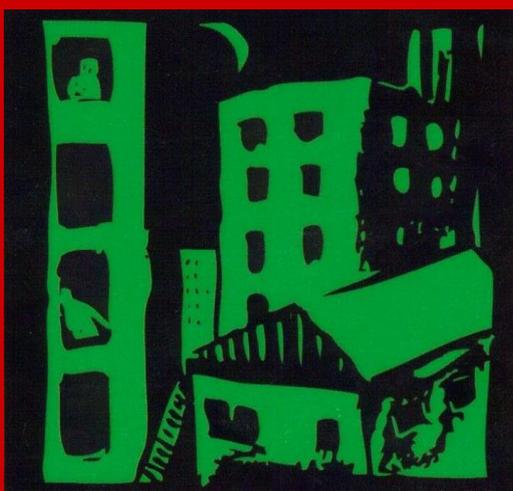


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The slippery slope to State capture: cadre deployment as an enabler of corruption and a contributor to blurred party-State lines

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ABSTRACT

*Drawing on both legal and political sources, this article scrutinises the policy of cadre deployment that the African National Congress (ANC), the ruling party in South Africa, has implemented, and continues to apply. The analysis begins by recalling and commenting on the only reported judgment in South African jurisprudence that dealt with the political influencing of municipalities' exercise of their public power to make appointments, namely, *Mlokoti v**

Amathole District Municipality & another 2009 (6) SA 354 (ECD). What the Mlokoti case has confirmed is that the legal foundation for the exercise of public power is found in the Constitution and its enabling legislation, and not in party political policy, such as the ongoing practice of cadre deployment. In an investigation of cadre deployment, the article then demonstrates that this ANC policy, particularly judging by its stated purpose, is incompatible with the constitutional State and, instead, enables the rise of the shadow State. Unsurprisingly, therefore, political commentators increasingly observe that, apart from the revelations at the Zondo Commission of Inquiry, State capture in South Africa in fact commenced when the ANC assumed political power in pursuit of the National Democratic Revolution. It is argued that the pursuit of a National Democratic Revolution in South Africa is directly at odds with the vision and goals of the 1994 constitutional pact. Convening a bipartisan national convention on philosophical and other approaches to the fight against corruption may offer a solution. Here, a starting point would be to reconsider the country's anti-corruption strategies to pay proper attention to the ethical causes of this scourge.

Keywords: South Africa; cadre deployment; ANC; corruption; party-State lines; State capture.

1 INTRODUCTION

South Africa is a multiparty constitutional democracy based on human dignity, equality and freedom. In terms of the progressive Constitution of the Republic of South Africa, 1996 (Constitution),¹ the post-democratic order is bound by the rule of law as well as by the separation of powers between the executive, legislative and judicial arms of government.² The doctrine of separation of powers has in recent years seen South Africa's apex court, the Constitutional Court, increasingly engaging in judicial oversight and holding the executive accountable, to the extent that politicians have accused it of overreaching, and of departing from the non-interventionist norm underlying separation of powers. As a result, the notion of "lawfare" between the courts and the executive has become an established term in the South African lexicon.³

¹ February J & Pienaar G "Twenty years of constitutional democracy" in Meyiwa T, Nkondo M, Chitiga-Mabugu M, Sithole M & Nyamnjoh F (eds) *State of the nation: South Africa 1994-2014. A twenty-year review of freedom and democracy* Cape Town : HSRC Press (2014) 25.

² The separation of powers was included in chap 4 of South Africa's interim Constitution as constitutional principle VI. See *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC). Also see the Chief Justice's remarks in the so-called "secret ballot" case, *United Democratic Movement v Speaker, National Assembly & others* 2017 (5) SA 300 (CC).

³ Roux TR "The Constitutional Court's 2018 term: lawfare or window on the struggle for democratic social transformation?" (2020) 10 *Constitutional Court Review* 1. Also see Corder H & Hoexter C "'Lawfare' in South Africa and its effects on the judiciary" (2017) 10 *African Journal of Legal Studies* 105 at 105.

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Gardbaum meticulously records how the Constitutional Court (like most courts worldwide) has, over a number of years, held to the non-interventionist norm, but dramatically shed its initial reluctance to review not only legislative outcomes, but also increasingly legislative processes.⁴ He states that “(s)ystemic weaknesses of executive political accountability that arises not merely from the existence but the abuse of dominant party status”, compelled the Constitutional Court to adopt a more interventionist approach in its jurisprudence. In reviewing the Constitutional Court’s 2018 term, Roux echoes this,⁵ stating that the cases reviewed in the term of review “reveal a Court that is increasingly functioning as the moral conscience of the nation”. For now, I will leave aside the question as to whether this jurisprudential shift amounts to lawfare in a negative sense or, instead, is a natural consequence of the struggle for democratic social transformation, as Roux seems to suggest. More fundamentally, I will argue here that practices and policies such as cadre deployment have increasingly necessitated this shift by the Constitutional Court.

To this end, this article presents an overview of case law, legislation, academic writing and reports across a broad field to shed further light on cadre deployment, particularly from a constitutional perspective. Cadre deployment is a recorded policy and practice of South Africa’s ruling African National Congress (ANC) and its tripartite alliance. Despite the Eastern Cape High Court’s judgment in *Mlokoti v Amathole District Municipality & another (Mlokoti (2009))*⁶ where political interference in decisions relating to appointments by municipalities was declared unlawful, cadre deployment seems to continue unabatedly. This, I will argue, has significantly contributed to the blurring of the lines between the State and the ruling party, and, in some instances, has given rise to a state of lawlessness or mobsterism – a situation directly at odds with a multiparty constitutional democracy.⁷ In the context of the recent State capture debate, these blurred party–State lines are in large part to blame for the co-existence of a “shadow State” alongside the South African “constitutional State”.⁸

⁴ Gardbaum S “Pushing the boundaries: judicial review of legislative procedures in South Africa” (2019) 9 *Constitutional Court Review* 1 at 1.

⁵ See Roux (2020) at 4.

⁶ 2009 (6) SA 354 (ECD).

⁷ Hoffman P “Cadre deployment is counterproductive and illegal in the public administration and SOEs” 19 July 2020 *Daily Maverick* available at <https://www.dailymaverick.co.za/opinionista/2020-07-19-cadre-deployment-is-counterproductive-and-illegal-in-the-public-administration-and-soes/> (accessed 14 Feb 2021).

⁸ Bhorat et al “Betrayal of the promise: How South Africa is being stolen” 25 May 2017 *Public Affairs Research Institute* available at <https://pari.org.za/betrayal-promise-report/> (accessed 14 Feb 2021) at 6; Mkhabela M “South Africa and the capture of the executive: undermining transformation?” in Meirotti M & Masterson G (eds) *State capture in Africa: old threats, new packaging?* Johannesburg : EISA (2018) at 129. Also see Corder & Hoexter (2017) at 109, who refer to Fraenkel’s dual State concept, namely, a prerogative (despotic) State and a normative State (where the law operates as a restraint).

It seems contextually sound to start the discussion against the backdrop of the *Mlokoti* (2009) judgment, which, as far as I could ascertain, is the only reported judgment to date that has directly dealt with the policy of cadre deployment. Many authors also cite *Mlokoti* (2009) as established authority on the unlawfulness of cadre deployment.⁹ Notably, the judgment was never taken on review, yet the practice of cadre deployment by the ruling party has continued, in a flagrant violation of the foundational principle of adherence to the rule of law.¹⁰

2 MLOKOTI V AMATHOLE DISTRICT MUNICIPALITY & ANOTHER 2009 (6) SA 354 (ECD)

Mlokoti (2009) vividly illustrates the contestation between South Africa's administrative law on municipal staff appointments, and extraneous considerations of party loyalty as exemplified by the ANC's political influence through its policy of cadre deployment. It shows that a tendency to value party loyalty above the interests of the State may be considered an enabler of the shadow State by defying not only the law, but also the norms set out in the Constitution.

2.1 Background

In 2008, the Amathole District Municipality in the Eastern Cape advertised the position of municipal manager. Following a shortlisting process, one Mr Mlokoti (the applicant in the case in question) and Mr Zenzile (the second respondent) were the preferred candidates. An interviewing panel subsequently assessed their respective strengths and weaknesses, after which the municipal council resolved to appoint Mr Zenzile, although everything pointed to Mr Mlokoti as the better candidate.¹¹ Mr Mlokoti successfully brought an application for the review and setting aside of the second respondent's appointment, and for the Court to order that he (Mr Mlokoti) be appointed instead.

In dealing with the merits of the application,¹² the Court observed that this kind of appointment needed to be governed by a proper recruitment policy, which the municipality indeed had, as well as by section 67 of the Local Government: Municipal Systems Act 32 of 2000. The latter section calls on municipalities to adopt "appropriate systems and procedures" to ensure "fair, efficient, effective and transparent personnel administration". The Court further confirmed that section 195 of the Constitution also

⁹ Twala C "The African National Congress (ANC) and the cadre deployment policy in the post-apartheid South Africa: a product of democratic centralisation or a recipe for constitutional crisis?" (2014) 41 *Journal of Social Sciences* 159 at 159; Shava E & Chamisa SF "Cadre deployment policy and its effects on performance management in South African local government: a critical review" (2018) 37 *Politeia* 1.

¹⁰ Contained in chap 1 of the Constitution.

¹¹ See *Mlokoti* (2009) at 357 para H.

¹² The Court first dealt with an unsuccessful preliminary issue challenge to its jurisdiction, which is not discussed here.

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applied, namely, that public administration at all levels of government must be governed by “democratic values and principles”, including “[e]fficient, economic and effective use of resources” and “[g]ood human-resource management and career-development practices, to maximise human potential”. In addition, the applicant relied on section 6 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA), contending that the municipality’s decision was “irrational, unreasonable and unjustifiable”.¹³ In a second argument pleaded in a subsequent supplementary affidavit, the applicant relied on the provisions of section 6(2) (e)(iv) of the PAJA, which stipulates as follows:

“(2) A court or tribunal has the power to judicially review an administrative action if —

(e) the action was taken —

(iv) *because of the unauthorised or unwarranted dictates of another person or body ...*”¹⁴

From the Court documents, it appears that the applicant came across a letter written by Amathole’s executive mayor to the chairperson of the ANC in the Eastern Cape, seeking guidance “regarding the further conduct of the matter [the appointment of a municipal manager] from the ANC provincial leadership”. In the letter, the executive mayor conceded that the first applicant had been “consistently rated as the better candidate by the selection committee”; that the municipality had obtained two legal opinions, both of which advised in favour of the applicant’s appointment; that the ANC caucus had decided to withhold these legal opinions from the opposition parties in the municipal council; and that, subsequently, the council, with the dissent of the opposition parties, had decided to appoint the second respondent. The latter made it abundantly clear that the executive mayor was well aware of the fact that the best candidate had not been appointed, and that no compelling reason had ever been advanced for “avoiding to appoint the most suitable candidate”.¹⁵

2.2 The substantive merits: administrative vs political act

The Court began by dealing with the municipality’s first contention with regard to the voting process that the municipal council had followed, finding that it was unlawful and a nullity. Next, the Court turned to the municipality’s second contention, namely, that the appointment of a municipal manager was a political decision and not an administrative act. Therefore, the municipality argued, the decision was not subject to the provisions of judicial review in terms of the PAJA or common law. In this regard, the municipality relied on the judgment in *Fedsure Life Assurance Ltd & others v Greater*

¹³ See *Mlokoti* (2009) at 363 para C.

¹⁴ Own italics.

¹⁵ See *Mlokoti* (2009) at 371 para A.

*Johannesburg Transitional Metropolitan Council & others (Fedsure (1999))*¹⁶ where the Constitutional Court remarked as follows:

“The council is a deliberative legislative body whose members are elected. The legislative decisions taken by them are influenced by political considerations for which they are politically accountable to the electorate ... Whilst this legislative framework is subject to review for consistency with the Constitution, the making of by-laws and the imposition of taxes by a council in accordance with the prescribed legal framework cannot appropriately be made subject to challenge by ‘every person’ affected by them on the grounds contemplated by section 24(b). The deliberation ordinarily takes place in the assembly in public where the members articulate their own views on the subject of the proposed resolutions. Each member is entitled to his or her own reasons for voting for or against any resolution and is entitled to do so on political grounds. It is for the members and not the courts to judge what is relevant in such circumstances.”¹⁷

Read superficially, these words of the Constitutional Court may have appeared to substantiate the municipality’s argument. Yet the Court in *Mlokoti* (2009) identified a flaw in the municipality’s argument, namely, that it failed to distinguish between the task to be performed and the functionary performing it.¹⁸ With reference to section 33 of the Constitution (on the right to just administrative action, and the need for legislation to be enacted to promote an efficient administration), the Court relied on the following dictum in *President of the Republic of South Africa & others v South African Rugby Football Union & others*:¹⁹

“In section 33 the adjective ‘administrative’ not ‘executive’ is used to qualify ‘action’. This suggests that the test for determining whether conduct constitutes ‘administrative action’ is not the question whether the action concerned is performed by a member of the executive arm of government. What matters is not so much the functionary as the function. The question is whether the task itself is administrative or not. It may well be, as contemplated in *Fedsure*, that some acts of a legislature may constitute ‘administrative action’. Similarly, judicial officers may, from time to time, carry out administrative tasks. The focus of the enquiry as to whether conduct is ‘administrative action’ is not on the arm

¹⁶ 1999 (1) SA 374 (CC). In this regard, Amathole District Municipality also relied on the judgment in *Pharmaceutical Manufacturers Association of South Africa & another: In re Ex parte President of the RSA & others* 2000 (2) SA 674 (CC).

¹⁷ See *Fedsure* (1999) at para 41.

¹⁸ See *Mlokoti* (2009) at 377 paras A & B.

¹⁹ 2000 (1) SA 1 (CC) at para 141.

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of government to which the relevant actor belongs, but on the nature of the power he or she is exercising.”²⁰

The Court went even further, stating that by merely attaching “the epithet ‘political’” to its staff appointment decisions, a municipal council could not evade its obligations in terms of the law and, instead, consider extraneous factors or influences.²¹ From the evidence, it was clear that the second respondent’s appointment had been made at the behest of the ANC’s regional executive council. However, the duty to appoint a municipal manager, the Court said, was a responsibility owed to “the electorate as a whole and not just the sectarian interests of their [the municipality’s] political masters”.²²

The Court was emphatic in its ultimate finding:

“In the circumstances it is clear that the councillors comprising the ANC caucus failed to exercise the discretion vested in them at all. That abdication of their discretionary powers must result in the decision to appoint second respondent being declared unlawful and being set aside.”²³

There are two further remarks in support of the Court’s judgment, if not already evident from the judgment itself. First, the enabling legal framework in this instance was derived from the Constitution and related legislation, and it is to this framework that the municipality’s employment policy needed to respond. Exercising public powers outside this framework, for instance, by applying an extraneous consideration, such as cadre deployment, is illegal. This remains so, whether or not the cadre deployment policy was devised and implemented by the ruling party, which rules by a considerable political majority. The authority for the system described here derives directly from the compact South Africans agreed to when power was transferred from the previous to the current regime. It follows, therefore, that the system can only be changed in terms of the procedure prescribed in the Constitution itself, by amending the highest law of the land. That is the only lawful way.

Secondly, as much as one accepts that a ruling party has the right through its democratic electoral mandate to implement its policies, it can never mean that those policies cannot be challenged as constitutionally invalid. It is common cause that in *Mlokoti* (2009) the unlawful appointment of the one candidate over the more suitable one, was challenged on account of a government policy, namely, the preference for an ANC candidate in terms of the cadre deployment policy.

²⁰ See *Mlokoti* (2009) at 377 para B.

²¹ See *Mlokoti* (2009) at 377 para D.

²² See *Mlokoti* (2009) at 380 para A.

²³ See *Mlokoti* (2009) at 380 para G.

Therefore, *Mlokoti* (2009) has established that the policy of cadre employment constitutes, in essence, an unlawful influence on the exercise of public power, in contravention of South African law and the values that underpin constitutional democracy. Through ties of party loyalty, the policy enables the repurposing of public institutions in the interests of the party, and not of society as a whole. This was the case at Amathole District Municipality, and – as testimony before the Zondo Commission²⁴ increasingly shows – at a range of other public entities also. In the next part, I examine the causal link between cadre deployment and the shadow State more closely.

3 CADRE DEPLOYMENT, THE SHADOW STATE AND THE SLIPPERY SLOPE

Etymologically,²⁵ the noun “cadre” refers to :

“... ‘permanently organized framework of a military unit’ (the officers, etc. as opposed to the rank-and-file), 1851; earlier ‘framework, scheme’ (1830); from French *cadre*, literally ‘a frame of a picture’ (16c), so, ‘a detachment forming the skeleton of a regiment,’ from Italian *quadro*, from Latin *quadrum* ‘a square,’ which related to *quattuor* ‘four’ (from PIE root *kwetwer- ‘four’). The communist sense ‘group or cell of workers trained to promote the interests of the Party’ is from 1930”.

The Cambridge Dictionary defines “cadre” as “a small group of trained people who form the nucleus of a military, political or business organization”.²⁶ Merriam-Webster,²⁷ in turn, defines it as “a nucleus or core group especially of trained personnel able to assume control or to train others” and, in a second sense, “a cell of indoctrinated leaders active in promoting the interests of the revolutionary party”.

At least in the South African sense, “cadre” clearly has a military or revolutionary connotation. Qobo notes that “the impulse to project a liberation identity came back to life during Thabo Mbeki’s second term in office, when tensions between the party and the [S]tate sharpened”.²⁸ In addition, Sara Gon²⁹ of the Institute of Race Relations states

²⁴ The Judicial Commission of Inquiry into Allegations of State Capture, Corruption, Fraud and Other Allegations in the Public Sector, Including Organs of State, led by South African Deputy Chief Justice Raymond Zondo, and commonly referred to as the “Zondo Commission”. More information about the Commission can be found at <https://www.statecapture.org.za> (accessed 05 September 2021).

²⁵ See Online Etymology Dictionary “cadre” available at <https://www.etymonline.com/word/cadre> (accessed 8 February 2021).

²⁶ See Cambridge Dictionary “cadre” available at <https://dictionary.cambridge.org/dictionary/english/cadre> (accessed 8 February 2021).

²⁷ See Merriam-Webster Dictionary “cadre” available at <https://www.merriam-webster.com/dictionary/cadre> (accessed 8 February 2021).

²⁸ See Qobo M “Party and state in South Africa” March 2019 *Centre for Development and Enterprise* available at <https://media.africaportal.org/documents/CDE-VIEWPOINTS-Party-and-State-in-South-Africa-final.pdf> (accessed 15 February 2021).

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that the ANC follows a socialist/Marxist programme, meaning that it views democracy in the country as a temporary measure that will ultimately make way for a socialist State. To this end, she says, the so-called National Democratic Revolution (NDR) must work to “put the levers of power of society in the hands of the ANC”. She then boldly adds: “The key to the [S]tate capture project was and remains cadre deployment.”

Political rhetoric by the ruling ANC and the Economic Freedom Fighters (EFF), which often urges its members to commit to “the revolution”, is fairly common in South Africa.³⁰ Of course, the idea of a NDR is not new, neither in South African nor internationally.³¹ Whenever a country’s citizenry is disgruntled (particularly in an economic sense, but more often also driven by secular differences due to competing factions in a party), revolutionary socialism offers an attractive option, which politicians fully exploit. Democratisation may have brought political freedom to South Africans, but most perceive themselves as still shackled by the economic inequalities of the past. One consequence of this disgruntlement is the irrational perception that the Constitution itself has not delivered on its guarantees.³² According to Saunderson-Meyer, a sizeable number of the ANC leaders regard the Constitution as “an inconvenient impediment to the revolutionary quest of the ANC, a compromise necessary at the time to access political power”.³³ The perception is that the ANC’s representatives’ authority comes directly from, and their loyalty is therefore owed to, the people first and foremost – and only then to the Constitution.

From a moral perspective, cadre deployment has been associated with “partialism”, “nepotism”, “political meddling”, “favouritism”, “cronyism” and “partisanship”. By its very nature, therefore, cadre deployment requires some moral judgment to ascertain whether such conduct is right or wrong. It is important at this

²⁹ BizNews “Cadre deployment has its roots in Mandela’s administration – IRR” 25 Oct 2018 available at <https://www.biznews.com/leadership/2018/10/25/cadre-deployment-r> (accessed 8 Feb 2021).

³⁰ See EFF “EFF Constitution” 16 December 2014 available at <https://effonline.org/wp-content/uploads/2019/07/Constitution.pdf> (accessed 8 February 2021). The EFF Constitution states: “The EFF takes socialism as the theoretical basis guiding its thinking and development of its political line and in this respect identifies itself as a MARXIST, LENINIST, and FANONIAN organisation.”

³¹ See Thompson CD “What revolutionary socialism means” (1903) 2 *The Vanguard* at 13-14; Mosala SJ, Venter JCM & Bain EG “The National Democratic Revolution (NDR) in South Africa: an ideological journey” (2019) 84 *KOERS Bulletin for Christian Scholarship* available at <https://doi.org/10.19108/> (accessed 8 February 2021).

³² See Davis DM “Authoritarian constitutionalism: the South African experience” (2020) 45 *Journal for Juridical Science* 1 at 9.

³³ Saunderson-Meyer W “How the ANC learnt to love the Constitution” 19 Feb 2021 *PoliticsWeb* available at <https://www.politicsweb.co.za/opinion/how-the-anc-learnt-to-love-the-constitution> (accessed 22 February 2021).

point to distinguish briefly between “cadre deployment” and “cadre employment”. According to Van Onselen,³⁴ “cadre deployment” is:

“The appointment by government, at the behest of the governing party, of a party-political loyalist to an institution or body, independent or otherwise, as a means of circumventing public reporting lines and bringing that institution under the control of the party, as opposed to the [S]tate.”³⁵

“Cadre employment”, in turn, Van Onselen defines as:

“Economic patronage dispensed to individuals, companies and agencies, by the government, not on merit but on the basis they enjoy some party-political connection to the governing party.”

Based on these definitions, Van Onselen then makes a few observations. First, and perhaps the most obvious, is that both notions bypass merit, but with a nuanced difference. Cadre deployment does so primarily to enhance control through appointments to positions of power; cadre employment, on the other hand, does so to dispense economic patronage using public money, although still entrenching party power. Therefore, one could argue that cadre employment entrenches the power achieved through cadre deployment. Cadre deployment is normally more “deliberate”, as Van Onselen states, and is governed by a well-documented and understood formal party policy, while cadre employment tends to be more pervasive and less formal. Van Onselen concludes:

“Once the ANC had secured many of the key positions of power in the civil service, it was able to dispense economic patronage more easily. That this practice is now as tainted as it is widespread means we have a free-for-all of sorts. So perhaps it is easy to understand why cadre employment is regularly used as a euphemism for cadre deployment – the difference being somewhat blurred in the public mind.”

Upon examining the descriptions of cadre deployment offered by Van Onselen and others, one immediately notices the potential of cadre deployment to create a “shadow” or “parallel State”, where public institutions are controlled not by the State, but by the party. This shadow State parasitically feeds off the constitutional State. Politicians would normally use rhetorical statements to keep assuring the public of their

³⁴ Van Onselen G “South African political dictionary: Cadre employment and cadre deployment” 30 August 2021 *Inside Politics* available at <https://inside-politics.org/2012/08/30/south-african-political-dictionary-cadre-employment-and-cadre-deployment/> (accessed 10 February 2021).

³⁵ Also see Ndedi A & Kok L “Roadmap for effective and efficient cadre deployment in South Africa” 25 August 2017 *SSRN Electronic Journal* available at <https://ssrn.com/abstract=3026392> (accessed 10 February 2021). The authors interpret cadre deployment in the same way as Van Onselen.

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commitment to constitutional values and principles,³⁶ whilst, in actual fact, they (or some of them) pursue objectives specific to their own or their party's interests instead of the interests of the State. And the creation of such a shadow State is often the start of a slippery slope to State capture.

Moreover, bypassing public reporting lines, thereby steering actions away from public scrutiny and into the realm of secrecy, usually has a corrupt moral basis. In any event, evading public reporting lines is a flagrant violation of the Constitution.³⁷ In sum, therefore, and to borrow a phrase from Johnson,³⁸ the policy of cadre deployment is “an anti-democratic stratagem in order to retain power”. The overriding aim is to accumulate political and economic power by manipulating the power of the State.

4 THE ANC AND CADRE DEPLOYMENT

Cadre deployment forms part of the official policy of the ruling ANC government and its tripartite alliance. According to Twala, the ANC's Cadre Policy and Deployment Strategy has its roots in the 1996 ANC party piece “The National Democratic Revolution. Is it still on track?”, which was based on input by Joel Netshitenzhe.³⁹ There can be little doubt that the ANC adopted the policy of cadre deployment in a bid to transform the “racially skewed” public administration of South Africa, “where black Africans comprised the majority of public servants in lower positions, with a few middle and senior level open hirelings in the homeland governments”.⁴⁰

Today, the policy has become the object of severe criticism by many in South African society. Twala,⁴¹ for instance, suggests that the ANC should guard against its cadre deployment policy being interpreted as a “[S]tate within a [S]tate”, which could lead to authoritarianism and “the emergence of secret elites within the party”.

The President of South Africa and of the ANC evidently recognises the scale of corruption often associated with cadre employment, judging by a letter to the ruling party in 2020.⁴² To President Cyril Ramaphosa's credit, he bravely admitted that “the

³⁶ See Mkhabela (2018) at 129.

³⁷ Section 1 of the Constitution.

³⁸ Note, however, that Johnson did not in his article refer to cadre deployment specifically. See Johnson RW “Thinking about state failure” 17 February 2021 *PoliticsWeb* available at <https://www.politicsweb.co.za/opinion/thinking-about-state-failure-i> (accessed 15 Feb 2021).

³⁹ See Twala (2014) at 159.

⁴⁰ See Shava & Chamisa (2018) at 2.

⁴¹ See Twala (2014) at 165.

⁴² Ramaphosa C “READ IN FULL: President Cyril Ramaphosa's letter to ANC members about corruption” 24 August 2020 *Business Live* available at <https://www.businesslive.co.za/fm/opinion/2020-08-24-read-in-full-president-cyril-ramaphosas-letter-to-anc-members-about-corruption/> (accessed 10 Feb 2021).

capture of [S]tate institutions by public interests facilitated by politicians and officials at the highest level” had indeed occurred in South Africa. He also went further by stating that, based on evidence before the Zondo Commission, there was

“a disturbing level of grand corruption, where *individuals were placed in various institutions*⁴³ to manipulate procurement and other processes to siphon off massive amounts of funds for a network of politicians, public servants and businesspeople”.

The President then describes the effects of widespread corruption in South Africa as “devastating” and detrimental to the general South African public, who had been robbed of money that may have been allocated “to improved public transport, to better infrastructure for the poor, to reliable and affordable electricity, to emerging black farmers and to the broader development of our country”.

With reference to South Africa’s cash-strapped State-owned enterprises, the President admitted that many of them had been “left dysfunctional and some virtually destroyed”, which “caused huge damage to the economy and to the capacity of the [S]tate”. Of course, there is no direct mention of cadre deployment in the President’s letter, although the words I have italicised above come extremely close. From what has been said thus far, however, it is safe to assume that, in a substantial number of instances, cadre deployment contributed to the unenviable position in which South Africa is finding itself currently. So, how did the lines between party and State become this blurred, and what are the consequences?

5 THE BLURRING OF PARTY–STATE LINES, IDEOLOGICAL CONFUSION, AND THE CONSEQUENCES OF CADRE DEPLOYMENT

The blurring of party–State lines may be ascribed to the ideological confusion in South Africa’s ruling party. One of the goals of cadre deployment, namely, to bring all institutions under the control of the party instead of the State, invariably causes internal competing interests to surface, as the divide along Zuma and Ramaphosa faction lines currently illustrates. To Qobo,⁴⁴ the fact that the ANC, as a “venerable liberation movement”, presides over a “modern constitutional democracy” creates a “perverse” relationship between party and State, which “frustrates democratic consolidation and imposes limits to growth and development”. Despite its seemingly good performance in its first term in power, Qobo states that the ANC was never sufficiently equipped to govern; the organisation never underwent “a change of culture” or acquired the ability to “re-align its ethos and systems with new demands”.⁴⁵ Therefore, the 1996 “normative parameters” agreed to by the party in terms of the Constitution were agreed to by the

⁴³ Own italics.

⁴⁴ See Qobo (2019) at 1.

⁴⁵ See Qobo (2019) at 1.

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“cream of the ANC’s intelligentsia, rather than the body of the party as a whole”. This inevitably meant that the party “would become unhinged” at some point, and that different factions not necessarily aligned with the party’s stated values would make their voices heard.⁴⁶ Qobo writes:⁴⁷

“New forces emerging in the ANC were battling to redefine its purposes. The ‘broad church’ party contained variegated ideological and factional strands, often at odds with each other: adherents of values associated with past leaders; perverse and sometimes corrupt elements; and new mixes of democrats, modernists, and those who saw the party as a vehicle to advance narrow personal interests. At best, the ANC became ideologically confused and organizationally incoherent.”

Qobo then cites the systemic irregularities and wastage in local government, as evidenced by, among others, the Auditor-General’s annual reports, to prove that cadre deployment is a “channel through which the party-[S]tate relationship is blurred”.⁴⁸ This blurred relationship has evidently had an adverse effect on the functioning of the State, as illustrated by the lack of regard for merit and sound principles of governance in *Mlokoti (2009)* as far back as 2009.

Shava and Chamisa,⁴⁹ in turn, lament the fact that the ANC’s aim to introduce “positive policies” that were designed to “improve the country’s economy” was accompanied by the cadre deployment policy. In discussing the harmful effects of the policy, the authors state that the “political patronage” associated with having party loyalists in top public sector jobs has led to “poor performances in government institutions and in the nation as a whole”. Their research on performance management in the public sector confirms that cadre deployment has “exacerbated problems related to corruption, poor procurement systems, wasteful expenditure and the deteriorating state of local government”. Specifically, at municipal level, they believe poor service delivery can be ascribed to “ingrained nepotism, overt politicisation and the appointment of unqualified personnel”.⁵⁰ Keeping in mind Van Onselen’s and other authors’ definition of cadre deployment discussed earlier,⁵¹ it is not surprising that Shava and Chamisa conclude that “[w]herever corruption thrives, accountability and

⁴⁶ See Qobo (2019) at 1.

⁴⁷ See Qobo (2019) at 2.

⁴⁸ See Qobo (2019) at 2. See also Mathiba G *The role of the Auditor-General in the promotion of efficient financial management in municipalities: a case study of the North West Province* (unpublished LLM mini-thesis, University of the Western Cape, 2019) at 95-96.

⁴⁹ See Shava & Chamisa (2018) at 1.

⁵⁰ See Shava & Chamisa (2018) at 2.

⁵¹ In part 3 above.

transparency disappear”.⁵² And corruption does seem to be thriving, as evidenced by a 2010 report by the Public Service Commission, cited in Shava and Chamisa’s study, which found various forms of bribery, fraud, mismanagement of public funds, and procurement through connected cadres.

Cadre deployment is undoubtedly among the enablers of the large-scale corruption and theft that has become almost a commonplace of the South African public sector. And it makes sense that a network of corrupt cadres, whose party loyalty has been rewarded with jobs, provides a fertile breeding ground for corruption to flourish. Still reeling from the shocking revelations about the capture of the South African State, and the evidence brought before the Zondo Commission, the nation hardly had a chance to process the news of the outbreak of the COVID-19 pandemic when the COVID procurement scandal made headlines.⁵³ According to one of the reporters who broke the news, the relaxation of Treasury’s procurement regulations under the national state of disaster, ironically with the aim of expediting the procurement of much-needed personal protective equipment, had resulted in an “orgy of corruption”, which the World Health Organisation’s Director-General described as “tantamount to murder”.⁵⁴ In addition to the many cases of corruption, irregular and wasteful expenditure also amounted to billions of rands. The first signs of corruption surfaced during the initial hard lockdown, when “reports started to emerge of food parcels being stolen or being used by ANC councillors as currency for political patronage”.

Yet Twala cautions against the assumption that injustice normally ensues when “incompetent and unqualified people [are] deployed into administration as municipal managers, chief financial officers and heads of certain services, such as local economic development, technical services and others” in terms of the cadre deployment policy.⁵⁵ Appealing for the matter to be viewed in context, he argues that the assumption that “ANC cadres are unqualified, incompetent by nature and necessarily black” is “misconceived and based on a flawed premise”, as there are also many qualified people in the ANC government. One could not agree more. Making the kind of race-based assumptions Twala refers to would be irresponsible if South Africa is serious about steering the country into a constitutionally aligned direction. Irresponsible assumptions, political rhetoric and, sometimes, plain hate speech will not do the country any favours. There is, however, a reality that we, as South Africans, must be courageous enough to face – one that Twala himself concedes:

⁵² See Shava & Chamisa (2018) at 11.

⁵³ Mathiba G “Corruption, public sector procurement and COVID-19 in South Africa: negotiating the new normal” (2020) 55(4) *Journal of Public Administration* 642 at 642. See also Heywood M “Scandal of the Year: COVID-19 corruption” 27 December 2020 *Daily Maverick* available at <http://www.dailymaverick.co.za/article/2020-12-27> (accessed 15 February 2021).

⁵⁴ See Heywood (2020). See also Mathiba (2020) at 653.

⁵⁵ See Twala (2014) at 159.

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“Whatever success the cadre deployment policy may have had, it has also led to cronyism, nepotism and corruption. To certain extent [sic] this has led to a paralysis of authority, with cadres inevitably torn between the needs of their jobs and the dictates of the party.”

For cadre deployment to be productive and not be seen “as another form of job reservation”, Twala concludes,⁵⁶ ANC members and society at large should demand that cadres be deployed in “a systematic, rational and coherent way”. Here too, however, I would argue that another South African reality also deserves consideration. South Africa already has a systematic, rational and coherent administrative and labour law framework, which draws its normative force and direction from the Constitution, and not from the ruling party. This was well illustrated in *Mlokoti* (2009). Yet the uncomfortable reality is that government (the ruling party) has refused to comply with the judgment of its own court on the (il)legality of cadre deployment, and many other matters,⁵⁷ flouting its commitment to the rule of law. This again points to a deep ideological confusion in the ruling party, as suggested earlier.

South African State-owned enterprises represent another area where the grand scale of corruption and theft associated with cadre deployment has become increasingly apparent.⁵⁸ In 2002, for instance, South Africa’s State-owned electricity utility Eskom was named global power company of the year.⁵⁹ A mere 13 years later, the same utility was “battling to plug a 191-billion rand funding gap”, had had “six CEOs in a decade”, and was battling to meet demand for power, which had resulted in “rolling blackouts almost every second day on average this year [2015]”.⁶⁰ As one reporter put it: “The ANC’s ruinous policy of rewarding loyal cadres with well paid jobs at State Owned Enterprises has wasted tens of billions in taxpayer money.”⁶¹

On the issue of cadre deployment in public administration and State-owned enterprises, Paul Hoffman⁶² states that these cadres are “constantly torn between what the law requires them to do and what the deployment committee wants in the way of

⁵⁶ See Twala (2014) at 165.

⁵⁷ See Corder & Hoexter (2017) at 111.

⁵⁸ Hogg A “Counting cost of ANC cadre deployment policy – SOEs losing tens of billions” 14 August 2015 *BizNews* available at <https://www.biznews.com/leadership/2015/08/14/counting-cost-of-anc-cadre-deployment-policy-soes-losing-tens-of-billions> (accessed 20 February 2021).

⁵⁹ Unknown “Eskom: a powerhouse in world energy” 22 February 2002 *Engineering News* available at <https://www.engineeringnews.co.za/print-version/eskom-x2013-a-powerhouse-in-world-energy-2002-02-22> (accessed 7 January 2020).

⁶⁰ Cohen M & Hill L “Management vacuum hobbles South Africa’s State Companies” 14 August 2015 *Bloomberg* available at <https://www.bloomberg.com/news/articles/2015-08-13/management-vacuum-hobbles-South-Africa-s-state-owned-companies> (accessed 20 February 2021).

⁶¹ See Hogg (2015).

⁶² See Hoffman (2020).

hegemonic control of all levers of power". Thus, the hegemony that the ANC strives for through its NDR is at odds with the rule of law contemplated in section 1 of the Constitution. As a result, instances of invasion of South Africa's constitutional enterprise have been increasing at an alarming rate. One example is the failure to comply with court orders, with a former President's current point-blank refusal to appear before a national commission of inquiry, despite being ordered by South Africa's apex court to do so, a good case in point. Another is the vicious attacks on the South African judiciary,⁶³ often when the judiciary checks the executive's power, as mandated by the Constitution. More examples include weak support for the Public Protector, a section 9 institution that was constitutionally established to bolster constitutional democracy, and the ANC's attempts to delay the release of a report by the former Public Protector implicating a former President.⁶⁴ While there are many more examples of unconstitutional responses by the ANC government, these few are sufficient to illustrate that, in Hoffman's words,⁶⁵ "[t]he ANC works on the basis that the first duty of its cadre is to the ANC", whilst "[t]he Constitution works (or is supposed to work) on the basis that the rule of law and the Constitution are supreme". This blind loyalty to the ANC is certainly fuelled by the party's cadre deployment policy and has led Hoffman to state:

"In practice, this means that the cadres see nothing wrong in fat salaries and fancy cars for cadres while infrastructure is left to rot in most municipalities and the duty of the [S]tate to respect, protect, promote and fulfil the human rights of all who live in SA is honoured in the breach. Poverty and hunger stalk the land, joblessness is higher than ever, inequality abounds and the cadres sail on disengaged from anything other than their revolutionary zeal."

Some political commentators believe that the Zondo Commission is uncovering State capture on a far larger scale than a "side project" of sorts that was primarily perpetrated by the Gupta family and a "few isolated rogues in government".⁶⁶ In fact, it is believed that the commission is revealing that State capture has been the "guiding ideology" of the ANC in governing South Africa for the past 27 years.⁶⁷ In this regard, Schreiber draws an interesting link between cadre deployment and black economic empowerment (BEE), arguing that the ideology of capturing all positions of State power "finds its fullest and most devastating expression when the racial fig leaf of BEE is

⁶³ LegalBrief "Judiciary: Attacks on judges 'a dangerous game'" 18 February 2021 *LegalBrief Today* available at <https://legalbrief> (accessed 22 February 2021).

⁶⁴ Pillay V "Nkandla report: it's the ANC v Tuli Madonsela" 18 March 2014 *Mail & Guardian* available at <https://mg.co.za/article/2014-03-18-anc-verses-thuli-madonsela-the-pressure-mounts/> (accessed 22 February 2021).

⁶⁵ See Hoffman (2020).

⁶⁶ Schreiber L "ANC is fundamental cause of continual looting and SA's decline" 18 Feb 2021 *Business Day* available at <https://www.businesslive.co.za/bd/opinion/2021-02-18-anc-is-fundamental-cause-of-continual-looting-and-sas-decline/> (accessed 22 February 2021).

⁶⁷ See Schreiber (2021).

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layered on top of cadre deployment”.⁶⁸ First, he argues, once loyal cadres are deployed in a powerful position, BEE is used to exclude “bona fide commercial operations”, and State tenders are awarded to the cadres’ “preferred ‘empowerment’ shells”. The contracts awarded to these companies are then used to “channel patronage back into the coffers of the parties that appointed them [the cadres] – while naturally also skimming some of the loot off the top for their personal benefit”. And the ultimate loser is the South African nation.

6 CONCLUSION

South Africa has come a long way since its democratisation. Despite the current sombre national mood, we have a lot to be thankful for, particularly our constitutionally entrenched rights, such as the right to freedom of speech, as well as our independent judiciary and an increasingly vibrant civil society. Yet the country faces serious obstacles.

South Africa appears to be challenged by a moral deficit, which manifests in conduct that flies in the face of the guarantees of our constitutional order. To ANC and national President Cyril Ramaphosa’s credit, there are some signs that accountability and transparency are being restored. I am convinced that the long-awaited report of the Zondo Commission, thanks to a brave and objective report by our former Public Protector in 2016, will reveal the nature, extent and causes of State capture, and will map the rise of our shadow State. It will reveal the shadowy network in both the public and private sectors that has blurred the lines between the constitutional State and the ruling party, and, in many instances, has resulted in plain mobsterism. Despite the vehement political opposition from certain quarters against the publication of Thuli Madonsela’s State capture report shortly before the last national election, and despite current efforts by certain groupings to discredit Justice Raymond Zondo and his Commission, truth and justice will prevail. They always have, albeit sometimes painfully slowly in the South African context. When it appears, the Zondo report ought to be publicly and widely used, not only in constitutional/philosophy and jurisprudence modules at universities, but at the most basic level of community interaction, to inform and educate us on the dangers of blurred party–State lines. Cadre deployment, at least in the way it has been applied by the ANC, is an enabler of much of our current woes.

The problem with outright condemnation of cadre deployment is that the line between an acceptable form of deployment and the point where it becomes immoral and illegal is not clear-cut. It is common practice in many countries across the globe for political parties to appoint their members to powerful State positions. That, in itself, is not contentious. What happens after the appointment is what tips the scales from acceptable to unacceptable. If a position involves the exercise of public power, it must be exercised in the best interests of the public. Moreover, the primary duty to do so

⁶⁸ See Schreiber (2021).

emanates not from party policy, but from the enabling legislative framework that not only created the position in the public service, but also sets the expectations inherent to the position. In *Mlokoti* (2009), Pickering J compellingly conveyed this in explaining that even though the appointment under scrutiny in that matter may have been facilitated by membership of a political party, the functions attached to the position needed to be performed in the public interest.

The second challenge with a sweeping condemnation of all cadre deployment as morally wrong is that, as Twala points out, many appointed cadres are in fact capable, qualified and equipped for their positions. There is, therefore, a risk in generalising. Nevertheless, the country and our law expect such cadres to advance the cause of objectivity and the rule of law, as I am sure many have done in the past when the whistle was blown on those intent on advancing only their narrow own interest.

What is the way forward for South Africa? Qobo proposes that the ANC undertake “reform to uproot corruption”.⁶⁹ In this regard, he recommends that law enforcement agencies be reformed and that “high standards” be set for the appointment of Directors-General in State departments, heads of State-owned enterprises and “other key government agencies”. The President, Qobo says, “will need to stand firm against cadre deployment traditions in the ruling party, and draw talent for the [S]tate from across the spectrum in the country”.⁷⁰

In writing an article of this nature, it is easy to generalise when one speaks of “moral compasses” or “moral standards”. A valid question may well be : of *whose* morals are we speaking in the light of our South African diversity? Space here does not allow for a conversation of this nature, and I would propose as a possible starting point the convening of a bipartisan national convention on the philosophical approaches to fighting corruption. Such convention should reconsider South Africa’s anti-corruption strategies, paying particular attention to the ethical causes of corruption and the role which cadre deployment and cadre employment may play in corruption. Vorster is right in saying that the ethical causes of corruption are often mentioned only in passing, if at all.⁷¹ Yet the battle against unlawful cadre deployment and its consequences is, at its core, a battle for sound ethics and moral values. As Spence et al have stated:⁷²

“The successful combating of crime and corruption presupposes a moral community: a community of people who for the most part try to do what is

⁶⁹ See Qobo (2019) at 5.

⁷⁰ See Qobo (2019) at 5.

⁷¹ Vorster SW “Fighting corruption – a philosophical approach” (2013) 47 *In Luce Verbi* available at <http://dx.doi.org/10.4102/ids.v47i1.651> (accessed 22 February 2021) at 3.

⁷² Spence EH, Miller S & Roberts P *Corruption and anti-corruption: a philosophical approach* Upper Saddle River, NJ: Pearson/Prentice Hall (2005), as cited in Vorster (2013).

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morally right and to avoid doing what is morally wrong, because they desire or believe that they ought to do what is right and to avoid doing what is wrong.”

I believe South Africa has that moral community. Despite our diversity, I do believe we will not differ too much on issues, which are clearly moral in terms of our Constitution, and those that are not.

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