zondo Commission, these qualities do not seem to be prioritised when appointing cadres as part of the Policy. According to the Auditor-General, the following projects demonstrate the need for the professionalisation of the public sector.

The 2023 Report drew attention to poor project management as a reason for wasted and irregular expenditure.³⁰³ Mismanagement has also resulted in claims against relevant departments, with the State Budget having to be spent on legal fees.³⁰⁴ Departments were found to have overspent which reduced their budget for the upcoming financial year.³⁰⁵ Departments did not recover the debt owed to them, which would have replenished their budgets.³⁰⁶ The Auditor-General found two main causes for the financial losses and poor financial health. These were weak financial management and procurement practices, and a lack of effective monitoring, oversight and accountability.³⁰⁷ A third cause was found to be the instability caused by regular changes in senior management positions.³⁰⁸ Instability in senior management

²⁹⁹ Auditor-General South Africa Tsakani Maluleke, 'Consolidated General Report on National and Provincial Audit Outcomes 2022-2023'3.

³⁰⁰ Ibid.

³⁰¹ Ibid at 7.

³⁰² Ibid.

³⁰³ Ibid at. 49-50.

³⁰⁴ Ibid at 52.

³⁰⁵ Ibid at 53.

³⁰⁶ Ibid at 54.

³⁰⁷ Ibid at 55.

³⁰⁸ Ibid at 74.

was reported to have an impact on the efficiency of management functions.³⁰⁹ Instability at accounting officer and authority levels due to regular dismissals and appointments negatively impacted decision making, the completion of projects and consequence management.³¹⁰ Chapter Two can be referenced for a discussion on government re-shuffles and its relation to state capture and the Policy. One of the particularly tumultuous executive positions in question has been the Minister of Finance. This department saw multiple appointments and dismissals due to preferences of the Gupta family. Cadres were appointed who would be loyal to Jacob Zuma.³¹¹

The 2017 and 2023 Reports are extensive in their reflection of the South African administration between the years 2014 and 2023. The Reports found significant weaknesses in service delivery due to poor financial management, fraudulent and irregular spending, stability of management, and the management in general of administrative functions. The administration has repeatedly failed to deliver maximum output, with minimal wasted resources.³¹² By definition, the administration lacks efficiency.

In reading the Zondo Commission Report, with specific regard to statements made by members of the ANC, as well as the various deployment policies, alongside the Auditor-Generals' Reports, the following could be deduced:

1. The ANC makes appointments with due regard to their Deployment Policy, which preferences cadres.
2. The deployment of cadres often preferences party loyalists over candidates who are most fit for purpose.
3. The Deployment Committee is a private body, however, due to their high status their decisions are considered de facto instructions to persons making appointment decisions, and to deviate is considered as indiscipline.
4. The decisions of the Deployment Committee, as a private body, have been shielded from accountability mechanisms, which has facilitated corrupt appointments.

³⁰⁹ Consolidated General Report op cit note 299 at 74.

³¹⁰ Ibid.

³¹¹ The book, *Zondo at your Fingertips*, authored by Paul Holden, illustrates the history of the Zondo Commission and can be referenced for further information on the events that led to the inquiry (Paul Holden 'Zondo at your Fingertips' (2023) *Jacan Media*).

³¹² Merriam-Webster.com Dictionary, s.v. 'efficient' op cit note 53.

5. State capture and corruption has weaponised cadre deployment, resulting in multiple re-shuffles, dismissals and re-appointments.
6. Instability in management and unqualified administrators has contributed to the mismanagement of the State's budget and subsequent failures in service delivery.

The above suggests that the utilisation of the Policy by the ANC impairs the administration's ability to function efficiently.

Despite the above conclusion, it is necessary to draw attention to the findings of the High Court of South Africa Gauteng Division, Pretoria in *Democratic Alliance v African National Congress and Others* 2024.³¹³The DA applied to the Court to declare the Policy inconsistent with the Constitution and unlawful.³¹⁴The DA further challenged the Policy's consistency with sections 9, 10 and 11 of the PSA.³¹⁵The DA's argument was that the Policy is responsible for blurring lines of accountability, facilitating state capture and poor service delivery.³¹⁶ The DA argued further that the Policy is responsible for breaches of human rights.³¹⁷The Court allowed the DA standing in the interests of justice.³¹⁸ The Court dismissed the application without ordering that the Policy is unconstitutional or unlawful. However, this case is distinguishable from the challenge presented in this paper, which focuses specifically on the Policy's impact on an efficient government.

Firstly, the application was dismissed largely on the grounds that the DA did not present a case to answer.³¹⁹Neither the constitutional challenge, nor the challenge to the abovementioned sections of the PSA, were specific and as such the Court was not able to conduct an appropriate test.³²⁰ On the other hand, in the case of *Mlokoti*, a specific appointment was challenged in the High Court of South Africa, Eastern Cape Division.³²¹In *Mlokoti* the Court found that the Respondent abdicated their discretionary powers and executed the dictates of the ANC's Regional Committee and as such the appointment was invalid.³²² The requirement to appoint

³¹³ *Democratic Alliance* supra note 5.

³¹⁴ *Ibid* at 1

³¹⁵ *Ibid* at 1

³¹⁶ *Democratic Alliance* supra note 5 at 2.

³¹⁷ *Ibid* at 2.

³¹⁸ *Ibid* at 12.

³¹⁹ *Ibid* at 62.

³²⁰ *Ibid* at 62.

³²¹ *Mlokoti* supra note 79.

³²² *Ibid*.

the best qualified person was founded in section 195 of the Constitution which requires the effective and efficient use of resources.³²³ The judgment in Mlokoti included further that, ‘a fair and efficient selection process must be followed in order to ensure that all candidates are selected “*objectively and on merit*’.³²⁴ The aforementioned requirement is founded on the provisions of section 195 of the Constitution and section 67 of the Local Government: Municipal Systems Act .³²⁵ The Gauteng High Court acknowledges that the specificity of the challenge is necessary to make a decision on the constitutionality and lawfulness of the Policy.³²⁶

Secondly, due to the lack of admissible evidence presented by the DA, the Court focuses on the benefits of the Policy as put forward by the Respondents. This paper does not argue that the Policy itself is unconstitutional. This paper, similarly to the Court, places emphasis on the fact that the ANC’s influence on the State is a product of the policies and manifestos put forward in their election campaign.³²⁷ Therefore, it is a facilitator of representative democracy. However, it is the ability of the Policy to result in appointments that are not fit for purpose that this paper challenges. Due to the lack of evidence put forward by the DA, the Court is unable to firstly, make a judgment as to whether the ‘line separating the Party from the State remains intact’ and, secondly, the tendency for the Policy to encourage appointments that are not fit for purpose.³²⁸ To this point, even if the Court, as it makes clear, is reluctant to rely on the evidence from the Commission put forward by the DA, it is not disputed that President Ramaphosa admitted to the Commission that in retrospect, certain types of deployment resulted in appointees not being fit for purpose and that the ANC, ‘need to do things differently.’³²⁹ Therefore, while at face value the judgment appears to invalidate the argument that the Policy is unconstitutional, unlawful and irrational, this is not correct. There was not enough evidence put forward to come to any other conclusion and the application did not specifically challenge the implementation of the Policy with regard to its impact on an efficient administration, as this paper has. Rather, the Policy in its entirety was questioned without any specificity.

³²³ *Mlokoti* supra note 79 at 11.

³²⁴ *Ibid* at 38-39.

³²⁵ *Ibid* at 39.

³²⁶ *Democratic Alliance* supra note 5 at 36.

³²⁷ *Democratic Alliance* supra note 5 at 56.

³²⁸ *Ibid* at 56.

³²⁹ *Ibid* at 25.

The argument below specifically challenges the *efficiency* of the Policy. Furthermore, it is agreed upon that the Policy is an aid to democracy, however, its implementation is the concern. Despite these concerns, it is demonstrated that the Policy is not irreparable.

IV. CADRE DEPLOYMENT'S IMPACT ON AN EFFICIENT ADMINISTRATION

The findings thus far have demonstrated that cadre deployment can lead to an inefficient administration due to the Policy's contribution to instability in the administration, corruption of the administration, and a lack of requisite skills provided to the administration through appointees. This inefficiency is unconstitutional and unlawful. Furthermore, the inefficiency may be the result of irrational appointments. The relevant provisions on which these findings are based is discussed below.

(a) Unconstitutionality

There are numerous sections of the Constitution that require the promotion of an efficient administration. Section 33 of the Constitution is the overarching section with regard to administrative justice and requires national legislation to be enacted to promote an efficient administration.

Chapter 10 of the Constitution speaks specifically to the public administration. Section 195(1)(b) states that the public administration must promote the efficient use of resources. The reports of the Auditor-General have demonstrated that there has been a failure to efficiently utilise resources due to a lack of skill, instability, mismanagement, and the failure to enforce consequences on public administrators. The current Auditor-General subsequently recommended the professionalisation of the administration. This would enforce a merit-based appointment system to protect against the wasted, unauthorised and irregular use of resources. While this assessment has focused on the Policy's impact on an efficient administration, it can be noted that the Policy undermines additional requirements in section 195. The Policy negatively impacts the economic and effective use of resources as demonstrated by the discussion above. The Policy further hinders an administration that is accountable and transparent through the use of the Deployment Committee.³³⁰ With regard to the Policy's

³³⁰ The Constitution of South Africa op cit note 1 at s195(1)(i).

connection to corrupt appointments, it further undermines an administration built on a high standard of professional ethics.³³¹

Section 196(2) of the Constitution requires the Public Service Commission (hereinafter referred to as the “PSC”), to exercise its powers and perform its functions without fear, favour or prejudice in the interest of the maintenance of an efficient public administration. Furthermore, it is required to act independently and impartially.³³² Section 196(3) of the Constitution requires other organs of state to assist and protect the PSC to ensure its independence and impartiality. The appointment procedure outlined in Chapter Two demonstrates the susceptibility of the PSC to appointments of ANC cadres as Commissioners. Therefore, the independence and impartiality of the PSC, as required by sections 196(2) and (3), is compromised. The PSC’s independence and impartiality are in the interest of the maintenance of an efficient public administration.³³³ In light of the findings on cadre deployment, the ability for the PSC to maintain an efficient public administration is compromised. Furthermore, the PSC itself risks being mismanaged and subsequently incapable of managing the public service and being an oversight mechanism.

Section 196(4)(d) requires the PSC to give directions aimed at ensuring that personnel procedures relating to the recruitment, transfers, promotions and dismissals comply with the values and principles set out in section 195 of the Constitution. Section 195, as discussed above, requires the promotion of an efficient use of resources.³³⁴ The Auditor-Generals found instability in managerial positions due to regular re-shuffles of administrative departments to affect the efficient functioning of the administration. This subsequently affects the efficient use of public resources. The PSC should be consistent in holding the Executive and National Assembly to account with regard to their regular re-shuffles.

(b) Unlawfulness

With regard to the constitutional provisions above, subsidiary legislation has been promulgated that requires an efficient administration.

³³¹ The Constitution of South Africa op cit note 1 at s 195(1)(a).

³³² Ibid at s 196(2).

³³³ Ibid at s 196(2).

³³⁴ Ibid at s 195(1)(b).

The Promotion of Administrative Justice Act 3 of 2000 (hereinafter referred to as “PAJA”), gives effect to section 33 of the Constitution. The Preamble of PAJA speaks to the Act’s duty to promote an efficient administration.

The Public Administration Management Act No. 11 of 2014 (hereinafter referred to as “PAM”), promotes efficient service delivery in the public administration.³³⁵ Furthermore, the PAM Act requires each administrative institution to promote the efficient, economic and effective use of resources.³³⁶

The PSA states that the head of department must be responsible for efficient management which allows for the effective utilisation of resources.³³⁷ The Auditor-Generals’ reports repeatedly blamed unqualified and unstable management for wasted expenditure and failed service delivery. Inefficient management was further found to be at fault for incurring legal fees when projects were mismanaged. The correlation between cadre deployment and instability in management and unskilled management, has been expressed repeatedly above.

(c) Irrationality

In light of the above constitutional and legislative provisions, it is clear that administrators, especially those in managerial positions, are required to promote an efficient administration. Administrators are further required to ensure the efficient use of resources. This has been demonstrated to often rely on the administrator being appropriately qualified and fit-for-purpose. Furthermore, the administrator should be fit and proper to protect against the corrupt use of state resources. Section 10 of the PSA stipulates that an employee of the public service must be fit and proper.³³⁸ The Zondo Commission Report found that cadre deployment did not prioritise appointing cadres who were fit-for-purpose. The primary objective was found to be positioning party loyalists within the administration who will adhere to the dictates of the ANC above all else. In the event that no account is taken for the administrator’s ability to promote an efficient administration, the appointment is irrational as per the discussion on rationality in

³³⁵ s 3(e).

³³⁶ s 4(b).

³³⁷ s 7(3)(b).

³³⁸ The Public Service Act op cit note 48.

subsection (a) of section III of Chapter Two. The same principles will apply if the administrator is not fit and proper and cannot be entrusted with the duties in question.

V. RECONCILING CADRE DEPLOYMENT AND AN EFFECTIVE ADMINISTRATION

Chapter Two focused on the positive aspects of cadre deployment, specifically its representative and transformative nature. Therefore, despite the subsequent findings of this chapter, the Policy as a whole should not be dismissed. There are legislative mechanisms and ANC-led policies that, if adhered to, enable cadre deployment to co-exist with an efficient administration. These mechanisms and policies focus mostly on the professionalisation of the public sector through training and oversight. This section will discuss the importance of the PAM Act, the PSA and the Skills Development Act no. 97 of 1998 (hereinafter referred to as the “SDA”). The Public Service Charter and the National Framework towards the Professionalisation of the Public Service will also be discussed.

(a) Legislative Mechanisms for the Professionalisation of the Public Service

1. Public Administration Management Act no. 11 of 2014

The PAM Act has been discussed in Chapter One. It gives effect to section 195(3) of the Constitution which requires national legislation to ensure the promotion of the values and principles outlined in section 195. The Act allows for the establishment of training institutions, the provision of pre-requisites for employment, the establishment of disciplinary proceedings and minimum norms and standards that the Minister has the discretion to apply.

The PAM Act recognises the need to transform the administration within reason.³³⁹ While appointments should be based on representation of the South African people, they must also be based on ability.³⁴⁰ Section 10(1) of the Act requires the head of an institution to train its employees to perform their functions in an efficient manner. Section 13(1) affords the Minister the opportunity to determine prerequisites for specific appointments or to require the completion of compulsory examinations.³⁴¹ This section is not peremptory, but perhaps should

³³⁹ s 4(1).

³⁴⁰ Ibid.

³⁴¹ s 13(1)(a) & (b).

be in order to reconcile the transformative and representative capabilities of cadre deployment with an efficient administration. Section 15(1) establishes a disciplinary unit. This would provide for the consequences suggested by the Auditor-General. Finally, section 16(1) of the Act affords the Minister the opportunity to prescribe minimum norms and standards regarding development and training, discipline and measures to improve the efficiency of institutions.³⁴²

2. Public Service Act, 1994

A purpose of the PSA is to provide for the organisation and administration of the public service of South Africa. The PSA regulates the conditions of employment of public service employees and is responsible for discipline. The PSA applies to current employees of the public service as well as to potential employees.³⁴³ That the PSA applies to potential employees is important in the Act's provision for training institutions. The PSA requires training institutions to be established which are to provide necessary training or conduct exams necessary to qualify for appointment in the public service.³⁴⁴ That the institution 'shall' provide such training is peremptory.³⁴⁵ To enforce the participation in the training program and/or the writing of exams protects the administration against unqualified persons being appointed. It further affords cadres the opportunity to be provided with the necessary training and upskilling.

Section 5(8)(a) of the PSA bestows on the PSC the powers to investigate compliance with the Act and issue directions accordingly to ensure compliance. Therefore, if a department has not set up the requisite training programmes, the PSC can hold them accountable.

Sections 9, 10 and 11 of the PSA may be read together. An executive authority may appoint any person in accordance with the Act, however, that person will not be considered qualified if they are not a fit and proper person.³⁴⁶ Therefore, a cadre can be deployed, but not if they are suspected to undermine the purpose of the office by acting in a corrupt manner. Section 11 speaks to the need for appointments to be representative and transformative in nature with due regard to democratic values and principles in the Constitution.³⁴⁷ However, when evaluating a

³⁴² ss 16(1)(b), (d) & (f).

³⁴³ s 2(1).

³⁴⁴ ss 4(1) & 3(a).

³⁴⁵ s 4(3)(a). The case of *S v Raghubar* 2013 (1) SACR 398 SCA ruled that 'shall' is an indicator that the legislature intended the clause to be peremptory.

³⁴⁶ ss 9 & 10(b).

³⁴⁷ s 11(1).

candidate for appointment, consideration must be given to the candidate's training, skills, competence and knowledge.³⁴⁸ Here, the ANC's cadre deployment policy, in its transformative and representative nature, is reconciled with a qualified administration.

3. Skills Development Act no. 97 of 1998

The purpose of the SDA is to develop the skills of the South African workforce.³⁴⁹ Section 2 of the Act provides for the additional purposes of improving productivity in the workplace; improving the delivery of social services; providing opportunities for new entrants to the labour market; and improving the employment prospects of persons previously disadvantaged by unfair discrimination. Therefore, the Act is transformative in nature, just as the ANC's Deployment Policy intends to be.

The Constitution states that no employee of the public service may be favoured or prejudiced because they support a particular political party.³⁵⁰ This is not to say that a public servant is not to be aligned with a specific party, or even recommended by that party. The cadre simply cannot be preferenced over other candidates purely based on their political affiliations. Furthermore, the cadre will require the requisite qualifications themselves. Therefore, cadre deployment does not need to contradict the aforementioned legislation. It can be utilised to serve the legislative and constitutional requirements.

(b) Republic of South Africa Service Charter (Public Service Coordinating Bargaining Council Resolution 1 of 2013)

As the Service Charter is presented by the Public Service Coordinating Bargaining Council (hereinafter referred to as the "PSCBC"), the State and public servants are parties to it. To adhere to the Service Charter is to promote an efficient administration with regard to the commitments made. As parties to the Service Charter, the State and public servants commit themselves to upholding the values and principles enshrined in section 195 of the Constitution.³⁵¹ As per Article 7, public servants further commit to not abusing their position

³⁴⁸ s 11(2)(b).

³⁴⁹ s 2(1)(a).

³⁵⁰ The Constitution of South Africa op cit note 1 at s 197(3).

³⁵¹ Republic of South Africa Service Charter (Public Service Coordinating Bargaining Council Resolution 1 of 2013) preamble.

in the public service to promote or prejudice the interests of any political party; accepting the responsibility to undergo ongoing training and self-development; being honest and accountable in dealing with public funds and using the resources of the public service efficiently and only for authorised official purposes; and promoting an efficient administration.³⁵²

(c) The National Framework towards the Professionalisation of the Public Service

In his testimony before the Zondo Commission, President Ramaphosa recognised that not all members of the public service are fit-for-purpose. He introduced the proposed National Implementation Framework towards the professionalisation of the Public Service (hereinafter referred to as the “Framework”). Ramaphosa testified that the Framework, ‘aimed to “capacitate” those in the civil service who are not “fit for purpose”’.³⁵³ The Framework further aimed, ‘to ensure that “fit for purpose” individuals with the proper experience and expertise are appointed into the civil service.’³⁵⁴ This Framework is a product of the National Development Plan for 2030. According to the National Development Plan, ‘the public service should attract highly skilled people and cultivate a sense of professional common purpose.’³⁵⁵ The aim of the Framework is to insulate the State from ‘undue political interference’ and ensure that appointments are made ‘based on merit’.³⁵⁶

The draft Framework was published in the Government Gazette (No. 44031 dated 24 December 2020). The Framework, as gazetted in December 2020, states that reforms are ‘essential for duties to be performed *efficiently*’.³⁵⁷ It relies on the constitutional requirement for the promotion of the efficient use of resources.³⁵⁸ It is recognised that the efficient use of resources, ‘contributes to improved service delivery’.³⁵⁹ A subsequent process of consultations, including public consultations, resulted in the revised Framework.³⁶⁰ The revised Framework proposed reforms for the following areas: stabilising the political-administrative interface; merit-based

³⁵² Service Charter Article 7 subsections 7.9 & 7.20-22.

³⁵³ Zondo Commission Report op cit note 76 at Part VI, Volume 2 at 626.

³⁵⁴ Zondo Commission Report op cit note 76 at Part VI, Volume 2 at 626.

³⁵⁵ National Development Plan 2030 Chapter 13 at 416.

³⁵⁶ The National School of Government. ‘A National Framework Towards the Professionalisation of the Public Sector’ October 2022 at 3.

³⁵⁷ A National Implementation Framework Towards the Professionalisation of the Public Service by a notice which appeared in the *Gazette* dated 24 December 2020 at Part 1 s 3.4.

³⁵⁸ *Ibid* at s 7.3.2.

³⁵⁹ *Ibid*.

³⁶⁰ The National School of Government op cit note 356 at 9.

recruitment and selection; consequence management; pre-entry, recruitment and selection; and continuing learning and professional development.³⁶¹ These reforms speak to the recommendations of the Auditor-General. They focus on the following key areas:

1. Strengthening the role of the Public Service Commission as an oversight mechanism;
2. Reconsidering cadre deployment practices for merit-based recruitment in the public sector;
3. Amending legislation in order for the public service to consider external candidates for positions of Director General and Deputy Director General with the relevant technical expertise;
4. Developing procedures for consequence management;
5. Implementing pre-entry requirements that will inform meritocratic appointments;
6. Implementing continuous learning and professional development interventions.³⁶²

The Framework additionally addresses the need for the public service to be representative. State funds are required to be used in alignment with the public interest, as expressed through the electoral process.³⁶³ The Framework defines professionalising as meaning that the public service is non-partisan.³⁶⁴ However, the public service is still required to loyally and diligently implement the political mandate.³⁶⁵ Therefore, a cadre should not be a political actor whose position is wholly dependent on their affiliation or loyalty to the Party. They are, however, required to practise the Party's politics in order to represent the electorate. How the Framework has reconciled these two requirements is through recommending competency assessments that are specific to the relevant appointment. Additionally, the requirements are presented as achievable by involving the PSC in interviews for deputy directors general and directors general.³⁶⁶ The recommendation with regard to the PSC would require the recommendations for the improved functioning of the PSC as an oversight mechanism to be implemented. The Framework further requires the public administration and public service to reflect the aspirations and transformative nature of the Constitution.³⁶⁷ The Framework addresses the need to reconsider cadre deployment practices rather than abolish them.

³⁶¹ The National School of Government op cit note 356 at 9-12.

³⁶² Ibid.

³⁶³ National Implementation Framework op cit note 357 at s 7.3.2.

³⁶⁴ Ibid at s 4.5.

³⁶⁵ Ibid.

³⁶⁶ Ibid.

³⁶⁷ Ibid at s 6.7.

The above legislation and frameworks are demonstrative of how the Policy may be reconsidered in order to comply with and promote constitutional and legislative provisions.

VI. CADRE DEPLOYMENT IN SOUTH AFRICA POST THE 2024 NATIONAL ELECTION

The legislation and frameworks addressed above align the Policy with an efficient administration. These recommendations are made with regard to the concerns this paper has addressed, supported by evidence of the Zondo Commission and Auditor-General Reports. A recurring concern was the impact of the ANC's one-party dominance on the Policy as a tool to make appointments, and requisite accountability mechanisms. However, these concerns could prove to be alleviated in the near future. The ANC lost their majority for the first time since 1994 in the 2024 national elections. Appointments are potentially no longer as susceptible to the will of the ANC. The Policy will need to develop. This development could be to the point that the Policy is no longer feasible, or that its purpose is defeated. At this time, only assumptions can be made. However, it will be interesting to reflect on the Auditor-General's report at the end of this electoral cycle. This would be to ascertain whether the public sector has undergone the professionalisation as discussed. Furthermore, the cause of the professionalisation should be investigated. If the recommendations are implemented, it could be predicted to be due to the ANC's loss of control. This would be assumed on the grounds that the legislation and the National Development Plan requiring the recommendations made by the Auditor-General to be implemented, existed prior to the Zondo Commission. Nevertheless, they were not carried out by the majority ANC government.

VII. CONCLUSION

The Cadre Deployment Policy is a policy that should be revered for its transformative and representative nature. However, this paper has demonstrated through the ANC's deployment documents, the Zondo Commission Report and reports of the Auditor-General, that the Policy has facilitated a failing public administration. The Policy and the use of the Deployment Committee has been shown to result in, and under certain circumstances maliciously encourage, unqualified and corrupt appointments. These attributes directly impact service delivery through mismanagement of resources, whether negligently or fraudulently, and through the creation of instability in the administration. This has overall contributed to an

inefficient administration. However, the Policy is not unsalvageable. By applying the Policy to the relevant constitutional provisions and legislative frameworks, it can be an asset to democratic South Africa and the transformative administrative system. The reconsideration of the Policy as proposed by the National Framework towards the Professionalisation of the Public Service is perhaps more likely to occur than ever before. This is due to South Africa's new Government of National Unity. With the dilution of ANC power in government, a cadre deployment policy built on compromise might emerge.

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