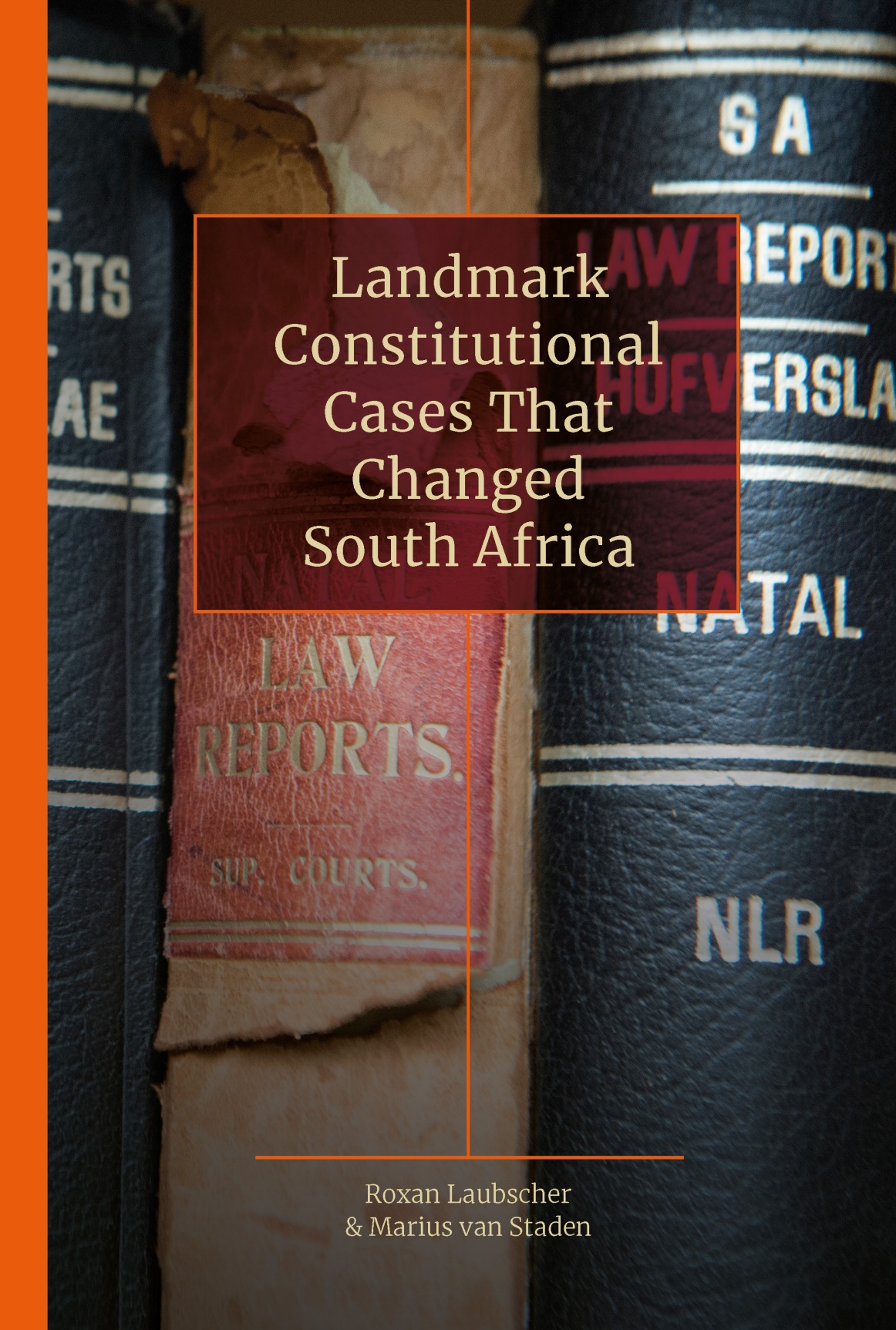

Landmark Constitutional Cases That Changed South Africa

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JOHANNESBURG

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Introduction

On 14 February 1995, the Constitutional Court of South Africa was inaugurated by President Nelson Mandela. In his inaugural speech, President Mandela remarked that the "future of our democracy" hinged on the existence and the work of the newly created Constitutional Court.[1] Furthermore, President Mandela rightly asserted that it is the Constitutional Court's task "to ensure that the values of freedom and equality which underlie our interim constitution – and which will surely be embodied in our final constitution – are nurtured and protected so that they may endure".[2] These sentiments are as true now as they were almost thirty years ago. However, whether and how the courts have nurtured and protected these sentiments over the last twenty-eight years is the topic that we want to address. This book serves as the first volume in a series of books that considers selected landmark judgments of the South African Constitutional Court. The series aims to analyse how the principles laid down in these cases have been developed in subsequent judgments, while also tracing the impact of these judgments on the South African law. The judgments that form the basis of this volume are discussed in ten separate chapters.

There exists no singular set of criteria to determine if any given judgment is a landmark judgment. However, in our assessment of relevant cases and the determination on which judgments should be included in this volume, we considered the following factors. First, we considered the impact of the judgment on society. Does it have a significant impact on the lives of people in South Africa? Does it resolve a long-standing legal issue or set a new precedent? Second, we considered the novelty of the judgment. Does it break new ground in the law? Does it offer a new interpretation of a constitutional provision or statutory law? Third, the clarity of the judgment was an important factor. Is it well-written and easy to understand? Does it provide clear guidance to lower courts? Fourth, the persuasiveness of the judgment was a foundational requirement. Does it offer sound reasoning and persuasive

arguments? Does it convince the reader that the court's decision is correct? Finally, we have also been moved by the longevity of the judgment. Does the judgment continue to be cited and followed by lower courts? Does it remain relevant even after many years?

These criteria are not exhaustive, and ultimately whether or not a judgment is considered to be a landmark judgment is a matter of opinion. However, they provide a useful starting point for assessing the significance of a particular judgment. We hope that, if a particularly important landmark judgment has been omitted, that it will be considered in one of the following volumes.

The reader may note that the format followed in chapters 1-5, written by Prof Laubscher, differs somewhat from the format followed in chapters 6-10, written by Prof Van Staden. The reason for this is twofold. First, some of legal issues discussed in these chapters lend themselves more to one of the two formats. Second, the chosen cases fall within the particular knowledge and expertise of the particular author. We therefore allowed ourselves some leeway in addressing the legal issues in our own way.

Chapter 1 discusses the case, *S v Makwanyane*, a ground-breaking case by the South African Constitutional Court, addressing the rights to life and dignity which were severely violated during the apartheid era. The decision significantly changed South African law and society, abolishing the death penalty and significantly impacting the interpretation and application of constitutional rights by South African courts. The significant aspects of the judgment have had a ripple effect on the jurisprudence of the South African courts, specifically South Africa's criminal justice system and constitutional law. The abolition of the death penalty brought about significant changes with regard to the interpretation and application of the rights to life, dignity, personal freedom, security, limitation of rights, the use of the indigenous value of *ubuntu*, and the role of public opinion in adjudication. This chapter provides a snapshot of the development of the main

areas of impact in subsequent judgments of the Constitutional Court and other South African courts. The Chapter argues that the most important contribution of the *Makwanyane* case is its interpretation and application of the indigenous concept of *ubuntu*, which has associations with transformation, restorative justice, and public policy considerations.

Chapter 2 of the volume considers the granting of "appropriate relief" and "constitutional damages" for violations of rights in the South African Bill of Rights in light of the judgment in *Fose v Minister of Safety and Security*. The *Fose* judgment is a crucial landmark in South African law, establishing the awarding of constitutional damages and shaping the courts' understanding of the constitutional term "appropriate relief". The *Fose* court viewed "appropriate relief" as effective, suitable, and just relief that is able to vindicate the Constitution, deter future infringements, and balance the interests of all parties involved, including the public interest. Although there has been diverging subsequent judgments on the issue of constitutional damages following the Court's initial approach in the *Fose* case, it remains the leading authority on constitutional damages while also making a significant contribution to our courts' interpretation of the term "appropriate relief".

Chapter 3 considers the case, *Greater Johannesburg Transitional Metropolitan Council v Fedsure Life Assurance Ltd*. The case raised significant questions about the judiciary's role in restraining executive power. In essence, the judgment established a parallel track for judicial review of executive actions alongside administrative law in terms of the principle of legality based on the "rule of law", which is an explicit value in section 1 of the 1996 Constitution. The principle of legality, as part of the rule of law, the Constitutional Court argued, was founded on the Interim Constitution's framework and is therefore implicit in its design. The Chapter demonstrates the judgment's reverberations across our legal system, particularly regarding the judicial trend of avoiding the application of the Promotion of Administrative Justice Act of 2000 by using the legality principle as highlighted in the *Fose*

judgment. The Chapter makes no attempt to list every case that refers to the legality principle; instead, it aims to provide a comprehensive overview of the most notable cases that best demonstrate judicial expansions and developments on legality review.

Chapter 4 evaluates *Bhe v Khayelitsha Magistrate; Shibi v Sithole; and South African Human Rights Commission v President of the Republic of South Africa*, wherein the Constitutional Court considered three related instances. In each of the three cases, the issues of whether male primogeniture violated indigenous inheritance rules that favored men over women, as well as the right of women and children to inherit property, were raised. In all three judgments, the Constitutional Court deemed the primogeniture norm of indigenous customary law to be unconstitutional and overturned the legislation governing black South Africans' intestate deceased estates as well as section 23 of the Black Administration Act of 1927. The *Bhe* ruling remains important because it invalidated a significant portion of indigenous customary law regarding inheritance based on discrimination against women, girl children, extramarital children, and men other than the eldest male relative; thereby discriminating against individuals based on race, sex, gender, social origin, and birth. As a result, the ruling upheld the idea that the Constitution is the highest law and that all other laws, including common law and customary law, must submit to it. The *Bhe* decision significantly influenced how the South African courts handle cases involving customary law, particularly regarding the recognition of customary law and its subjection to the Constitution. However, the flexible approach of the minority judgment in the *Bhe* case, has proven to be the most influential contribution of the judgment, as is illustrated by the various judgments discussed in this Chapter.

The extent to which courts should intervene in the enforcement of private contracts between individuals where contractual terms and their enforcement are considered to be unjust or against the values of the Constitution, is discussed in Chapter 5 of this volume. This is exactly what the Constitutional Court had to decide in *Barkhuizen v Napier*.

The Chapter examines the important facets of this decision regarding the "law of general application" requirement under section 36 of the Constitution, the direct and indirect application of the Bill of Rights, and constitutional values and public policy considerations in relation to contractual terms and other private law relationships. The Chapter demonstrates the significant impact of the *Barkhuizen* case on South Africa's legal system by following the progression of these elements in subsequent judgments. The Chapter argues that the *Barkhuizen* case is significant because of its influence on the use of constitutional values to inform public policy decisions. Furthermore, the Chapter illustrates that our courts apply the principles laid down in the *Barkhuizen* ruling in a variety of contexts, including contracts, wills, and the law of delict.

Chapter 6 examines the teleological method of statutory interpretation used in *African Christian Democratic Party v The Electoral Commission* (*ACDP* case). The Chapter examines the disagreements between the majority and the minority of the Court regarding the role of language in statutory interpretation, the proper remedy to be employed, and issues relating to the separation of powers and the role of the judiciary in relation to the legislature. The Chapter examines how the *ACDP* case has affected the legal system in South Africa. The Chapter notes that the majority of the Court in the *ACDP* case was too eager to completely reject the text of the contested legislative clause. The Chapter therefore recognises that a provision's text is never the only factor in determining its legal meaning and examines the development of this principle in subsequent case law.

Chapter 7 of the volume considers the Constitutional Court's decision in *Harksen v Lane*. In this case the Court ruled that the provision of the Insolvency Act of 1936, that temporarily vests a solvent spouse's assets in the trustee of the insolvent spouse's estate, did not infringe the right to property (due to the temporary nature of the vesting). Even though it treated couples differently than other people, it did not violate the right to equality because the distinction had a justifiable reason. In reaching this conclusion, the Constitutional

Court created a contentious test for establishing unfair discrimination. This test is the most notable contribution of the *Harksen* case. The Chapter examines cases that preceded *Harksen*, major criticisms of *Harksen*, and how *Harksen* is related to the legislative tests that have been implemented in the Promotion of Equality and the Prevention of Unfair Discrimination Act, 2000 and the Employment Equity Act, 1998. The Chapter concludes that a unified strategy to deciding unfair discrimination inquiries is required, and that the *Harksen* test needs to be reviewed.

The case of *National Education, Health, and Allied Workers Union (NEHAWU) v University of Cape Town*, which is considered in Chapter 8, has been particularly noteworthy in the context of the constitutionalisation of labour law and for enhancing the public law aspect of labour law. The Court in this case endorsed a broad purposeful approach to interpreting labour laws and outlines the range and scope of enforcing the right to fair labour practices, as provided in section 23(1) of the Constitution. The focus of the Chapter is the Court's finding that, where legislation falls within "constitutional limits", a court, interpreting the legislation, must give full effect to the legislative purpose of the provision and that the "proper interpretation of such legislation will ensure the protection, promotion and fulfilment of constitutional rights and as such will be a constitutional matter". The Chapter notes that the Court's conclusion in the case has the effect of giving it jurisdiction over all labour-related issues. Furthermore, the Chapter argues that, due to the judgment in *NEHAWU*, the Constitutional Court therefore now serves as the highest court in labour disputes. The Chapter investigates these developments in labour law by considering various labour law judgments.

Chapter 9 examines the *Government of the Republic of South Africa v Grootboom* (*Grootboom*) case as one of the most important Constitutional Court judgments on socio-economic rights. The 1996 Constitution's inclusion of socio-economic rights has generated debate from its inception. The Chapter considers the issues of the limitation of public power and the

extent that a court can assess the appropriateness of state action or inactivity when the judiciary's decisions may have budgetary implications for the state regarding the fulfillment of socio-economic rights. As a result, the Chapter analyses the *Grootboom* Court's approach to issues of justiciability of socio-economic rights and separation of power issues. The Chapter notes that, although the *Grootboom* Court held that the right of access to housing (and other socio-economic rights) are legally enforceable, the right to housing does not establish an express legally enforceable right to housing for individuals. The right of access to affordable housing only ensures reasonable public housing policy. Consequently, the Chapter illustrates, with reference to subsequent case law, that courts would therefore be reluctant to tell government what to do or how to go about implementing the right of access to housing, as well as other socio-economic rights.

The Interim Constitution and the Final Constitution of South Africa were the first constitutions in the world to protect sexual orientation as a human right. Chapter 10 considers *Minister of Home Affairs v Fourie (Doctors for Life International, Amici Curiae); Lesbian and Gay Equality v Minister of Home Affairs* (*Fourie* case), which was a pivotal case for equality and LGBTQ+ rights on a global and international scale. The Chapter considers the Constitutional Court's remedy to allow marriage or civil unions for same-sex couples and demonstrates the shortcomings of this solution. The Chapter investigates whether the laws governing relationships in South Africa today can support new kinds of intimate partnerships with reference to various subsequent cases. More specifically, the Chapter examines if protection can be extended to those who are in domestic partnerships, polyamorous relationships and relationships with transgender, gender diverse, and intersex individuals.

We hope that this series of books will provide the reader with a detailed, yet crisp overview of the impact that the Constitutional Court has had on the South African legal system. It was not our intention to discuss every single decided case that is relevant to each chapter, but rather to highlight the

most significant cases which best illustrate the development of the legal principles as laid down by the Constitutional Court in the selected judgments. As far as possible, we tried to achieve this goal in a clear and straightforward way so as to accommodate a variety of readers, including students, researchers and even the more advanced lay reader.

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Roxan Laubscher & Marius van Staden
September 2023

Endnotes

1 Address by President Nelson Mandela at the inauguration of the Constitutional Court, Johannesburg 14 February 1995, available at http://www.mandela.gov.za/mandela_speeches/1995/950214_concourt.htm (accessed 2023-07-21).
2 Mandela (n 1).

Chapter 1

The death penalty decision: A triumph for human rights and the value of *ubuntu*

S v Makwanyane[1]

"It is only if there is a willingness to protect the worst and the weakest amongst us, that all of us can be secure that our own rights will be protected." (S v Makwanyane par 88)

1.1 Introduction

S v Makwanyane was one of the first cases the South African Constitutional Court decided. It is difficult to envisage a more pertinent issue for the new Court to consider at the dawn of our newly established constitutional democracy than the importance of the rights to life and dignity, which was so grossly violated during the apartheid era. There is no doubt that this ground-breaking decision changed the face of South African law and society forever. Apart from abolishing the death penalty, which was a meaningful change to the criminal justice system at the time, the *Makwanyane* judgment has profoundly impacted the interpretation and application of constitutional rights by the South African courts. This chapter highlights the most significant aspects of the judgment and shows the ripple effect of these aspects on the jurisprudence of the South African courts.

In this case, the Court was called upon to decide the death penaltys constitutionality. The two accused in this matter, Themba Makwanyane and Mvuso Mchunu, had been convicted on four counts of murder, one count of

attempted murder, and one count of robbery with aggravating circumstances. They had been sentenced to death on each of the counts of murder and to long terms of imprisonment on the other counts. The two accused, following the adoption of the Interim Constitution of the Republic of South Africa, 200 of 1993, challenged the constitutionality of the death penalty based on the rights to life, human dignity and, because the death penalty may be seen as a "cruel, inhuman or degrading treatment or punishment", contravening the right to personal freedom and security in terms of the Interim Constitution.[2]

The Court unanimously held (although in eleven separate judgments) that capital punishment was inconsistent with the Interim Constitution's commitment to human rights and consequently invalidated section 277(1)(*a*) of the Criminal Procedure Act 51 of 1977, which provided for the imposition of the death penalty. The Court forbade the government from further executing death row prisoners and ruled that these prisoners should remain in prison until new sentences were imposed.[3] The Court, among other things, held that the carrying out of the death sentence "destroys life", which is protected without reservation under section 9 of the Interim Constitution, "annihilates human dignity", which is protected under section 10 of the Interim Constitution, and is arbitrary in its enforcement and thus irremediable.[4] Furthermore, the Court held that the death penalty does not allow for rehabilitation, contrary to the indigenous value of *ubuntu* – a value that underlies our new constitutional order.[5] Finally, the Court pointed out that the state did not prove that the death penalty was a more effective crime deterrent than a lengthy prison sentence.[6] This chapter identifies and explores the significant aspects of the *Makwanyane* judgment and tracks the impact and development of these aspects in various selected subsequent cases.

1.2 Significant aspects of the judgment

1.2.1 The interpretation, content and limitation of the rights in question

1.2.1.1 The interpretation and content of the rights to life, dignity and personal freedom and security

One of the main reasons why the *Makwanyane* case remains significant in South African law is the Court's thorough consideration of the content of the fundamental constitutional rights to life, human dignity, personal freedom, and security.[7] Using a comparative approach encompassing international and foreign law, Chaskalson P considered the content of the rights to human dignity and life, which forms the basis of the prohibition of "cruel, inhuman or degrading punishment" in section 11 of the Interim Constitution. This comparative approach is a significant interpretative development in South African constitutional law. Moreover, this approach gave effect to the provisions of the interpretation clause (section 35(1) of the Interim Constitution), which required courts to have regard to applicable international and foreign law when interpreting the provisions of the Bill of Rights.[8] The Court's approach to applying section 35(1) of the Interim Constitution regarding comparative interpretation remains significant in applying the current interpretation clause, section 39 of the 1996 Constitution.[9]

In his comparative approach, Chaskalson P considered it significant that most democratic countries have abolished the death penalty either expressly or practically.[10] In addition, Chaskalson P argued that comparable bills of rights in foreign jurisdictions might be useful in interpreting the South African Bill of Rights and its provisions, for example, in the case of Hungary, where the death penalty was declared unconstitutional.[11] Chaskalson P, however, cautioned that the South African Constitution had to be interpreted against the backdrop of the Constitution's unique history, structure, language, circumstances and the South African legal system as a whole.[12] Nevertheless, Chaskalson P considered the legal

position regarding the death penalty in some other states, including the United States of America and India. Chaskalson P specifically considered that statutes sanctioning the death penalty in some states in the United States were struck down if it provided mandatory imposition of the death penalty, or no discretion, too little discretion, or an unbound discretion concerning imposing a death sentence.[13] Similar to the United States, Chaskalson P argued, the discretion afforded by the empowering statute, as well as factors such as the way the case was investigated, how effectively the accused was defended, the personality of the trial judge, the race and poverty of the accused, could also play a role in imposing the death sentence in South Africa.[14] These factors add a distinct element of chance in imposing the death penalty and may lead to arbitrariness and inequality.[15] In a separate judgment, Ackermann J also emphasised the arbitrary nature of the imposition of the death penalty.[16] Furthermore, Chaskalson P pointed out that, although the Indian Supreme Court found the death penalty to be constitutionally compliant, the South African Constitution is differently phrased when compared to its Indian counterpart.[17] In the South African context, we need not ascertain whether the death penalty is "totally devoid of reason or purpose", as was argued by the Indian Supreme Court, but rather whether "the death penalty is cruel, inhuman or degrading, and if it is, whether it can be justified" in terms of our limitation clause.[18]

Chaskalson P considered foreign law and international law and the decisions of international courts and tribunals. Concerning article 7 of the International Covenant on Civil and Political Rights (ICCPR), for example, the United Nations Human Rights Committee has been divided as to the obligations of member states regarding the death penalty under the Covenant.[19] In *Kindler v Canada*, the Committee found that extradition to a country where the death penalty may be imposed may be allowed and would not necessarily breach a member state's obligations regarding the imposition of a cruel and inhuman punishment.[20] While in *Ng v Canada*, the Human Rights Committee found that, in this specific case,

extradition would contravene Canada's obligations in terms of the ICCPR since the method of punishment in the case was death by asphyxiation in a gas chamber. In contrast, the death sentence in the *Kindler* case would have been carried out by lethal injection.[21] Chaskalson P argued that these decisions, and dissenting views in these cases, support the view that, on a narrow interpretation, the death penalty could be seen as a cruel and inhuman punishment.[22] In terms of article 3 of the European Convention on Human Rights (ECHR), which prohibits "inhuman or degrading punishment", the European Court of Human Rights held that where given a choice to extradite an offender to a country where the death penalty may be imposed and a country where the death penalty has been abolished, the option should be "exercised in a way which would not lead to a contravention of article 3".[23] In *Soering*, the court chose to extradite the offender to Germany, where the death penalty had been abolished. According to Chaskalson P, the Court has been called on to make a similar determination as the court in the *Soering* case. Chaskalson P explained:

> *"A holding by us that the death penalty for murder is unconstitutional, does not involve a choice between freedom and death; it involves a choice between death in the very few cases which would otherwise attract that penalty under section 277(1)(a), and the severe penalty of life imprisonment."*[24]

The *Makwanyane* judgment's consideration and interpretation of the rights to human dignity, life and personal freedom and security is another significant aspect of the judgment, especially concerning ascertaining the content and meaning of these rights and their application in future cases. Regarding the rights to life and human dignity, Chaskalson P held that it is important to consider these rights within South Africa's unique history of oppression:

> *"The history of the past decades has been such that the value of life and human dignity have been demeaned. Political, social and other factors created a climate of violence resulting in a culture of retaliation and vengeance. In the process, respect for*

> *life and for the inherent dignity of every person became the main casualties. The State has been part of this degeneration, not only because of its role in the conflicts of the past, but also by retaining punishments which did not testify to a high regard for the dignity of the person and the value of every human life."*[25] *(own emphasis)*

This "high regard" for human dignity, which underlies our new constitutional dispensation, is precisely why there is a close connection between the prohibition of "cruel, inhuman and degrading punishment" provided by the right to personal freedom and security and the right to human dignity.[26] Put differently, cruel and inhuman punishment should be prohibited because of its effect of objectification of the individual subjected to it. This objectification seriously impairs an individual's fundamental right to human dignity. In addition, an individual's entitlement to human dignity is not affected by the individual's status as a person convicted of a crime. Chaskalson P had the following to say about the rights of convicted individuals in our constitutional order:

> *"[Constitutional] rights vest in every person, including criminals convicted of vile crimes. Such criminals do not forfeit their rights under the Constitution and are entitled, as all in our country now are, to assert these rights, including the right to life...."*[27]

Moreover, the fundamental right to life is another factor to be considered when determining if a particular punishment is "cruel, inhuman or degrading". As a person's right to life has been labelled "[t]he most fundamental of all human rights",[28] the preservation of the so-called "twin rights" of human dignity and life have been described as the "source of all other rights".[29] Chaskalson P, referring to the reasoning of the Hungarian Constitutional Court in which the death penalty was invalidated, explained that "[t]hese twin rights are the essential content of all rights under the Constitution. Take them away, and all other rights cease".[30] Essentially, the courts in both the Hungarian death penalty case and the *Makwanyane*

case argued that a punishment (such as the death penalty) might be construed as a "cruel, inhuman or degrading" punishment if it limits the fundamental twin rights of human dignity and life in such a way as to "eliminat[e] them irretrievably".[31] According to Chaskalson P in the *Makwanyane* case, the death sentence "destroys life" and "annihilates human dignity", has "elements of arbitrariness" in its enforcement and is "irremediable" – as such, Chaskalson P concluded that the death sentence was indeed a "cruel, inhuman and degrading" punishment.[32] In its detailed consideration of these rights, Chaskalson P set the tone for properly interpreting these rights in subsequent judgments. Langa J echoed these sentiments in his judgment, indicating that the right to life includes "the right not to be deliberately put to death by the State as punishment", and, although the limitation clause may still be applied to limitations on the right to life, these limitations must be seen in the light of South Africa's history of gross human rights violations.[33]

1.2.1.2 Limitation of the rights to life, dignity and personal freedom and security

Makwanyane is also significant because it illustrates the Court's approach to interpreting and applying the Interim Constitution's limitation clause to the fundamental rights in question. As this is one of the early judgments of the Court, it is instructive to note the Court's approach to the limitation of rights and how this approach has been used and adapted in subsequent judgments and, eventually, used in applying the 1996 Constitution's limitation clause.[34] Chaskalson P noted that the limitation of rights in terms of a general limitation clause comprises a so-called "two-stage" approach, where the right first needs to be interpreted (in other words, the interpretation stage), followed by the justification stage.[35] In addition, Chaskalson P pointed out that, concerning the justification of the limitation of rights, the onus of proof is on the "legislature, or the party relying on the legislation, to establish this justification, and not for the party challenging it to show that it was not justified".[36] In other words, the party

whose right(s) has been infringed does not need to prove that the limitation was justified. They need only prove that their right has been limited.

Determining whether a limitation is necessary and reasonable for purposes of section 33 of the Interim Constitution essentially entails a proportionality analysis.[37] A proportionality analysis, Chaskalson P stated, comprises the consideration and balancing of competing interests, including the following factors: the nature and importance of the right(s); the purpose of the limitation and the importance of this purpose; the extent of the limitation and its efficacy; and whether the purpose could be reached by using less limiting means.[38] Chaskalson P continued his comparative approach by considering the approaches of other courts to the proportionality analysis when limiting rights. Chaskalson P considered the approaches followed by courts in Canada and Germany and the European Court of Human Rights.

Chaskalson P, referring to the application of the proportionality test by the Canadian Supreme Court in *R v Oakes*,[39] stressed that there must be a rational connection between the limitation and its purpose, that the right needs to be limited as little as possible and that there must be a balance between the *effects* of the limitation and the purpose for which the right is limited.[40] Chaskalson P argued that, although there is a rational connection between the death penalty and its purpose, the elements of arbitrariness and unfairness must be considered in the balancing process.[41] Moreover, Chaskalson P reasoned that the rights in question are not limited "as little as possible" when alternative punishments, such as life imprisonment, are available.[42] Although judicial scrutiny of the statutorily prescribed punishments for certain crimes may raise separation of powers issues, the Canadian Supreme Court held that legislatures do not have "unrestricted licence to disregard an individual's Charter Rights".[43] Therefore, although the state should be afforded deference in selecting appropriate punishments for crimes, this does not give the state unlimited power to choose any punishment whatsoever

– the rights of individuals still need to be considered and limited as little as possible.

Regarding proportionality, Sachs J argued that the right to life could not be subject to "incremental invasion",[44] and therefore, "[w]hen it comes to execution... there is no scope for proportionality".[45] Moreover, Sachs J points out that "life by its very nature cannot be restricted, qualified, abridged, limited or derogated from in the same way. You are either alive or dead".[46] Therefore, Sachs J argues that the limitation clause and the concept of constitutionalism do not allow for the "extinction" of rights but for the protection of rights and their justifiable limitation.[47]

In terms of the German proportionality test, the German Constitutional Court has regard to the purpose of the limitation, whether the limitation could possibly achieve the purpose and whether it actually does achieve the purpose in practice, and whether there is a proper balance between the purpose and the right that has been limited.[48]

When limiting rights in terms of the ECHR, the purpose or the "ends" of the limitation must be a "pressing social need" and the means used must be proportionate to attaining those ends.[49] A balance must therefore be struck between "general" and "individual" interests.[50] The European Court of Human Rights has found that where a right fundamental to democratic society has to be limited or where a law interferes with intimate aspects of an individual's private life, a higher standard of justification is required to limit such rights.[51]

Although these comparisons could be instructive in applying the proportionality test in the South African context, the South African Bill of Rights has unique criteria which must be considered when limiting the various fundamental rights.[52] In the South African context, the rights to life and dignity are values that are of the highest importance in our constitutional order and are "at the heart" of the prohibition of "cruel, inhuman or degrading punishment" – a clear and convincing case, therefore, has to be made out to justify the imposition of the death penalty.[53]

In *Makwanyane*, Chaskalson P considered the various justifications for retaining the death penalty, including the deterrent effect of the death penalty relative to other punishments; crime prevention; retribution; and the fact that the Appellate Division would only confirm a death sentence if it were convinced that it would be the only proper sentence.[54] Chaskalson P rightly pointed out that the Appellate Division was not a strong check on the imposition of death sentences because it could not refuse to impose the death sentence if another sentence would not be considered more appropriate – the Appellate Division, therefore, did not have much discretion in this regard.[55]

As to the argument of the deterrent effects of retaining the death penalty to prevent the occurrence of serious crimes, Chaskalson P stressed that the most significant deterrent of crime is the knowledge that offenders will be apprehended, convicted and punished – this is what our current system lacks.[56] Chaskalson P further argued that the law is brought into disrepute when its criminal justice system is ineffective and crimes go unpunished.[57] However, the question is not whether persons convicted of serious and violent crimes should be sentenced to death or go unpunished but, instead, whether they should be executed or imprisoned for an appropriately long time.[58] In this regard, Ackermann J emphasised that the state, therefore, must ensure that unreformed offenders should remain in prison to protect other individuals in society:

> *"[i]f there is an individual right not to be put to death by the criminal justice system there is a correlative obligation on the state, through the criminal justice system, to protect society from once again being harmed by the unreformed recidivist killer or rapist."*[59]

In this regard, Mahomed J argued that any presumption regarding the deterrent effects of the death penalty on the occurrence of crime would be "fallacious and at the least, highly speculative and rationally unconvincing" and, in

addition, it lacks substantiating empirical evidence and is unrealistic.[60]

Chaskalson P pointed out that South Africa has committed to "a future founded on the recognition of human rights, democracy and peaceful co-existence... for all South Africans" and that respect for the rights to life and dignity lies at the heart of this commitment.[61] One of the main reasons for prohibiting the death penalty is that it gives the state the authority to kill, which "cheapens the value of human life" and, therefore, by not authorising the state to impose the death sentence "the State will serve in a sense as a role model for individuals in society".[62] Chaskalson P rightly remarks that our country, in particular, desperately needs such a role model[63] and that more lives may be saved in the long run by establishing a "rights culture" than by executing convicted individuals.[64] The same may be said for the so-called "crime prevention justification" for the death penalty – imposing a death sentence is not the only way of preventing serious and violent crime.[65]

Regarding retribution as a justifying objective of the death penalty, Chaskalson P argued that there is no need for the punishment to be identical to the crime.[66] Chaskalson P explained that "[t]he state does not need to engage in the cold and calculated killing of murderers to express moral outrage at their conduct" – lengthy prison sentence could have the same effect.[67] As our Constitution is based on recognising the value of human life, dignity and the importance of reconciliation, retribution should not be given undue weight in the proportionality analysis.[68] Regarding retribution, Mahomed J pointed out that there are good reasons why the punishment should not necessarily be similar to the crime. For example, executions would "desensitise" our society's "respect for life *per se*".[69]

After considering these justifying factors, Chaskalson P turned to the content of the rights in question and, ultimately, the balancing process. Chaskalson P conceded that there might be some uncertainty surrounding the term "essential

content" of a right regarding the limitation clause in section 33(1) of the Interim Constitution. However, it is clear from Chaskalson P's comparative discussion of the rights to life and dignity that these rights form the basis of the right to personal freedom and security and its prohibition of cruel, inhuman and degrading punishment in section 11 of the Interim Constitution.[70] In this regard, Kriegler J emphasised that the death penalty, by definition, "strikes at the heart of the right to life". At the same time, Mahomed J argued that the death penalty annihilates the essential content of the right to life and impermissibly degrades the right to human dignity.

Similarly, Mokgoro J held that the death penalty violates the essential content of the right to life because it "extinguishes life itself" while also "dehumanising" the offender – therefore violating the right to human dignity, not only of the offender but also of those who carry out the penalty.[71] Moreover, O'Regan J emphasised the right to life as central to our constitutional values.[72] For O'Regan J, the right to life is essential to our new democratic society that seeks to "recognise and treasure" the value of each community member.[73] Such an understanding of the right to life also encompasses the right to human dignity, which acknowledges "the intrinsic worth of human beings".[74]

Finally, Chaskalson P, in balancing all the competing rights and interests in this case, held that criminals do not forfeit their rights and are still entitled to assert all fundamental human rights guaranteed by the Constitution.[75] Whether a particular punishment is consistent with these fundamental rights depends not on a moral judgment but on the interpretation of the Constitution.[76] Furthermore, Chaskalson P stressed that there is a fundamental difference between limiting rights and destroying them entirely – which is what the imposition of the death penalty essentially does.[77] In conclusion, the Court, per Chaskalson P, reasoned that since the rights to dignity and life are the most important rights and serve as the basis of all other rights, the state must demonstrate that these rights are to be valued above all others in everything it does – which objective cannot be

reached if the state is empowered to objectify those convicted of serious crimes.[78] Similarly, Didcott J argued that South Africa had experienced enough "savagery" and that "wanton killing must stop before it makes a mockery of the civilised, humane and compassionate society to which the nation aspires and has constitutionally pledged itself".[79] In addition, Didcott J remarked that the state must set an example "in demonstrating the priceless value it places on the lives of all its subjects, even the worst".[80] Similarly, Langa J remarked that "the value of human life is inestimable, and it is a value which the State must uphold by example".[81] The Court, per Chaskalson P, consequently found that the requirement of section 33 of the Interim Constitution has not been met and that the death penalty is, therefore, unconstitutional.[82]

1.2.2 The value of *ubuntu*

The second reason the judgment remains significant is that it considered the indigenous value of *ubuntu*, which the Court thought to be akin to the value of human dignity. It further held that both these concepts are values that underlie our constitutional dispensation.[83] The Court, per Langa J, remarked that since our constitutional approach has been founded on a commitment to reconciliation and not retribution, it would be most consistent with the value of *ubuntu* if our society wished to "prevent crime... [rather than] to kill criminals simply to get even with them".[84] In his separate concurring judgment, Langa J emphasised South Africa's commitment to establishing a new society based on a "change in mental attitude from vengeance to an appreciation of the need for understanding, from retaliation to reparation and from victimisation to *ubuntu*".[85] Furthermore, Langa J attempted to explain the meaning of *ubuntu*, stressing that the concept entails not only a right to dignity but also a corresponding duty to respect the dignity of others:

> *"It recognises a person's status as a human being, entitled to unconditional respect, dignity, value and acceptance from the members of the community such person happens to be*

> *part of. It also entails the converse, however. The person has a corresponding duty to give the same respect, dignity, value and acceptance to each member of that community. More importantly, it regulates the exercise of rights by the emphasis it lays on sharing and co-responsibility and the mutual enjoyment of rights by all."*[86]

Langa J further remarked that "heinous crimes are the antithesis of *ubuntu*" and that inhuman and degrading treatment is "bereft of *ubuntu*".[87] In addition, Langa J rightly argues that your commitment to our new "rights culture" will be tested, not only by how we protect the "weakest" and most vulnerable members of our society but also by how we treat the "worst among us".[88] Langa J concluded that our Constitution does not "allow us to kill in cold blood in order to deter others from killing" as this would be against everything the Constitution stands for and our new constitutional dispensation aspires to achieve.[89]

Madala J described *ubuntu* as akin to "humaneness, social justice and fairness".[90] Madala J emphasised that the imposition of the death penalty rejects the notion that perpetrators could be rehabilitated and regards this rejection as the antithesis of the concept of *ubuntu*.[91] Regarding rehabilitation, Mahomed J pointed out that the death penalty accepts that a convicted individual is beyond any possibility of "rehabilitation", "reform" or "repentance" and is therefore seen to be "beyond the pale of humanity".[92] This view of the convicted individual violates not only the human dignity of that person but also the dignity of our society as a whole.[93] In addition, Mahomed J stressed how South Africa's new constitutional order has brought about a decisive break with our discriminatory and oppressive past and further emphasised the South African society's need for a community based on the value of *ubuntu*.[94] Mahomed J equated the value of *ubuntu* with

> *"the ethos of an instinctive capacity for and enjoyment of love towards our fellow men and women; the joy and the fulfilment involved in recognising their innate humanity; the reciprocity*

> *this generates in interaction within the collective community; the richness of the creative emotions which it engenders and the moral energies which it releases both in the givers and the society which they serve and are served by."*[95]

Furthermore, Mokgoro J pointed out that in evaluating the constitutionality of laws, indigenous South African values "are not always irrelevant nor unrelated to this task" but are embodied in the South African Constitution.[96] Mokgoro J argued that balancing competing rights and interests inevitably entails value judgements. Still, these judgements are not subjective but rather embody objective and transparent shared common values.[97] Mokgoro J further stated that

> *"[a]lthough South Africans have a history of deep divisions characterised by strife and conflict, one shared value and ideal that runs like a golden thread across cultural lines, is the value of ubuntu – a notion now coming to be generally articulated in this country."*[98]

According to Mokgoro J, the value of *ubuntu* underlies the Bill of Rights and is essential to the coherence of all the rights entrenched therein.[99] As to the meaning of the term "*ubuntu*", Mokgoro J defines it as "humaneness", "personhood" or "morality" and metaphorically explains the term as encompassing values such as "group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity".[100] Moreover, Mokgoro J held that human dignity and life are sides of the same coin, so to speak and that *ubuntu* is closely related to both these fundamental human rights.[101]

Moreover, Sachs J emphasised the importance of giving "long overdue recognition" to African law and traditional legal ideas, values and practices, which would "restore dignity to ideas and values that have long been suppressed or marginalised".[102] Sachs J, however, cautioned against "invoking each and every aspect of traditional law as a source of values", as we also do not rely on every aspect of common law – only those aspects that accord with the principles of our

new constitutional order, whether in terms of traditional or common law, should be upheld and developed.[103] The Court's discussion of the value of *ubuntu* in the *Makwanyane* case laid the foundation for other courts to use and further expand on this concept.

1.2.3 The role of public opinion

Finally, the *Makwanyane* judgment remains significant as to its finding on the role that public opinion should play in the adjudicative process, especially in controversial matters such as the abolition of the death penalty.[104] In a now-famous statement, the Chaskalson P held:

> *"Public opinion may have some relevance to the enquiry, but in itself, it is no substitute for the duty vested in the Courts to interpret the Constitution and to uphold its provisions without fear or favour. If public opinion were to be decisive there would be no need for constitutional adjudication. The protection of rights could then be left to Parliament, which has a mandate from the public, and is answerable to the public for the way its mandate is exercised, but this would be a return to parliamentary sovereignty, and a retreat from the new legal order established by the 1993 Constitution."*[105]

According to Chaskalson P, the question that should be answered is not what the majority of South Africans believe an appropriate sentence for serious crimes, such as murder, should be, but rather whether such a sentence would be justifiable in terms of our unique Constitution.[106] Courts are independent arbiters of the Constitution and cannot be diverted from this special duty by "making choices on the basis that they will find favour with the public".[107] In this regard, Didcott J held that courts should try to steer clear of external pressures, such as the consideration of public opinion, in constitutional adjudication, as it is primarily the purpose of the legislature (and arguably the executive) to consider such opinions when formulating policy.[108] Kentridge J pointed out that no conclusive evidence was placed before the Court, either

in the form of a referendum or legislation, indicating current public opinion on the death penalty and no clear conclusion could be reached.[109] Furthermore, Kriegler J avers that the issue in this case is purely legal and is not based on "ethics or philosophy and certainly not politics".[110] According to Kriegler J, the question here is not

> *"whether I favour the retention or the abolition of the death penalty, nor whether this Court, Parliament or even overwhelming public opinion supports the one or the other view. The question is what the Constitution says about it."*[111]

In a similar vein, Madala J held that, in determining the constitutionality of the death penalty, we need not ask what the opinions or attitudes of the public are on the matter. We need only consider the provisions of the Constitution.[112] Determining public opinion in adjudication, Madala J held, is neither "necessary" nor "desirable".[113]

Moreover, Mahomed J argued that, although public opinion may play an important role in the political arena, the judicial process is completely different and is based on the judicial interpretation and assessment of various factors to ascertain "what the *Constitution* permits and what it prohibits".[114] Mokgoro J indicated that the difference between values and public opinion is that values are "enduring" while opinions "fluctuate" – constitutional values are not based on "uninformed" or "prejudiced" opinions of the majority.[115] Unlike the political realm, where majority opinion matters, adjudication protects minorities and the vulnerable.[116] In addition, Sachs J agreed with the other justices that it is not the court's task to decide which public preferences regarding the death penalty should be preferred but to answer the question with a purely legal response based on the interpretation of the Constitution.[117]

1.3 *Impact of the judgment*

1.3.1 Impact on the interpretation of the rights to life, dignity and personal freedom and security

The consideration of the importance of the rights to life, dignity and personal freedom and security, especially seen against the backdrop of the gross human rights violations during the apartheid era, undoubtedly played an important role in the abolition of the death penalty in the *Makwanyane* case. The *Makwanyane* Court's detailed analysis of these rights and the Court's emphasis on their importance in an open and democratic society based on the values of dignity, freedom and equality set the tone for interpreting and protecting these rights in subsequent cases.[118] This part of the chapter considers the approach followed in several cases that dealt with these important rights after the *Makwanyane* judgment.

In *S v Williams*[119] the Constitutional Court had to decide on the constitutionality of juvenile whipping. Similar to the *Makwanyane* Court's emphasis on human dignity, the Court in *S v Williams* stressed that the state must act as a "role model" in society and argued that if the state stripped "the weakest and the most vulnerable among us" of their human dignity, "the danger increases that their regard for a culture of decency and respect for the rights of others will be diminished".[120] In other words, if the state disregards the importance of the rights to life and dignity, it breeds a society that does not cherish the inherent value of each human being in society. According to the *Williams* Court, an enlightened society should punish offenders "without sacrificing decency and human dignity".[121] In addition, the Court held that "measures that assail the dignity and self-esteem of an individual will need to be justified; there is no place for brutal and dehumanising treatment and punishment" in our Constitution.[122] Finally, the Court stated that the punishment of juvenile whipping strips the offender, as well as the person administering the punishment, of their dignity and the practice "debases everyone involved in it".[123]

In *Ferreira v Levin NO; Vryenhoek v Powell NO*,[124] the Constitutional Court considered the alleged unconstitutionality of certain provisions in the Companies Act 61 of 1973 regarding examining persons in winding-up proceedings. The Court specifically considered and commented on the interpretation and content of the constitutional rights to personal freedom and security and the right to dignity as discussed by the Court in *Makwanyane*. First, the Court in *Ferreira* pointed out that, when interpreting the Constitution, a purposive approach must be followed that takes into account the context and history of the adoption of the provisions and the violations of these rights during the apartheid era.[125] Second, the Court held that the right in section 11 of the Interim Constitution to personal freedom and security entailed two separate rights – one relating to "freedom" and the other to "security of the person".[126] Third, the Court described this right to "freedom" as one of the Constitution's "core rights" and the rights to life and dignity, emphasised in the *Makwanyane* case.[127] In addition, the Court considered the importance of the right to human dignity and commented that "[h]uman dignity cannot be fully valued or respected unless individuals are able to develop their humanity, their 'humanness' to the full extent of its potential".[128] Moreover, the Court linked the right to freedom with the right to dignity, stating that

> *"human dignity cannot be fully respected or valued unless the individual is permitted to develop his or her unique talents optimally. Human dignity has little value without freedom; for without freedom personal development and fulfilment are not possible. Without freedom, human dignity is little more than an abstraction. Freedom and dignity are inseparably linked. To deny people their freedom is to deny them their dignity."*[129]

Notwithstanding the link between dignity and freedom, the Court argued that freedom has an "intrinsic constitutional value of its own" and must be interpreted as widely and generously as possible.[130]

In *Soobramoney v Minister of Health (Kwazulu-Natal)*,[131] the Court held that the right not to be refused emergency

medical treatment meant that a person could not be refused urgent emergency medical care – this, however, did not include medical care for terminal conditions. Concerning the interpretation of constitutional rights, the Constitutional Court confirmed its approach in the *Makwanyane* case. It held that a broad and purposive approach must be followed, considering the context and history of the right.[132] Using a wide interpretation of the right to life, the Court construed the right to encompass other entitlements, such as "housing, food and water, employment opportunities, and social security", necessary to sustain human life.[133]

In *Ex Parte Minister of Safety and Security: In Re S v Walters*,[134] the Constitutional Court considered the constitutional validity of the legislative provisions which permitted the use of force when arresting an individual suspected of a crime. The Court, referring to the *Makwanyane* case, held that our new constitutional order should value the rights to human dignity and life above all others and that "[o]ur Constitution demands respect for the life, dignity and physical integrity of every individual"– including suspects of crime and those that have been convicted.[135] The Court in *Walters* pointed out that the *Makwanyane* Court already made reference to the scenario of using deadly force to arrest suspects and commented that "[g]reater restriction on the use of lethal force may be one of the consequences of the establishment of a constitutional State which respects every person's right to life" and that Chaskalson P even said that one of the consequences of the *Makwanyane* judgment might be that lethal force during arrests may be declared unconstitutional.[136] As to the importance of the rights in question, the Court in *Walters* further held that "the right to life, to human dignity and bodily integrity are individually essential and collectively foundational to the value system prescribed by the Constitution. Compromise them and the society to which we aspire becomes illusory".[137]

Similar to the judgment in *Williams*, the Constitutional Court in *Freedom of Religion South Africa v Minister of Justice and Constitutional Development*[138] declared the common law defence

of moderate and reasonable chastisement regarding children unconstitutional, as it infringed on the right of personal freedom and security of children, specifically section 12(1)(*c*) – the right to be free from all forms of violence. Building on the Court's argument in the *Williams* and *Makwanyane* cases, the Court held that "a culture of authority which legitimates the use of violence is inconsistent with the values for which the Constitution stands".[139] Furthermore, the Court held that human dignity "occupies a special place in the architectural design of our Constitution" as it is constitutionally entrenched as both a value and a constitutional right.[140] The Court concluded that chastisement as a disciplinary tool, however moderate and reasonable, unjustifiably infringes the fundamental right of the dignity of children and can therefore not be retained.[141]

1.3.2 Impact on the application of the limitation clause

The *Makwanyane* case was one of the first cases in which the Constitutional Court had to conduct a limitation analysis (proportionality test) and apply the limitation clause provided in section 33 of the Interim Constitution. This part highlights some cases that show the Constitutional Court's use and interpretation of the proportionality test regarding the limitation clauses in both the Interim and 1996 Constitutions following the *Makwanyane* judgment.[142]

In *S v Williams*,[143] where the Constitutional Court declared the punishment of juvenile whipping unconstitutional, the Court held that the test formulated in the limitation clause (section 33) of the Interim Constitution amounted to a proportionality test, which meant that three questions had to be answered when limiting constitutional rights:

> *"(a) whether the means used are reasonable; (b) whether they are justifiable in the context of the civilised society we hope we are or which we, through this Constitution, are aspiring to be; and (c) whether they are necessary to attain the objective."*[144]

Furthermore, the Court held that the proportionality test entails "weighing up" the rights to be limited against the objectives that such limitation sought to achieve[145] and "must necessarily take place against the backdrop of the values of South African society as articulated in the Constitution".[146] The *Williams* judgment also referred to the *Makwanyane* Court's consideration of the application of the proportionality test in Canada, the European Court of Human Rights and the German Constitutional Court.[147]

In *Coetzee v Government of the Republic of South Africa, Matiso v Commanding Officer Port Elizabeth Prison*,[148] the Constitutional Court invalidated certain sections of the Magistrates Court Act, which provided for the imprisonment of civil judgment debtors. Regarding the limitation of rights, the Court referred to the so-called two-stage approach set out in the *Makwanyane* judgment (see discussion above). It argued that these two stages are "interlinked" in several ways:

> *"[F]irstly, by overt proportionality with regards to means, secondly by underlying philosophy relating to values and thirdly by a general contextual sensitivity in respect of the circumstances in which the legal issues present themselves."*[149]

In the *Coetzee* judgment, Sachs J emphasised that the two-stage approach to the limitation of rights should also not be seen as a "mechanical" or "technical" process but should rather be seen as a "balancing process within a holistic, value-based and case oriented framework" which focusses on "the synergetic relation between the values underlying the guarantees of fundamental rights and the circumstances of the particular case".[150]

In *Mistry v Interim National Medical and Dental Council*,[151] which was one of the last cases to be decided by the Constitutional Court in terms of the Interim Constitution, the Court considered whether inspectors' powers of entry, examination, search and seizure provided in terms of the Medicines and Related Substances Control Act[152] were contrary to the Constitution, specifically the right to privacy. In this

case, the Court thoroughly explored and applied each of the factors alluded to by the *Makwanyane* Court in assessing the justifiability of a limitation of a right to the facts of the case at hand. The Court's analysis would soon give other courts a perfect example of how to apply these factors, as the factors were subsequently included in the limitation clause of the 1996 Constitution.[153]

S v Manamela (Director-General of Justice Intervening)[154] was decided in terms of the 1996 Constitution. In this case, the Constitutional Court provided important guidelines for applying the limitation clause of the 1996 Constitution. First, the Court pointed out that the factors listed in section 36 are not exhaustive and that other factors may also be considered.[155] Second, echoing the sentiments of the *Mistry* and *Coetzee* judgments, the Court held that the balancing process should not be seen as a mechanical exercise and the factors contained in section 36 should not be approached as a "check-list".[156] The Court further remarked that when applying the proportionality test, as a general rule, "the more serious the impact of the measure on the right, the more persuasive or compelling the justification must be".[157] Moreover, the Court held that although the limitation clauses of the Interim and 1996 Constitution differ in various respects, the application of the limitation clause of the 1996 Constitution, like the limitation clause in the Interim Constitution, "continues to involve the weighing up of competing values on a case-by-case basis to reach an assessment founded on proportionality".[158]

In *Prince v President of the Law Society of the Cape of Good Hope*,[159] the Constitutional Court refused to declare the provisions that criminalised the private use of marijuana unconstitutional. In this case, the relevant provisions were challenged because they infringed on the right to freedom of religion (the use of marijuana forms part of the Rastafarian religion) and human dignity. Concerning the factors in the limitation clause of the 1996 Constitution, the Court remarked that no single factor is decisive in a limitation analysis and that all relevant factors need to be considered.[160] In addition, the Court stressed that the value of human dignity is central to the

section 36 limitation analysis and informs the interpretation of "most, if not all, other constitutional rights".[161]

In *Law Society of South Africa v Minister for Transport*,[162] the Constitutional Court considered a challenge to the constitutionality of various amendments to the Road Accident Fund Act[163] as the impugned provisions were allegedly contrary to the principle of rationality and unjustifiably infringed different constitutional rights. In this case, the Constitutional Court confirmed that "rationality" formed part of the proportionality test, as illustrated in the section 36 factor, "relation between the limitation and its purpose", and that "[i]t is self-evident that a measure which is irrational could hardly pass muster as reasonable and justifiable for purposes of restricting a fundamental right".[164] However, the Court also pointed out that even if a provision was rationally related to a legitimate purpose, it may "yet fail to pass muster under the rights limitation analysis"[165] – this is why all relevant factors must be considered in the limitation analysis.

1.3.3 Impact on the judicial development and use of *ubuntu* as a constitutional value

Although the first express reference to the concept of *ubuntu* was in the post-amble to South Africa's Interim Constitution,[166] the judgment in *S v Makwanyane* has been referred to as *ubuntu*'s "judicial birth".[167] The value was not retained in the 1996 Constitution, which is one of the reasons why the *Makwanyane* case remains significant regarding the concept's interpretation and application. It falls outside the scope of this chapter to discuss the vast array of articles, comments and critiques on the concept of *ubuntu*.[168] Instead, this part of the chapter tracks the South African courts' development of the concept in several cases since its debut in the *Makwanyane* judgment.

At the outset, it must be noted that, although no reference to *ubuntu* was retained in the 1996 Constitution, the courts nevertheless have a duty in terms of section 211(3) of the Constitution to apply customary law "when that law

is applicable, subject to the Constitution and any legislation that specifically deals with customary law" and, according to section 39(2) of the Constitution, to promote the "spirit, purport and objects of the Bill of Rights" when developing customary law. Himonga, Taylor and Pope rightly point out that the recognition of customary law, which includes the concept of *ubuntu*, promotes the ultimate goal of our Constitution, namely transformative constitutionalism.[169] It is therefore submitted that the *Makwanyane* Court's use of *ubuntu* should be understood in the light of this transformative goal. Wittingly or unwittingly, the Court's approach in *S v Makwanyane* regarding *ubuntu* set in motion the use of the concept as a catalyst for transformative judicial reasoning by the courts by harmonising the customary value of *ubuntu* with other legal values and principles. Keep and Midgley argue that "the notion of inclusivity that is inherent in *ubuntu-botho* makes it an ideal overarching vehicle for expressing shared values"[170] and, as remarked by Himonga, Taylor and Pope, this may lead to the development of a true pluralistic legal system.[171]

Following the *Makwanyane* judgment, the idea of harmonising *ubuntu* with other legal values and principles may be seen in several cases. In *Bophuthatswana Broadcasting Corporation v Ramosa*, the court emphasised that "*ubuntu* echoes many historical principles of law and ethics, which still today play a role in guiding the judiciary".[172] Similarly, in *S v Mandela*,[173] the court had to decide whether the defence of "necessity" should be a complete defence to a murder charge or whether it should be limited, based on the importance of the right to life and our new constitutional values. The court held that such a defence had to be limited and further stated that

> *"[w]ere the defence of necessity to be extended... it would represent a lowering of regard for life and an undermining of the very fabric of the attempt to build a constitutional community, where each and every person is deserving of equal concern and respect and in which community grows sourced in the principle of ubuntu."*[174]

In another case, *Crossley v The National Commissioner of the South African Police Services*,[175] the court was called upon to grant an interdict to prevent the burial of a man who had allegedly been murdered. The deceased's remains must be subjected to forensic examination to provide crucial evidence in prosecuting the accused. However, granting the interdict would have been contrary to the African cultural and religious practices of the deceased and his family, which would have infringed on their constitutional rights to dignity, religion and culture. The court held that recognising cultural burial rites and practices must prevail, as these went sorely neglected and unrecognised under our previous discriminatory dispensation.[176] The court stressed that such an approach would be in accordance with the indigenous value of *ubuntu,* which underlies our Constitution, as well as the dignity of the deceased and his family.[177]

Moreover, in *Du Plooy v Minister of Correctional Services*,[178] the value of *ubuntu* was invoked in deciding whether to grant parole to a terminally ill prisoner on medical grounds. The court stated that "humanness, empathy and compassion" are inherent to *ubuntu* and that the prisoner's continued incarceration under the circumstances would infringe on his dignity and constitute a cruel and inhuman punishment if parole was not granted.[179]

In 2004, in *Port Elizabeth Municipality v Various Occupiers*,[180] the Constitutional Court had another opportunity to build on its interpretation of *ubuntu* since the Court first used it in the *Makwanyane* judgment, but this time under the 1996 Constitution. This case is significant because, unlike the cases discussed thus far, the Court did not merely attempt to emphasise *ubuntu* or harmonise *ubuntu* with other constitutional values. It further developed the concept of *ubuntu* by linking it to restorative justice, which paved the way for a series of "*ubuntu*-based" eviction decisions.[181] Although more commonly used in the criminal law context, the term "restorative justice" is used in this case to emphasise "[a]cceptance of responsibility, making restitution and promoting harmony" when resolving disputes.[182] In *Port*

Elizabeth Municipality, the municipality sought an eviction order against 68 individuals who erected shacks on private land within the municipal area and have lived there for two to eight years. The Court had to weigh the right of the occupiers to have access to adequate housing (in terms of section 26(1) of the Constitution) and their right not to be unlawfully evicted from their homes (in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (PIE) 19 of 1998), against the property rights of the landowners (in terms of section 25 of the Constitution). The Court argued that the purpose of the PIE Act is connected to the concept of *ubuntu* and "requires the court to infuse elements of grace and compassion into the formal structures of the law" regarding evictions and that the Court had to "promote the constitutional vision of a caring society based on good neighbourliness and shared concern".[183] Moreover, the Court held that *ubuntu* "suffuses the whole constitutional order" and "combines individual rights with a communitarian philosophy".[184] The Court further described *ubuntu* as

> *"a unifying motif of the Bill of Rights, which is nothing if not a structured, institutionalised and operational declaration in our evolving new society of the need for human interdependence, respect and concern."*[185]

The Court argued that in eviction matters, this meant that to achieve "sustainable reconciliations of the different interests involved" the parties had to "engage with each other in a pro-active and honest endeavour to find mutually acceptable solutions" by using "face-to-face engagement or mediation through a third party".[186] Furthermore, the Court pointed out that the "stereotypical approach" of those seeking eviction is to view occupiers as "faceless and anonymous squatters" who should automatically "be expelled as obnoxious social nuisances".[187] This approach can no longer be encouraged, and indeed, the Court argued, "has no place in the society envisaged by the Constitution; justice and equity require that everyone is to be treated as an individual bearer of rights entitled to respect for his or her dignity".[188] The Court

concluded that the municipality did not adequately engage with the occupiers and neither listened to their concerns nor provided any suitable alternative land.[189] The Court refused to confirm the eviction order and dismissed the appeal. The Court also cautioned that this *ubuntu*-based approach should be followed in future eviction cases:

> *"On the basis of this judgment a court involved in future litigation involving occupiers should be reluctant to accept that it would be just and equitable to order their eviction if it is not satisfied that all reasonable steps had been taken to get an agreed, mediated solution."*[190]

Similarly, in *City of Johannesburg v Rand Properties (Pty) Ltd*,[191] the High Court followed this *ubuntu*-based restorative justice approach in an eviction matter. As part of its Inner-City Renewal Project, the City sought the eviction of occupants of various residences that posed health and fire risks. First, the Court stressed that *ubuntu* entails

> *"the capacity to express compassion, justice, reciprocity, dignity, harmony and humanity in the interests of building, maintaining and strengthening the community. Ubuntu speaks to our inter-connectedness, our common humanity and the responsibility to each that flows from our connection."*[192]

Next, the Court emphasised *ubuntu*'s connection with restorative justice principles. It argued that we should not "allow urbanisation and the accumulation of wealth and material possessions to rob us of our warmth, hospitality and genuine interests in each other as human beings",[193] emphasising that the applicant's suggestion that the respondents "be relocated to an informal settlement flies in the face of the concept that a 'person is a person through persons' *(Ubuntu)*".[194] The Court ordered that the City had a duty to provide access to adequate inner city accommodation so that the residents could continue to earn a living in the city.[195] It should be noted, however, that the Supreme Court of

Appeal overturned this ruling and that this judgment made no reference to *ubuntu* whatsoever.[196]

In *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd*,[197] however, the Constitutional Court reiterated the importance of its *ubuntu*-based restorative justice approach regarding eviction matters, stating that it is a concept underlying both the Constitution and the PIE Act,[198] although the Court did not further elaborate on the concept. Later, in *Occupiers of Erven 87 and 88 Berea v De Wet NO*,[199] the Constitutional Court again emphasised that all relevant circumstances must be considered when granting an eviction order and, regarding its *ubuntu*-based approach in the *Port Elizabeth Municipality* case, the Court stated that this is "a more expansive enquiry than simply determining rights of occupation".[200]

In *Dikoko v Mokhatla*,[201] the Constitutional Court extended the use of its *ubuntu*-based restorative justice approach to defamation matters. Mokgoro J pointed out that, under the spirit of *ubuntu*, in defamation matters, the goal of our law should be the "re-establishment of harmony in the relationship between the parties, rather than to enlarge the hole in the defendant's pocket".[202] Mokgoro J explained that courts should, as far as possible, attempt to repair relations between the parties, as this approach is consistent with *ubuntu* and the concept of restorative justice

> *"[b]ecause an apology serves to recognise the human dignity of the plaintiff, thus acknowledging, in the true sense of ubuntu, his or her inner humanity, the resultant harmony would serve the good of both the plaintiff and the defendant."*[203]

In a separate judgment, Sachs J agreed that monetary damages in defamation matters did not address the dignity aspect of the harm that the individual and their reputation have suffered.[204] He further pointed out that "[w]hat is called for is greater scope and encouragement for enabling the reparative value of retraction and apology to be introduced into the proceedings".[205] Moreover, Sachs J argued that the goal should

be to repair the damage done, not to punish – acknowledging the spirit of the value of *ubuntu*.[206]

The ruling in another defamation matter, *The Citizen 1978 (Pty) Ltd v McBride*,[207] may be seen as a triumph for freedom of expression, although not so much for *ubuntu* and restorative justice. The Constitutional Court was divided on whether a newspaper calling someone a "murderer" and a "criminal" for crimes in which the defendant received amnesty in the post-apartheid truth and reconciliation process constituted defamation. The majority of the Court held that, although these utterances were "harsh and unforgiving", the newspaper was still entitled to the protection of their right to freedom of expression.[208] While Mogoeng J, in a minority judgment, thought that the statements did constitute defamation and that "human dignity must colour the spectacles through which we view defamatory publications", especially those connected to our past and, in addition, that

> *"[i]n cases of defamation that relate to the amnesty process sensitivity to this national project is called for. The law cannot simply be applied with little regard to the truth and reconciliation process and ubuntu."*[209]

Mogoeng CJ's sentiments regarding *ubuntu* in *The Citizen v McBride* can be seen more clearly in the Constitutional Court's majority judgment in *City of Tshwane Metropolitan Municipality v Afriforum*.[210] This case addressed the constitutionality of changing various historical street names in the Tshwane Metropolitan area. The majority of the Court, per Mogoeng CJ, held that

> *"[a]ll peace and reconciliation-loving South Africans whose world-view is inspired by our constitutional vision must embrace the African philosophy of 'ubuntu'... The African world-outlook that one only becomes complete when others are appreciated, accommodated and respected, must also enjoy prominence in our approach and attitudes to all matters of importance in this country, including name-changing. White South Africans must enjoy a sense of belonging.*

> *But unlike before, that cannot and should never again be allowed to override all other people's interests. South Africa no longer 'belongs' to white people only. It belongs to all of us who live in it, united in our diversity. Any indirect or even inadvertent display of an attitude of racial intolerance, racial marginalisation and insensitivity, by white or black people, must be resoundingly rejected by all South Africans in line with the Preamble and our values, if our constitutional aspirations are to be realised."*[211]

The case is significant because it links *ubuntu* with the physical transformation of our country in the sense of replacing old names and symbols symbolic of our painful past to promote a sense of "belonging" for all South Africans.

In *Afri-Forum v Malema*,[212] the Equality Court referred to *ubuntu* and restorative justice in the context of freedom of expression regarding a disputed struggle song, "Kill the Boer, kill the Farmer". The Court held that

> *"[u]buntu is recognised as being an important source of law within the context of strained or broken relationships amongst individuals or communities and as an aid for providing remedies which contribute towards more mutually acceptable remedies for the parties…"*[213]

Furthermore, the Court stated that in our new democratic regime, all "[m]embers of society are enjoined to embrace all citizens as their brothers". In light of this and the spirit of *ubuntu*, "this new approach to each other must be fostered". The Court consequently held that

> *"the Equality Act allows no justification on the basis of fairness for historic practices which are hurtful to the target group but loved by the other group. Such practices may not continue to be practised when it comes to hate speech."*[214]

Restorative justice and *ubuntu* were again referred to by the Constitutional Court in *Van Vuren v Minister of Correctional Services*,[215] but this time in a criminal matter. The Court had

to decide when a person would become eligible for parole if sentenced to death in 1992. Still, the sentence was converted to life imprisonment following the *Makwanyane* judgment. At the time of the conversion of his sentence, the mandatory minimum incarceration time for lifers before becoming eligible for parole was 15 years. In 2004 this was extended to 20 years. In the Court's majority judgment, Nkabinde J referred to the link between restorative justice and the "foundational value or norm of *Ubuntu-Botho*" and that parole has an important restorative justice purpose of rehabilitating offenders and recognising their human dignity.[216]

In the context of the rights of children to dignity and privacy, the Constitutional Court in *Centre for Child Law v Media 24 Limited*[217] was called upon to confirm the constitutional invalidity of section 154(3) of the Criminal Procedure Act 51 of 1977 as it, among other things, allegedly infringed the rights of child victims of crime to privacy and dignity by omitting to afford them identity protection. The Court held that "[w]hen it comes to a child in the criminal justice system, a restorative justice approach is optimal" and that "[w]e must not be quick to ignore the 'moral malleability or reformability of the child offender'".[218] The Court stressed that a restorative justice approach is crucial when children are involved as it "encourages rehabilitation and reintegration", which are principles that underlie the value of *ubuntu*.[219]

The Constitutional Court has also linked the value of *ubuntu* with public policy considerations to interfere in contractual relationships, which were manifestly unfair. This approach was first developed in *Barkhuizen v Napier*,[220] where the Court stated that "[p]ublic policy takes into account the necessity to do simple justice between individuals" and that "[p]ublic policy is informed by the concept of ubuntu".[221] This approach was also followed by the Supreme Court of Appeal in *Bredenkamp v Standard Bank of SA Ltd*,[222] as well as the Constitutional Court in *Botha v Rich NO*,[223] although these courts did not expressly refer to the value of *ubuntu* or elaborate any further on the so-called *Barkhuizen*-principle. In *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty)*

Ltd, the Constitutional Court again confirmed the *Barkhuizen*-principle. *It reiterated* that one of the purposes of the principle is to protect "vulnerable individuals" in contractual relationships.[224] More recently, the Constitutional Court in *Beadica 231 CC v Trustees for the time being of the Oregon Trust*[225] had to decide the correct constitutional approach to enforcing contractual terms, specifically, whether the Court could refuse to enforce such terms on public policy grounds. The Court held that "abstract concepts, such as *ubuntu*, reasonableness and fairness" play an important role in the judicial control of contracts.

Furthermore, the Court stated that, although these "abstract values do not provide a free-standing basis upon which a court may interfere in contractual relationships", they do "perform creative, informative and controlling functions".[226] The majority judgment confirmed that courts might interfere in contractual relationships when a contractual "term, or its enforcement, is so unfair, unreasonable or unjust" that it would be contrary to public policy.[227] Froneman J, in a separate judgment, emphasised that *ubuntu*, as a constitutional value, must now determine "what public policy is and whether a term in a contract is contrary to public policy" and that "[p]ublic policy takes into consideration the necessity to do simple justice between individuals and is [therefore] informed by the concept of *ubuntu*".[228] These sentiments were also confirmed in *AB v Pridwin Preparatory School*[229] where the Court stressed that, since the value of *ubuntu* may be used to determine what public policy entails,

> *"[t]his leaves space for enforcing agreed bargains (pacta sunt servanda), but at the same time allows courts to decline to enforce particular contractual terms that are in conflict with public policy, as informed by constitutional values, even though the parties may have consented to them."*[230]

In the employment context, the Constitutional Court in *Hoffmann v South African Airways*,[231] the Court held that persons living with HIV must be treated with "compassion and understanding". In other words, "[w]e must show *ubuntu*

towards them" and that they must not be "condemned to 'economic death' by the denial of equal opportunity in employment".[232] In *National Union of Metalworkers of South Africa obo Nganezi v Dunlop Mixing and Technical Services (Pty) Limited*,[233] the Constitutional Court confirmed that the use of the value of *ubuntu* in contractual and employment relationships is primarily employed to protect vulnerable parties to these relationships:

> *"This Court's development of good faith and ubuntu in contractual relationships is intended to infuse good faith into unequal contractual relationships, or more equality into hierarchical relationships precisely where the hierarchy leads to the exertion of unfair power over the subordinated party."*[234]

The Constitutional Court in *Mahlangu v Minister of Labour*[235] considered the constitutionality of the Compensation for Occupational Injuries and Diseases Act 130 of 1993 (COIDA) regarding excluding domestic workers from COIDA's social security protection framework. Similar to the Court's view of *ubuntu* in the *Makwanyane* judgment, the Court in *Mahlangu* emphasised the use of the value of *ubuntu* in protecting the most vulnerable and marginalised individuals in society, in this case, domestic workers, who are predominantly poor black women.[236] The Court stated that it could not allow such a "form of state-sanctioned inequity" and that this would be contrary to "the values of our newly constituted society namely human dignity, the achievement of equality and *ubuntu*".[237]

1.3.4 Impact on the role of public opinion

The *Makwanyane* judgment made it clear that, although public opinion could have some significance in deciding controversial matters, it cannot be decisive in the adjudicative process. The following paragraph tracks direct (and indirect) judicial references to the role that public views and opinions play in adjudication, following the *Makwanyane* judgment.

Soon after the *Makwanyane* judgment, the Constitutional Court in *S v Williams*[238] confirmed that "public opinion, on its

own, is not determinative of constitutional issues".[239] The Court argued that, although there was a growing consensus in the international community that juvenile whipping constituted a violation of the right to human dignity and the rights of children, the Court stated that the punishment "must be assessed in the light of the values underlie the Constitution".[240] This is the most important question for the Court to consider, not necessarily the community's opinion.

In *S v Dlamini, S v Dladla; S v Joubert; S v Schietekat*,[241] the Constitutional Court made important observations on granting bail to those awaiting trial. Among other things, the Court concluded that, although public peace and the opinions of the community are important considerations when granting bail, considering

> *"...public opinion and taking into account the likely behaviour of persons other than the detainee... smack of preventive detention and infringe a detainee's liberty interest protected by s 35(1)(f) of the Constitution. Elevating the sentiments of the community above the interests of the detainee is constitutionally impermissible."*[242] *[own emphasis]*

In *S v Jordan*,[243] however, the Constitutional Court seemed to shy away from its approach to public opinion, which it followed in the preceding cases. In this case, the Court was called upon to decide the constitutionality of the criminalisation of prostitution. If the Court followed the approach it had developed in the *Makwanyane* and *Williams* judgments, it would have had to determine whether the criminalisation of prostitution was contrary to the rights and values enshrined in the Constitution. Instead, the Court seemed to suggest that because there was no consensus in the community on the approach to be used regarding either the criminalisation or the legalisation of prostitution, the issue is much better suited to be resolved by an elected legislature rather than the courts. It should be noted that the same could be said of the public's perceptions regarding the death penalty. The majority judgment in *Jordan* remarked that

> *"[i]n a democracy those are decisions that must be taken by the legislature and the government of the day, and not by courts. Courts are concerned with legality, and in dealing with this matter I have had regard only to the constitutionality of the legislation and not to its desirability."*[244]

In a similar vein, the minority judgment concluded that

> *"[t]he issue [of prostitution] is an inherently tangled one where autonomy, gender, commerce, social culture and law enforcement capacity intersect. A multitude of differing responses and accommodations exist, and public opinion is fragmented and the women's movement divided. In short, it is precisely the kind of issue that is invariably left to be resolved by the democratically accountable law-making bodies."*[245]

In *Phillips v Director of Public Prosecutions*,[246] the Constitutional Court invalidated a provision of the Liquor Act[247] which prohibited the sale and on-site consumption of alcohol during performances of an "indecent" or "obscene" nature. The Court's approach to public opinion is best illustrated by the judgment of Sachs J where he stated that:

> *"It is not obvious to me what degree of tailoring would establish the bare minimum that the South African community would tolerate in a bar which customers entered knowing full well what they were going to see, or even if this would be the test. Without further evidence or argument it is possible to have clear views on the propriety or otherwise of employing women to disport their bodies in an erotic manner so as to encourage the sale of liquor. The issue in this case, however, is not the propriety of such conduct, but the constitutionality of its prohibition."*[248] *[own emphasis]*

This interpretation seems to be a return to the Court's previous approach to public opinion in that the Court emphasised that it is not the public's perception of propriety that should be established by the Court, only the constitutionality of the

provisions and whether it would be contrary to constitutionally enshrined rights and values.

In *Bhe v Khayelitsha Magistrate*,[249] the Constitutional Court declared the rule of male primogeniture in the customary law of succession unconstitutional as it unjustifiably discriminated against women and children by excluding them from inheriting. Regarding public perceptions and opinions and the development of customary law, Ncgobo J, in a partially dissenting minority judgment, referred to the development of customary law in Ghana, stressing that it was not brought about by their legislature but by the courts taking cognisance of changing community views and perceptions.[250] The development of customary law in Ghana was "spontaneous developments engineered by public opinion".[251] In other words, although public opinion may not be decisive, it could play a role in developing common and customary law in the future.

1.4 Conclusion

From the discussion above, it is clear that the impact of the *Makwanyane* judgment cannot easily be overstated. This chapter does not attempt to discuss all case law that has referenced *Makwanyane*. Instead, it provides a snapshot of the development of the main areas of impact in the case in selected subsequent judgments of the Constitutional Court and some other South African courts.

The chapter highlighted that the *Makwanyane* Court's abolition of the death penalty not only brought about an enormous change to South Africa's criminal justice system but also impacted significantly on our constitutional law in four important respects: regarding the interpretation of the rights to life, dignity and personal freedom and security; the limitation of rights; the use of the indigenous value of *ubuntu*; and the role of public opinion in adjudication.

The *Makwanyane* Court favoured a broad, purposive approach to interpreting constitutional rights, which considers the values underlying our new democratic

dispensation, the history and the context of the provisions, and the consideration of relevant international and foreign law. Subsequent judgments have developed this approach by giving the rights to life, dignity and personal freedom and security a broad and inclusive meaning that also emphasises the interrelatedness of these rights. So, for example, the Court in *Ferreira v Levin* emphasised the link between human dignity and personal freedom. At the same time, the Court in *Soobramoney* gave a broad interpretation of the right to life to include other entitlements necessary for human life. In addition, following the example of the *Makwanyane* Court, the judgments in *Williams*, *Walters* and *Freedom of Religion South Africa* have confirmed that the state should act as an example to society concerning respect for the rights to life, human dignity and personal freedom and security. Therefore, capital and corporal punishment, as well as the use of excessive force when making arrests, is inconsistent with the type of society our new constitutional order has sought to establish and must therefore be rejected.

The *Makwanyane* judgment is also significant because of its approach to the interpretation and application of the limitation clause of the Interim Constitution – an approach that has been adopted and refined in subsequent cases, not only in terms of the Interim Constitution but also concerning the current limitation clause in the 1996 Constitution. Various guidelines for applying the limitation clauses (both in terms of the Interim and 1996 Constitution) have crystallised in the case law. The courts have confirmed that the limitation clauses essentially entail a proportionality test which requires the weighing up of the right(s) in question against the objectives that the limitation of the right(s) seeks to achieve (see, for example, *Williams*). In this regard, most of the judgments considered in this chapter confirmed that the values underlying our new constitutional order (especially human dignity) play an integral role in the limitation analysis and that the proportionality test must be a holistic and value-based process (see for example *Williams*, *Coetzee* and *Prince*). Other guidelines developed by the various courts regarding

the factors in the limitation clauses include: that the limitation analysis is not a "mechanical" or "technical" exercise (see *Coetzee* and *Manamela*); the factors in the limitation clause should not be seen as a "check-list" (see *Manamela*); no single factor in the limitation clause should be seen as decisive, but should be regarded as a whole (see *Prince*); the factors in the limitation clause are not an exhaustive list, and that all relevant factors and circumstances must be considered (see *Coetzee*, *Manamela*, *Prince* and *Law Society of South Africa*); and that, although rationality forms part of the limitation analysis, it is not decisive on its own (see *Law Society of South Africa*). Furthermore, some cases, such as the *Mistry* case, undertook a detailed application of each of the factors to the facts at hand – which offers other courts valuable guidance on how the factors should be applied in practice.

The *Makwanyane* case remains significant regarding the indigenous concept of *ubuntu* as the case may be seen as the "judicial birth-place" of the concept in our jurisprudence. As the transformation of South African society is one of the main goals of our Constitution, the link between transformation and *ubuntu* has become an essential theme in case law. The *Makwanyane* Court's discussion and approach regarding *ubuntu* has, wittingly or unwittingly, become a catalyst for transformative judicial reasoning in subsequent case law – harmonising the customary value of *ubuntu* with other legal values and principles, as well as setting in motion a series of judgments on restorative justice based on the value of *ubuntu.* The South African courts have used and developed the concept of *ubuntu* in various contexts, as illustrated by the cases discussed in the chapter. Following the *Makwanyane* judgment, various cases have emphasised that the concept of *ubuntu* can be harmonised with other legal principles and, when seen against the backdrop of our discriminatory past, can be used to address these injustices and transform our society (see, for example, *Bophuthatswana Broadcasting Corporation*, *S v Mandela*, *Crossley* and *Du Plooy*).

Furthermore, the courts have also developed the value of *ubuntu* to give effect to the concept of restorative justice

in various contexts. First, the value of *ubuntu* was linked to restorative justice in a series of eviction matters in which the courts emphasised engagement between the parties and finding mutually acceptable solutions (see *Port Elizabeth Municipality*, *Blue Moonlight Properties* and *Occupiers of Erven 87 and 88 Berea*). Second, *ubuntu* and restorative justice were applied in defamation matters where the courts stressed that the concept of *ubuntu* implied that restoring the relationship between the parties was more important than punishing the offender by paying damages (see *Dikoko* and *The Citizen*). Third, the concept of *ubuntu* and restorative justice has been linked to the physical transformation of South African society in the sense of the removal of physical symbols of our past, such as street names (see *City of Tshwane Metropolitan Municipality*), as well as other symbols of our past, such as struggle songs (see *Afri-Forum v Malema*). Fourth, restorative justice and *ubuntu* have been used in various criminal matters to emphasise that offenders can be rehabilitated, reformed and reintegrated into society (see *Van Vuren* and *Centre for Child Law*). Finally, *ubuntu* has also been included in public policy considerations for courts to interfere in private law relationships such as contracts (see *Barkhuizen v Napier*, *Bredenkamp*, *Botha*, *Everfresh*, *Beadica 231 CC* and *Pridwin Preparatory School*) and labour relations (*Hoffmann*, *National Union of Metalworkers of SA* and *Mahlangu*). In these cases, the courts confirmed that, although there is the freedom to enter into contracts, the courts may interfere in such relationships if the provisions are manifestly unfair or to protect weaker, more vulnerable parties.

Finally, the *Makwanyane* judgment remains significant because of its clear pronouncement on the role of public opinion in deciding controversial matters, namely that public opinion cannot be decisive in the adjudicative process. Most of the judgments discussed in this part of the chapter agreed that, although public opinion may be relevant, the question that should be answered is whether the provisions under discussion were contrary to the Constitution and the

rights and values enshrined therein (see *Williams*, *S v Dlamini* and *Phillips*).

It is clear that the *Makwanyane* case has profoundly impacted South African society and its legal system and that *Makwanyane*'s legacy will continue to be seen in our jurisprudence for many years. Arguably, the most significant contribution of the *Makwanyane* case, apart from the abolition of the death penalty, relates to the indigenous concept of *ubuntu* and its links to transformation, restorative justice and public policy considerations that have developed in the case law. It is hoped that the courts will continue to find new and ingenious ways to apply and develop the concept of *ubuntu* in other contexts to further the transformative goals of our constitutional dispensation.

Endnotes

1 1995 3 SA 391 (CC).
2 *S v Makwanyane* (n 1) par 1–4.
3 *S v Makwanyane* (n 1) par 150.
4 *S v Makwanyane* (n 1) par 54, 95.
5 *S v Makwanyane* (n 1) par 241–244.
6 *S v Makwanyane* (n 1) par 188, 202.
7 For further reading on the *Makwanyane* Court's interpretive approach, see Klaasen "Constitutional interpretation in the so-called 'hard cases': Revisiting *S v Makwanyane*" 2017 *De Jure* 1; Botha "Justice Sachs and the use of international law by the Constitutional Court: Equity or expediency?" 2010 *SAPL* 235.
8 S 35(1) of the Interim Constitution reads: "In interpreting the provisions of this Chapter a court of law shall promote the values which underlie an open and democratic society based on freedom and equality and shall, where applicable, have regard to public international law applicable to the protection of the rights entrenched in this Chapter, and may have regard to comparable foreign case law."
9 The Constitution of the Republic of South Africa, 1996 (hereafter the Constitution). S 39(1) of the 1996 Constitution reads: "When interpreting the Bill of Rights, a court, tribunal or forum – (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and (c) may consider foreign law."
10 *S v Makwanyane* (n 1) par 33.
11 *S v Makwanyane* (n 1) par 37–38, 83; see decision no. 23/1990 (X.31.) Hungarian Constitutional Court (available at https://www.hunconcourt.hu/dontes/decision-23-1990-on-capital-punishment (accessed 14/07/2021)).
12 *S v Makwanyane* (n 1) par 39.
13 *S v Makwanyane* (n 1) par 42.
14 *S v Makwanyane* (n 1) par 48.
15 See *S v Makwanyane* (n 1) par 48–56; also see Mahomed J at par 273–274.
16 See *S v Makwanyane* (n 1) par 152–166.
17 *S v Makwanyane* (n 1) par 78; see *Bachan Singh v State of Punjab* (1980) 2 SCC 684.
18 *S v Makwanyane* (n 1) par 78.
19 A 7 of the ICCPR provides that: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."

20 *S v Makwanyane* (n 1) par 63-67; *Kindler v Canada* United Nations Committee on Human Rights, Communication No 470/1991, 30 July 1993.
21 *S v Makwanyane* (n 1) par 63-67; *Ng v Canada* United Nations Committee on Human Rights, Communication No 469/1991, 5 November 1993.
22 *S v Makwanyane* (n 1) par 67.
23 *S v Makwanyane* (n 1) par 69; *Soering v United Kingdom* (1989) 11 EHRR 439.
24 *S v Makwanyane* (n 1) par 69.
25 *S v Makwanyane* (n 1) par 218.
26 *S v Makwanyane* (n 1) par 57-62.
27 *S v Makwanyane* (n 1) par 137.
28 *R v Home Secretary, Ex parte Bugdaycay* (1987) AC 514 at 531G quoted in *S v Makwanyane* (n 1) par 83.
29 *S v Makwanyane* (n 1) par 84.
30 *S v Makwanyane* (n 1) par 84; see the Hungarian Constitutional Court's judgment (n 11).
31 *S v Makwanyane* (n 1) par 83-84.
32 *S v Makwanyane* (n 1) par 95.
33 *S v Makwanyane* (n 1) par 217-219.
34 The limitation clause, s 33(1) of the Interim Constitution provides: "The rights entrenched in this Chapter may be limited by law of general application, provided that such limitation - (a) shall be permissible only to the extent that it is - (i) reasonable; and (ii) justifiable in an open and democratic society based on freedom and equality; and (b) shall not negate the essential content of the right in question." The limitation clause of the current Constitution, s 36(1), provides: "(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including - (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose."
35 *S v Makwanyane* (n 1) par 100; also see Kriegler J at par 208-209.
36 *S v Makwanyane* (n 1) par 102.
37 *S v Makwanyane* (n 1) par 104.
38 *S v Makwanyane* (n 1) par 104; Notably, the factors referred to here by the Court strongly resemble the factors which were later expressly included in the limitation clause of the 1996 Constitution.

39 1986 19 CRR 308.
40 *S v Makwanyane* (n 1) par 105.
41 *S v Makwanyane* (n 1) par 106.
42 *S v Makwanyane* (n 1) par 106.
43 *Tetreault-Gadoury v Canada (Employment and Immigration Commission)* (1991), 4 CRR (2d) 12 26 quoted in *S v Makwanyane* (n 1) par 107.
44 *S v Makwanyane* (n 1) par 351.
45 *S v Makwanyane* (n 1) par 352.
46 *S v Makwanyane* (n 1) par 353.
47 *S v Makwanyane* (n 1) par 354, 357.
48 *S v Makwanyane* (n 1) par 108.
49 *S v Makwanyane* (n 1) par 109.
50 *S v Makwanyane* (n 1) par 109; also see *R v France* 1993 16 EHRR 1 par 63.
51 *S v Makwanyane* (n 1) par 109; also see *Handyside v United Kingdom* 1979–80 1 EHRR 737 par 49; *Dudgeon v United Kingdom* 1981 4 EHRR 149 par 52; *Norris v Ireland* 1988 13 EHRR 186 par 46; *Modinos v Cyprus* 1993 16 EHRR 485.
52 *S v Makwanyane* (n 1) par 110.
53 *S v Makwanyane* (n 1) par 111.
54 *S v Makwanyane* (n 1) par 112.
55 *S v Makwanyane* (n 1) par 113.
56 *S v Makwanyane* (n 1) par 122; also see Didcott J at par 183, Kentridge J at par 202.
57 *S v Makwanyane* (n 1) par 124.
58 *S v Makwanyane* (n 1) par 123.
59 *S v Makwanyane* (n 1) par 171.
60 *S v Makwanyane* (n 1) par 287.
61 *S v Makwanyane* (n 1) par 124.
62 *S v Makwanyane* (n 1) par 124.
63 *S v Makwanyane* (n 1) par 124.
64 *S v Makwanyane* (n 1) par 125.
65 *S v Makwanyane* (n 1) par 128.
66 *S v Makwanyane* (n 1) par 129; also see Didcott J at par 185, Kentridge J at par 203.
67 *S v Makwanyane* (n 1) par 129.
68 *S v Makwanyane* (n 1) par 130.
69 *S v Makwanyane* (n 1) par 296.
70 *S v Makwanyane* (n 1) par 132–133; also see Ackermann J at par 167 and Didcott J at par 175.
71 *S v Makwanyane* (n 1) par 313, 314.
72 *S v Makwanyane* (n 1) par 326.
73 *S v Makwanyane* (n 1) par 326.
74 *S v Makwanyane* (n 1) par 327–328.
75 *S v Makwanyane* (n 1) par 137.
76 *S v Makwanyane* (n 1) par 137.

77 *S v Makwanyane* (n 1) par 143.
78 *S v Makwanyane* (n 1) par 144; also see Mokgoro J at par 316.
79 *S v Makwanyane* (n 1) par 190.
80 *S v Makwanyane* (n 1) par 190.
81 *S v Makwanyane* (n 1) par 222.
82 *S v Makwanyane* (n 1) par 146.
83 *S v Makwanyane* (n 1) par 131, 225, 307.
84 *S v Makwanyane* (n 1) par 131.
85 *S v Makwanyane* (n 1) par 223.
86 *S v Makwanyane* (n 1) par 224.
87 *S v Makwanyane* (n 1) par 225.
88 *S v Makwanyane* (n 1) par 229.
89 *S v Makwanyane* (n 1) par 233.
90 *S v Makwanyane* (n 1) par 237.
91 *S v Makwanyane* (n 1) par 241–243.
92 *S v Makwanyane* (n 1) par 271.
93 *S v Makwanyane* (n 1) par 272.
94 *S v Makwanyane* (n 1) par 261–263.
95 *S v Makwanyane* (n 1) par 263.
96 *S v Makwanyane* (n 1) par 300.
97 *S v Makwanyane* (n 1) par 304.
98 *S v Makwanyane* (n 1) par 307.
99 *S v Makwanyane* (n 1) par 307.
100 *S v Makwanyane* (n 1) par 308.
101 *S v Makwanyane* (n 1) par 311.
102 *S v Makwanyane* (n 1) par 365.
103 *S v Makwanyane* (n 1) par 383.
104 For some general reading on perceptions on the death penalty, see Potgieter, Khoza and Michell "Perceptions of the death penalty" 2003 *Acta Criminologica* 57.
105 *S v Makwanyane* (n 1) par 88.
106 *S v Makwanyane* (n 1) par 87.
107 *S v Makwanyane* (n 1) par 89.
108 *S v Makwanyane* (n 1) par 188.
109 *S v Makwanyane* (n 1) par 200–201.
110 *S v Makwanyane* (n 1) par 207.
111 *S v Makwanyane* (n 1) par 206.
112 *S v Makwanyane* (n 1) par 256.
113 *S v Makwanyane* (n 1) par 259.
114 *S v Makwanyane* (n 1) par 266.
115 *S v Makwanyane* (n 1) par 305.
116 *S v Makwanyane* (n 1) par 305.
117 *S v Makwanyane* (n 1) par 349.
118 For further reading on the development of the content of the rights under discussion, see Barrett "*Dignatio* and the human body" 2005 *SAJHR* 525; Hanri "Human Dignity in the Common Law of Contract: Making Sense of the

Barkhuizen, Bredenkamp and *Botha* Trilogy" 2019 *CCR* 409; Bohler-Muller "Re-thinking the state's duty to protect and uphold the right to life in a criminal justice context" 2009 *Obiter* 307.

119 1995 3 SA 632 (CC).
120 *S v Williams* (n 119) par 47.
121 *S v Williams* (n 119) par 68.
122 *S v Williams* (n 119) par 77.
123 *S v Williams* (n 119) par 89.
124 1996 1 SA 984 (CC).
125 *Ferreira* (n 124) par 46.
126 *Ferreira* (n 124) par 46.
127 *Ferreira* (n 124) par 47.
128 *Ferreira* (n 124) par 49.
129 *Ferreira* (n 124) par 49.
130 *Ferreira* (n 124) par 49-50.
131 1998 1 SA 765 (CC).
132 *Soobramoney* (n 131) par 16.
133 *Soobramoney* (n 131) par 31.
134 2002 4 SA 613 (CC).
135 *Walters* (n 134) par 44.
136 *Walters* (n 134) par 25 and *S v Makwanyane* (n 1) par 140.
137 *Walters* (n 134) par 28.
138 2020 1 SA 1 (CC).
139 *Freedom of Religion South Africa* (n 138) par 43.
140 *Freedom of Religion South Africa* (n 138) par 45.
141 *Freedom of Religion South Africa* (n 138) par 67.
142 For further reading on the application of the limitation clause in s 36 of the 1996 Constitution and the proportionality test, see Iles "A fresh look at limitations: unpacking section 36" 2007 *SAJHR* 68; Smit "Balancing rights in education: Applying the proportionality test" 2008 *Acta Academica* 210; Rautenbach IM "Proportionality and the limitation clauses of the South African bill of rights" 2014 *PER* 2229.
143 *S v Williams* (n 119).
144 *S v Williams* (n 119) par 58.
145 *S v Williams* (n 119) par 58.
146 *S v Williams* (n 119) par 59.
147 *S v Williams* (n 119) par 60.
148 1995 4 SA 631 (CC).
149 *Coetzee* (n 148) par 45.
150 *Coetzee* (n 148) par 46.
151 1998 4 SA 1127 (CC).
152 101 of 1965.
153 See *Mistry* (n 151) par 24-30; The factors referred to by the *Makwanyane* Court are as follows: "the nature of the right that is limited and its importance to an open and

democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy and, particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question." (*S v Makwanyane* (n 1) par 104).

154 2000 3 SA 1 (CC).

155 *S v Manamela* (n 154) par 32.

156 *S v Manamela* (n 154) par 32.

157 *S v Manamela* (n 154) par 32.

158 *S v Manamela* (n 154) par 33.

159 2002 2 SA 794.

160 *Prince* (n 159) par 45.

161 *Prince* (n 159) par 50.

162 2011 1 SA 400 (CC).

163 56 of 1996.

164 *Law Society of South Africa* (n 162) par 37.

165 *Law Society of South Africa* (n 162) par 37.

166 The post-amble of the Interim Constitution provided as follows: "The adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge. These can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimisation."

167 Himonga, Taylor and Pope "Reflections on judicial views of *ubuntu*" 2013 *PER* 370 374.

168 For some insightful further reading on the concept of *ubuntu* see: Kroeze "Doing things with values: The role of constitutional values in constitutional interpretation" 2001 *Stell LR* 265; Kroeze "Doing things with values II: The case of *ubuntu*" 2002 *Stell LR* 252; Du Plessis "Harmonising legal values and *ubuntu*: The quest for social justice in the South African common law of contract" 2019 *PER* 2; Motha "Archiving colonial sovereignty: From *ubuntu* to a jurisprudence of sacrifice" 2009 *SAPL* 297; Mnyongani "De-linking *ubuntu*: towards a unique South African jurisprudence" 2010 *Obiter* 134; Ndima "Reconceiving African jurisprudence in a post-imperial society: the role of *ubuntu* in constitutional adjudication" 2015 *CILSA* 359; Bohler-Müller "Some thoughts on the *ubuntu* jurisprudence of the Constitutional Court" 2007 *Obiter* 590; Ndima "The shape and content of post-apartheid African law: Academic

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169 Himonga, Taylor and Pope (n 167) 371.
170 Keep and Midgley "The emerging role of *ubuntu-botho* in developing a consensual South African legal culture" in Bruinsma and Nelken (eds) *Recht der Werkelijkheid* (2007) 29 48.
171 Himonga, Taylor and Pope (n 167) 370.
172 Himonga, Taylor and Pope (n 167) 390; *Bophuthatswana Broadcasting Corporation v Ramosa* 1997 HOL 283 (B). 4-5.
173 2001 1 SACR 156 ©.
174 *S v Mandela* (n 173) 168A-C.
175 2004 3 All SA 436 (T).
176 *Crossley* (n 175) par 18.
177 *Crossley* (n 175) par 19-20.
178 2004 3 All SA 613 (T).
179 *Du Plooy* (n 178) par 29.
180 2005 1 SA 217 (CC).
181 See Himonga, Taylor and Pope (n 167) 395.
182 Skelton "Face to face: Sachs on restorative justice" 2010 *SAPL* 94 95.
183 *Port Elizabeth Municipality* (n 180) par 37.
184 *Port Elizabeth Municipality* (n 180) par 37.
185 *Port Elizabeth Municipality* (n 180) par 37.
186 *Port Elizabeth Municipality* (n 180) par 39.
187 *Port Elizabeth Municipality* (n 180) par 41.
188 *Port Elizabeth Municipality* (n 180) par 41.
189 *Port Elizabeth Municipality* (n 180) par 58-60.
190 *Port Elizabeth Municipality* (n 180) par 61.
191 2007 1 SA 78 (W).
192 *City of Johannesburg v Rand Properties* (n 191) par 63.
193 *City of Johannesburg v Rand Properties* (n 191) par 63.
194 *City of Johannesburg v Rand Properties* (n 191) par 64.
195 *City of Johannesburg v Rand Properties* (n 191) par 64, 66.
196 *City of Johannesburg v Rand Properties (Pty) Ltd* 2007 6 SA 417 (SCA).
197 2012 2 SA 104 (CC).
198 *Blue Moonlight Properties* (n 197) par 38.
199 2017 5 SA 346 (CC).
200 *Occupiers of Erven 87 and 88 Berea* (n 199) par 65.
201 2006 6 SA 235 (CC).

202 *Dikoko* (n 201) par 68.
203 *Dikoko* (n 201) par 69.
204 *Dikoko* (n 201) par 109–111.
205 *Dikoko* (n 201) par 112.
206 *Dikoko* (n 201) par 112.
207 2011 4 SA 191 (CC).
208 *The Citizen 1978 (Pty) Ltd v McBride* (n 207) par 111.
209 *The Citizen 1978 (Pty) Ltd v McBride* (n 207) par 243.
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211 *City of Tshwane v Afriforum* (n 210) par 11.
212 2011 6 SA 240 (EqC).
213 *Afri-Forum v Malema* (n 212) par 18.
214 *Afri-Forum v Malema* (n 212) par 108.
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216 *Van Vuren* (n 215) par 51.
217 2020 4 SA 319 (CC).
218 *Centre for Child Law* (n 217) par 76.
219 *Centre for Child Law* (n 217) par 76–77.
220 2007 5 SA 323 (CC).
221 *Barkhuizen* (n 220) par 51.
222 2010 4 SA 468 (SCA).
223 2014 4 SA 124 (CC).
224 2012 1 SA 256 (CC) par 24.
225 2020 5 SA 247 (CC).
226 *Beadica 231 CC* (n 225) par 79.
227 *Beadica 231 CC* (n 225) par 80.
228 *Beadica 231 CC* (n 225) par 175.
229 2020 5 SA 327 (CC).
230 *Pridwin* (n 229) par 61.
231 2001 1 SA 1 (CC).
232 *Hoffmann* (n 231) par 38.
233 2019 8 BCLR 966 (CC).
234 *National Union of Metalworkers* (n 233) par 66.
235 2021 2 SA 54 (CC).
236 *Mahlangu* (n 235) par 65.
237 *Mahlangu* (n 235) par 65.
238 *S v Williams* (n 143).
239 *S v Williams* (n 143) par 36.
240 *S v Williams* (n 143) par 37.
241 *S v Dlamini*, *S v Dladla*; *S v Joubert*; *S v Schietekat* 1999 4 SA 623 (CC).
242 *S v Dlamini* (n 241) par 54.
243 *S v Jordan (Sex Workers Education and Advocacy Task Force* 2002 6 SA 642 (CC).
244 *S v Jordan* (n 243) par 30.
245 *S v Jordan* (n 243) par 90.
246 2003 3 SA 345 (CC).

247 27 of 1989.
248 *Phillips* (n 246) par 66.
249 *Bhe v Khayelitsha Magistrate* 2005 1 SA 580 (CC).
250 *Bhe* (n 249) par 203–207.
251 *In re Kofi Antubam (Decd): Quaico v Fosu* 1965 G.L.R 138 quoted by the Court in *Bhe* (n 249) par 207.

Chapter 2

Constitutional remedies: Constitutional damages and "appropriate relief"

Fose v Minister of Safety and Security[1]

"[C]ertain harms, if not addressed, diminish our faith in the Constitution… a Constitution has as little or as much weight as the prevailing political culture affords it. The defence of the Constitution – its vindication – is a burden imposed not exclusively, but primarily on the judiciary" (Fose v Minister of Safety and Security par 96).

2.1 Introduction

It is one of the most important functions of a justiciable constitution that it should authorise the judicial authority to effectively and fairly address infringements of the constitutional rights of individuals to redress the harm that has been caused.[2] In terms of the South African Constitution of 1996, section 38 of the Bill of Rights provides that any person listed in the section whose constitutional rights have allegedly been infringed may approach a competent court for "appropriate relief".[3] "Appropriate relief" could include existing common law and relevant statutory remedies. Still, the question is whether these are sufficient to vindicate infringements of constitutional rights and deter future infringements effectively. In the private law sense, damages are a well-known delictual remedy to compensate individuals who have suffered harm at the hands of another, albeit physical, financial, emotional or for future loss of income. This,

however, begs the question of whether a unique type of public law damages, in the form of "constitutional damages", is needed to specifically address infringements of constitutional rights as "[t]he private law concept of damages is not designed to vindicate the values underlying the Constitution".[4]

This is precisely the issue that arose in *Fose v Minister of Safety and Security.* In this case, the Constitutional Court had to decide whether so-called "constitutional damages" should be considered "appropriate relief" (in terms of section 7(4)(*a*) of the Interim Constitution), where an individual's constitutional rights have been limited.[5] The appellant instituted a claim against the Minister of Safety and Security in the high court for damages arising from an alleged "series of assaults" by members of the South African Police Services.[6] The appellant claimed common law damages for pain and suffering, insult, shock, past and future medical expenses, loss of enjoyment of the amenities of life, and punitive damages in the form of "constitutional damages".[7] The constitutional damages were claimed for the infringement of his constitutional right not to be tortured and not to be subjected to cruel, inhuman or degrading treatment, as well as for infringements on his rights to dignity and privacy.[8] The respondent raised an exception to the claim in the court *a quo* arguing that a claim of "constitutional damages" was not good in law.[9] The high court upheld the exception.

The Constitutional Court considered the meaning of "appropriate relief" and stated that this would be a relief "that is required to protect and enforce the Constitution".[10] The Court further remarked that, if need be, courts may have to develop new remedies to protect and enforce constitutional rights.[11] The Court stated that, in principle, there does not seem to be a reason why "appropriate relief" could not include an award of (constitutional) damages "where such an award is necessary to protect and enforce rights".[12] However, the Court remarked that in most instances, the "common law will be broad enough to provide all the relief that would be 'appropriate' for a breach of constitutional rights".[13] Notwithstanding these remarks, the Court held that in the *Fose* case, it would be inappropriate to

impose constitutional damages, as the plaintiff would already have been appropriately compensated in terms of the available common law remedies.[14]

Although the plaintiff in the *Fose* case was unsuccessful in claiming constitutional damages, it remains significant because it is the first South African Constitutional Court judgment that recognised the possibility of awarding constitutional damages in appropriate circumstances where this would provide an *effective* remedy. There has, however, been much debate on the circumstances that would merit the awarding of constitutional damages, especially against the state, where the state has acted with gross negligence. This chapter explores significant aspects of the *Fose* judgment regarding "appropriate relief" and the recognition of "constitutional damages" and tracks the development of these concepts in subsequent cases.

2.2 Significant aspects of the judgment

2.2.1 "Appropriate relief"

The judgment in *Fose* mainly focuses on the meaning of "appropriate relief" in cases where constitutional rights have been infringed and considers whether such relief would necessarily include "constitutional damages". The term "appropriate relief" is derived from section 7(4)(*a*) of the Interim Constitution, which provided that: "When an infringement of or threat to any right entrenched in this Chapter is alleged, any person referred to in paragraph (*b*) shall be entitled to apply to a competent court of law for appropriate relief, which may include a declaration of rights."[15] Didcott J, in a separate judgment, indicated that appropriate relief in terms of this provision includes all existing common law and statutory remedies, as well as new remedies that may be developed by the courts to protect entrenched constitutional rights adequately.[16] Kriegler J, in a separate judgment, pointed out that section 7(4)(*a*) does not provide for "relief where appropriate" but for "appropriate relief *per se*" – in other

words, "violations of chapter three rights *must* be remedied" (own emphasis).[17] Kriegler J further reiterated that in our new constitutional order, as in common law, all rights have complementary remedies. Their objectives determine the nature of these remedies[18] – once the aim of the relief has been determined, "the meaning of 'appropriate relief' follows as a matter of course".[19]

Ackermann J, writing for the majority, held that in the constitutional context, "appropriate relief" would be "relief that is required to protect and enforce the Constitution", which may include "a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced" or may require a court to develop new remedies to protect and enforce constitutional rights.[20]

Although the appellant and Ackermann J placed considerable emphasis on foreign law concerning appropriate relief and constitutional damages, it is submitted that this emphasis is somewhat misplaced.[21] Even Ackermann J conceded that foreign law, although instructive, is not always helpful or appropriate to use in the South African context due to the differences that exist between legal systems, for example, between unitary and federal court systems, between flexible and more rigid rules of delict and tort law, and differences in states' approaches to vicarious and state liability.[22] Arguably, one can agree with the view of O'Regan J in her (partially dissenting) separate judgment, where she stated that "reliance on foreign jurisprudence [in this matter] is of little value in interpreting the provisions of our Constitution".[23] This chapter does not consider the Court's discussion of the legal position in these foreign jurisdictions. Instead, it focuses on the Court's interpretation of "appropriate relief" within the South African context.

Barns correctly points out that what can be deduced from the *Fose* judgment is that, in the Court's view, "appropriate relief" is the relief that is *effective*, *suitable* and *just*.[24] Concerning an "effective" remedy, the Court stated that:

> *"an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced. Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that when the legal process establishes that an infringement of an entrenched right has occurred, it be effectively vindicated."*[25]

The requirement that relief should be "effective" also means that courts must ensure that remedies are effective and "forge new tools" to achieve this objective if necessary.[26] Kriegler J pointed out that it was part of the courts' judicial function to "[exercise] our discretion to choose between appropriate forms of relief" and to "carefully analyse the nature of a constitutional infringement, and strike *effectively* at its source" (own emphasis).[27] Furthermore, Kriegler J referred to the "suitability" of the relief, stating that "[w]hen something is appropriate it is 'specially fitted or suitable'", while "suitable" in the context of "appropriate relief" refers to "the extent to which a particular form of relief vindicates the Constitution and acts as a deterrent against further violations of rights enshrined in chapter three".[28] In determining the suitability of the relief, Kriegler J argued that the nature of the infringement and the impact of the remedy are factors that should be considered – the remedy would greatly rely on the circumstances of the particular case.[29] The requirement that relief should be "just" or "fair", as derived from Canadian law, means that "the interests of... both the complainant and society as a whole ought, as far as possible, to be served" by the particular remedy.[30]

Although the Court stated that it would not make a pronouncement in this regard, it pointed out that "appropriate relief" in a case such as the one at hand may well consist of a declaratory order in combination with an appropriate order for costs without awarding damages.[31]

2.2.2 "Constitutional damages"

The question that had to be answered by the Court is whether punitive constitutional damages would constitute "appropriate relief" where constitutional rights have been "outrageously violated".[32] According to the Court, the main objectives of "constitutional damages" as a form of relief are *deterrence* and *vindication* of constitutional rights.[33] While the deterrence objective of constitutional damages is, rather obviously, to discourage future infringements of the rights in question, the meaning of vindication may not be as clear.[34] In their separate judgments, Didcott J and Kriegler J both stated that "vindication" means "to defend against encroachment or interference".[35] According to Didcott J and Kriegler J, the infringement of rights harms not only the particular individual but society as a whole. If such infringements are not adequately remedied, "they will impair public confidence and diminish public faith in the efficacy of the protection" while diminishing our faith in the Constitution itself.[36] In this regard, Kriegler J rightly points out that the violation of rights "not only harms a particular person but impedes the fuller realisation of our constitutional promise".[37]

The Court held that, in principle, there was no reason why "appropriate relief" could not include damages, in the delictual sense, where such an award is necessary "to protect and enforce Chapter 3 rights"[38] – the question is whether this would include special (punitive) constitutional damages *in addition* to delictual damages. The appellant contended that appropriate relief, in this case, would consist of ordinary delictual damages, as well as special constitutional damages, in the form of punitive damages, to vindicate the constitutional rights that have been infringed, to punish the government organs concerned and deter them from future infringements.[39] The Court rightly pointed out that there is scant precedent in our law of delict for awarding punitive damages, except perhaps in defamation matters, and quite a lot of criticism is levelled against such awards.[40] The Court aptly quoted Van der Walt's criticism of punitive damages as follows:

> *"awarding additional sentimental damages as a penalty for outrageous conduct on the part of the defendant is not justifiable in a modern system of law... awarding punitive damages unduly enriches the plaintiff who is entitled only to compensation for loss suffered."*[41]

The Court argued that, although it may seem desirable to have a special "constitutional remedy" in the form of constitutional damages when constitutional rights have been infringed, there are various reasons why such a remedy may be problematic, especially regarding the "punishment" and "deterrence" objectives. The Court proceeded to summarise these reasons. First, the amount of these punitive damages can only be vaguely estimated and therefore runs "counter to the Anglo-Canadian tradition" of carefully calculated damages.[42] In a similar vein, Didcott J pointed out that the development of a punitive constitutional damages remedy would be "most unwise", "fraught with difficulties" and would "[pose] problems of principle and policy which are fundamental, profound and controversial" – such a radical change would first need to be thoroughly investigated, for instance by the South African Law Commission.[43] Second, ordinary compensatory damages may adequately address the individual's harm (be it physical, emotional or monetary) while also fulfilling deterrent and punitive functions.[44] Therefore, there is no need to award further punitive damages. In this regard, Kriegler J also pointed out that there was various common law, as well as special statutory remedies available "designed to provide suitable relief for the infringement of constitutional rights" and that it would "undermine the best efforts of the legislature to exclude these remedies from a court's arsenal of remedial options".[45] Third, the deterrent effect of awarding any type of damages is difficult, if not impossible, to assess with any degree of certainty.[46] This may especially be true in the case of constitutional damages awarded against state organs where the state entity is held vicariously liable for the actions of employees. In such cases, the organ itself is not responsible for the actual infringement of the rights in question. In contrast, the employees who *are*

responsible do not suffer the financial punishment of the damages awarded. Fourth, although punitive awards against the state may lead to systemic change, the changes may be prolonged, needing numerous awards to set this change in motion. At the same time, the process would also greatly depend on the willingness of the state to facilitate such institutional and policy changes.[47]

Fifth, the Court pointed out that the deterrence objective of awarding punitive damages focuses on future infringements and does not address the harm a specific individual has suffered.[48] Sixth, awarding punitive damages provides the plaintiff with an "unjustifiable windfall" unrelated to the damages suffered.[49] Seventh, equitable awarding of damages, in contrast to punitive damages, "deters specifically" and clearly.[50] Eight, awarding punitive damages is inappropriate if "the breach does not realistically lend itself to the pursuit of deterrent policies".[51] Ninth, it may not always be necessary to award punitive damages to emphasise the importance of constitutional rights if there are "non-pecuniary forms of redress [that] may convey effectively the symbolic importance of constitutional guarantees".[52] Tenth, punitive damages are not considered appropriate in class action lawsuits because it is impossible to determine the damage each claimant has suffered to their constitutional rights in a symbolic sense.[53] Eleventh, and importantly, punitive damages punish a defendant without the usual protective measures in terms of criminal law and may lead to "multiple sanctioning".[54] Finally, the Court rightly pointed out that when substantial damages are awarded against the state and government organs, the financial burden of such awards is inevitably shifted to taxpayers.[55]

Based on the reasons listed above, the Court held that it did not deem it appropriate to award punitive constitutional damages in the circumstances, as this would serve to punish the defendant without the usual "safeguards afforded in a criminal prosecution", which is unacceptable in a constitutional system that provides extensive constitutional protection regarding procedural rights in criminal matters.[56]

Furthermore, the Court held that it was not convinced that awarding punitive constitutional damages has any deterrent effect on the government or its organs.[57] In this regard, the Court pointed out that:

> *"[f]or awards to have any conceivable deterrent effect against the government they will have to be very substantial and the more substantial they are the greater the anomaly that a single plaintiff receives a windfall of such magnitude."*[58]

Finally, and perhaps most importantly, the Court argued that because the South African government already experiences considerable financial and resource constraints, it would be counterproductive to social and economic development in our country if substantial punitive constitutional damages were to be awarded against the state, especially where plaintiffs have received adequate compensation in the form of regular damages.[59] Didcott J agreed that enriching a single plaintiff at taxpayers' expense would not be appropriate.[60] Similarly, Kriegler J argued that "[t]he policemen implicated in the appellant's claim could not possibly be deterred by a payment of damages bearing no relation to their own finances".[61] Kriegler J, therefore, concluded that awarding punitive constitutional damages would not be appropriate in this case because it would be ineffective in addressing the issue at hand.[62] The Court held that, in this specific matter, it was inappropriate to order the state to pay punitive constitutional damages.[63] However, the Court suggested that it would be possible for courts to develop other non-monetary constitutional remedies that would be deemed appropriate relief to vindicate constitutional rights when infringements occur.[64]

Another significant aspect of the judgment, which had not been alluded to in the majority judgment of Ackermann J, was highlighted by Didcott J. Didcott J pointed out that the Court's remarks and hesitancy in awarding punitive damages mostly applied in instances where the defendant is an organ of state.[65] This differs from circumstances where the defendant is a private individual or a private entity in two important

respects: first, the damages would not be paid from public funds that could have been better spent elsewhere; and second, the objective of deterrence would be more likely to be effective against private individuals than against organs of state.[66] Therefore, a more compelling case could be made out for awarding punitive constitutional damages against private individuals than would be the case if the defendant was an organ of state.[67]

Kriegler J was of the opinion that the Court's criticism and rejection of punitive constitutional damages in this case should, however, not be understood as a blanket rejection of such remedy but rather as a rejection of the remedy in this specific case only.[68] Other circumstances may therefore arise where such a remedy may constitute appropriate relief, depending on the facts of the case. Kriegler J disagreed with Ackermann J and Didcott J, arguing that circumstances may arise where such relief would be appropriate, even against organs of state.[69]

2.3 Impact of the judgment

2.3.1 Impact on the interpretation of "appropriate relief"

It should be noted, as Bishop points out, that the South African courts favour an approach that first relies on common law (or statutory) remedies that would effectively vindicate constitutional rights, before relying on or developing any new special constitutional remedies, in accordance with the principle of subsidiarity.[70] Following the *Fose* judgment, our courts had various opportunities to develop the meaning and content of the phrase "appropriate relief". In *City Council of Pretoria v Walker*,[71] the respondent refused to pay for services rendered, alleging that the City Council unfairly discriminated against residents residing in certain residential areas of Pretoria. The Council implemented different utility rates for different areas, which, according to the respondent, amounted to (indirect) unfair discrimination based on race. In other words, the residents in the predominantly "white" suburbs

paid higher rates, while the township residents (in Mamelodi and Atteridgeville) paid a much lower flat rate.[72] For purposes of this discussion, only the Court's reference to "appropriate relief" is discussed. The Court in the *Walker* case held that "appropriate relief" was for the courts to implement against government organs – it was not open to aggrieved individuals to decide on the "appropriate relief" that should be meted out against state organs and then to proceed "to punish the government structure by withholding payment which is due".[73] The Court further held that "appropriate relief should be relief which is tailored to the needs of the particular case".[74] Although the Council's appeal succeeded in the case, the Court held that it would not be appropriate for a costs order to be made against the respondent.[75]

Another reference was made to "appropriate relief" in *Hoffmann v South African Airways*.[76] This case dealt with the alleged discriminatory employment policy of South African Airways that precluded the employment of HIV-positive flight attendants. The Court held that "appropriate relief" must be both "fair and just in the circumstances", which means that the interests of all parties, including society at large, must be considered.[77] In determining the appropriate relief in a particular case, a balancing process governed by the following objectives should therefore be followed:

> *"first, to address the wrong occasioned by the infringement of the constitutional right; second, to deter future violations; third, to make an order that can be complied with; and fourth, of fairness to all those who might be affected by the relief."*[78]

Furthermore, the Court argued, the nature of the right and the nature of the infringement will determine the relief that should be granted.[79]

In *Bel Porto School Governing Body v Premier of the Western Cape Province*,[80] the appellants argued that a new "rationalisation and redeployment scheme" implemented by the Western Cape Department of Education would cause various schools that catered to the needs of learners

with disabilities to lose some of its highly qualified and experienced teachers and assistants as these employees had to be reallocated to previously disadvantaged schools that were understaffed. In terms of the new policy, the Department would also not continue to subsidise the assistants employed by the schools. At the same time, the Department also refused to employ the assistants when requested to do so by the schools. The appellants argued that the Department's decision infringed on the rights to equality and just administrative action of the schools, the assistants and the learners.[81] Chaskalson CJ dismissed the appeal and held that the appellant's right to just administrative action was not infringed and, as they did not argue for relief other than the assistants be employed by the Department itself, the appellants could not be granted any other relief since the Department could not employ these assistants.[82] The majority judgment is not particularly helpful with regard to the current discussion of the courts' interpretation of "appropriate relief". However, the minority judgments prove to be more useful in this regard. Mokgoro and Sachs JJ, in their dissenting judgment, found that a court may order additional appropriate relief where a declaration of invalidity on its own is not sufficient – the constitutional provision regarding remedies "is open-ended and therefore inherently flexible, Courts may come up with a variety of remedies in addition to a declaration of constitutional invalidity".[83]

Furthermore, they argued that, because of the flexibility in granting constitutional remedies, the "straightjacket" or "all or nothing" approach to remedies suggested by the respondents (and arguably the majority judgment of Chaskalson CJ) is "inappropriate" and could even be "damaging for the development of administrative justice".[84] Mokgoro and Sachs JJ further held that "[s]uch a totalist perspective risks either forcing government to grind to a halt, or else completely subsuming legitimate claims by individuals or groups into the greater good".[85] In their view it would be untenable to refuse to provide a remedy when constitutional rights have been infringed, simply because it would be difficult

for the infringer to remedy the infringement – "[i]t is the remedy that must adapt itself to the right, not the right to the remedy".[86] Madala J agreed with Mokgoro and Sachs JJ, that "appropriate relief" could encompass more than that which the party originally sought.[87] In addition, Ngcobo J held that "appropriate relief" must be interpreted "purposively" and be read with section 172(1)(*b*) of the Constitution, which "empowers the Court, in constitutional matters, to make 'any order that is just and equitable'".[88] Ngcobo J stressed the importance of courts not taking a passive approach to granting appropriate relief, stating that such an approach could render constitutional rights "meaningless and futile".[89] As granting relief is a judicial function, Ngcobo J argued, it should not be governed by "notions akin to onus of proof" – in other words, the relief granted by the court may differ from that which was sought by a party and the court may actively request that additional evidence be placed before it in order to make a determination as to what would constitute appropriate relief in a particular case.[90] Ngcobo J disagreed with the majority judgment, rightly pointing out that "the fact that the successful litigant has not claimed a particular relief or that the parties did not address argument on a particular relief, should be no bar to the determination of the appropriate relief".[91] Likewise, if there is a lack of information which may hinder a court from making a determination as to the granting of appropriate relief, courts may use its own procedures to ensure that the parties provide such information, unless it would not serve the interests of justice.[92] Ngcobo J concluded that courts have a duty to provide relief when constitutional rights have been infringed as this "redresses the wrong done and thus gives meaning and substance to constitutional rights".[93]

2.3.2 Impact on the recognition of "constitutional damages"

Following the *Fose* judgment, *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd*[94] was the first case in which the Constitutional Court specifically considered constitutional damages for a second time. In this case, persons

from an adjacent township unlawfully occupied part of the Modderklip farm.[95] After various failed attempts and court proceedings to have the occupiers removed,[96] the Supreme Court of Appeal held that the property rights of the owner of the Modderklip farm had been infringed by the unlawful occupation and the ineffective eviction orders that had been granted by the other courts in this case.[97] The Supreme Court of Appeal, referring to the *Fose* judgment, argued that courts have a duty to fashion orders that would provide effective relief to those whose rights have been infringed,[98] which in this case meant the payment of damages to compensate the property owner for the unlawful occupation of the land and that the unlawful occupiers may continue to occupy the land until the state makes alternative land available.[99] Although the Supreme Court of Appeal did not expressly say so, it effectively ordered the state to pay "constitutional damages". On appeal in the Constitutional Court, Langa ACJ writing for a unanimous Court, emphasised that the rule of law, as one of the founding values of our constitutional order, together with section 34 of the Constitution, requires the state to "provide the necessary mechanisms for citizens to resolve disputes that arise between them",[100] but the state's duty to provide mechanisms and institutions to resolve disputes does not end there, it also includes taking steps to ensure "that large-scale disruptions in the social fabric do not occur in the wake of the execution of court orders".[101] As the other court orders obtained by Modderklip proved ineffective and unenforceable, Modderklip Farm was effectively forced to assume a duty that would ordinarily vest in the state, which was unreasonable.[102] Ineffective court orders may lead to "social upheaval", parties taking the law into their own hands and "is a recipe for anarchy" – subverting the purpose of the rule of law.

Conversely, in this case, it would also not have been reasonable to evict the occupiers from the land without providing alternative accommodation.[103] Therefore, it followed that some other relief must be granted to address the infringement that occurred, which relief must effectively vindicate the rights concerned.[104] The Court approvingly

highlighted some of the reasons put forward in the Supreme Court of Appeal judgment as to why the payment of (constitutional) damages would be appropriate in this case, namely:

> *"[i]t compensates Modderklip for the unlawful occupation of its property in violation of its rights; it ensures the unlawful occupiers will continue to have accommodation until suitable alternatives are found and it relieves the state of the urgent task of having to find such alternatives."*[105]

Consequently, the Constitutional Court found no other appropriate relief available in this case and therefore ordered the payment of (constitutional) damages by the state to Modderklip, calculated in terms of the Expropriation Act 63 of 1975.[106] Thus, although the Court did not expressly term the damages as *constitutional* damages, this is essentially what the Court ordered.

In the context of socio-economic rights, the Supreme Court of Appeal in *MEC, Department of Welfare, Eastern Cape v Kate*,[107] expressly ordered the payment of constitutional damages. In this case, the respondent sought the payment of constitutional damages equivalent to the amount she was entitled to in interest due to the Department of Welfare unlawfully withholding the social grant to which she was entitled, which action allegedly infringed her rights to social security and human dignity.[108] Interestingly, the court held that an order to pay constitutional damages may be appropriate even if other remedies, such as delictual remedies, are available: "the relief that is permitted by s 38 of the Constitution is not a remedy of last resort, to be looked to only when there is no alternative – and indirect – means of asserting and vindicating constitutional rights."[109] The court argued that there are two reasons why it deems constitutional damages appropriate in this case, first, because it did not see any reason why the constitutional rights should not be directly vindicated, and second, because of the endemic nature of the breach complained of in the case (in other words, the Department's habitual failure to pay social

grants timeously).[110] As to the objection that the payment of constitutional damages would be burdensome on the public purse (and therefore taxpayers), the court stated that this was not a sufficient reason to withhold relief from the respondent and stated that

> *"[i]f the provincial administration must seek further funds, in addition to those that have been appropriated for providing social assistance, in order to meet claims for damages, hopefully its accountability to the legislature will contribute to a proper resolution."*[111]

In *M v Minister of Police of the Government of the Republic of South Africa*,[112] the High Court had to decide on the appropriateness of an award of constitutional damages for a child's loss of parental care following an assault on the parent during detention at a police station which led to the parent's death. Without much consideration of the factors mitigating against an award of constitutional damages, but with a lengthy discussion of foreign case law,[113] the court ruled that a child is entitled to constitutional damages for the deprivation of parental care and referred the case to a further trial to hear evidence to ascertain the quantum of the damages that should be awarded.[114] On appeal, in *Minister of Police v Mboweni*,[115] the Supreme Court of Appeal again had to consider if constitutional damages were an appropriate remedy in this case. The Supreme Court of Appeal rightly pointed out that the High Court did not properly consider whether other appropriate remedies (such as delictual remedies) could vindicate the right in question and therefore upheld the appeal.[116]

In *Komape v Minister of Basic Education*,[117] the High Court had to decide if constitutional damages constituted an appropriate remedy when a young child passed away after falling into an unsafe pit toilet at school. The court ruled that if constitutional damages were to be awarded, it would be purely punitive in this case.[118] The court held that it was not convinced that additional constitutional damages would be an appropriate remedy, as there was no evidence that it would deter future infringements, nor does it enforce the

violated rights or serve the interests of society.[119] The court, therefore, concluded that a structural interdict was the only appropriate relief to address the inadequate sanitary facilities at the school.[120]

Although the issue did not come before our courts, the so-called Esidemeni arbitration, heard by retired Constitutional Court judge Dikgang Moseneke, also entailed awarding constitutional damages. In this case, Moseneke had to decide on the most appropriate relief for the families of 144 psychiatric patients who tragically died at various psychiatric institutions around Gauteng due to gross negligence and neglect.[121] In addition to common law damages, Moseneke ordered that the Department of Health pay each family an additional R1 million in (punitive) constitutional damages, stating that the then Minister of Health, Mahlangu, "acted with impunity" and that the deaths were a "gross violation of constitutionally entrenched rights".[122]

In *Residents of Industry House, 5 Davies Street, New Doornfontein, Johannesburg v Minister of Police*,[123] the Constitutional Court had another opportunity to consider the constitutional damages remedy. In this case, various raids were conducted by the respondents, seemingly without warrants, on certain inner-city properties where the applicants resided, purportedly as part of a campaign to find and arrest undocumented immigrants.[124] The applicants contended that they were each entitled to a token amount of R1000.00 in constitutional damages in respect of each raid to vindicate their constitutional rights to privacy and dignity infringed by the respondents.[125] The Court held that, even though the phrase "appropriate relief" includes the remedy of "constitutional damages" for a breach of rights,[126] if "the violation of constitutional rights involves the commission of a delict, an award of constitutional damages, in addition to those available under the common law, will seldom be available".[127] With reference to the *Modderklip* judgment, the Court held that "appropriateness" should be understood to mean "effectiveness". In other words, even when other remedies are available, constitutional damages may be

awarded if that is found to be the more (or the most) effective remedy in a particular instance.[128] However, effectiveness alone is not the only consideration in determining what would constitute "appropriate relief" in a particular case, especially where numerous remedies are available – the circumstances of the case should guide a court in selecting what remedy would be "appropriate".[129] Furthermore, the Court highlighted factors to be taken into account when ascertaining whether constitutional damages would be appropriate in a particular case, namely:

> *"the first is the existence of an alternative remedy that would vindicate the infringement of the rights alleged by the claimant and the second is, whether that alternative remedy is effective or appropriate in the circumstances. Ancillary factors include whether the infringement of the constitutional rights was systemic, repetitive and particularly egregious; whether the award will significantly deter the type of constitutional abuses alleged; the effect of the award on state resources; and the need to avoid opening the floodgates in respect of similar matters."*[130]

First, the Court pointed out that the existence of other remedies, although not an absolute bar, is a substantial consideration weighing against the awarding of constitutional damages.[131] In this regard, if a delictual remedy exists, for instance, an award of constitutional damages may only be appropriate if it would be "manifestly unjust or unreasonable" to require a claimant to rely on the delictual remedy or if the delictual remedy would be ineffective in the particular case.[132] The second consideration is that the remedy must be appropriate in the unique circumstances of the particular case. If appropriate alternative remedies are available, a court need not resort to constitutional damages.[133] The Court further held that when deciding on an appropriate remedy, a court must balance the interests of the claimant, the respondent and the public.[134] Moreover, the Court emphasised that legal certainty is also needed in our law concerning awarding constitutional damages:

> *"To hold that constitutional damages are available in any matter if they meet the mere threshold of appropriate relief would create considerable uncertainty in our law and inequality in the sense that claimants who seek to vindicate the same right would be treated differently. This would generate uncertainty on when constitutional damages may be allowed. The uncertainty and unpredictability would be at variance with the rule of law, a linchpin of the Constitution."*[135]

In other words, constitutional damages should be the "most appropriate remedy" in a particular case, bearing in mind the other remedies available to the claimant.[136] If another remedy can effectively vindicate the infringement of a constitutional right, there is no need to award additional constitutional damages, as this would effectively "amount to punishing the taxpayers for conduct for which they bear no responsibility".[137] Therefore, the Court held that constitutional damages were not an appropriate remedy in this matter.[138]

Recently, in *Thubakgale v Ekurhuleni Metropolitan Municipality*,[139] constitutional damages were sought for an alleged infringement of the right of access to adequate housing.[140] Therefore, the Court had to determine whether constitutional damages constituted "appropriate relief" within the context of socio-economic rights.[141] Jafta J, writing for the majority, held that section 26(1) and (2) of the constitution has not been accepted to entail a state duty to supply housing on demand because the right must be *progressively* realised.[142] The majority stressed that

> *"section 26 does not confer a right to claim a house within a specified time, the failure to provide a house cannot cause an injury or damage to the individual in need of a house. And without an injury, there can be no claim for constitutional damages. Moreover, the scheme of section 26 rules out any direct claim for damages".*[143]

The majority of the Court emphasised that there are clear differences between socio-economic rights and other rights and that non-fulfilment of a socio-economic right does

not entitle one to constitutional damages, whereas with infringements of other rights, awarding constitutional damages may be appropriate.[144] According to the majority, the real issue, in this case, is that the applicants were not claiming constitutional damages for a breach of their socio-economic right but for the municipality's breach of a previous court order – which means that constitutional damages would only serve a punitive purpose in this case.[145] Socio-economic rights may, therefore, not be *enforced* by awarding constitutional damages in the form of punitive damages.[146] Majiedt J's dissenting judgment disagreed with the majority's conclusion and would have awarded constitutional damages. The dissenting judgment argued that "an alternative remedy can only be a bar to a claim for constitutional damages if it is effective".[147] Constitutional damages, Majiedt J held, was the only appropriate relief in this case because all other avenues had already been exhausted by the applicants without success and were, therefore, not effective remedies in this particular case.[148] In a short concurring judgment, Madlanga J indicated that "the possibility of the appropriateness of constitutional damages whenever socio-economic rights are at issue" cannot *per se* be excluded – it would depend on the circumstances of the particular case.[149]

2.4 Conclusion

From the discussion of the case law above, it is clear that jurisprudence has come full circle concerning awarding constitutional damages for infringements of rights in the Bill of Rights. Initially, following what Klaaren describes as a "remedies-conscious perspective" in *Fose*,[150] then deviating from its initial approach in the case of *Kate*, but ultimately returning to the Constitutional Court's initial approach in the *Residents of Industry House* case.

Although the *Fose* judgment remains significant as the leading authority on the awarding of constitutional damages in South African law, as has been confirmed in the recent case of *Residents of Industry House*, the *Fose* judgment has also had a significant influence on our courts' understanding

of the meaning of "appropriate relief". The Court in the *Fose* case regarded "appropriate relief" as relief that is *effective*, *suitable* and *just*. In other words, it would be a remedy that can vindicate the Constitution, deter future infringements, consider the case's unique circumstances and also consider and balance the interests of all parties concerned, including the public interest.

Consequently, the Constitutional Court in *City Council of Pretoria v Walker* emphasised that "appropriate relief" largely depends on the unique facts of a case. In contrast, the Court in *Hoffmann v South African Airways* emphasised that relief must be just and fair in the circumstances, considering the competing interests of all concerned. In *Bel Porto School Governing Body*, the minority judgments argued that awarding "appropriate relief" is a judicial function and, as such, a court may grant relief other than that which a claimant has sought if such relief is appropriate in the case. The Court further held that "appropriate relief" is flexible and should be interpreted broadly and purposively. Courts could also request additional evidence if further information is needed to determine what relief would be appropriate in a particular case – courts must, therefore, not adopt a passive role in this regard.

Regarding the remedy of constitutional damages, the Court in *Fose* held that the purposes of the remedy are to vindicate constitutional rights, deter future infringements and punish those who have infringed the claimant's rights. In *Fose*, the Court conceded that although vindication of constitutional rights is an important purpose, this objective (as well as the objectives of punishment and deterrence) may also be realised by means of other delictual or statutory remedies. The Court proceeded to list various reasons why awarding constitutional damages may be problematic, especially if the main purposes are deterrence and punishment. Most notably, the Court pointed out that constitutional damages would not be effective as a deterrent to or a punishment against state organs, as those responsible for the infringement do not experience the financial implications of such awards. Furthermore, if additional punitive constitutional damages were to be

awarded, it would also mean that the financial burden of such awards would inevitably be shifted to taxpayers, which is manifestly unreasonable, especially if a claimant could be adequately compensated in terms of other remedies. It is important to note, as Didcott J pointed out, that the majority's reservations regarding awarding constitutional damages may only apply to constitutional damages awarded against the state. An award of constitutional damages may better deter private individuals than organs of state. However, it would still depend on the circumstances of the case if such an award would constitute appropriate relief. Finally, Kriegler J emphasised that the Court's decision should not be seen as an absolute bar to awards of constitutional damages against organs of state. It would always depend on the facts of the case.

In this regard, the *Modderklip* case seems to be a case in point. In this case, both the Supreme Court of Appeal and the Constitutional Court found that there were no other remedies that would be appropriate or effective in vindicating the constitutional right to property that had been infringed, given that the other remedies already proved fruitless or would be manifestly unreasonable in the circumstances. Again, much emphasis was placed on the unique facts of a particular case in the courts' decision to award constitutional damages against the state. In the *Kate* judgment, the Supreme Court of Appeal deviated from the approach followed thus far in *Fose* and *Modderklip*, holding that constitutional damages could be awarded even if other appropriate remedies were available. This is not only contrary to the other decisions of the Constitutional Court but also contrary to the principle of subsidiarity. It is submitted that the court erred in this case as the complainant already received back pay and the interest due to her from the Department of Welfare and was already fully compensated. Therefore, the award of constitutional damages was purely punitive and went against all the reasons proffered in the *Fose* judgment against awarding such damages. Furthermore, the court afforded scant regard to the fact that the constitutional damages award, in this case, placed an undue burden on taxpayers but was also too

insignificant to either punish or deter the Department from future infringements. Likewise, in *M v Minister of Police of the Government of the Republic of South Africa*, the High Court followed the approach in *Kate.* It held that constitutional damages could be awarded to a child for loss of parental care at the hands of a third party. Again, as in the case of *Kate*, the court erred in awarding constitutional damages where various other appropriate remedies could have vindicated the right in question. Criticism was also levelled at the ruling in the Esidemeni arbitration as the families in the case were already compensated by means of ordinary damages.[151] Furthermore, it is the taxpayer who will eventually bear the brunt of such awards, and even though the awards were substantial, it is still doubtful whether such awards would deter future infringements by the state.

On this point, it may be noted that at the time of writing, the issue of constitutional damages has been raised regarding the matter of the settlement of the claims of the families of the deceased Lonmin miners who were killed by police during the infamous Marikana Massacre in August 2012.[152] According to Mavuso, despite the settlement of the claims to victims and the families of the deceased miners to the amount of R330 million, SERI (Socio-Economic Rights Institute of South Africa) is pursuing a further claim for constitutional damages against the state.[153] The same criticism may be raised against such a claim as in the case of the Esidemeni arbitration, namely that the state has already amply compensated the victims and their families and that the remedy of constitutional damages should not be used as a punishment.

Fortunately, the courts returned to the Constitutional Court's original approach regarding constitutional damages in *Minister of Police v Mboweni*, the *Komape* judgment and the recent cases of *Residents of Industry House* and *Thubakgale v Ekurhuleni Metropolitan Municipality*. In the *Residents of Industry House* case, and the majority in the *Thubakgale* case, the Court rightly held that the existence of alternative remedies would mitigate against the awarding of constitutional damages, especially where such remedies on their own would be

effective in vindicating the rights in question. Again, as in the case of the *Fose* and *Modderklip* judgments, the Court emphasised that the unique facts of the particular case would be decisive in selecting the remedy that would be most appropriate in the circumstances. The Court also gave due regard to other factors that play a role in the decision to award constitutional damages, such as whether the infringement of the rights in question was systemic, the burden on taxpayers if constitutional damages were to be awarded, and the deterrent effect, if any, of such an award. At the same time, the Court in *Thubakgale* emphasised that constitutional damages cannot be used to enforce those rights or to serve a punitive purpose, especially concerning socio-economic rights.

The approach of the courts in *Minister of Police v Mboweni*, *Komape* and the *Residents of Industry House* case is to be welcomed. Not only do these judgments confirm the Constitutional Court's initial approach in the *Fose* case, but these decisions are also squarely in line with the principle of subsidiarity and lead to legal certainty regarding the awarding of constitutional damages in South African law.

In conclusion, it is submitted that the *Fose* judgment has significantly contributed to our jurisprudence on constitutional remedies. It remains the leading authority on constitutional damages while substantially contributing to our courts' understanding of the phrase "appropriate relief". It is hoped that the courts will use the approach followed in the *Fose*, *Modderklip* and *Residents of Industry House* judgments to further develop and expand on these concepts. Especially regarding awards of constitutional damages against private individuals, there still seems to be some debate as to whether constitutional damages would be more appropriate than in the case of awards against organs of state. It is further submitted that awarding constitutional damages in cases where no other appropriate relief is available, for instance, in cases such as the *Modderklip* case, would at least provide the party with some measure of relief while also recognising the importance of entrenched constitutional rights.

Endnotes

1 1997 3 SA 786 (CC) (*Fose*); for a discussion of the case see Funnah and Sibanda "Towards a selective awarding of punitive damages awards in South Africa? A comment on *Fose v The Minister of Safety and Security*" 2007 *Codicillus* 36–49.
2 De Vos and Freedman *South African Constitutional Law in Context* (2014) 389.
3 The Constitution of the Republic of South Africa, 1996 (hereafter the Constitution). The Constitution of the Republic of South Africa of 1993 (Interim Constitution) had a similar provision, s 7(4)(*a*).
4 De Vos and Freedman (n 2) 409.
5 *Fose* (n 1) par 1.
6 *Fose* (n 1) par 11; also see the high court judgment, *Fose v Minister of Safety and Security* 1996 2 BCLR 232 (W).
7 *Fose* (n 1) par 13.
8 *Fose* (n 1) par 1 and 12.
9 *Fose* (n 1) par 14.
10 *Fose* (n 1) par 19.
11 *Fose* (n 1) par 19.
12 *Fose* (n 1) par 60.
13 *Fose* (n 1) par 58.
14 *Fose* (n 1) par 72.
15 Also see s 38 of the Constitution which has a similar provision: "Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant *appropriate relief*, including a declaration of rights" (own emphasis).
16 *Fose* (n 1) par 78.
17 *Fose* (n 1) par 94.
18 *Fose* (n 1) par 95.
19 *Fose* (n 1) par 97.
20 *Fose* (n 1) par 19.
21 In fact, most of Ackermann J's judgment comprises his consideration of foreign law, which includes the United States of America, Canada, Germany, India, New Zealand, and Sri Lanka, among others, see par 24–54.
22 *Fose* (n 1) par 58.
23 *Fose* (n 1) par 106.
24 Barns "Constitutional damages: a call for the development of a framework in South Africa" 2013 *Responsa Meridiana* 1 9.
25 *Fose* (n 1) par 69.
26 *Fose* (n 1) par 69.

27 *Fose* (n 1) par 96.
28 *Fose* (n 1) par 97.
29 *Fose* (n 1) par 97.
30 *Fose* (n 1) par 38.
31 *Fose* (n 1) par 68.
32 *Fose* (n 1) par 80.
33 *Fose* (n 1) par 81.
34 *Fose* (n 1) par 82 and 97.
35 *Fose* (n 1) par 82 and 96.
36 *Fose* (n 1) par 82 and 96.
37 *Fose* (n 1) par 95.
38 *Fose* (n 1) par 60 and 98.
39 *Fose* (n 1) par 61.
40 *Fose* (n 1) par 62-63; *Innes v Visser* 1936 WLD 44 45; *Lynch v Agnew* 1929 TPD 974 978; *Esselen v Argus Printing and Publishing Co Ltd* 1992 3 SA 764 (T) 771H-I; *Dikoko v Mokhatla* 2006 6 SA 235 (CC) 263; McKerron *The Law of Delict* (1971) 207; Neethling *Persoonlikheidsreg* (1991) 60-61, 168; Van der Walt *Delict: Principles and Cases* (1979) 5-7; Burchell *The Law of Defamation in South Africa* (1985) 290-294, and *Principles of Delict* (1993) 187; Neethling "The law of delict and punitive damages" 2008 *Obiter* 238-246.
41 *Fose* (n 1) par 63; see Van der Walt (n 40) 6.
42 *Fose* (n 1) par 65.
43 *Fose* (n 1) par 85.
44 *Fose* (n 1) par 65.
45 *Fose* (n 1) par 99.
46 *Fose* (n 1) par 65.
47 *Fose* (n 1) par 65.
48 *Fose* (n 1) par 65.
49 *Fose* (n 1) par 65.
50 *Fose* (n 1) par 65.
51 *Fose* (n 1) par 65.
52 *Fose* (n 1) par 65.
53 *Fose* (n 1) par 65.
54 *Fose* (n 1) par 65.
55 *Fose* (n 1) par 65.
56 *Fose* (n 1) par 70.
57 *Fose* (n 1) par 71.
58 *Fose* (n 1) par 71.
59 *Fose* (n 1) par 72, 83.
60 *Fose* (n 1) par 84.
61 *Fose* (n 1) par 103.
62 *Fose* (n 1) par 103.
63 *Fose* (n 1) par 73.
64 *Fose* (n 1) par 74.
65 *Fose* (n 1) par 87.

66 *Fose* (n 1) par 87.
67 *Fose* (n 1) par 87.
68 *Fose* (n 1) par 91.
69 *Fose* (n 1) par 92.
70 Bishop "Remedies" in Bishop and Woolman (eds) *Constitutional Law of South Africa* (2007) 79–81.
71 1998 2 SA 363 (CC).
72 *Walker* (n 71) par 1, 6.
73 *Walker* (n 71) par 93.
74 *Walker* (n 71) par 95.
75 *Walker* (n 71) par 98.
76 2001 1 SA 1 (CC).
77 *Hoffmann* (n 76) par 42, 43.
78 *Hoffmann* (n 76) par 45.
79 *Hoffmann* (n 76) par 45.
80 2002 3 SA 265 (CC) (*Bel Porto School Governing Body*).
81 *Bel Porto School Governing Body* (n 80) par 1, 2 and 43.
82 *Bel Porto School Governing Body* (n 80) par 83–129.
83 *Bel Porto School Governing Body* (n 80) par 56.
84 *Bel Porto School Governing Body* (n 80) par 57, 59.
85 *Bel Porto School Governing Body* (n 80) par 59.
86 *Bel Porto School Governing Body* (n 80) par 62.
87 *Bel Porto School Governing Body* (n 80) par 94.
88 *Bel Porto School Governing Body* (n 80) par 123.
89 *Bel Porto School Governing Body* (n 80) par 125.
90 *Bel Porto School Governing Body* (n 80) par 125.
91 *Bel Porto School Governing Body* (n 80) par 126.
92 *Bel Porto School Governing Body* (n 80) par 126, 128.
93 *Bel Porto School Governing Body* (n 80) par 126.
94 *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC) (*Modderklip Boerdery* (CC)).
95 *Modderklip Boerdery* (CC) (n 94) par 3.
96 See *Modderklip Boerdery (Pty) Ltd v Modder East Squatters* 2001 4 SA 385 (W); *Modderklip Boerdery (Edms) Bpk v President van die Republiek van Suid-Afrika en Andere* [2003] 1 All SA 465 (T).
97 *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, amici curiae); President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, amici curiae)* 2004 6 SA 40 (SCA) (hereafter *Modderklip Boerdery* (SCA) judgment); see *Modderklip Boerdery* (CC) (n 94) par 19.
98 *Modderklip Boerdery* (SCA) (n 97) par 42.
99 *Modderklip Boerdery* (SCA) (n 97) par 43.
100 *Modderklip Boerdery* (CC) (n 94) par 39.
101 *Modderklip Boerdery* (CC) (n 94) par 43.

102 *Modderklip Boerdery* (CC) (n 94) par 44–45.
103 *Modderklip Boerdery* (CC) (n 94) par 47–48.
104 *Modderklip Boerdery* (CC) (n 94) par 58.
105 *Modderklip Boerdery* (CC) (n 94) par 59.
106 *Modderklip Boerdery* (CC) (n 94) par 66.
107 2006 4 SA 478 (SCA) (*MEC, Department of Welfare, Eastern Cape*).
108 *MEC, Department of Welfare, Eastern Cape* (n 107) par 1–18.
109 *MEC, Department of Welfare, Eastern Cape* (n 107) par 27.
110 *MEC, Department of Welfare, Eastern Cape* (n 107) par 27.
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113 *M v Minister of Police of the Government of the Republic of South Africa* (n 112) par 28–41.
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116 *Minister of Police v Mboweni* (n 115) par 22.
117 *Komape v Minister of Basic Education* (1416/2015) 2018 ZALMPPHC 18 (23 April 2018) (*Komape*).
118 *Komape* (n 117) par 67.
119 *Komape* (n 117) par 68.
120 *Komape* (n 117) par 70.
121 Davidow and Wagner "Constitutional damages: punitive damages?" 2018 *Without Prejudice* 18; also see Maphumulo "Constitutional damages amid the worsening public service delivery" 2020 *Without Prejudice* 47–48.
122 Davidow and Wagner (n 121) 18.
123 (CCT 136/20) 2021 ZACC 37 (22 October 2021) (*Residents of Industry House*).
124 *Residents of Industry House* (n 123) par 1.
125 *Residents of Industry House* (n 123) par 89.
126 *Residents of Industry House* (n 123) par 92.
127 *Residents of Industry House* (n 123) par 97; also see the Court's discussion of the *Fose* case in this regard at par 92–95.
128 *Residents of Industry House* (n 123) par 99.
129 *Residents of Industry House* (n 123) par 100.
130 *Residents of Industry House* (n 123) par 103.
131 *Residents of Industry House* (n 123) par 105.
132 *Residents of Industry House* (n 123) par 105.

133 *Residents of Industry House* (n 123) par 113.
134 *Residents of Industry House* (n 123) par 114.
135 *Residents of Industry House* (n 123) par 118.
136 *Residents of Industry House* (n 123) par 118.
137 *Residents of Industry House* (n 123) par 120.
138 *Residents of Industry House* (n 123) par 121; also see the separate concurring judgment of Jafta J in this case at par 127–161.
139 CCT 157/20) 2021 ZACC 45 (7 December 2021).
140 *Thubakgale v Ekurhuleni Metropolitan Municipality* (n 139) par 2.
141 *Thubakgale v Ekurhuleni Metropolitan Municipality* (n 139) par 7.
142 *Thubakgale v Ekurhuleni Metropolitan Municipality* (n 139) par 145, 149.
143 *Thubakgale v Ekurhuleni Metropolitan Municipality* (n 139) par 150.
144 *Thubakgale v Ekurhuleni Metropolitan Municipality* (n 139) par 121, 157.
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146 *Thubakgale v Ekurhuleni Metropolitan Municipality* (n 139) par 121, 169, 191.
147 *Thubakgale v Ekurhuleni Metropolitan Municipality* (n 139) par 47.
148 *Thubakgale v Ekurhuleni Metropolitan Municipality* (n 139) par 78–79.
149 *Thubakgale v Ekurhuleni Metropolitan Municipality* (n 139) par 196.
150 Klaaren "A remedial interpretation of the *Treatment Action Campaign* decision" 2003 *SAJHR* 455 457.
151 Davidow and Wagner (n 121) 20.
152 Mavuso "State pays R330 million to settle Marikana tragedy cases, but now battling new headache of constitutional damages" available at https://www.iol.co.za/news/politics/state-pays-r330-million-to-settle-marikana-tragedy-cases-but-now-battling-new-headache-of-constitutional-damages-f29a0bb2-042f-4b96-9fdc-826385702f47 (2023-09-14).
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Chapter 3

Administrative review, the principle of legality and "PAJA-avoidance"

Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council[1]

"[I]t is a fundamental principle of the rule of law, recognised widely, that the exercise of public power is only legitimate where lawful" (Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Council par 56).

3.1 Introduction

An effective system of administrative law plays an essential role in upholding the value of the "rule of law", which underlies our constitutional dispensation and is also essential to "the transformative nature of constitutional democracy in South Africa".[2] However, not all executive actions qualify as administrative actions but these exercises of public power cannot be outside the reach of judicial review. In *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council*, the Constitutional Court dealt with important issues regarding the role of the courts in controlling public power. Essentially, the judgment initiated a parallel track for judicial review of executive actions alongside the administrative law based on the principle of legality founded on the "rule of law", which is implicit in the framework of the Interim Constitution, and which is now an explicit value in section 1 of the 1996 Constitution. This chapter highlights the most significant aspects of the judgment. It shows the ripple effect

of the judgment in our jurisprudence, especially regarding the judicial trend of using the principle of legality to avoid applying the Promotion of Administrative Justice Act 3 of 2000 (PAJA).

The matter arose from a significant increase in property rates within the so-called Eastern Metropolitan Substructure that, together with the Greater Johannesburg Transitional Metropolitan Council (the TMC), constitutes the local government in the greater Johannesburg municipal area.[3] The increases were attacked because the council's resolutions to increase the rates were *ultra vires* or the budgets the council drew up were irregularly considered and approved.[4] The High Court rejected these contentions but granted leave to appeal to the Supreme Court of Appeal.[5] The Supreme Court of Appeal, however, was of the opinion that, because the case raised constitutional issues, the matter was outside its jurisdiction and should rather be decided by the Constitutional Court.[6]

Consequently, the Constitutional Court was called upon to decide whether the council's resolutions relating to the property rates increase were consistent with the (Interim) Constitution. Although the parties during the appeal proceedings in the Supreme Court of Appeal agreed that the council's resolutions constituted *administrative actions*, in the Constitutional Court, the respondents argued that the resolutions were *legislative* in nature and that section 24 of the Interim Constitution (the right to just administrative action) therefore did not apply.[7] The Court held that "labelling" state actions as "legislative", "administrative" or "quasi-judicial" may be problematic and that there is now a tendency to avoid these types of classification.[8] Before our democratic dispensation, the Court reasoned, "not only the powers but the very existence of local government depended entirely on superior legislatures".[9] The status of local government has undergone considerable changes since the adoption of the Interim Constitution. These governments now enjoy "a place in the constitutional order". They "have to be established by the competent authority" and "are entitled to certain powers, including the power to make by-laws and impose rates".[10]

The powers of local councils are not necessarily "delegated" powers merely because it is exercised by a local council. These powers could also be original powers derived from legislation and the Constitution.[11] Consequently, the Court held that a municipal council enacting by-laws in terms of the Constitution is a legislative function[12] while imposing rates, taxes and levies is generally also a power usually vested in elected legislative bodies and is therefore also legislative rather than administrative in nature.[13] Moreover, the Court argued that it is unnecessary to determine the nature of the local council's powers since the exercise of all powers by all organs of state in our constitutional dispensation is subject to constitutional review on the ground of "legality".[14] Although there is no express constitutional provision stating that a local government that acts outside constitutional and statutory authority is acting unconstitutionally, there is nothing new about requiring organs of state to remain within the express authority and powers given to them and viewing actions outside of those as *ultra vires* and therefore unlawful.[15] This is a "fundamental principle of the rule of law", in other words, "that the exercise of public power is only legitimate where lawful".[16] The Court further emphasised that the "rule of law – to the extent at least that it expresses this principle of legality – is generally understood to be a fundamental principle of constitutional law".[17] The Court found that the property rates were lawful and that the budgets were lawfully compiled and approved but the Court was equally divided as to the lawfulness of the levy imposed by the council. Consequently, the appeal had to fail.[18]

It is not necessary for the purposes of this discussion to consider the various challenges to the increased property rates in detail. Instead, this chapter considers the Court's approach to the rule of law, specifically the principle of legality and the gateway that this approach opened to an alternative avenue for judicial review. The chapter also investigates whether this approach is indicative of a particular view regarding judicial deference to the decisions of organs in other levels of

government and the ripple effect that this approach has had on the Court's later jurisprudence.

3.2 *Significant aspects of the judgment*

3.2.1 The rule of law and the principle of legality

The crux of the matter in the *Fedsure* case is that all government action, regardless of its nature, is subject to the Constitution and may be subjected to judicial review. This contention, the Court argued, is a consequence of the rule of law, which includes the principle of legality. The Court explained that

> *"[i]t seems central to the conception of our constitutional order that the legislature and executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law. At least in this sense, then, the principle of legality is implied within the terms of the interim Constitution."*[19]

The Court further held that the rule of law, and the principle of legality, now underlies and supplements the common law principles of *ultra vires* in our new constitutional order, while the principle of legality is encompassed in section 24 of the Interim Constitution with regard to "administrative actions".[20] Regarding legislative and executive actions, the principle of legality remains "implicit in the Constitution"[21] and, obviously, the rule of law is now also explicitly recognised in section 1 of the 1996 Constitution. Therefore, the principle of legality is implicit in the judicial review of all government action, whether it is of a legislative or administrative nature.

3.2.2 Judicial deference and PAJA avoidance

Although the Court in the *Fedsure* case did not expressly consider the matter of judicial deference, its approach can be discerned from the discussion of the status of local governments within our new democratic order. The Court started by highlighting that the Interim Constitution

brought about a significant change in the status of our local governments and local government areas, which were previously demarcated along racial lines.[22] The Court indicated that, prior to the Interim Constitution, the courts had the authority to review subordinate legislation, executive actions and administrative actions as part of the inherent jurisdiction of courts.[23] The legal principles developed in this process, the Court remarked, are often referred to as "administrative law".[24] The Court referred to the judgment in *South African Roads Board v Johannesburg City Council*,[25] which discussed various examples from foreign case law where the courts scrutinised the actions of local governments.[26] These foreign local governments, however, were all acting within systems of parliamentary sovereignty and exercised delegated, as opposed to original, powers – the courts, therefore, had to scrutinise their powers in terms of the principles of natural justice and it was not necessarily important to ascertain what kind of power (legislative, executive or administrative) was at issue.[27] This is completely different from the nature of local governments in terms of the Interim Constitution.[28] As our local governments are no longer purely exercising delegated powers, it is important to ask what type of power is being exercised.[29] The Court proceeded to distinguish between the two ways of enacting legislation, in other words, by elected legislatures (such as parliament, municipal councils etc) or by officials in terms of legislation (such as ministerial regulations etc). The former is purely a legislative power, while the latter is administrative in nature.[30]

The Court noted that, before our new democratic dispensation, the courts adopted a more deferential approach toward the legislative powers of parliament than toward administrative actions and subordinate legislative functions of lower levels of government – primarily because of the supremacy of parliament.[31] Administrative actions, as well as subordinate legislation (in other words, legislation made by legislative bodies other than parliament), could, however, be reviewed by courts.[32] This position was significantly changed by the adoption of the Interim Constitution, as all legislation

and actions by organs of state were now subject to judicial review, including legality testing.[33] As municipal councils now have original powers in terms of the Constitution, instead of delegated powers, the actions of municipal councils should no longer only be seen as subordinate or administrative in nature.[34] However, although not considered in the *Fedsure* judgment, there are additional steps in the process of reviewing administrative actions, for instance, a reasonableness review. Whereas, in terms of the principle of legality, there is no such consideration, which may make a legality review a more attractive and, arguably, more deferential type of review than a PAJA review. The judgment, therefore, although probably unwittingly, has led to a judicial trend to avoid classifying actions as "administrative" in order to apply the less stringent review process in terms of the principle of legality, rather than the more comprehensive review process in terms of PAJA.

3.3 Impact of the judgment

3.3.1 Impact of the use of the "principle of legality"

The principle of legality, as applied in the *Fedsure* judgment, has had a substantial influence on the judicial review jurisprudence of the Constitutional Court, especially in the area of administrative law. In *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa*, the question was raised whether a court has the power to review and set aside a decision by the President of South Africa to bring an act of parliament into force. The matter arose when the high court was requested to review and set aside the President's decision to bring the South African Medicines and Medical Devices Regulatory Authority Act 132 of 1998 into operation.[35] In the case, the Court pointed to the principle of legality as a means of reviewing executive actions which are not reviewable as administrative actions. The Court declared that the principle of legality is an incidence of the rule of law:

> *"The exercise of all public power must comply with the Constitution which is the supreme law, and the doctrine of legality which is part of that law."*[36]

Furthermore, the Court emphasised that the principle of legality comprises a rationality test but that a court could not substitute an executive's decision with their own simply because a court disagrees with that decision:

> *"Rationality in this sense is a minimum threshold requirement applicable to the exercise of all public power by members of the executive and other functionaries. Action that fails to pass this threshold is inconsistent with the requirements of our Constitution, and therefore unlawful. The setting of this standard does not mean that the courts can or should substitute their opinions as to what is appropriate, for the opinions of those in whom the power has been vested. As long as the purpose sought to be achieved by the exercise of public power is within the authority of the functionary, and as long as the functionary's decision, viewed objectively, is rational, a court cannot interfere with the decision simply because it disagrees with it, or considers that the power was exercised inappropriately."*[37]

The significance of the judgment is that it confirmed that no action is beyond the reach of the courts' review powers, not even powers that are executive (although not administrative) in nature. In subsequent cases, therefore, executive actions could be subjected to judicial review in terms of the principle of legality, even if they do not comply with the requirements of an "administrative action" as defined in the Promotion of Administrative Justice Act 3 of 2000 (PAJA). However, this created an avenue for parties and courts to circumvent the requirements for review in terms of PAJA in favour of a seemingly simpler avenue of review in terms of the principle of legality.

In *President of the Republic of South Africa v South African Rugby Football Union* (*SARFU*),[38] the Court was called upon to review the exercise of the powers of the President regarding

the circumstances in terms of which the President may be called to testify before a court of law.[39] The Court in *SARFU* argued that apart from the clause on administrative justice, the powers of the President are constrained by the principle of legality, which is implicit in the Constitution.[40] According to the Court, therefore, even though the President's powers cannot be classified as administrative in nature, that does not mean that it cannot be constrained.[41]

The Constitutional Court in *Masetlha v President of the Republic of South Africa*[42] had to decide on the constitutionality of the President's decision to dismiss the then Director-General of the National Intelligence Agency (NIA), Mr Masetlha. In this case, the majority of the Court found that the President's decision did not constitute an administrative action but was rather executive in nature and could, therefore, only be constrained on the basis of the principle of legality, as well as rationality.[43] Interestingly, in the dissenting minority judgment, Ngcobo J argued that, in terms of the rule of law, executive actions should not be arbitrary[44] and the question therefore is whether the principle of legality has (or should have) a procedural component.[45] Ngcobo J supported this argument by relying on the "deeper principle" of "fundamental fairness" that underlies the Constitution,[46] explaining that

> *"those who exercise public power must act fairly. In my view, the rule of law imposes a duty on those who exercise executive powers not only to refrain from acting arbitrarily, but also to act fairly when they make decisions that adversely affect an individual."*[47]

Extending the principle of legality to include procedural elements, however, brings the doctrine precariously close to the test for just administrative action in terms of PAJA.

Ngcobo CJ's reasoning in the *Masetlha* case was taken further in his majority judgment in *Albutt v Centre for the Study of Violence and Reconciliation*.[48] This case dealt with applications for presidential pardons for persons convicted

of crimes that were allegedly politically motivated but who did not participate in the reconciliation processes of the Truth and Reconciliation Commission (TRC).[49] The president wished to institute a special category of pardons for politically motivated crimes committed during the apartheid era, which was supposed to address the "unfinished business" of the TRC and to promote reconciliation and national unity.[50] For this purpose, the president sought to establish a multiparty Pardon Reference Group (PRG) to assist him when considering applications of persons made under the special political pardoning process.[51] The PRG would act in terms of the so-called Terms of Reference for a Special Dispensation on Presidential Pardoning Process Relating to Certain Offenders, which set out the responsibilities of the PRG and the factors that would play a role when considering applications in terms of this pardoning process, while the Explanatory Memorandum issued by the Department of Justice further explained the pardoning process and the values and principles that would underlie any decision made in terms of this special dispensation process.[52] However, neither the Terms of Reference nor the Explanatory Memorandum made any reference to the interests of the victims of these alleged political crimes, nor did the documents state whether such victims would have a right to make representations in this regard.[53] Various non-governmental organisations sought the participation of victims in the pardoning process but the presidency did not concede, inevitably leading to the litigation in the *Albutt* case.[54] Again, as in the *Masetlha* case, Ngcobo CJ preferred to approach the matter from a principle of legality perspective, which in his view, should include an element of procedural fairness.[55] Ngcobo CJ reasoned that procedural fairness should form part of legality review as the Constitution is underpinned by the "principles of accountability, responsiveness and openness" and, furthermore, because of the fact that the participation of victims was so central to the TRC's reconciliation process that "[t]o do otherwise is to undermine the TRC process and is contrary to the objective of promoting national unity and national reconciliation".[56] The majority judgment, therefore, concluded that the duty to allow

the participation of victims in the pardoning process is implicit in the specific features of the special pardoning dispensation and that the president's decision to exclude their participation was, therefore, irrational.[57] Kohn is of the opinion that in doing so, Ngcobo CJ not only introduced a procedural element in the principle of legality's rationality enquiry but also a type of proportionality test "by examining both the 'means' and the 'end' in question". In other words, the "means" (i.e. victim participation) had to promote the "ends" of the process (i.e. national unity and reconciliation).[58]

In a more recent case, *Speaker of the National Assembly v Public Protector; Democratic Alliance v Public Protector*,[59] the Constitutional Court had to determine the constitutional validity of the rules pertaining to the removal of Chapter 9 office-bearers in terms of section 194 of the Constitution. In essence, therefore, the case also involved the procedural element of the principle of legality. After the relevant portfolio committee found that there were no parliamentary rules which provided for the removal of the Chapter 9 institutions' office-bearers, the National Assembly drafted and adopted rules which provided for a seventeen-step procedure for the removal of these office-bearers.[60] In this case, the Public Protector stood to be removed in terms of these newly adopted parliamentary rules and therefore sought to challenge the rules on various grounds – including the principle of legality's rationality requirement. First, the Public Protector challenged the rationality of the rules on the basis that it irrationally authorised the National Assembly and the Speaker to appoint an independent panel headed by a judge which would be responsible for ascertaining whether there were grounds for the removal of the Chapter 9 office-bearer.[61] The Public Protector not only questioned the National Assembly's power to appoint a panel headed by a judge but also questioned the National Assembly's authority to adopt such rules from the outset.[62]

The Constitutional Court held that, as the independent panel would only have the power to make recommendations to parliament on the *prima facie* existence of evidence of

misconduct regarding the particular office-bearer, the appointment of the panel and the judge was not contrary to the separation of powers or the principle of legality's rationality requirement.[63] Furthermore, the Court held that the powers of parliament to adopt its own rules is enshrined in section 57 of the Constitution, which provides that the National Assembly "may make rules and orders concerning its business with due regard to representative and participatory democracy, accountability, transparency and public involvement".[64] Clearly, the parliamentary rules in question were adopted to enhance the accountability of the Chapter 9 institutions' office-bearers and the Court therefore rejected the Public Protector's contention that the appointment of the independent panel "offends the principle of legality".[65]

In reaching this conclusion, the Constitutional Court, therefore, confirmed the approach of the Court in the *Albutt* judgment in that it also applied a type of proportionality test in its legality review – in other words, the Court assessed how well the "means" (ie the rules) promoted the "ends" (i.e. the ensuring accountability). Second, the Public Protector contended that the rules did not comply with the principle of legality because it failed to afford the office-bearer in question adequate opportunities to be heard.[66] The Court held that the Public Protector's argument had no merit as the rules provide the office-bearer with two opportunities to be heard. First, the office bearer may make written submissions to the independent panel. Second, the office-bearer may make submissions to the National Assembly once it has been found that there is *prima facie* evidence of misconduct on the part of the office-bearer.[67] The Court consequently held that the procedure in terms of the rules was not irrational with regard to affording Chapter 9 office-bearers an opportunity to be heard.[68] In effect, although the Court did not make any express reference to it, the judgment again confirms the approach of the *Albutt* case, namely that procedural fairness and the *audi alteram partem* principle are both requirements of legality review.

However, not all members of the Constitutional Court are prepared to extend the application of the principle of legality's rationality enquiry. In *Law Society of South Africa v Minister for Transport*,[69] which dealt with the constitutionality of various provisions of the 2005 amendment to the Road Accident Fund Act 56 of 1996, Moseneke DCJ held that fairness should not form part of the rationality enquiry in terms of the principle of legality.[70] Moseneke DCJ further held that, where rights are allegedly limited by legislative provisions, it was unnecessary to employ the principle of legality and its rationality standard in order to fulfil the same function as the limitation clause in section 36 of the Constitution, as rationality already forms part of the proportionality analysis of section 36.[71]

Another interesting question is whether the principle of legality includes a duty to provide reasons for a decision, similar to the duty which forms part of the right to just administrative action in terms of section 33 of the Constitution and section 5 of PAJA. In *Judicial Service Commission v Cape Bar Council*,[72] the Supreme Court of Appeal had to decide whether the Judicial Service Commission's (JSC) omission to provide reasons for its decision not to recommend any candidates for two vacant judicial positions was rational. The Court held that because the JSC's powers flow from the Constitution, it has a duty not to act arbitrarily or irrationally and, as an organ of state in terms of section 239 of the Constitution, it also has to act in a way that is responsive, accountable and transparent in accordance with section 195 of the Constitution.[73] The Court accordingly held that the only inference that could be drawn from these provisions is that there must be a duty to provide reasons and that the JSC, therefore, as a general rule, is obliged to provide reasons for its decisions.[74] Kohn indicates that the judgment has further extended the rationality requirement in terms of the principle of legality to include the duty to give reasons – which is more extensive than the rationality enquiry in terms of PAJA itself, as the duty to give reasons is expressly provided elsewhere in section 5 of PAJA but does not, strictly speaking, form part of the requirement of rationality.[75] Furthermore, Kohn also rightly argues that, because of the *sui*

generis nature of the JSC's powers and its close connection to the policy formulation functions of the executive, the Court should have given separation of powers considerations more weight in the circumstances – which is also why the JSC's functions were excluded from administrative scrutiny in terms of PAJA in the first place.[76]

Further expansion of the rationality requirement in terms of the principle of legality was undertaken by the Constitutional Court in *Democratic Alliance v President of South Africa*.[77] In this case, the Constitutional Court, as foreshadowed by the minority judgment of Ngcobo J in *Masetlha*, as well as the *Albutt* case, extended the principle of legality's rationality enquiry to include a type of proportionality test. The *Democratic Alliance* case dealt with the rationality, and therefore the constitutional validity, of the President's decision to appoint Mr Simelane as the National Director of Public Prosecutions (NDPP).[78] Yacoob ADCJ indicated that the Court had to consider the following requirements in order to establish the rationality of the President's decision: "(i) the distinction between reasonableness and rationality and the relationship between means and ends; (ii) whether the process, as well as the ultimate decision, must be rational; (iii) the consequences for rationality if relevant factors are ignored; and (iv) rationality and the separation of powers."[79] On the face of it, these requirements already seem to go much further than a mere "rhyme and reason"- enquiry. It is, therefore, strange that Yacoob ADCJ insists that the rationality enquiry should be seen as something distinct from the reasonableness enquiry applicable in administrative matters when the test that the judgment later employs does not reflect this sentiment.[80] Notwithstanding the Court's explanation that the test for reasonableness is concerned with the decision itself, while the rationality enquiry is only concerned with the existence of a rational link between the "means and the ends",[81] the Court went on to argue that the rationality of the "process as well as... the merits" of the decision must be assessed.[82]

Respectfully, the assessment of the merits of a decision is virtually indistinguishable from the test for reasonableness

in administrative review and should not form part of a rationality enquiry. However, Yacoob ADCJ goes even further by arguing that the rationality enquiry also includes "the decision employed to achieve the purpose... [and] everything done in the process of taking that decision".[83] This means that if "a particular step... is... unrelated to the end", it could "taint the whole process with irrationality".[84] Similarly, with regard to ignoring factors relevant to a particular decision, the Court held that if the failure to consider such factors had a significant impact on the rationality of the entire process, the "final decision may be rendered irrational and invalid by the irrationality of the process as a whole".[85] Finally, with regard to the separation of powers, the Court ironically first pointed out that "[i]f executive decisions are too easily set aside, the danger of courts crossing boundaries into the executive sphere would loom large".[86] Furthermore, the Court argued that because rationality review is the "lowest possible threshold for the validity of executive decisions", it is difficult to see how the separation of powers can be undermined by rationality review alone.[87] However, as seen from the Court's interpretation of the rationality standard, it seems to encompass much more than a mere "rhyme and reason"-inquiry and is, therefore, much more than a "minimum standard" of review. Strangely enough, in contrast with Yacoob ADCJ's initial finding that the rationality enquiry is the "lowest possible threshold" for review and therefore cannot infringe upon the separation of powers, he proceeded to argue that rationality review does not amount to a lower standard than in terms of administrative review, finding that "[r]ationality does not conceive of differing thresholds".[88] Obviously, one cannot have it both ways. Either it is a lower standard of review, affording more deference regarding executive actions, or it is not. Kohn argues that although the trend of expanding the meaning and content of the principle of legality and its rationality requirement may act as a "vital check against... abuses" by the executive, it also shows a "lack of sensitivity to the tenets of our doctrine of separation of powers and the type of deference required by it".[89]

In another interesting judgment, *State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited*,[90] the Constitutional Court had to decide whether an organ of state that wants its own decision reviewed must do so in terms of the principle of legality or in terms of PAJA. The Court unanimously overturned the decision of the Supreme Court of Appeal which found that organs of state are bearers of the right to just administrative action in section 33 of the Constitution. The Constitutional Court therefore held that organs of state may only have their own decisions reviewed in terms of the principle of legality.[91]

3.3.2 The impact of "judicial deference" and "PAJA avoidance"

Judicial deference refers to the "institutional capacity of the courts in adjudicating matters better suited to the deliberation of administrative or executive bodies".[92] The "institutional capacity" of administrative and executive bodies could relate to "greater institutional competence, expertise, or constitutional/democratic legitimacy of an administrative body to decide a matter".[93] Therefore, the argument is that when decisions of an executive nature are involved, the courts should be more deferent than in the case of decisions of an administrative nature.

Deference was addressed in the case of *Minister of Defence and Military Veterans v Motau*,[94] where the Constitutional Court had to determine the constitutional validity of a decision by the minister to remove two directors, the Chairperson and Deputy Chairperson, from the board of the Armaments Corporation of South Africa (SOC) Ltd (Armscor). After finding that the decision to remove the directors was executive, rather than administrative, in nature (as the appointment and removal of directors on the board was closely related to policymaking and implementation),[95] the Court proceeded to review the decision in terms of the principle of legality and, more specifically, the requirement of rationality. The Court clearly stated that rationality is an objective standard and, in order to meet the standard of rationality, the power must

be rationally related to the purpose for which it was given.[96] Furthermore, rationality is also clearly distinguishable from the standard of reasonableness.[97] The Court, in an attempt to formulate an organisational model in order to determine when to apply either a legality review or an administrative review process, the Court set out certain factors to consider, including the deference that the courts had to afford executive organs.[98] For purposes of this discussion, we only focus on the Court's argument with regard to judicial deference. With regard to deference, the majority argued that a court should consider whether it would be appropriate to subject a particular exercise of power to a higher degree of scrutiny in terms of administrative review rather than a lower level of scrutiny in terms of the principle of legality and the rationality requirement.[99] Konstant, however, rightly points out that it may not be so simple to determine the degree of deference that should be afforded to different types of executive, legislative, administrative and judicial powers:

> *"[d]eference with respect to each of these categories exists on a sliding scale. Reasons for deference may operate differently within each category, and it would be difficult to ascertain a standard level of deference in every case of executive, judicial, legislative or administrative decisions."*[100]

In *Electronic Media Network Limited v e.tv (Pty) Limited*,[101] which dealt with the validity of the amendments to the Broadcasting Digital Migration Policy formulated by the minister of communications. The Court was satisfied that because the amendment concerned policy formulation, the action was executive in nature and, therefore, subject to review in terms of the principle of legality.[102] The Court, seemingly referring to the deference courts owe the executive branch, held that

> *"[t]he judicial arm would do well to resist the enticement or urge to inadvertently, yet impermissibly, encroach on the Executive's national policy-determination space on some elasticised rationality or other constitutional basis that purportedly justifies judicial intervention."*[103]

Konstant, however, questions whether the distinction between legality review and PAJA review can be sustained, especially if one considers the expansion that legality review has undergone already.[104] In other words, there is a possibility that rationality review may become so similar to PAJA review that they may become almost indistinguishable, making the level of deference owed by the court virtually the same with regard to executive and administrative actions. In order to determine the level of deference a court should afford another branch of government, Kavanagh argues that, instead of making a distinction between policy decisions and non-policy decisions, courts should rather differentiate between "the type of policy decision appropriate to the institutional features, competence, and legitimacy of the courts and the type of policy decision that is beyond that competence".[105] This argument seems to suggest that, instead of allowing more deference when a decision entails policy and less when it does not, there should be degrees of deference within legality review depending on the *type* of policy decision at stake.

In addition, there is the issue of courts using the principle of legality as a way of avoiding PAJA review. Konstant argues that the courts' preference for applying the principle of legality instead of PAJA review may be connected to the courts' apparent aversion to the definition of "administrative action" in terms of PAJA, as well as the courts' "inability to allow a class of decision to be unreviewable on the other".[106] *Pharmaceutical Society of South Africa v Minister of Health*; *New Clicks South Africa (Pty) Limited v Tshabalala-Msimang NO*[107] dealt with the validity of certain regulations made by the minister regarding the pricing of medication and dispensing fees. In this case, the Supreme Court of Appeal simply held that the "regulations had to withstand the test of legality" and that the debate whether to apply PAJA in this case "has no bearing on this judgment and I prefer to refrain from commenting" – which was not the case as this was a matter considered by the court *a quo*.[108] Hoexter argues that judgments like this reduce the importance of administrative review and PAJA itself.[109] Hoexter also rightly points out that it is strange that

the Supreme Court of Appeal so readily follows a fuzzy general principle, such as the principle of legality when a well-defined system of administrative review exists in terms of PAJA – which is against the principle of subsidiarity.[110] Even in the appeal to the Constitutional Court in *Minister of Health v New Clicks South Africa (Pty) Ltd*,[111] the judgment distinctly lacked unanimity on the question of whether PAJA was or should be applicable to regulations and the making of regulations.

3.4 Conclusion

From the discussion above, it is clear that the *Fedsure* case has had a profound and lasting impact on the control of executive power by the courts. In addition, the South African courts have developed and expanded the principle of legality in various judgments after its initial use in the *Fedsure* case to further assist in curtailing executive action. This chapter has by no means attempted to include each and every case that mentions the principle of legality but rather endeavoured to give a broad overview of the most prominent cases that best illustrate some of these judicial developments and expansions on legality review.

From the discussion of the case law above, it is evident that, at first, the courts merely confirmed the finding of the Constitutional Court in the *Fedsure* judgment, which found that executive actions that did not comply with the provisions of PAJA regarding administrative action were still reviewable in terms of the principle of legality as an aspect of the rule of law. This may also be seen from the decisions in *Pharmaceutical Manufacturers*, *SARFU* and the majority judgment in *Masetlha*.

However, in the minority judgment in *Masetlha,* it was already apparent that the courts were becoming more inclined to expand the principle of legality to include, among other things, a procedural element. This approach was applied explicitly in the majority judgment in *Albutt*, where the Court not only recognised that legality review's rationality requirement should include an element of procedural fairness but also a type of proportionality test. This reasoning was

again followed in the recent judgment of *Speaker of the National Assembly v Public Protector*. While in *Democratic Alliance v President of South Africa*, the Court extended the proportionality test in terms of the rationality requirement to such as extent that it may be said to come close to a test for reasonableness. By contrast, the Constitutional Court in *Law Society of South Africa v Minister for Transport* found that fairness should not form part of the rationality enquiry in legality review. Further development may be seen in the judgment of *Judicial Service Commission v Cape Bar Council*, where the Court further extended the principle of legality to include the duty to give reasons for a decision. Furthermore, in *State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited*, the Court confirmed that, as state organs are not bearers of the right to just administrative action in terms of the Constitution, they can only have their own decisions reviewed in terms of the principle of legality and not in terms of PAJA.

The *Fedsure* judgment, however, is also significant for another reason. The development and expansion of legality review have led to the availability of a seemingly simpler, parallel method of review to administrative review in terms of PAJA. Furthermore, the court's apparent aversion to the application of the principles of PAJA, combined with the doctrine of deference and the expansion of the content of legality review, has led to the so-called problem of "PAJA avoidance". This is why some authors, such as Konstant, believe that the distinction between administrative and legality review may not be sustainable.[112] The Constitutional Court has tried to establish a workable model to determine when to apply either legality review or PAJA-review to actions of the executive and to ascertain the level of deference that courts should afford different types of executive action – see, for example, *Motau* and *Electronic Media Network Limited v e.tv (Pty) Limited* cases. Nevertheless, some judgments, such as *Pharmaceutical Society of South Africa v Minister of Health; New Clicks South Africa (Pty) Limited v Tshabalala-Msimang NO*, have exhibited a distinct avoidance of the issue altogether, preferring to apply the principle of legality. On the other hand,

there are judgments such as *Minister of Health v New Clicks*, where the Constitutional Court was divided on the question of whether legality review or PAJA review should be applicable. These judgments make it clear that there is by no means unanimity among the courts on the application of either the principle of legality or PAJA review. This is unfortunate since this discord between the courts undermines legal certainty, while the apparent preference for legality review in cases that should be governed by PAJA subverts the principle of subsidiarity.

In conclusion, it is submitted that the *Fedsure* judgment remains significant because of its contribution to the review and curtailment of executive power based on the value of the rule of law. Although the review of public power and legality review's subsequent expansion and development by the courts is to be welcomed from an accountability perspective, it has not been without its challenges. It is hoped that the South African courts will further refine the applicability criteria of legality review in order to distinguish it from administrative review, which would lead to much-needed legal certainty.

Endnotes

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2 Corder "The development of administrative law in South Africa" in Quinot *et al Administrative Justice in South Africa: An Introduction* (2020) 2.
3 *Fedsure* (n 1) par 1.
4 *Fedsure* (n 1) par 16.
5 *Fedsure* (n 1) par 17; see *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1998 2 SA 1115 (SCA).
6 *Fedsure* (n 1) par 18–19.
7 *Fedsure* (n 1) par 21.
8 *Fedsure* (n 1) par 23–24.
9 *Fedsure* (n 1) par 38.
10 *Fedsure* (n 1) par 38.
11 *Fedsure* (n 1) par 39.
12 *Fedsure* (n 1) par 42.
13 *Fedsure* (n 1) par 45.
14 *Fedsure* (n 1) par 40.
15 *Fedsure* (n 1) par 54, 56.
16 *Fedsure* (n 1) par 56.
17 *Fedsure* (n 1) par 56.
18 *Fedsure* (n 1) par 115.
19 *Fedsure* (n 1) par 58.
20 *Fedsure* (n 1) par 59.
21 *Fedsure* (n 1) par 59.
22 *Fedsure* (n 1) par 2–3.
23 *Fedsure* (n 1) par 23.
24 *Fedsure* (n 1) par 23.
25 1991 4 SA 1 (A).
26 *Fedsure* (n 1) par 24.
27 *Fedsure* (n 1) par 25.
28 *Fedsure* (n 1) par 25.
29 *Fedsure* (n 1) par 26.
30 *Fedsure* (n 1) par 27.
31 *Fedsure* (n 1) par 28.
32 *Fedsure* (n 1) par 28.
33 *Fedsure* (n 1) par 32.
34 *Fedsure* (n 1) par 34–36.
35 2000 2 SA 674 (CC) par 1–8; also see *Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the Republic of South Africa* 1999 4 SA 788 (T).
36 *Pharmaceutical Manufacturers* (n 35) par 20.
37 *Pharmaceutical Manufacturers* (n 35) par 90.
38 2000 1 SA 1 (CC).

39 *SARFU* (n 38) par 1.
40 *SARFU* (n 38) par 148.
41 *SARFU* (n 38) par 148.
42 2008 1 SA 566 (CC).
43 *Masetlha* (n 42) par 76, 78.
44 *Masetlha* (n 42) par 176.
45 *Masetlha* (n 42) par 178.
46 *Masetlha* (n 42) par 179.
47 *Masetlha* (n 42) par 180.
48 2010 3 SA 293 (CC).
49 *Albutt* (n 48) par 1.
50 *Albutt* (n 48) par 4.
51 *Albutt* (n 48) par 5.
52 *Albutt* (n 48) par 5, 7.
53 *Albutt* (n 48) par 7.
54 *Albutt* (n 48) par 8.
55 Kohn "The burgeoning constitutional requirement of rationality and the separation of powers: Has rationality review gone too far?" 2013 *SALJ* 810 830; *Albutt* (n 48) par 71.
56 *Albutt* (n 48) par 71.
57 *Albutt* (n 48) par 72, 74
58 Kohn (n 55) 830.
59 (CCT 257/21; CCT 259/21; CCT 257/21) 2022 ZACC 1 (4 February 2022).
60 *Speaker of the National Assembly v Public Protector* (n 59) par 9, 14–15.
61 *Speaker of the National Assembly v Public Protector* (n 59) par 17.
62 *Speaker of the National Assembly v Public Protector* (n 59) par 74–75, 79, 84.
63 *Speaker of the National Assembly v Public Protector* (n 59) par 77–78.
64 *Speaker of the National Assembly v Public Protector* (n 59) par 79–80.
65 *Speaker of the National Assembly v Public Protector* (n 59) par 85.
66 *Speaker of the National Assembly v Public Protector* (n 59) par 88.
67 *Speaker of the National Assembly v Public Protector* (n 59) par 89.
68 *Speaker of the National Assembly v Public Protector* (n 59) par 91.
69 2011 1 SA 400 (CC).
70 *Law Society of South Africa v Minister for Transport* (n 69) par 39.

71 *Law Society of South Africa v Minister for Transport* (n 69) par 37.
72 2013 1 SA 170 (SCA).
73 *Judicial Service Commission v Cape Bar Council* (n 72) par 43.
74 *Judicial Service Commission v Cape Bar Council* (n 72) par 44–45.
75 Kohn (n 55) 833.
76 Kohn (n 55) 833.
77 2013 1 SA 248 (CC).
78 *Democratic Alliance v President of South Africa* (n 77) par 1.
79 *Democratic Alliance v President of South Africa* (n 77) par 12(b).
80 *Democratic Alliance v President of South Africa* (n 77) par 29; see also Kohn (n 55) 834.
81 *Democratic Alliance v President of South Africa* (n 77) par 29, 32.
82 *Democratic Alliance v President of South Africa* (n 77) par 33.
83 *Democratic Alliance v President of South Africa* (n 77) par 36.
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86 *Democratic Alliance v President of South Africa* (n 77) par 41.
87 *Democratic Alliance v President of South Africa* (n 77) par 42, 44.
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91 *State Information Technology Agency* (n 90) par 37.
92 Konstant "Administrative action, the principle of legality and deference – the case of *Minister of Defence and Military Veterans v Motau*" 2018 *CCR* 68 79.
93 Konstant (n 92) 79.
94 2014 5 SA 69 (CC).
95 *Motau* (n 94) par 47, 48.
96 *Motau* (n 94) par 69.
97 *Motau* (n 94) par 69.
98 *Motau* (n 94) par 33–44; also see Konstant (n 92) 77.
99 *Motau* (n 94) par 43.
100 Konstant (n 92) 77.
101 2017 9 BCLR 1108 (CC) (*Electronic Media Network*).
102 *Electronic Media Network* (n 101) par 22, 26.
103 *Electronic Media Network* (n 101) par 26.
104 Konstant (n 92) 77.
105 Kavanagh "Deference or Defiance? The Limits of the Judicial Role in Constitutional Adjudication" in Huscroft (ed) *Expounding the Constitution: Essays in Constitutional Theory* (2008) 194 197.
106 Konstant (n 92) 75.
107 2005 3 SA 238 (SCA).

108 *New Clicks* (SCA) (n 107) par 94.
109 Hoexter "'Administrative action' in the courts" 2006 *Acta Juridica* 303 317.
110 Hoexter (n 109) 317, 318.
111 2006 2 SA 311 (CC).
112 Konstant (n 92) 77.

Chapter 4

Customary law and its development: legal certainty versus flexibility?

Bhe v Khayelitsha Magistrate; Shibi v Sithole; South African Human Rights Commission v President of the Republic of South Africa[1]

"When dealing with indigenous law every attempt should be made to avoid the tendency of construing indigenous law concepts in the light of common law concepts or concepts foreign to indigenous law." (Bhe v Khayelitsha Magistrate; Shibi v Sithole; South African Human Rights Commission v President of the Republic of South Africa par 156)

4.1 Introduction

Indigenous laws and customs form an important part of the lives of millions of South Africans. The South African Constitution expressly recognises customary law and the role of traditional leaders and authorities in section 211. Section 39(2) – (3) of the Constitution further provides that the values underlying the Constitution must be promoted when customary law is developed by the courts and that the Bill of Rights does not deny the existence of any other rights and freedoms recognised in terms of customary law. At the same time, sections 30 and 31 of the Constitution guarantee cultural and language rights. However, like the South African common law, indigenous law is now subject to the supreme Constitution and may be struck down if found to be contrary to its provisions. Although rules of customary law may form

part of the culture and lived reality of many South Africans, the application of these rules may sometimes result in discrimination. This problem is well illustrated in the decision at hand. In *Bhe v Khayelitsha Magistrate; Shibi v Sithole; South African Human Rights Commission v President of the Republic of South Africa*, the Constitutional Court considered three similar cases together. All three cases related to the constitutionality of indigenous inheritance laws that favoured males over females and the effect that the rule of male primogeniture had on the rights of women and children to inherit in terms of indigenous law. In all three cases, the Constitutional Court declared the indigenous customary law rule of primogeniture unconstitutional and struck down the legislative framework regulating intestate deceased estates of black South Africans, as well as section 23 of the Black Administration Act.[2] Section 23 of the Black Administration Act created a parallel system of intestate succession regulating the deceased estates of black South Africans, alongside the provisions of the Intestate Succession Act,[3] which provided for the intestate succession of white South Africans.[4] Purportedly, this was done to preserve the indigenous rules and customs of black communities regarding intestate succession.[5] *Bhe v Khayelitsha Magistrate* concerned the exclusion of two minor daughters from inheriting from their father due to the indigenous law rule of male primogeniture,[6] while in the second case, *Shibi v Sithole*, the sister of a deceased male was excluded from inheriting from her brother due to the same rule.[7] In the last case, *South African Human Rights Commission v President of the RSA*, the Commission sought an order declaring section 23 of the Black Administration Act unconstitutional as it infringed the constitutional rights to equality, dignity and the rights of children.[8] According to the Court, section 23 of the Act is "manifestly discriminatory"[9] and outdated since it ossified official customary law and grossly violated the rights of black African persons relative to white persons.[10] The Court had the following to say about section 23 of the Black Administration Act:

> *"It could be argued that despite its racist and sexist nature, section 23 gives recognition to customary law and acknowledges the pluralist nature of our society. This is however not its dominant purpose or effect. Section 23 was enacted as part of a racist programme intent on entrenching division and subordination. Its effect has been to ossify customary law. In the light of its destructive purpose and effect, it could not be justified in any open and democratic society."*[11]

With regard to the customary law rule of male primogeniture, the Court held that it discriminated unfairly against women and illegitimate children on the grounds of race, gender and birth.[12] Furthermore, the Court held that it was not possible to develop the rule of primogeniture in order to bring it in line with the Constitution[13] and development on a "case by case basis" would make changes to this indigenous law rule slow and uncertain.[14] The result of the order was that all deceased estates were to be governed until further legislation was enacted by the Intestate Succession Act,[15] whereby widows and children could inherit regardless of their gender or legitimacy.[16]

The *Bhe* judgment remains significant since it struck down a considerable part of the indigenous customary law on inheritance due to discrimination against women, girl children, extra-marital children (and men other than the eldest male relative) on the basis of race, sex, gender, social origin and birth. The judgment, therefore, confirmed the principle that all law, including customary law and common law, is subject to the Constitution as the supreme law. The issue, however, remains controversial, and the majority judgment is criticised by some, such as Himonga, who favours the "case by case"-approach suggested in the Court's minority judgment.[17]

4.2 Significant aspects of the judgment

4.2.1 Constitutional recognition of customary law and its subjection to the Constitution

In contrast to our previous dispensation's disregard of customary laws and traditions, the Constitution now gives express recognition to customary law by entrenching various institutions unique to it, such as traditional leaders and authorities.[18] The Constitutional Court held that the

> *"Constitution itself envisages a place for customary law in our legal system. Certain provisions of the Constitution put it beyond doubt that our basic law specifically requires that customary law should be accommodated, not merely tolerated, as part of South African law, provided the particular rules or provisions are not in conflict with the Constitution. Sections 30 and 31 of the Constitution entrench respect for cultural diversity. Further, section 39(2) specifically requires a court interpreting customary law to promote the spirit, purport and objects of the Bill of Rights. In similar vein, section 39(3) states that the Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by customary law as long as they are consistent with the Bill of Rights. Finally, section 211 protects those institutions that are unique to customary law. It follows from this that customary law must be interpreted by the courts, as first and foremost answering to the contents of the Constitution. It is protected by and subject to the Constitution in its own right."*[19]

Furthermore, the Constitution, as the supreme law of the Republic, applies to all legal rules, including customary law.[20] The Constitutional Court in *Bhe* confirmed that rules of customary law could not be found unconstitutional merely because it differs from common-law rules or legislative provisions – the question that should be answered is whether customary rules are compatible with the Constitution, not whether they are different or provide similar remedies as common law or legislation.[21] This is in line with an earlier

decision of the Court in *Alexkor Ltd v Richtersveld Community*, where the Court stated that the validity of customary law must be determined with reference to the Constitution, not the common law.[22] The majority and the minority of the Court confirmed that customary law should be interpreted within "its own setting" and not "through the prism of the common law or other systems of law".[23] This approach, according to the Court, previously led to the "fossilisation and codification of customary law which in turn led to its marginalisation" and denied it an "opportunity to grow in its own right and to adapt itself to changing circumstances".[24] With regard to customary law, therefore, the Court in the *Bhe* case made three observations. First, customary law is not static. Attempts to harmonise its provisions with the Constitution are constitutionally sanctioned. Second, customary law may be amended by legislative interventions by Parliament. Third, the Constitution envisages that customary law may be changed, regulated or implemented by means of national legislation.[25]

4.2.2 "Living" customary law and its development

The Court in the *Bhe* case further highlighted some of the positive aspects of customary law which relate to the so-called "living" character of customary law rules, specifically: its inherently flexible nature; its consensus-seeking approach; and its emphasis on family and community structures and fostering communitarian values and traditions (such as ubuntu).[26] Although the Court's acknowledgement of the "living" nature of customary law is a significant aspect of the judgment, the Court's approach has been criticised, not only in the minority judgment but also in subsequent cases dealing with customary law and its development.

According to the majority in the *Bhe* judgment, referring to the decision in the *Richtersveld* case, customary law is not "fixed" or "formally classified", but rather "evolves as the people who live by its norms change their patterns of life".[27] In reality, however, official South African customary law has not developed to adjust to the changing circumstances and the lived reality of the community, primarily because these

rules have been codified in legislation and textbooks and have therefore remained unchanged.[28] Consequently, the "official" customary law rules, for instance regarding the law of succession, are not observed in practice or are observed differently.[29] The Court observed that "official customary law as it exists in the text books and in the Act is generally a poor reflection, if not a distortion of the true customary law", while "true" customary law "recognises and acknowledges the changes which continually take place" in society.[30] According to the Court, "official" customary law has been distorted and has been interpreted in a way that overemphasises its "patriarchal" features and undervalued its "communitarian ones".[31] While rules of Roman-Dutch law were systematically reformed by removing its patriarchal features, customary law rules remained unchanged in this regard[32] – resulting in the "formalisation and fossilisation of a system which by its nature should function in an active and dynamic manner".[33] Ultimately, the majority of the Court therefore found that the customary law rule of male primogeniture, in terms of the customary law of succession, could not be developed to comply with the right to equality in the bill of rights and therefore had to be found unconstitutional.[34] However, the question that arises regarding this approach is whether the living nature of customary law is best served by a uniform approach, such as that suggested by the majority of Constitutional Court by declaring the rule of male primogeniture unconstitutional, or whether a case-by-case approach would not have been more appropriate.[35] The majority held that development of customary law rules on a case-by-case basis would be too slow to effect meaningful change to customary law and would result in legal uncertainty and a lack of uniformity, as different courts may develop different solutions for similar problems.[36]

In the Court's view, a case-by-case approach to the development of the customary law would not adequately protect the right to equality in this instance – a more decisive approach was therefore necessary.[37] Although the Court conceded that the legislature was better suited to address the deficiencies of the customary law of succession

by means of legislative intervention, the Court was of the opinion that such legislative initiative would unreasonably delay an effective remedy being given to those affected by the offending customary law rules.[38] In the Court's view, the only way that the defect in question could be remedied was to declare the relevant rules of the customary law of succession unconstitutional and let the provisions of the Intestate Succession Act 81 of 1987 apply in all instances of intestate succession, with due regard to some of the unique characteristics of customary unions, such as polygynous marriages.[39]

The minority judgment in the case, however, portrays a different interpretation of what constitutes "living" customary law. Contrary to the majority judgment, Ngcobo J, in his minority judgment, held that the customary law rule of male primogeniture could be developed in order to comply with the Constitution.[40] According to Ngcobo J, customary law rules need to be interpreted within a particular social context.[41] As the customary law is based on a system portraying "reciprocal duties and obligations among the family members" (encapsulated by the indigenous value of *ubuntu*), customary law rules strive to make sure that "every family member had access to basic necessities of life such as food, clothing, shelter and healthcare".[42] The head of the family played an important role in this regard. Upon his death, someone had to take over the responsibilities of the head of the family, which would include taking care of family members and minor children and common family property.[43] Ngcobo J stressed that in terms of customary law, in contrast to common law, there was an important difference between "succession" and "inheritance" – where the former refers to a person "stepping into the shoes of the deceased" and taking over the person's responsibilities (not necessarily inheriting the deceased's property), while the latter relates to acquiring ownership of property of the deceased.[44] This meant that, while the rule of male primogeniture therefore discriminated against minors and younger siblings, such discrimination in Ngcobo J's view was not necessarily unjustifiable, as minor children could not

take over the responsibilities of the family head, while older siblings have a duty to take care of younger family members.[45] Ngcobo J, however, conceded that with regard to women, the rule of male primogeniture unjustifiably limits their right to equality and the rule, therefore, can "no longer be justified in the present day and age" with regard to women.[46] Accordingly, the minority judgment held that the male primogeniture rule should be developed in order to include women, as this best reflects the "living" customary law of succession. Regarding the development of customary law, Ngcobo J found that the courts have an obligation to preserve and develop customary law rather than strike down such rules.[47]

When developing customary law, "in order to adapt it to the changed circumstances requires the Court to have regard to what people are actually doing", in other words, "true" or "living" customary law.[48] Ngcobo J stressed that, in his view, customary law should not be struck down or replaced but be accepted as part of the country's pluralist legal system and the instances where these rules are applicable should be regulated.[49] This approach to customary law is also followed in various African countries.[50] Ngcobo J argued that such an approach to customary law would recognise the South African democracy's commitment to promoting diversity.[51] Ngcobo J concluded that customary law should "be respected and accorded a place in our legal system. It must not be allowed to stagnate as in the past or disappear".[52]

4.3 Impact of the judgment

4.3.1 Impact of the constitutional recognition of customary law and the impact of the development of "living" customary law

As the recognition of customary law and the development of "living" customary law is so closely related in the *Bhe* judgment, these aspects are discussed together in this section. In the cases that followed the *Bhe* judgments, the courts, however, seem to have found resonance with the minority

judgment in the *Bhe* case – opting to use a more flexible approach to customary law rules than was purportedly followed by the majority of the Court. In *Gumede (born Shange) v President of the Republic of South Africa*,[53] for instance, the Constitutional Court was called upon to confirm an order of constitutional invalidity made by the High Court pertaining to certain sections of the Recognition of Customary Marriages Act,[54] as well as provisions of the KwaZulu Act on the Code of Zulu Law[55] which subjected wives to the marital power of their husbands regarding property. The impugned provisions were challenged to the extent that it created different matrimonial property regimes for customary marriages entered into before and after the commencement of the Act. The Court pointed out, similar to the judgment in the *Bhe* case, that during South Africa's pre-democratic period, "customary law was entirely prevented from evolving and adapting as the changing circumstances of the communities required".[56] The Court further noted that courts must not only recognise and apply customary law but it also has a duty to develop it.[57] Furthermore, the Court held that many crucial constitutional goals are served by adapting customary law. First, such adaptation ensures that customary law aligns with our supreme law, its principles and standards, as well as with global human rights norms.[58] Second, such modification would liberate customary law from its impoverished history.[59] Finally, it would realise and affirm the plural nature of our legal system, which is governed by the Constitution.[60] Moseneke DCJ, in a unanimous judgment, held that the provisions in question were patently discriminatory towards women in customary marriages on the basis of gender[61] and further stated that such a marital property system "renders women extremely vulnerable by not only denuding them of their dignity but also rendering them poor and dependent".[62] The Court rightly pointed out that customary marriages should be viewed within their own context and not "through the prism of the proprietary marital regimes under the common law or divorce legislation that regulates civil marriages", as customary marriages do not "place a premium on the dichotomy between marriages in and out of

community of property".[63] Consequently, the Court found no justification for the unfair discrimination against women in customary marriages and found the impugned provisions unconstitutional. [64]

Purportedly, a flexible approach to the recognition and development of customary law rules was also followed in *Shilubana v Nwamitwa*,[65] where the Court was called upon to decide the validity of the development of customary law rules by a traditional community regarding traditional leadership and status. As the *Bhe* judgment left open the question as to the constitutionality of the rule of male primogeniture in other contexts, such as traditional status and leadership, the Court in *Shilubana* had to decide whether this rule could be developed by the traditional community. The Court, in accordance with its decision in *Bhe*, held that customary law, similar to other rules of law, is deserving of respect but also needs to accord with the Constitution.[66] The Court in *Shilubana* noted that customary law "is a body of law by which millions of South Africans regulate their lives and must be treated accordingly".[67] In setting out its approach to customary law, the Court emphasised that the content of the customary law rules in question should first be determined by considering the past practice of the particular community and the functioning of the rules within the particular traditional setting.[68] Second, the Court stressed that customary law should not be allowed to stagnate but that traditional communities' right to develop their own customary law rules "to meet the needs of a rapidly changing society" should be "respected and facilitated".[69] With regard to "living customary law", the Court held that where the content of such rules is not immediately clear, evidence of the present practice of the particular community, as well as any developments, should be considered.[70]

However, the *Shilubana* case differs from the *Bhe* case in that the rules of customary law in the *Shilubana* matter were already developed by the traditional community, whereas the question in *Bhe* was whether the Court should develop the particular customary law rule or declare it unconstitutional where the traditional community has not

embarked on such developments. According to the *Shilubana* case, the development of a customary law rule by a traditional community is different from the development of such rules by a court – where such development occurs within such a community, "the court must strive to recognise and give effect to that development, to the extent consistent with adequately upholding the protection of rights".[71] According to the Court in *Shilubana*, therefore, "deference should be paid to the development by a customary community of its own laws and customs where this is possible".[72] It is therefore submitted that the approach in the *Shilubana* case is more in line with the flexible approach to customary law proposed by Ncgobo J in the *Bhe* case, although the Court's reasoning behind its preference seems unconvincing. According to the *Shilubana* case, the reason for the Court's decision in the *Bhe* case to replace the customary rules relating to the succession was to counter legal uncertainty and protect rights, whereas in the *Shilubana* case, the court was of the opinion that these considerations were not important with regard to traditional leadership and status.[73] However, it may well be asked whether legal certainty and protection of rights are not also important considerations with regard to succession to traditional title and status and indeed with regard to most, if not all, legal disputes.

In *Mayelane v Ngwenyama*,[74] the Constitutional Court had to rule on the existence and interpretation of customary law rules relating to an alleged customary law requirement that a first wife in a polygynous marriage must consent to her husband's subsequent marriage(s) for those marriages to be considered valid in terms of customary law. Significantly, the Court noted that "[p]aradoxically, the strength of customary law – its inherent adaptive flexibility – is also a potential difficulty when it comes to its application and enforcement in a court of law".[75] The Court recognised the status of customary law in terms of the Constitution as a separate system of law that "lives side-by-side with the common law and legislation" and acknowledged that this system of law "requires innovation in determining its 'living' content, as opposed to the potentially stultified version contained in past legislation

and court precedent".[76] Regarding the approach to be followed toward customary law and its interpretation and development, the Court rightly noted that terms such as "consent" must be understood within the particular customary law setting and that the courts must not "impose common-law or other understandings of that concept" in a customary law setting.[77] Furthermore, the Court emphasised that customary law's development must occur in a participatory way, "reflected by the voices of those who live the custom".[78] The Court further held that although customary law is uniform, it may have various manifestations.[79]

The Court, considering the Xitsonga customary practice at the time of the marriage in question, held that a first wife needed to be informed of any subsequent marriages and that the wife in question was not informed in the particular case.[80] Furthermore, the Court questioned whether it would be compatible with the rights to dignity and equality of a wife to allow her husband to marry another woman without her consent.[81] The Court pointed out that "[w]hile we must accord customary law the respect it deserves, we cannot shy away from our obligation to ensure that it develops in accordance with the normative framework of the Constitution".[82] According to the Court, "[r]espect for human dignity requires that her husband be obliged to seek her consent and that she be entitled to engage in the cultural and family processes regarding the undertaking of a second marriage".[83] The Court, therefore, concluded that Xitsonga customary law must be developed to include a requirement that the consent of the first wife is necessary for the validity of a subsequent customary marriage. This is in accordance with this Court's jurisprudence requiring that living customary law be consistent with the Constitution.[84] This result also complies with the requirements of equality and human dignity.[85]

In the case, *Sengadi v Tsambo; In Re: Tsambo*,[86] the High Court had to decide whether the handing over of the bride was an essential element of a valid customary marriage. Important for purposes of this discussion, the Court pointed out that our customary law is not "rigid, static, immutable

and ossified" but rather that customary law has evolved and adapted to changing socio-economic conditions and modern cultural norms and practices.[87] According to the Court, "living customary law" is "dynamic, pragmatic and constantly adapting to the interactive social and economic imperatives which infuse living customary law with flexibility in its content and application".[88] Consequently, the Court concluded that, in terms of flexible living customary law, the requirement of handing over the bride could be waived or done symbolically.[89] The Court further held that customary law rules in the modern era have to be consistent with the spirit and purport of the Constitution and its underlying values.[90] In addition, the Court found that customary law rules should therefore keep pace with the changing norms and customs of African communities and adapt to be consistent with the Bill of Rights.[91] The Court held that the custom of "handing over the bride", therefore, also needs to adapt and keep pace with socio-economic conditions and constitutional values, taking into account the rights of women and previous discrimination against women.[92]

4.4 Conclusion

The discussion has shown that the *Bhe* judgment has had a significant influence on the South African courts' approach to customary law matters in subsequent judgments, especially regarding the recognition of customary law and its subjection to the Constitution. However, the flexible approach of the minority judgment of Ncgobo J in the *Bhe* case especially has proven to be the most persuasive.

Sibanda and Mosaka argue that the majority judgment (and to a lesser extent the minority) in the *Bhe* case inadvertently perpetuated perceptions of the superiority of common law above customary law.[93] They aver that what the judgment seems to imply is that if a woman's rights have been violated in terms of customary law, it can only be vindicated in terms of the Constitution and the common law.[94] In so doing, the Court, according to Sibanda and Mosaka, reaffirmed the "exalted" position of the common law, despite the common and customary law apparently being placed on equal

footing in terms of the Constitution.[95] Sibanda and Mosaka therefore argue that this approach emphasises "Western cultural dominance in South Africa's legal culture as well as the concomitant deeper entrenchment of the prevailing alienation between the two systems".[96] Consequently, Sibanda and Mosaka suggest that the courts adopt an approach to customary law rules that recognises and promotes the values underlying the Constitution, without replacing those rules with common law ones.[97] According to Weeks, notwithstanding the *Bhe* Court's recognition of the importance of customary law, its failure to develop the customary law rule of male primogeniture is most regrettable.[98] Furthermore, Weeks points out that, although the Court acknowledged the equal status of customary and common law, the Court still opted to replace the relevant customary law rule with provisions from civil legislation.[99] The Court therefore "failed to live out its commitment to treating customary law equally beyond mere rhetoric" and neglected to develop customary law as required by the Constitution.[100] In addition, Weeks criticises the judgment on the basis that it has had minimal impact on the lives of women (especially women in rural areas) who live in accordance with customary law.[101] Weeks believes that it would be wrong to assume that a "single default [approach] put in place by *Bhe* is appropriate to achieve gender equality and protect women as a vulnerable group" in all instances.[102] Therefore, Weeks seems to favour Ngcobo J's more fluid approach in the minority judgment which emphasises family involvement and agreement in succession matters.[103] Such an approach could therefore be adapted to the particular circumstances of each succession matter, although this would mean that the application of customary succession rules could lead to legal uncertainty.

The Constitutional Court's approach to the development of (or rather the choice not to develop) the customary law in the *Bhe* decision, although severely criticised, remains a significant decision regarding customary law. On the one hand, it could be argued that the majority of the Court's choice not to develop the customary rule of male primogeniture is either

based on a failure to recognise the equal status of customary and common law or a failure to appreciate the social context of the rule in question. On the other hand, it could be argued that the Court's approach is based on the supremacy of the Constitution and the importance of the right to equality in an open and democratic society based on the values of human dignity, equality and freedom.

This chapter has strived to give a broad overview of various cases dealing with issues pertaining to customary law, which best illustrated the influence of the *Bhe* case, especially its minority judgment. In the *Gumede*[104] judgment, for example, the legacy of the *Bhe* decision is evident in the Court's recognition of customary law and the abolishment of the impugned statutory provisions, which codified certain aspects of customary marriages to the extent that it was found to be inconsistent with the Constitution. The influence of the minority judgment in the *Bhe* case's flexible approach to customary law is especially evident in the *Gumede* judgment, where the Court opined for a contextual interpretation of customary law and for an approach to customary law that does not view customary rules through a common law lens.[105] Similarly, in the *Shilubana*[106] matter, the Court recognised the importance of the development of customary law rules and that customary law should not be allowed to stagnate but should be allowed to keep up with current social norms and customs.[107]

The *Shilubana* judgment, in accordance with the flexible approach suggested in the minority judgment in the *Bhe* case, further held that the development of customary law by traditional communities themselves should be treated with deference by courts – suggesting that courts should be cautious about interfering with customary law rules which have already undergone development by traditional communities, as long as those developments are constitutionally compliant.[108] In the *Mayelane*[109] matter, the Court expressly recognised the flexible and "living" nature of customary law, emphasising that its development should be participatory in nature and consider the current norms and customs of those who live according to

its prescripts.[110] Finally, in *Sengadi v Tsambo*,[111] the High Court also found favour with the minority decision in the *Bhe* case, holding that "living customary law" is flexible and adapts to the norms, practices and socio-economic considerations of those who live by customary laws.[112] Importantly, in *Sengadi v Tsambo*, the court actively developed the rule on "handing over the bride" as an element of a valid customary marriage, holding that it was not an essential prerequisite of a valid marriage but could be waived by the parties or done in a symbolic way.[113]

In conclusion, it is submitted that the *Bhe* judgment remains significant regarding the recognition of the status of customary law as a fully-fledged set of legal rules that exists alongside the common law but is also subject to the Constitution as the supreme law. The pluralistic nature of South African law is what makes our law unique and diverse, but it may also lead to legal uncertainty. Perhaps the most important contribution of the majority judgment in the *Bhe* case, although contested by some, is that it created legal certainty regarding the customary law of succession. The cases following the *Bhe* decision, however, portray a different interpretation of the judgment – one that is consistent with the flexible approach to customary law rules, which was suggested in Ncgobo J's minority judgment. The flexible approach, however, is also not without its challenges. Ascertaining the norms and practices of a particular traditional community may be more difficult than it sounds. In addition, different traditional communities may have similar rules but apply them differently. Deciding and developing all customary law matters individually, as opposed to having a uniform set of customary law rules that may be applied in all cases, may prove challenging. It is hoped that the courts will continue to steer the tricky course between the flexible approach to customary law rules, legal certainty and being mindful of not viewing customary law rules through a common law lens.

Endnotes

1 2005 1 SA 580 (CC).
2 38 of 1927.
3 81 of 1987.
4 *Bhe* (n 1) par 1.
5 *Bhe* (n 1) par 2, 40.
6 *Bhe* (n 1) par 9–20.
7 *Bhe* (n 1) par 21–28.
8 *Bhe* (n 1) par 29–31.
9 *Bhe* (n 1) par 68.
10 *Bhe* (n 1) par 72.
11 *Bhe* (n 1) par 72.
12 *Bhe* (n 1) par 91–93.
13 *Bhe* (n 1) par 94.
14 *Bhe* (n 1) par 112.
15 81 of 1987.
16 *Bhe* (n 1) par 136.
17 Himonga "Reflection on *Bhe v Magistrate Khayelitsha*: In Honour of Emeritus Justice Ngcobo of the Constitutional Court of South Africa" 2017 *SAPL* 1–18.
18 s 211 of the Constitution.
19 *Bhe* (n 1) par 41.
20 See ss 2 and 8(1) of the Constitution; see also the minority judgment, *Bhe* (n 1) par 148.
21 *Bhe* (n 1) par 42.
22 2003 12 BCLR 1301 (CC) par 51.
23 *Bhe* (n 1) par 43, 148.
24 *Bhe* (n 1) par 43.
25 *Bhe* (n 1) par 44.
26 *Bhe* (n 1) par 45.
27 *Bhe* (n 1) par 81; *Richtersveld* (n 22) par 52.
28 *Bhe* (n 1) par 82.
29 *Bhe* (n 1) par 84.
30 *Bhe* (n 1) par 86.
31 *Bhe* (n 1) par 89.
32 *Bhe* (n 1) par 90.
33 *Bhe* (n 1) par 90.
34 *Bhe* (n 1) par 94, 97, 109; Also see *Mthembu v Letsela* 2000 3 SA 867 (SCA) where the Supreme Court of Appeal declined to make a finding as to the constitutional validity of the rule of male primogeniture in the customary law of succession.
35 See *Bhe* (n 1) par 110.
36 *Bhe* (n 1) par 112.
37 *Bhe* (n 1) par 113.
38 *Bhe* (n 1) par 115.
39 *Bhe* (n 1) par 117–119.

40 *Bhe* (n 1) par 139.
41 *Bhe* (n 1) par 162.
42 *Bhe* (n 1) par 163.
43 *Bhe* (n 1) par 165.
44 *Bhe* (n 1) par 161, 167-172.
45 *Bhe* (n 1) par 180-183.
46 *Bhe* (n 1) par 187-191.
47 *Bhe* (n 1) par 215.
48 *Bhe* (n 1) par 219.
49 *Bhe* (n 1) par 235.
50 *Bhe* (n 1) par 235.
51 *Bhe* (n 1) par 235.
52 *Bhe* (n 1) par 236.
53 2009 3 SA 152 (CC).
54 120 of 1998.
55 16 of 1985.
56 *Gumede* (n 53) par 20.
57 *Gumede* (n 53) par 21.
58 *Gumede* (n 53) par 22.
59 *Gumede* (n 53) par 22.
60 *Gumede* (n 53) par 22.
61 *Gumede* (n 53) par 34.
62 *Gumede* (n 53) par 36.
63 *Gumede* (n 53) par 43.
64 *Gumede* (n 53) par 44-49.
65 2009 2 SA 66 (CC).
66 *Shilubana* (n 65) par 43.
67 *Shilubana* (n 65) par 43.
68 *Shilubana* (n 65) par 44.
69 *Shilubana* (n 65) par 45.
70 *Shilubana* (n 65) par 46.
71 *Shilubana* (n 65) par 48-49.
72 *Shilubana* (n 65) par 49.
73 *Shilubana* (n 65) par 76-77.
74 2013 4 SA 415 (CC).
75 *Mayelane* (n 74) par 25.
76 *Mayelane* (n 74) par 43.
77 *Mayelane* (n 74) par 49.
78 *Mayelane* (n 74) par 50.
79 *Mayelane* (n 74) par 51.
80 *Mayelane* (n 74) par 61.
81 *Mayelane* (n 74) par 71.
82 *Mayelane* (n 74) par 71.
83 *Mayelane* (n 74) par 73.
84 *Mayelane* (n 74) par 75.
85 *Mayelane* (n 74) par 75.

86 (40344/2018) 2018 ZAGPJHC 666; 2019 1 All SA 569 (GJ) (8 November 2018).
87 *Sengadi v Tsambo* (n 86) par 20.
88 *Sengadi v Tsambo* (n 86) par 21.
89 *Sengadi v Tsambo* (n 86) par 21.
90 *Sengadi v Tsambo* (n 86) par 24.
91 *Sengadi v Tsambo* (n 86) par 31.
92 *Sengadi v Tsambo* (n 86) par 35–37.
93 Sibanda and Mosaka "*Bhe v Magistrate, Khayelitsha*: A cultural conundrum, Fanonian alienation and an elusive constitutional oneness" 2015 *Acta Juridica* 256 278.
94 Sibanda and Mosaka (n 93) 278.
95 Sibanda and Mosaka (n 93) 278.
96 Sibanda and Mosaka (n 93) 278.
97 Sibanda and Mosaka (n 93) 279.
98 Weeks "Customary succession and the development of customary law: The *Bhe* legacy" 2015 *Acta Juridica* 215 216.
99 Weeks (n 98) 216.
100 Weeks (n 98) 216–217.
101 Weeks (n 98) 217.
102 Weeks (n 98) 252.
103 Weeks (n 98) 252–253.
104 *Gumede* (n 53).
105 *Gumede* (n 53) par 43.
106 *Shilubana* (n 65).
107 *Shilubana* (n 65) par 45.
108 *Shilubana* (n 65) par 49.
109 *Mayelane* (n 74).
110 *Mayelane* (n 74) par 25, 50.
111 *Sengadi v Tsambo* (n 86).
112 *Sengadi v Tsambo* (n 86) par 21.
113 *Sengadi v Tsambo* (n 86) par 21.

Chapter 5

Contractual provisions, constitutional values and public policy: To what extent may courts interfere in the enforcement of contracts?

Barkhuizen v Napier[1]

"[A] term in a contract that is inimical to the values enshrined in our Constitution is contrary to public policy and is, therefore, unenforceable." (Barkhuizen v Napier par 29)

5.1 Introduction

In terms of the Constitution of the Republic of South Africa, 1996, our constitutional democracy is founded on various constitutional values, including human dignity, freedom and equality.[2] These values must be promoted when interpreting the Bill of Rights, as well as when courts interpret legislation and develop common and customary law.[3] As the Constitution is applicable both vertically (between the state and individuals) and horizontally (between individuals), the values underlying the Constitution also infuse important considerations in private law, such as public policy and the *boni mores*, that are particularly important when considering contractual provisions and delictual matters respectively. It may, however, be asked to what extent courts should interfere in the enforcement of contracts between private individuals where contractual terms and their enforcement are alleged to be unfair or against the values of the Constitution. This is

exactly what the Constitutional Court had to decide in the *Barkhuizen* matter.

In *Barkhuizen v Napier*, Mr Barkhuizen entered into a short-term contract of insurance with a syndicate of Lloyd's Underwriters of London, represented by Mr Napier in South Africa. In terms of that contract, Mr Barkhuizen was insured against loss resulting from damage to his motor vehicle. His motor vehicle was involved in an accident resulting in damage beyond economical repair and Mr Barkhuizen duly notified Mr Napier of the occurrence of the accident and the resulting damage and claimed R181 000, representing the sum insured. Mr Napier, however, repudiated the claim, alleging that the motor vehicle had been used for business purposes, contrary to the undertaking to use it for private purposes only.[4] More than two years later,[5] Mr Barkhuizen instituted action against the defendant claiming the sum of R181 000 together with interest thereon. Mr Napier, however, raised the pleas that he had been released from liability because the applicant had failed to serve summons within 90 days of being notified of the repudiation of his claim. The special plea was based on clause 5.2.5 of the contract, which provided that "if we reject liability for any claim made under this Policy we will be released from liability unless summons is served . . . within 90 days of repudiation".[6] Mr Barkhuizen conceded non-compliance with clause 5.2.5 but alleged that the clause is contrary to public policy because it prescribed an unreasonably short time to institute action and it constitutes an infringement on the right of the insured to seek the assistance of a court. Specifically, Mr Barkhuizen alleged that the clause is contrary to the provisions of section 34 of the Constitution of the Republic of South Africa, which guarantees the right of access to courts.[7]

The High Court[8] found that the impugned clause was inconsistent with section 34 and made a declaration to that effect. The High Court had to consider if the contractual provision was a law of general application. If not, it cannot be subjected to a limitation analysis under section 36(1) of the Constitution.[9] The limitation clause contemplates that only a *law of general application* will be subject to it. The High Court

found that the common-law principle *pacta sunt servanda* was the law of general application. The High Court found that the limitation of the right of access to courts in terms of the contract was not reasonable and justifiable under section 36(1).[10] The High Court did, however, find that the impugned contractual clause was, in fact, a "law" for purposes of section 172(1)(*a*) of the Constitution, which requires a court to declare "any law or conduct" that is inconsistent with the Constitution to be invalid.[11]

On appeal to the Supreme Court of Appeal, the Court accepted that contractual claims are subject to the Constitution.[12] The Court accepted that a contractual term that is contrary to public policy is unenforceable and that public policy "now derives from the founding constitutional values of human dignity, the achievement of equality and the advancement of human rights and freedoms, non-racialism and non-sexism".[13] However, the Court concluded that the very limited information presented to it was insufficient to decide whether these constitutional principles had, in fact, been violated.[14] Importantly, the Supreme Court of Appeal issued a warning that the fact that a term in a contract is unfair or may operate in a harsh manner does not, on its own, lead to the conclusion that the term violates the values enshrined in the Constitution. The Supreme Court of Appeal emphasised the importance of the principles of dignity and autonomy, which finds expression in the liberty to regulate one's life by freely engaging in contractual arrangements as one sees fit.[15] The Court held that what the Constitution requires of the courts is that they "employ its values to achieve a balance that strikes down the unacceptable excesses of 'freedom of contract' while seeking to permit individuals the dignity and autonomy of regulating their own lives".[16] The Court also held that "intruding on apparently voluntarily concluded arrangements is a step that Judges should countenance with care, particularly when it requires them to impose their individual conceptions of fairness and justice on parties' individual arrangements".[17] The Court held that the principle of *pacta servanda sunt* was subjected to constitutional control and that constitutional

values of equality and dignity may prove decisive when the issue of the parties' relative bargaining positions is at issue.[18] The Court held, however, that the Constitution does not prevent time bar provisions in contracts where these are entered into freely and voluntarily. The Court however found that there is no evidence that the insurance contract in issue here was not entered into freely and voluntarily.[19] The Supreme Court of Appeal, therefore, set aside the order of the High Court and replaced it with one upholding the special plea with costs.[20]

The Constitutional Court was called upon to decide whether a time limit clause in the contract in question violated public policy as demonstrated by constitutional values, particularly those embodied in the Bill of Rights – which also raised the issue of direct application of the Bill of Rights in private relationships and, particularly, to contractual terms.[21] The Court pointed out that "[s]ince the advent of our constitutional democracy, public policy is now deeply rooted in our Constitution and the values which underlie it". Therefore, where ascertaining the "content of public policy was once fraught with difficulties", this is no longer the case.[22] According to the Court, contractual terms that are contrary to constitutional values are against public policy and are, therefore, unfair and unenforceable.[23] In considering the time limitation clause in the impugned clause of the contract in question, the Court held that the right of an injured party to seek the assistance of a court of law has always been recognised by our common law. Generally speaking, a clause in a contract that denies a party the ability to seek judicial relief is considered against public policy.[24] The Court, however, held that in this particular case, the clause was not against public policy as the applicant failed to give any reason for his non-compliance with the clause.[25] Although the applicant was unsuccessful, the principles laid down and considered in the *Barkhuizen* case have had a profound impact on the South African law of contract regarding the applicability of constitutional values to contractual terms. There has, however,

been much debate on the extent that courts should be allowed to interfere in contracts between private individuals.

This chapter explores the significant aspects of the judgment regarding the "law of general application"-requirement in terms of section 36 of the Constitution, direct and indirect application of the Bill of Rights and considerations of constitutional values and public policy when it comes to contractual terms and other private law relationships. Thereafter, the chapter tracks the development of these aspects in subsequent cases.

5.2 Significant aspects of the judgment

5.2.1 Contracts and the "law of general application" when considering section 36 of the Constitution

In terms of section 36 of the Constitution, rights may only be limited in terms of a "law of general application". The question in the case, therefore, was if there was a "law of general application" in this case, as it dealt with the terms of a contract. Ngcobo J, writing for the majority of the Constitutional Court, took issue with the High Court's assertion that the contractual provision was not a law of general application for purposes of section 36(1) of the Constitution but that it was a law for purposes of section 172(1)(*a*) of the Constitution.[26] The judge found that the High Court's reasoning was flawed because it was not the common law principle but the clause itself that was irreconcilable with the Constitution.[27] What the majority of the Court, however, overlooked was that the "law of general application"-requirement in section 36 applies to laws (legislation, common and customary law) and also the *application* of those laws. In other words, the provisions of the law could be constitutionally compliant, but the application of a legal rule could be unconstitutional. In the case of *Barkhuizen*, the "law of general application" was the common law rules of contract, but the unconstitutionality was not located in the rules of contract *per se* but in the unconstitutional *application* of the common law rules pertaining to contractual freedom.[28]

5.2.2 Constitutional values and public policy regarding contractual terms

The majority in *Barkhuizen* then proceeded to consider the proper approach of constitutional challenges to contractual terms where both parties to a contract are private parties. The judge noted that different considerations may apply to certain contracts where the state is a party.[29] Ncgobo J found that, in the event that the provisions of a contract are challenged based on their constitutionality, the question of whether or not the contested clause violates public policy will be raised. The legal convictions of the community are reflected in public policy, and public policy, in turn, reflects the values that society holds to be the most important. The judge noted that the process of deciding what should be included in public policy used to be quite challenging.[30] However, it is not the case any longer. Since the establishment of our constitutional democracy, public policy is now heavily influenced by the principles that are enshrined inside our Constitution.[31] The judge found that

> *"[w]hat public policy is and whether a term in a contract is contrary to public policy must now be determined by reference to the values that underlie our constitutional democracy as given expression by the provisions of the Bill of Rights. Thus a term in a contract that is inimical to the values enshrined in our Constitution is contrary to public policy and is, therefore, unenforceable."*[32]

The Court held that the proper approach when dealing with constitutional challenges to contractual terms is whether the challenged contractual provision is contradictory to public policy as indicated by the constitutional values, in particular those stated in the Bill of Rights. Public policy imports the notions of fairness, justice and reasonableness.[33] This method, however, leaves room for the application of the *pacta sunt servanda* principle but at the same time it permits courts to refuse to enforce contractual terms that are in conflict with constitutional values, even if the parties may have consented to those terms. The judge, therefore, found that the conclusion that must be drawn from this is that the method utilised by the

High Court in determining whether the contractual clause was compatible with the Constitution was not appropriate.[34]

As to section 34 of the Constitution, the Court held that this right not only reflects the foundational values that underlie our constitutional order but also that it constitutes public policy as access to courts is fundamental to "stability in an orderly society".[35] Importantly, the majority noted that the judiciary in the pre-constitutional era had also accepted that contractual terms that deny the right to approach courts were considered to be contrary to public policy and thus contrary to the common law.[36] The Court also emphasised the constitutional obligation imposed upon the judiciary to develop the common law in terms of section 39(2) of the Constitution, including the principles of contract law, so as to bring it in line with the values that underlie the Constitution.[37]

As such, the majority found that the Court's task was to determine whether the impugned contractual provision was inimical to the values that underlie our constitutional democracy, including section 34 of the Constitution and, therefore, contrary to public policy and unenforceable.[38] The majority accepted that time limitation clauses, although commonly found in contracts and statutes, limit the right to seek judicial redress.[39] The Court commented on the importance of such provisions in that it serves the interests of justice by, amongst others, ensuring that witnesses are able to testify when the memories of events are still fresh to them and because documentary evidence may have disappeared.[40] The majority, however, noted that, in general, public policy does, in fact, tolerate time limitation clauses.[41] Ncgobo J also found that the Constitution itself recognises that there may be circumstances when it would be reasonable to limit the right to seek judicial redress in terms of section 36(1) and that this position, therefore, reflects public policy.[42] Notwithstanding, the majority held that the enforcement of an unreasonable or unfair time limitation clause would be contrary to public policy and that it would also be contrary to public policy to enforce a time limitation clause that does not afford the person bound by it an adequate and fair opportunity to seek judicial redress.[43]

The Court then turned to determine the fairness of the contractual provision and stated that two questions were relevant in this regard. First, whether the clause itself is unreasonable. Second, if the clause is reasonable, whether it should be enforced in the light of the circumstances which prevented compliance with the time limitation clause.[44] Regarding the second question, the onus rests on the party claiming that the enforcement of the time limitation clause was unreasonable to show that there was a good reason why there was a failure to comply.[45] Regarding the first question, the Court identified two conflicting principles. On the one hand, "public policy, as informed by the Constitution, requires, in general, that parties should comply with contractual obligations that have been freely and voluntarily undertaken".[46] On the other hand, "all persons have a right to seek judicial redress".[47] The Court held that "the potential injustice that may be caused by inequality of bargaining power" is an important principle to determine whether a contractual term is contrary to public policy.[48] The majority held that a time limitation clause could be unfair if it allowed for too short an amount of time, was inflexible,[49] if it was impossible[50] or was not entered into in good faith.[51] The Court held that there was no evidence that the contract was not freely concluded, that there was unequal bargaining power between the parties and that the clause was not drawn to Mr Barkhuizen's attention.[52] What was further problematic for Mr Barkhuizen was that he did not furnish the court with any reason for his non-compliance with the time clause and, therefore, the judge held that it would be impossible to determine whether the enforcement of the clause against the applicant would be unfair and unjust and, as a result, against public policy in the absence of those facts.[53] Therefore, the majority of the Court dismissed the appeal.[54]

Moseneke DCJ, in his dissenting judgment, disagreed with the reasoning and primary conclusion of Ngcobo J's majority judgment that the impugned time bar clause does not violate public policy.[55] The judge disagreed with the finding of Ngcobo J that "the consistency of a contractual

term with public policy must be assessed by reference to the circumstances and conduct of the parties to the contract".[56] As a result of this approach, the "personal attributes and station in life played a decisive role in the determination of the majority judgment that the time bar clause is fair and just and thus accords with public policy".[57] Instead, Moseneke, DCJ found that whether the provision itself unreasonably or unjustifiably limits the right to seek judicial redress should not rest with the peculiar situation of the contracting parties but "with an objective assessment of the terms of their bargain".[58] The judge agreed with the majority's two-part assessment but found that the clause was unreasonably short and manifestly inflexible.[59] The judge found that it was not possible to properly prepare for litigation within just 90 days,[60] that it was not clear what legitimate purpose was served by this unseemly haste,[61] that the time bar was not reciprocal[62] and that, following the advent of constitutional democracy, there was a tendency of parliament adopting an approach to time limitation clauses which ameliorated their consequences.[63] In addition, courts are generally entitled to condone non-compliance with a time limitation provision if good cause is shown.[64] The judge found that, in the case at hand, the contested time bar clause, according to its words, does not make provision for an extension of time on the basis of a showing of good cause and it is, therefore, unenforceable regardless of the reason for the failure to comply.[65]

In another dissenting judgment, Sachs J made much of the fact that the agreement which Mr Barkhuizen signed was a standard form contract.[66] Sachs J held that consumers are frequently unable to resist the terms in a standard form contract and are often unaware of their existence or unable to appreciate their import. In addition, onerous terms are often couched in obscure legalese and incorporated as part of the fine print of the contract.[67] Most consumers will simply sign or accept the contract without knowing the full implications of accenting to the provisions.[68] Standard form contracts are typically not the result of negotiations but rather the hiring of legal teams by sellers of goods and services to serve the

sellers' interests in order to protect their interests.[69] Standard form contracts often resemble an imposition of will rather than mutual consent to an agreement.[70] The judge held that "clauses in a standard form contract that are unreasonable, oppressive or unconscionable are in general inconsistent with the values of an open and democratic society that promotes human dignity, equality and freedom".[71] The judge also held that it is important to note that the legal convictions of the community should not be equated with the convictions of the *legal community* and that the principle of *pacta sunt servanda* had a complicated and axiomatic legal meaning. In addition, the doctrine's application has become severely restricted following the advent of constitutional democracy.[72] Furthermore, Sachs J noted that legal tradition would often lag behind social and commercial reality.[73]

In what echoed the approach of Moseneke DCJ, Sachs J held that, what was needed was "a principled approach, using objective criteria, consistent both with deep principles of contract law and with sensitivity to the way in which economic power in public affairs should appropriately be regulated to ensure standards of fairness in an open and democratic society".[74] Sachs J found that the personal circumstances of Mr Barkhuizen should not have been taken into consideration and that, even though he was not illiterate or indigent, that "[s]tandard form contracts by their very nature have standard effects".[75] The judge held that the rich have the same entitlement as everybody else to fair treatment in their capacity as consumers.[76] In addition, Sachs J held that "considerations of public policy animated by the Constitution dictate that the time-bar clause in question limiting access to court, should not be enforced, and that the insured should not be deprived of his right to proceed with his claim on the merits".[77]

5.2.3 Direct or indirect application of the Bill of Rights

Although the direct and indirect application of the Bill of Rights was not expressly addressed in the majority judgment,

Langa CJ stated the following regarding direct and indirect application in his dissenting judgment:

> *"I concur in the judgment of Ngcobo J, with the exception of one matter on which I prefer not to express an opinion at this time. To the extent that Ngcobo J's judgment holds that the only acceptable approach to challenging the constitutionality of contractual terms is indirect application under section 39(2), I disagree. While I agree that indirect application may ordinarily be the best manner to address the problem, I am not convinced that section 8 does not allow for the possibility that certain rights may apply directly to contractual terms or the common law that underlies them. Fortunately, I find it unnecessary to decide the matter at this time as, to my mind, what public policy requires in this case is exactly the same as what a direct application of section 34 would demand. Indeed, the distinction between direct and indirect application will seldom be outcome determinative. I would therefore prefer not to preclude the possibility that the Bill of Rights may, in some circumstances, apply directly to contracts."*[78]

The Chief Justice, as he was then, did not provide an explanation as to why certain rights in the Bill of Rights could be directly applied to terms in contracts and to the common law on which they are based. He also did not explain either why he assumed that direct application and indirect application could provide the same effect in the particular circumstances.

5.3 *Impact of the judgment*

5.3.1 Impact of the use of constitutional values and public policy considerations in private relationships

The *Barkhuizen* Court's application of constitutional values as the basis of public policy considerations that courts may use to interfere in private law relationships has had a profound impact on subsequent judgments, not only pertaining to contracts but also relating to wills and the law of delict. In *Beadica 231 CC v Trustees for the time being of the Oregon*

Trust[79] the case involved the correct constitutional approach to the judicial enforcement or refusal to enforce contractual provisions, and, in particular, the public policy justifications for such a refusal. The majority of the Court aimed to clarify and establish legal certainty in relation to the application of public policy issues to contract law.[80] The majority also provided a thorough analysis of how our courts have evolved in their use of public policy factors when deciding whether to enforce contractual terms.[81] Apart from the *Barkhuizen* decision, the Court particularly referred to the Supreme Court of Appeal judgment in *Bredenkamp v Standard Bank of SA Ltd*,[82] as well as the Constitutional Court decision in *Botha v Rich NO*.[83] The Supreme Court of Appeal's opinion in the *Bredenkamp* case was that the *Barkhuizen* decision supports the idea that when a constitutional value is restricted by a contract's terms or by the application of those terms, it is necessary to assess whether the restriction is "fair and reasonable".[84] The Supreme Court of Appeal, however, held that the termination of the banking relationship in that particular instance "did not offend any identifiable constitutional value and was not otherwise contrary to any public policy consideration" when it applied this concept to the facts of the *Bredenkamp* case.[85] In *Botha*, the Constitutional Court was asked to rule on whether a contract's cancellation clause may be enforced where the contract was subject to the statutory framework established by section 27(1) of the Alienation of Land Act 68 of 1981.[86] Their principal question in *Botha* was whether it is against public policy to enforce a cancellation provision in a contract where more than 50% of the purchase price has been paid and in response to a claim for a transfer under section 27 of the Act.[87] The Court stated in this regard that denying Ms Botha her right to transfer the property in accordance with section 27 "would be a disproportionate sanction in relation to the considerable portion of the purchase price she has already paid, and would thus be unfair".[88] From the discussion of the relevant case law, the Court in *Beadica* deduced that "abstract values do not provide a free-standing basis upon which a court may interfere in contractual relationships. As mentioned, they perform creative, informative and controlling functions".[89]

Consequently, a court may only refuse to uphold a clause in a contract if the "term, or its enforcement, is so unfair, unreasonable or unjust that it is contrary to public policy".[90]

In *King NNO v De Jager*, the Constitutional Court had to determine whether certain clauses in a will that barred female descendants from inheriting were unjust discrimination and, as a result, unlawful and unconstitutional.[91] The majority of the Constitutional Court ruled that freedom of testation is a crucial common-law right whose protection upholds the ideals of freedom and dignity that form the basis of our constitutional order.[92] Freedom of testation does not, however, give one permission to behave "unlawful[ly] or contrary to public policy".[93] The Court emphasised that common law has always held this to be true, even prior to the ratification of the Constitution.[94] Wills that go against the Constitution's values are therefore void and unconstitutional.[95]

In another inheritance case dealing with public policy considerations, *Wilkinson v Crawford NO*, the Constitutional Court had to determine whether the terms "children", "descendants", "issue" and "legal descendants" used in a trust deed included legally adopted children and whether their exclusion constituted unfair discrimination under section 9 of the Constitution.[96] The majority of the Court concluded that the contested language could not be read to include adopted children and that there was no indication that such children were intended to be included.[97] Nevertheless, the majority held that testamentary clauses that are against public policy are illegal and unenforceable with regard to the alleged unfair discrimination against adopted children.[98] In addition, the Court emphasised that "birth" was the basis for the distinction between biological and adoptive children, which is a ground that is forbidden by section 9(3) of the Constitution.[99] Following the logic of the decision in *Bhe v Magistrate, Khayelitsha (Commission for Gender Equality as Amicus Curiae); Shibi v Sithole; South African Human Rights Commission v President of the Republic of South Africa*,[100] the majority argued that because adopted children are frequently stigmatised in the same way that children born outside of marriage are,

they too should have their dignity respected and protected.[101] As a result, the Court held that it is against public policy and unenforceable to exclude adopted children solely on the basis of their birth[102] because doing so "serves to perpetuate the discrimination that they, as a class, have been (and continue to be) subjected to".[103]

In a delictual matter, *Mahlangu v Minister of Police*, the Constitutional Court was asked to rule on whether the minister may be held accountable for the entirety of a person's unlawful arrest and detention, which was the outcome of an illegally acquired confession.[104] The respondents asserted that the arrest and the detention were two independent offences that should be considered and proven separately, whereas the accused claimed that the confession obtained after his arrest through torture was the only cause for his continuing custody.[105] The question was whether "public policy dictates" that this behaviour would be "too remote for delictual liability to attach to the police and, vicariously, to the Minister" despite the fact that the inclusion of the false confession in the docket was undoubtedly factually connected to the accused's unlawful detention.[106] The promotion of these principles and section 12 of the Constitution are "at the heart of public policy considerations" since public policy is guided by the Constitution and its values.[107] Additionally, the Court disagreed that the arrest and detention constituted two distinct offences that needed to be examined separately,[108] concluding that "present public policy dictates that delictual liability must attach, lest we find ourselves in a situation where freedom as a constitutional value and the right to freedom and security of the person are devalued".[109]

5.3.2 Impact of direct and indirect application of the Bill of Rights

In the *Barkhuizen* case, the Court incorrectly assumed that the contractual provision was the "law of general application", thereby overlooking the common law rules of contract and their application as the true "law of general application".[110] This unfortunate trend was continued in *Dladla v City of*

Johannesburg, where the Court held that a contract between the City and a shelter was not a "law of general application" for purposes of section 36 of the Constitution.[111]

Regarding the direct application of the Bill of Rights, the other judges in *Barkhuizen* held that the Constitutional Court decided not to test the impugned contractual provision in terms of any of the specific substantive provisions of the Bill of Rights, as the High Court had done. Direct application means that a case is decided with direct reference to the rights and limitation clauses in the Bill of Rights, while indirect application means that open-ended private law concepts such as "public policy" are applied in conformity with the constitutional values, particularly the values of freedom, dignity, and equality as referred to in section 1 of the Constitution.[112] The difference between the two is that indirect application means that open-ended private law concepts are applied in conformity with constitutional values, particularly the values of freedom, dignity and equality. Direct application takes place through the mechanism of section 8 of the Constitution:

> *"(1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.*
>
> *(2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.*
>
> *(3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court—*
>
> *(a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and*
>
> *(b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1).*

> *(4) A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person."*

Indirect application takes place in terms of section 39(2) of the Constitution, which states that "[w]hen interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights".[113]

In *Barkhuizen*, the objections in the majority judgment against the direct application of the Bill of Rights were based on the assumption that the general limitation clause in section 36(1) "contemplates that only a law of general application will be subject to it" and that a clause in a contract that limits a right "is not a law of general application". Therefore, on this account, it is impossible to find a justification in terms of section 36(1) for any limitation that is imposed by something other than "law". It cannot, therefore, on its own, be subjected to a limitation analysis under section 36(1)".[114] As Rautenbach has pointed out, section 36(1) does not contemplate that only legislation could be applicable to a limitation enquiry.[115] According to the author, section 36(1) contains only two qualifying criteria for its operation. First, any factual limitation of a right must be authorised by law. Second, the qualification "general" means that a legislature may not, in law, provide for the limitation of the rights of a specific person or a single set of circumstances.[116] The author acknowledges that any conduct or action that limits rights and that is not authorised by any rule of law cannot be justified under the general limitation clause. However, the author points out that this does not mean that section 36(1) "may never be used to justify the limitation of rights by administrative, judicial or individual action *when such action is authorised by law*".[117] According to the author, "both the authorising law of general application and any discretionary action performed in terms of such a law are valid if they comply with the requirements in the rest of section 36 – section 36 does not permit only the justification of law".[118] Rautenbach traced the erroneous view

that was put forward in the early days of the Constitutional Court that only authorising law could be subject to a limitation analysis to *President of the RSA v Hugo*,[119] where Kriegler J stated that the "savings clause is not there for the preservation of executive acts of government [and by implication any other private action that cannot be classified as law] but to allow certain rules of law to be saved".[120] This view was contained in a footnote and was not justified or supported by authoritative sources. Unfortunately, by the time *Barkhuizen* was decided, the view had become accepted by the judiciary. In *Dladla v City of Johannesburg*, Cameron J, however, seemingly endorsed the opposite viewpoint: "Section 36 states that a rights infringement may be justified not 'by' or 'under', but 'in terms of' a 'law of general application'. 'In terms of' is much broader than 'by' or 'under'. It is advisedly capacious. It allows that the policy at issue here, though not itself law, may be sourced in law."[121]

Woolman has set out several problems with preferring indirect application over direct application as follows: First, "[i]f the drafters of the Constitution had intended such a substitution, the structure and the language of the Bill of Rights would have reflected that intention. It doesn't."[122] Second, "this strategy — of speaking in values—has freed the court almost entirely from the text, and thereby grants the court the licence to decide each case as it pleases, unmoored from its own precedent".[123] Third, "[b]y continually relying on section 39(2) of the Constitution to decide challenges both to rules of common law and to provisions of statutes, the court obviates the need to give the specific substantive rights in Chapter 2 the content necessary to determine the actual validity of the rule being challenged in the instant matter and of similar rules challenged in subsequent matters."[124] Fourth, "[t]his strategy also enables the court to skirt the nuanced process of justification that section 36 of the Constitution or some other express limitations clause in a specific substantive right might require."[125] Fifth, the use of section 39(2) "often leaves readers of a judgment at a loss as to how the Bill of Rights might operate in some future matter".[126]

It is worthwhile to note that, notwithstanding criticisms levelled against the Constitutional Courts' preference for indirect application, the Court has persisted in continuing to use this mode of application. So, for example, in the case of *Beadica*,[127] the Court decided that constitutional values and rights apply to contractual clauses and their execution through a process known as indirect horizontality (indirect horizontal application of the Bill of Rights). This is the same way that general values such as fairness, reasonableness, equity and justice, and good faith are considered when applying the common law rule that contractual clauses may not offend public policy.[128] The Court defended the use of indirect application, stating:

> *"The impact of the Constitution on the enforcement of contractual terms through the determination of public policy is profound. A careful balancing exercise is required to determine whether a contractual term, or its enforcement, would be contrary to public policy. As explained by the Supreme Court of Appeal in Barkhuizen SCA, and endorsed by this Court in Barkhuizen, the Constitution requires that courts 'employ [the Constitution and] its values to achieve a balance that strikes down the unacceptable excesses of 'freedom of contract', while seeking to permit individuals the dignity and autonomy of regulating their own lives.' It is clear that public policy imports values of fairness, reasonableness and justice. Ubuntu, which encompasses these values, is now also recognised as a constitutional value, inspiring our constitutional compact, which in turn informs public policy. These values form important considerations in the balancing exercise required to determine whether a contractual term, or its enforcement, is contrary to public policy. While these values play an important role in the public policy analysis, they also perform creative, informative and controlling functions in that they underlie and inform the substantive law of contract. Many established doctrines of contract law are themselves the embodiment of these values. In addition, these values play a fundamental role in the application and development of rules of contract*

> *law to give effect to the spirit, purport and objects of the Bill of Rights."*[129]

The Court also found this approach to be consistent with the Constitution's transformative ideal:

> *"Transformative adjudication requires courts to search for substantive justice, which is to be inferred from the foundational values of the Constitution that is the injunction of the Constitution – transformation. These values should be used creatively by courts to draw normative impetus and develop new doctrines that address deficiencies in the law of contract."*[130]

In line with criticisms that indirect application of the Bill of Rights to contractual provisions may lead to unbridled judicial law-making, the Court acknowledged that "[i]n line with this Court's repeated warnings against overzealous judicial reform, the power held by the courts to develop the common law must be exercised in an incremental fashion as the facts of each case require".[131] Rautenbach has however argued that the problem does not necessarily lie in judicial law-making, but rather with legal certainty. The author has stated that "although reasonableness, fairness, justice and equity are fundamental elements of the legal systems of open and democratic societies based on human dignity, equality and freedom, their application to concrete disputes cannot be predicted beforehand with absolute certainty. This is also true of concepts such as public policy, nonarbitrariness, conscionability, reciprocal trust, good faith, constitutional values in general and proportionality".[132]

If Langa CJ was correct to say that there may still exist cases in which there may be direct application of the constitutional provision to a contractual provision, then it is worthwhile asking in which matters such direct application may still be used. In *AB v Pridwin Preparatory School*,[133] the majority of the Constitutional Court commented that the case presented "an opportunity to clarify certain aspects of *Barkhuizen* relating to direct horizontal application of

rights between private parties, as against their indirect application through public policy".[134] The case concerned the constitutionality of a decision by an independent school to terminate the contracts that entitled two child learners to attend that school. Clause 9.3 of the contract between the School and the parents provided that "[t]he School also has the right to cancel this Contract at any time, for any reason, provided that it gives you a full term's notice, in writing, of its decision to terminate this Contract". The School cancelled the contract because of serious misconduct by the parents. It is important to note that the case did not concern a challenge to the constitutionality of the contractual provision but rather to the decision of the School to enforce the provision.

The Court purported to use direct application to invalidate the contractual provision. The Court found that "where constitutional rights are directly at issue, I do not understand *Barkhuizen* to inhibit determining the enforceability of a contractual clause by direct application of the Bill of Rights to private persons in terms of s 8(2) and 8(3)".[135] The majority of the Court, therefore, based the invalidation of the decision of the School on an application of sections 28(2) and 29(1)(*a*) of the Constitution directly. The Court said that the appellants in the matter based their claim directly on the violation of constitutional rights and that the legal duties of the school, therefore, arose directly from the Constitution and not from the contract.[136] Therefore, the dispute to be adjudicated was not of a contractual nature and the direct application route under section 8(2) could therefore be followed.[137]

Interestingly, the Constitutional Court did not embark on a limitation of rights analysis in terms of section 36 of the Constitution. This was because the Court continued its reliance on the *Barkhuizen*-notion that section 36 applies only to limitations in law and not to contractual clauses and their application and that "[a] limitation analysis in terms of s 36 of the Constitution is not possible due to the 'law of general application' threshold".[138] Rautenbach has argued that

> *"[b]ecause it is rather unthinkable that the respondents are precluded from presenting any justification for the limitation of rights under contractual clauses or the execution of contractual clauses because section 36 does not apply, the court in the Barkhuizen case used a fairness justification standard. Despite the fact that the court in the AB case said that it was following the direct application route, it applied the bill of rights indirectly."*[139]

Currently, there are no clear criteria to be applied when a court will be called upon to consider whether the indirect route or the direct route should be followed. The Court in *AB* referred to the way in which complainants formulate their challenges. The Court held that "[a] challenge based on the direct application of constitutional rights to the decision of the School is discernible from the pleadings. That should be the applicable route". The court also found that the Court "should not avoid direct horizontal application where it appears to be the most appropriate means of resolving a constitutional dispute. This depends to some extent on whether the parties have pleaded their case in a way that demonstrates the direct applicability of the constitutional rights to the impugned conduct".[140] The distinction between a challenge to the constitutionality of the contractual provision and a challenge to the decision of the School to enforce the provision seems rather technicist and superficial. After all, the School was only empowered to enforce the provision because it existed in the first place. Notwithstanding, little turns on this difference as the Court's approach to the differentiation between direct and indirect application amounts to a distinction without a difference.

Nevertheless, Rautenbach has lauded the Court in *AB* for engaging in a proper rights analysis of sections 28(2) and 29(1)(*a*) of the Constitution – albeit before falling back in a value judgement exercise. What is clear is that a reconsideration of the meaning of section 36(1) of the Constitution will be necessary before true direct application will be possible. The Constitutional Court in *AB* was already open to the idea that the

rights in sections 28(2) and 29(1)(*a*) of the Constitution could be limited – but not in terms of section 36(1). The Court held:

> "*In determining whether there is appropriate justification for the limitation of the right, a number of factors may be considered – all circumstances surrounding the impairment of the right must be taken into account as it is a fact and context specific enquiry: the nature of the obligation on the alleged wrongdoer; whether the wrongdoer took measures to ameliorate the impact of the limitation of the right; the availability of alternative options; whether the process leading up to the limitation of the right was procedurally fair; and the extent of the limitation and its effect on the right holder. This list of considerations is not intended to be exhaustive. While these examples of consideration factors are sourced from Juma Musjid, where the standard applied was 'reasonableness' and not 'appropriate justification', they nevertheless offer a helpful starting point for the factors that constitute contextual considerations.*"[141]

These factors, to a large extent, already echo some of the section 36(1) considerations.

Regarding the direct application of the Bill of Rights to the common law, the Court in *Khumalo v Holomisa*[142] held that the reference to "all law" in section 8(1) of the Constitution did not apply to common law in private relationships, as this would mean that section 8(3) of the Constitution had "no apparent purpose".[143] The Court also argued that indirect application of the Bill was the only means by which our constitutional values could influence our private law.[144] According to Rautenbach and Venter, however, there is, in fact, no convincing reason to apply the Bill of Rights "indirectly" in the case of private law.[145] The Bill can be applied directly in all instances of private law, even when incrementally developing the common and customary law in terms of section 8(3) of the Constitution. This is so because section 8(3) is only applied *after* provisions of the Bill of Rights have been applied to a specific private relationship in terms of section 8(2) and there has been decided that a private individual has unfairly infringed on

another's constitutional right and that no common law or statutory remedies can effectively address the infringement – in which case the court must develop a common law remedy.[146] Section 8(3), therefore, does not provide an express reference to the direct application of the Bill to the common law but rather the device of the "development of common law" as a remedy to better protect rights.[147] Rautenbach and Venter argue that the Court in *Khumalo* misconstrued the meaning of section 8(3), as the section gives effect to the Bill of Rights by applying constitutional rights and values *directly* to the common law, as the common law, its application and its development all have to comply with the Bill of Rights.[148] Rautenbach and Venter aver that rights in the Bill of Rights should therefore be applied directly to private law rules as

> *"[t]his is an inevitable implication of the supremacy of the entrenched and justiciable constitution. Arguments that the direct application of the Bill of Rights to private law seriously undermines 'private autonomy' are not convincing. Apart from the fact that it is not clear why direct application would be more drastic than so-called indirect application, the 'private autonomy' of private persons in terms of private law has never been absolute. Rules of private law has always set limits to 'private autonomy' for the sake of an ordered society and for the protection of the rights of others."*[149]

5.4 Conclusion

From the above discussion, it is apparent that the *Barkhuizen* case has been quite influential in South Africa's jurisprudence. Arguably, the case has had the greatest impact regarding the use of constitutional values as part of public policy considerations. This aspect of the *Barkhuizen* judgment has been widely used by our courts in various matters, ranging from contracts to wills and the law of delict. So, for example, the reasoning of the *Barkhuizen* decision regarding public policy and constitutional values has been used in contractual disputes such as the *Bredenkamp*, *Botha*, *Beadica* and *AB* cases. The Court in the *Beadica* case also rightly concluded that

the *Barkhuizen* case "remains the leading authority in our law on the role of equity in contract, as part of public policy considerations".[150] *Barkhuizen*'s public policy reasoning was also implemented in the inheritance matters of *Wilkinson* and *King*, as well as the delictual matter of *Mahlangu.* The *Barkhuizen* Court's reasoning regarding constitutional values and public policy gives effect to the values underlying the Constitution and applies these values in private relationships. Therefore, it remains significant and enforces the supremacy of the Constitution.

The *Barkhuizen* case's approach to identifying the "law of general application" for purposes of a section 36 limitation analysis, as well as the Court's approach to the direct and indirect application of the Bill of Rights, however, is unfortunate. The Court's approaches to these questions have caused much confusion in subsequent judgments. The Court's incorrect approach to identifying the law of contract or the common law and its application as the "law of general application" in cases dealing with contracts and other common law matters may be seen in the cases of *Dladla* and *Khumalo.* The Constitutional Court's affinity for the so-called "indirect application" of the Bill of Rights is also an unfortunate trend in the Court's jurisprudence due to the reasoning in the *Barkhuizen* matter. Examples of this approach are clearly visible in the *Khumalo*, *Beadica* and *AB* cases. This is an unfortunate trend, as it is submitted that there is no reason to apply the Bill of Rights in a so-called "indirect" way when private law rules are interpreted or developed. The provision in section 8(3) of the Constitution clearly states that the interpretation or development comes only *after* a provision of the Bill of Rights has been *applied* in a private law relationship. It is hoped that the courts will in future overturn this unfortunate trend.

Endnotes

1 2007 5 SA 323 (CC) (*Barkhuizen*).
2 See s 1 of the Constitution of the Republic of South Africa, 1996 (the Constitution).
3 See s 39 of the Constitution.
4 *Barkhuizen* (n 1) par 2.
5 *Barkhuizen* (n 1) par 84.
6 *Barkhuizen* (n 1) par 3.
7 *Barkhuizen* (n 1) par 9. Section 34 of the Constitution provides that "[e]veryone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum".
8 *Barkhuizen v Napier* 2005 JOL 15446 (T).
9 The provisions reads as follows: "(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including - (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose. (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights."
10 *Barkhuizen* (n 1) par 24.
11 *Barkhuizen* (n 1) par 25.
12 *Napier v Barkhuizen* 2006 4 SA 1 (SCA) (*Barkhuizen* (SCA)).
13 *Barkhuizen* (SCA) (n 12) par 7.
14 *Barkhuizen* (SCA) (n 12) par 10.
15 *Barkhuizen* (SCA) (n 12) par 12.
16 *Barkhuizen* (SCA) (n 12) par 13.
17 *Barkhuizen* (SCA) (n 12) par 13.
18 *Barkhuizen* (SCA) (n 12) par 7.
19 *Barkhuizen* (SCA) (n 12) par 9.
20 *Barkhuizen* (n 1) par 17.
21 *Barkhuizen* (n 1) par 23.
22 *Barkhuizen* (n 1) par 28.
23 *Barkhuizen* (n 1) par 29.
24 *Barkhuizen* (n 1) par 34.
25 *Barkhuizen* (n 1) par 86.
26 *Barkhuizen* (n 1) par 25-26.
27 *Barkhuizen* (n 1) par 26.
28 See Rautenbach and Venter *Rautenbach-Malherbe Constitutional Law* (2018) 310-311.
29 *Barkhuizen* (n 1) par 27.

30 *Barkhuizen* (n 1) par 28.
31 *Barkhuizen* (n 1) par 28.
32 *Barkhuizen* (n 1) par 29.
33 *Barkhuizen* (n 1) par 73.
34 *Barkhuizen* (n 1) par 30.
35 *Barkhuizen* (n 1) par 31 33.
36 *Barkhuizen* (n 1) par 34. The judge in n 21 specifically referred to the following cases: *Administrator, Transvaal v Traub* 1989 4 SA 729 (A) 764E; *Avex Air (Pty) Ltd v Borough of Vryheid* 1973 1 SA 617 AD 621F–G; *Stokes v Fish Hoek Municipality* 1966 4 SA 421 (C) 423H–424C; *Gibbons v Cape Divisional Council* 1928 CPD 198 200 and *Benning v Union Government (Minister of Finance)* 1914 AD 29 31.
37 *Barkhuizen* (n 1) par 35.
38 *Barkhuizen* (n 1) par 36.
39 *Barkhuizen* (n 1) par 46.
40 *Barkhuizen* (n 1) par 47.
41 *Barkhuizen* (n 1) par 48.
42 *Barkhuizen* (n 1) par 48.
43 *Barkhuizen* (n 1) par 51.
44 *Barkhuizen* (n 1) par 56.
45 *Barkhuizen* (n 1) par 58.
46 *Barkhuizen* (n 1) par 57.
47 *Barkhuizen* (n 1) par 57.
48 *Barkhuizen* (n 1) par 59.
49 *Barkhuizen* (n 1) par 62.
50 *Barkhuizen* (n 1) par 75.
51 *Barkhuizen* (n 1) par 79.
52 *Barkhuizen* (n 1) par 66.
53 *Barkhuizen* (n 1) par 84–85.
54 *Barkhuizen* (n 1) par 89.
55 *Barkhuizen* (n 1) par 93.
56 *Barkhuizen* (n 1) par 94.
57 *Barkhuizen* (n 1) par 95.
58 *Barkhuizen* (n 1) par 96.
59 *Barkhuizen* (n 1) par 111.
60 *Barkhuizen* (n 1) par 112.
61 *Barkhuizen* (n 1) par 113.
62 *Barkhuizen* (n 1) par 114.
63 *Barkhuizen* (n 1) par 115.
64 *Barkhuizen* (n 1) par 117.
65 *Barkhuizen* (n 1) par 118.
66 The judge explained at *Barkhuizen* (n 1) par 135 that a standard form contracts are "contracts that are drafted in advance by the supplier of goods or services and presented to the consumer on a "take-it-or-leave-it" basis, thus eliminating opportunity for arm's length negotiations. They contain a common stock of contract terms that tend to be weighted heavily in favour of the supplier and

to operate to limit or exclude the consumer's normal contractual rights and the supplier's normal contractual obligations and liabilities."

67 *Barkhuizen* (n 1) par 135.
68 *Barkhuizen* (n 1) par 136.
69 *Barkhuizen* (n 1) par 137.
70 *Barkhuizen* (n 1) par 138.
71 *Barkhuizen* (n 1) par 140.
72 *Barkhuizen* (n 1) par 141.
73 *Barkhuizen* (n 1) par 145.
74 *Barkhuizen* (n 1) par 146.
75 *Barkhuizen* (n 1) par 149.
76 *Barkhuizen* (n 1) par 149.
77 *Barkhuizen* (n 1) par 185.
78 *Barkhuizen* (n 1) par 186.
79 2020 5 SA 247 (CC) (*Beadica*).
80 *Beadica* (n 79) par 18.
81 *Beadica* (n 79) par 20–78.
82 2010 4 SA 468 (SCA) (*Bredenkamp*); see *Beadica* (n 79) par 39–42.
83 2014 4 SA 124 (CC) (*Botha*); see *Beadica* (n 79) par 44–57.
84 *Bredenkamp* (n 82) par 44, 46.
85 *Bredenkamp* (n 82) par 64.
86 *Beadica* (n 79) par 44.
87 *Botha* (n 83) par 19.
88 *Botha* (n 83) par 49.
89 *Beadica* (n 79) par 79.
90 *Beadica* (n 79) par 80.
91 2021 4 SA 1 (CC) (*King*).
92 *King* (n 91) par 124.
93 *King* (n 91) par 123, 125.
94 *King* (n 91) par 127.
95 *King* (n 91) par 128.
96 2021 4 SA 323 (CC) par 22, 23.
97 *Wilkinson* (n 96) par 35–36.
98 *Wilkinson* (n 96) par 69.
99 *Wilkinson* (n 96) par 74.
100 2005 1 SA 580 (CC).
101 *Wilkinson* (n 96) par 80, 89.
102 *Wilkinson* (n 96) par 98.
103 *Wilkinson* (n 96) par 94.
104 2021 2 SACR 595 (CC) par 1.
105 *Mahlangu* (n 104) par 16.
106 *Mahlangu* (n 104) par 42.
107 *Mahlangu* (n 104) par 43.
108 *Mahlangu* (n 104) par 45.
109 *Mahlangu* (n 104) par 44.
110 Rautenbach and Venter (n 28) 311.

111 2018 2 BCLR 119 (CC) (*Dladla*); see Rautenbach and Venter (n 28) 311.
112 Woolman "The amazing, vanishing Bill of Rights" 2007 *SALJ* 762 776; Currie and De Waal *The Bill of Rights Handbook* (2005) 32, 64; Cockrell "Private law and the Bill of Rights; a threshold issue of 'horizontality'" in LexisNexis *Bill of Rights Compendium* [Issue 14] par 3A14 and 3A16) and Van der Walt "Transformative constitutionalism and the development of South African property law (part 1)" 2005 *TSAR* 655 666 n 33 and n 34.
113 Rautenbach and Venter (n 28) 268; also see Leinius and Midgley "The impact of the Constitution on the law of delict: *Carmichele v Minister of Safety and Security*" 2003 *SALJ* 19.
114 *Barkhuizen* (n 1) par 32.
115 "Constitution and contract – exploring "the possibility that certain rights may apply directly to contractual terms or the common law that underlies them" 2009 *TSAR* 613 619.
116 Rautenbach (n 115) 620.
117 Rautenbach (n 115) 620. Original emphasis.
118 Rautenbach (n 115) 621.
119 1997 6 BCLR 708 (CC).
120 *President of the RSA v Hugo* (n 119) par 76 n 7.
121 *Dladla* (n 111) par 98.
122 Woolman (n 112) 763.
123 Woolman (n 112) 763.
124 Woolman (n 112) 763.
125 Woolman (n 112) 763.
126 Woolman (n 112) 763.
127 *Beadica* (n 79).
128 *Beadica* (n 79) par 72.
129 *Beadica* (n 79) par 71–73.
130 *Beadica* (n 79) par 74–75.
131 *Beadica* (n 79) par 76.
132 "Constitution and contract: Indirect and direct application of the Bill of Rights on the same day and the meaning of 'in terms of law'" 2021 *TSAR* 379 385.
133 2020 5 SA 327 (CC) (*AB*).
134 *AB* (n 133) par 105.
135 *AB* (n 133) par 67.
136 *AB* (n 133) par 184.
137 *AB* (n 133) par 107.
138 *AB* (n 133) par 197.
139 (n 132) 390–391.
140 *AB* (n 133) par 130.
141 *AB* (n 133) par 198.
142 2002 5 SA401 (CC).
143 *Khumalo* (n 142) par 32.

144 see Rautenbach and Venter (n 28) 294; also see O'Regan "From form to substance: The constitutional jurisprudence of Laurie Ackerman" in Barnard-Naudé *et al* (eds) *Dignity, Freedom and the Post-Apartheid Legal Order* (2008) 9.
145 Rautenbach and Venter (n 28) 294.
146 Rautenbach and Venter (n 28) 294.
147 Rautenbach and Venter (n 28) 294.
148 Rautenbach and Venter (n 28) 294.
149 Rautenbach and Venter (n 28) 294-295.
150 *Beadica* (n 79) par 58.

Chapter 6

Statutory interpretation: Textual thresholds and the separation of powers

African Christian Democratic Party v The Electoral Commission[1]

> *"[I]n approaching the interpretation of provisions of legislation, courts must understand those provisions in the light of their legislative purpose within the overall [legislative] framework. That framework must be understood in the light of the important constitutional rights and values that are relevant." (African Christian Democratic Party v The Electoral Commission par 34)*

6.1 Introduction

Before the advent of constitutional democracy in South Africa, the interpretation of statutes proceeded with some exceptions in a literal, dogmatic and positivist fashion.[2] The dominant approach to the interpretation of statutes was literalist. In its most strict guise, literalism requires that "the meaning of an enacted provision can and must be deduced from the very words in which the provision is couched, regardless of consequences".[3] Later on, the rule was softened and, as expressed by the so-called "golden rule" of statutory interpretation

> *"the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in*

> *which case the grammatical and ordinary sense of the words may be modified, so as to avoid the absurdity and inconsistency, but no further."*[4]

After the advent of constitutionalism, however, the South African judiciary, in general, and the Constitutional Court, in particular, has followed an approach to interpreting statutes which may best be described as purposive, broad purposive, teleological, value activating and so on.[5] Although both the majority[6] and (arguably) the minority[7] of the Court in *African Christian Democratic Party v The Electoral Commission* utilised such an approach, this was not the first instance in which the Court had done so. The case did, however, expose the schism between two schools of thought about the role that text plays in such a new approach to interpreting statutes.[8] This schism is yet to be resolved. According to some, such as the majority of the Court in the *ACDP* case, extra-textual factors such as purpose, context and history should be allowed to supersede a legislative provision's explicit and unambiguous text. According to others, however, such as the minority of the Court, the text of a legislative provision must always control the encounter and the interpreter must choose from the array of possibilities which best serve the purpose of a legislative provision in light of constitutional values for which the text provides. According to Du Plessis, this schism exists between those who believe that "[w]here 'clear language' and purpose are at odds, the latter supposedly has to have the upper hand" and others who believe that "only vague and ambiguous (as opposed to clear and unambiguous) language may play second fiddle to statutory purpose".[9]

In the very first delivered Constitutional Court judgment, *S v Zuma*,[10] the Constitutional Court endorsed the view that "the Constitution must be interpreted so as to give clear expression to the values it seeks to nurture for a future South Africa" but warned

> *"that even a constitution is a legal instrument, the language of which must be respected. If the language used by the lawgiver is ignored in favour of a general resort to 'values' the result is*

> *not interpretation but divination. [A] constitution 'embodying fundamental rights should as far as its language permits be given a broad construction'".*[11]

The majority of the Court in the *ACDP* case, as will be shown, did not heed this warning. From the above, it is clear that the schism raises important questions surrounding the function of language, the separation of powers and the powers of the judiciary vis-à-vis that of the legislature. In the chapter, the *ACDP* case is reconsidered. The chapter explores the teleological approach to the interpretation of statutes which was adopted in the *ACDP* case. The chapter further explores the schism between the majority and the minority of the Court regarding the function of language within the interpretation of statutes, the proper remedy to have been employed and arguments surrounding the separation of powers and the function of the judiciary *vis-à-vis* that of the legislature. Thereafter the chapter explores the impact of the *ACDP* case on contemporary South African legal culture. It is ultimately concluded that the majority of the Court in the *ACDP* case was too quick to totally disregard the text of the impugned statutory provision.

6.2 Facts of the case

The facts of the *ACDP* case may be summarised as follows. Section 14(1)(*b*) of the Municipal Electoral Act requires a party contesting a municipal election to pay to the office of the local representative of the Electoral Commission, by a specified deadline, a deposit equal to the prescribed sum by means of a bank assured cheque. A notice of a party's intention to contest the election and its party lists must also be sent along with the cheque. Proposing to contest an election in the Cape Town Metro Municipality, the ACDP submitted its notice and party lists to the Electoral Commission's Cape Town office but did not pay the prescribed deposit of R3000,00 in the manner allowed by section 14(1)(*b*). Instead, it presented the central office of the Electoral Commission in Pretoria with a bank-guaranteed cheque containing in one sum all the deposits

payable in respect of all the municipalities in which the party wished to contest the election. A list of these municipalities was sent along with the cheque, but the Cape Town Metro was omitted from the list as a result of administrative oversight and the bulk amount did not include a deposit for the Cape Town election. After the deadline for the payment of deposits had passed and after it had agreed not to contest elections in some of the municipalities originally included in its list, the party discovered the error. This meant that the Commission held in favour of the ACDP a surplus sum of money, which then requested the Commission to use that credit (or part thereof) as a deposit for the Cape Town Metro election. The Commission declined to do so, arguing that the prescribed process and the deadline for registration of the parties were peremptory and that the inability of the ACDP to fully comply with both may not have been a cause.

The Electoral Court agreed with the Commission on an appeal against that ruling, and the ACDP subsequently turned to the Constitutional Court for relief. The majority of the Court held that the payment in Pretoria of the deposit for participation in the election in municipalities subsequently uncontested by the ACDP was adequate to pay the deposit for the election of the Cape Town Metro. The Court stressed that it did not condone the non-compliance of the ACDP with the conditions for peremptory registration. Instead, the majority of the Court found that the group was still compliant with these conditions by doing what the ACDP did.

The minority of the Court, however, held that legislative provisions require exact compliance. Because of the wording of the provision, there is no discretion to condone non-compliance in respect of the legislative provision(s). Deviations from the letter of the law relating to voting procedures would "have an impact on the fairness of the election" and could not, therefore, be sanctioned.

6.3 Teleological interpretation

In 1976 Cowen expressed the need for a clearly articulated and consistently followed general theory of interpretation.[12] Prior to the adoption of the first justiciable Constitution, the task of formulating such a theory seemed impossible. Although literalism, as expressed in the so-called "golden rule" of statutory interpretation, dominated the interpretation of legislative provisions in South Africa, interpretation often preceded to a lesser extent in terms of intentionalist,[13] contextual[14] or purposive[15] theories. To complicate matters, interpretation often proceeded in terms of what Du Plessis has termed the "literalist-cum-intentionalist" theory in which allegiance was declared to the intention of the legislature but, ultimately, a provision was merely interpreted in a literalist fashion.[16]

Other theories were also not developed to their fullest extent as they were often qualified by the literalist postulate that interpreters could only look beyond the text when the text was vague or when strict adherence would lead to absurdity.[17] This discordance in the approach to statutory interpretation can be explained by the fact that different common-law systems of statutory interpretation were introduced in South Africa because of the country's colonial past. As Cowen points out, Roman law and Roman-Dutch law were not entirely settled as to the proper approach to statutes. Nevertheless, the author concludes that "the overwhelming 'weight' of authority in Roman-Dutch law, favours the anti-literalist approach".[18] It was De Villiers CJ who, "on a fateful day in 1875",[19] dealt the deathblow to the Roman-Dutch law of statutory interpretation in *De Villiers v Cape Divisional Council* when the court found that interpretation had to proceed in terms of (literalist) English common-law.[20] Following this seminal decision, interpretation consequently proceeded in terms of a literal fashion and neglected Roman-Dutch law concerning statutory interpretation.[21]

There were, however, certain instances in which the judiciary accepted, even prior to the adoption of the first

justiciable constitutions, that it was possible to disregard the text of a statutory provision. In terms of the so-called "golden rule" of statutory interpretation

> *"the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid the absurdity and inconsistency, but no farther."*[22]

Following the advent of constitutional democracy, much of the received wisdom of the common-law theories of statutory interpretation must be reconsidered. The judiciary has adopted an approach to the interpretation of statutes that seeks to animate and give life to the values and rights in the Constitution.[23] Following the toppling of the notion of the "intention of the legislature" by constitutional supremacy, "broad" purposive interpretation is slowly supplanting (or has already supplanted, some may claim) the old "golden rule" of statutory interpretation.[24]

Section 39(2) of the Constitution states that anyone "[w]hen interpreting any legislation must promote the spirit, purport and objects of the Bill of Rights". Section 39 can therefore be seen as an instruction to interpreters to look beyond the text in which a statutory provision is couched to give meaning to such provisions. Additionally, the Constitutional Court in *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd*[25] found that "where two conflicting interpretations of a statutory provision could both be said to be reflective of the relevant structural provisions of the Constitution as a whole, read with other relevant statutory provisions, the interpretation which *better* reflects those structural provisions should be adopted".[26]

Botha declares that "[t]he fundamental principle of statutory interpretation is that the purpose of the legislation must be determined in the light of the spirit, purport and objects of the Bill of Rights in the Constitution".[27] It is

striking that this principle endorses the purposive approach whilst qualifying it at the same time. Indeed, teleological interpretation can be seen as a species of purposive interpretation but goes beyond simply ascertaining the purpose of a legislative provision.

Du Plessis has indicated that purposive interpretation *simpliter* "has the potential to turn into a rather unruly horse if three *caveats* are not heeded".[28] Firstly, the processes involved in the interpretation of statutes are too complicated for the purpose of a statutory provision to be described in a simple catchword or catchphrase.[29] Secondly, merely asking what the purpose of a statutory provision is may well be restrictive because the purpose may indeed be restrictive. Merely inquiring into the purpose of a statutory provision without regard to the broader purpose of a statutory provision can therefore be limiting and ignore the injunction placed upon the courts by section 39 of the Constitution to "promote the spirit, purport and objects of the Bill of Rights" when interpreting legislation. Thirdly, Du Plessis warns that purpose can also only be determined through processes of interpretation and that "the purpose of a provision can simply not be known prior to interpretation".[30] The author warns that such a narrow approach "too easily seduces an interpreter to read a purpose or object into a provision prematurely, and therefore in an arbitrary manner, shedding the responsibility to justify or, at least, explain his or her preference".[31]

The method of statutory interpretation, which goes beyond merely asking what the purpose of a statutory provision is, is generally referred to as "teleological interpretation",[32] a "value-activating strategy",[33] or the "value-coherent theory" of statutory interpretation.[34] It has become commonplace for this principle to guide the interpretation of legislation and has been endorsed by the Constitutional Court.[35] The approach was best described (although not explicitly endorsed) by the majority of the Court in the *ACDP* case:

> *"[I]n approaching the interpretation of provisions of … legislation, courts … must understand those provisions in*

> *the light of their legislative purpose within the overall … [legislative] framework. That framework must be understood in the light of the important constitutional rights and values that are relevant."*[36]

According to Le Roux, this "[b]roader approach" favoured by the Court has four distinct steps: Firstly, the purpose of the provision must be established. Secondly, it should be asked if "that purpose would be obstructed by a literal interpretation of the provision". If that is the case, thirdly, "an alternative interpretation of the provision that 'understands' its central purpose" must be adopted. Fourthly, it must be ensured "that the purposive reading of the legislative provision also promotes the object, purport and spirit of the Bill of Rights".[37] It may thus be argued that "broad" purposivism, with its alliance with constitutional values, is a preferred alternative and solution to the problems of conventional purposivism.

6.4 The schism

What is not resolved by the adoption of the teleological approach to the interpretation of statutes is what the function of text should be in applying this approach. Can the purpose of a statutory provision be preferred even when it is clearly at odds with the text of a legislative provision, or should a teleological interpretation which fits within the range of possibilities provided for within the text of a statutory provision be preferred?

Devenish has described the minority judgment as "jurisprudentially superficial", "dogmatic" and grounded in a "literal style of interpretation".[38] Le Roux has, however, questioned this conclusion and argued that Devenish is too quick to do so. In fact, the author claims both judgments adopt a purposive or teleological reading. What the minority of the judgment points out is merely that the purposive or teleological interpretation of a statutory provision sometimes mandates a narrow reading of its wording. A *textual threshold* is implied in section 39(2) of the Constitution. This means that the purposive or teleological interpretation of a legislative

provision remains subject to what the words of that provision are "capable of" meaning. The *textual threshold* was read into section 39(2) of the Constitution precisely in order to prevent courts in the absence of a finding of unconstitutionality, to interpretively change or disregard the text of legislation in the name of the purpose or spirit of the legislation and the Bill of Rights.

6.5 Problems with disregarding the text of statutory provisions[39]

6.5.1 The function of language

As a starting point, it is important to acknowledge that the text in itself is not wholly capable of controlling the interpretation which will ultimately be afforded to a given statutory provision. The openness of language has always produced a proliferation of meanings and this situation has only been exacerbated by the so-called linguistic or hermeneutical turn in legal interpretation that has been enhanced by the advent of constitutional democracy in South Africa.[40] And, as Le Roux points out, the minority of the Court in the *ACDP* case does not adopt a literalist approach in which the text is allowed to entirely control the encounter. It is trite that a literalist approach to the interpretation of statutes is inappropriate within the context of the Constitution. Indeed, the Constitution itself, both when interpreting the provisions of the Bill of Rights and the provisions of other legislation, mandates the interpreter to look further than the text of a legislative provision. According to section 39(1) of the Constitution, "[w]hen interpreting the Bill of Rights, a court, tribunal or forum must [amongst others] promote the values that underlie an open and democratic society based on human dignity, equality and freedom". According to section 39(2) of the Constitution, "[w]hen interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights".

There are also several jurisprudential reasonings about the nature of language that militates against the adoption of a literalist approach to the interpretation of statutes. If it seems that a provision doesn't have to be interpreted, that is because you have interpreted it already. Interpretive principles are always at work.[41] This is so because a statute is a legal instrument and a legal instrument is, according to Endicott, "a normative text with a technical effect" in that "the law itself has techniques for determining the effect of the normative text".[42] This is not to say that legislative provisions may not be more precise than others (or perhaps more vague than others). According to the author, "[a] legal instrument is vague if its language is imprecise, so that there are cases in which its application is unclear".[43]

The central point is that "there is no straightforward, general relation between the language used in a legal instrument to make law, and the law that is made".[44] A paradoxical question that has often been posed is how legislation can be certain whilst still achieving flexibility. Legal certainty is required by the rule of law, which, in turn, requires predictability of outcome.[45] The Constitutional Court has held that laws must be written in a clear and accessible manner and that impermissibly vague provisions violate the rule of law, a founding value of our Constitution.[46] On the other hand, no two sets of facts are ever exactly the same, requiring that legislation should be sufficiently flexible to cover a multitude of situations.

Having accepted that text alone cannot and may not control the interpretation of statutes, the question then turns to what the role of text should be in contributing meaning to a legislative provision. Teleological interpretation requires interpreters to have regard to all the elements of a statutory provision to determine what the broad purpose of a provision is. These elements are the text, context, values, history and comparative environment of a provision.[47]

According to Du Plessis

> *"statutes … ought not to be understood as 'entities' composed of, for instance, grammatical, systematic, purposive or historical 'elements': these 'elements' should rather be seen as simultaneously given, co equal modes of existence or being that are 'on the move', overlapping and interacting."*[48]

According to Le Roux, this means that "a statutory norm can never finally come to rest on any one of its potential modes of being".[49] Du Plessis, therefore, highlights the "structural complexity" and "many-sidedness" of legislative provisions and points out that their interpretation and the linguistic, systematic, teleological, historical and comparative elements of legislation should be weighed against one another without attributing a superior status to any one of these elements.[50] This is the nature of the interpretive exercise. In any given case, any one of these elements may be relationally more important than in other cases. Although there are shades of meaning that an interpreter can attach to a statutory provision, this does not mean to say that the interpreter has unfettered discretion. And even though the text may be considered of less importance in the interpretation of a given statutory provision, this does not mean that the text may be entirely disregarded.

It should be noted that the language dimension only "cautions the interpreter to take the meaning-generative functioning of language, and of the text as linguistic signifier, seriously".[51] It is not a throwback to literalism as it does not require that only the text must be considered. Instead, the text is considered the starting point when determining the purpose of legislation in the light of constitutional values. This is not to say that the textual element is unimportant. Meaning must ultimately come to rest on all of the "entities: or "elements" within the legislative environment. In fact, it acknowledges that textual consideration will control the range of possible meanings of a legislative provision.[52]

There is a limit to which the words of a statute may be disregarded in the process of an application of purposive

interpretation.[53] The Constitutional Court has also held that "[a] contextual or purposive reading of a statute must of course remain faithful to the actual wording of the statute".[54] The Constitutional Court stated that "[w]hile we must always be conscious of the values underlying the Constitution, it is nonetheless our task to interpret a written instrument" and that if the language is "ignored in favour of a general resort to 'values' the result is not interpretation but divination".[55]

Wallis, writing as academic, has indicated that "[t]here will be some cases, though they are likely to be few, where the language admits of only one meaning, in which event no amount of reliance on context can avoid that meaning".[56] According to the author,

> *"[t]he clearer the language used in the text and the more obvious its meaning in accordance with the ordinary understanding of language, the less the influence of context in arriving at a conclusion as to its meaning. The more possible meanings there are and the more finely balanced they are, the more powerful will be the influence of contextual factors in the ultimate decision."*[57]

Indeed, there may be cases in which the language used by the legislature is of such a vague nature that the courts will have no other choice but to look to the other elements of statutory interpretation. It might be useful for the legislature to leave it to the judiciary to give content to a legislative norm. According to Endicott, this choice has "power allocation value" and "private ordering value".[58] Substantively, the legislature delegates to the courts the power to determine, based on the vague criteria contained therein, what is meant by the legislative provision. The allocation of this power to the judiciary is justifiable because judges possess specialised expertise to develop legislation in light of norms. The doctrine of precedent will then allow the norm to develop incrementally and to revise general principles through the processes of appeal. Similarly, Hart adopted the view that it may be inevitable and desirable for there to be a margin of uncertainty

as it will leave judges to arrive at sensible results in unforeseen future cases.[59]

6.5.2 The availability of other remedies

In *Van Rooyen v The State*,[60] the Constitutional Court explained how cases where the constitutionality of legislation is questioned must be dealt with:

> *"[L]egislation must be construed consistently with the Constitution and thus, where possible, interpreted so as to exclude a construction that would be inconsistent with … [the Constitution]. If held to be unconstitutional, the appropriate remedy ought, if possible, to be in the form of a notional or actual severance, or reading in, so as to bring the law within acceptable constitutional standards. Only if this is not possible, must a declaration of complete invalidity of the section or sub-section be made."*

From the above, the following points may be discerned: Firstly, all law must be interpreted ("read down") to avoid inconsistency with the Constitution. Secondly, if this is not possible, the law (or at least the offending parts thereof) must be declared unconstitutional and invalid. Thirdly, the court may remedy the unconstitutionality by means of severance, reading in or notional severance. If this is not possible, then the ultimate remedy must be granted in declaring the law (completely) invalid. In addition, the Constitution also empowers the courts to limit the impact of the order of invalidity by suspending or limiting the retrospective effect of the order.[61] The Constitutional Court has also, on several occasions, allowed an interim remedy of notional or actual severance or reading in during a period of suspension to diminish the effects of the continued violation of rights.[62]

It is clear that the Constitutional Court has endorsed a multiple-step approach in dealing with constitutional challenges to legislation. Indeed the adoption of such a methodology might easily be explained if one has regard to the traditionally accepted distinction between reading strategies

(exercises of statutory interpretation) on the one hand and remedies on the other. Du Plessis has stressed the point that "[a]gain, severance and reading-in are constitutional remedies — as opposed to reading strategies — provided for in section 172(1)(*b*)".[63] Interpretation in conformity with the Constitution is rather seen as a reading strategy which is used in order to prevent it from being struck down because it is unconstitutional. O'Regan has also stated that "[r]eading down a statute does not require any order or remedy, it is something that is done in the text of the judgment itself with no consequential relief to follow".[64]

Reading strategies are often regarded as judicially activist or as an encroachment on the powers of the legislature as it requires the judiciary to engage in law-making. These powers of the judiciary are, however, mandated by the Constitution itself. It should also be recalled that the legislature is capable of quickly amending the remedies provided for by the judiciary and these remedies are also often meant to be a stop-gap measure until the legislature is able to respond to the remedy which was made by the courts. Often, courts will also mandate the legislature to adopt legislation to deal with the matter which was found to be unconstitutional.

Le Roux, however, disagrees.[65] He believes that the Constitutional Court, in part because of some of its judges' extremely reactionary approach to constitutional and statutory interpretation, has opted for remedial activism rather than interpretive flexibility. This preference has arisen because of a narrow understanding of interpretation that excludes the alteration of words from its scope. In the opinion of Le Roux, this narrow point of view is also a politically unsound limitation of the democratic process. According to the author, the problem is that constitutional remedies (as opposed to interpretive techniques) are only available for use by the Constitutional Court itself or under its direct supervision and, therefore, cannot be used by anyone else. As a result of the centralising tendencies inherent in this distinction, the democratisation of legal meaning in post-apartheid South Africa is imperilled. According to the author,

the apartheid state's centralised control of meaning was exactly duplicated in its post-apartheid successor's juricentric approach to legal interpretation.

The author's argument rests on two assumptions. First, the author believes that granting constitutional remedies over interpretation in conformity with the Constitution is more activistic. In fact, the use of reading strategies over and above constitutional remedies may be regarded as more activistic when the text itself is incapable of bearing such a meaning. Second, the author assumes that the South African judiciary has a narrow understanding of interpretation that excludes the alteration of words from its scope. It may, however, be questioned if the South African judiciary has remained entirely unreformed following the advent of constitutional democracy. Although it is true that many legal practitioners and judges were trained in a formalistic legal tradition, nearly three decades of constitutional democracy and the enunciation of a new, teleological approach to the interpretation of statutes have slowly but surely filtered through our judicial system. Courts are more inclined than ever to search for the meaning of a word in elements outside of the text of a legislative provision. This does not mean to say, however, that the text of the provision may be discarded. But courts are more inclined than ever to interpret the words to mean something else than that which only the textual environment would dictate. In this sense, the courts are open to the possibility that text may be altered in the process of interpretation. This does, however, not mean that the text should be or may be disregarded in its entirety.

This argument was also effectively debunked in *Daniels v Campbell* when the Constitutional Court observed:

> "*Another important consideration relates to the rule of law. The problem of readily importing interpretations piecemeal into legislation is the precedent it sets. Courts below will follow the lead and readily interpret rather than declare invalid statutes inconsistent with the Constitution. However, constitutional re-interpretation does not come to this Court for confirmation.*

> *The result may be that high courts develop interpretations at varying paces and inconsistently. This makes for an even more fragmented jurisprudence and would have deleterious effects on how people regulate their affairs. It is highly undesirable to have an institution as important as marriage recognised for some people in some provinces and not in others. The rule of law requires legal certainty."*[66]

It may be more activistic and arguably judicially dishonest for courts to use their power of interpretation to read provisions in a way that avoids a finding of unconstitutionality *when the text is not capable of being assigned such a meaning.*[67] In these circumstances, it would be better for a court to declare the provision invalid and grant a constitutional remedy. When declarations of invalidity are made in higher courts other than the Constitutional Court, such an order must be certified by the Constitutional Court. Granting a constitutional remedy, therefore, has the extra benefit of being subject to additional judicial scrutiny and oversight. When a court uses its power of interpretation to achieve a result that is not possible based on the text, it may be possible that absent appeal by one of the parties to a dispute, a new precedent will be created without the same oversight being applied to it.

In the *ACDP* case, the Constitutional Court could easily have come to the conclusion that the text of the relevant provisions of the Electoral Act was unconstitutional as it does not accord with key constitutional values, amongst others, the value of universal suffrage. The Court could then have required Parliament to amend the provision.

6.5.3 Separation of powers

An important canon of teleological statutory interpretation is the rule *iudices est ius dicere sed non dare* ("it is the judge's role to state the law, not to give it").[68] This rule seeks to counter divination of the interpreter's preferences and prejudices.[69] South Africa, as a young democracy, is still in the process of working out precisely how much power each branch of government has. Even if it is accepted, as some hold, that "[l]

aw making is an inherent and essential part of the judicial process",[70] it is still not wholly clear what the powers of the judiciary are in interpreting legislation. Chief amongst these concerns is the question as to what role text is to play in statutory interpretation and if the text of a statute may be disregarded in favour of resorting to other concerns such as constitutional values, context and legislative purpose. Indeed, in the world's oldest constitutional democracy, the United States of America, the matter has not been entirely settled.[71] In fact, it only became settled in the 19th century that it was the judicial branch of government which was vested with the power of interpretation when the US Supreme Court in *Marbury v Madison* found that "[i]t is emphatically the province and duty of the Judicial Department to say what the law is. Those who apply the rule to particular cases must, of necessity, expound and interpret that rule".[72] In English legal history, judges exercised both legislative and judicial powers.[73] In *Osborn v Bank of the United States*, the US Supreme Court held as follows:

> *"Judicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and, when that is discerned, it is the duty of the Court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the Judge; always for the purpose of giving effect."*[74]

Although the Constitution does not expressly endorse the principle of separation of powers within its text, the Constitutional Court has accepted that this principle is inherent to our constitutional order.[75] In *Doctors for Life International v Speaker of the National Assembly*,[76] the Constitutional Court warned that

> *"[c]ourts must be conscious of the vital limits on judicial authority and the Constitution's design to leave certain matters to other branches of government. They too must observe the*

> *constitutional limits of their authority. This means that the judiciary should not interfere in the processes of other branches of government unless to do so is mandated by the Constitution."*

Consider the very nature of courts as an independent pillar of the state, as described by the Constitutional Court in *S v Mamabolo*:

> *"Under the doctrine of separation of powers it stands on an equal footing with the executive and the legislative pillars of state; but in terms of political, financial or military power it cannot hope to compete. It is in these terms by far the weakest of the three pillars; yet its manifest independence and authority are essential. Having no constituency, no purse and no sword, the judiciary must rely on moral authority. Without such authority it cannot perform its vital function as the interpreter of the Constitution, the arbiter in disputes between organs of state and, ultimately, as the watchdog over the Constitution and its Bill of Rights — even against the state."*[77]

In *Natal Joint Municipal Pension Fund v Endumeni Municipality*, the Supreme Court of Appeal stated that "[i]nterpretation always follows upon the democratic process leading to legislation and is, in that sense, a secondary and subordinate process. The interpreter does not write upon a blank page, but construes the words written by others."[78]

The key argument against the judiciary disregarding the clear text of a statutory provision is wholly related to the institution losing its moral authority. Political attacks against the judiciary and constitutionalism are not unknown. The judiciary as an institution stands to lose its legitimacy if it encroaches on the terrain of the other branches of government. As Smith reminds us, "[a] legal system's moral authority is not self-bestowed; no regime may arrogate to itself the license to act as it does, acquiring authority by self-declared decree".[79] The author makes it clear that "authority" refers to moral authority.

Irrespective of constitutional and jurisprudential debate about the powers of the judiciary in interpreting legislation, if the judiciary loses its moral authority, then the South African constitutional project will be crippled. If the judiciary itself is tried in the court of public opinion and found to be overstepping its authority, then it is at risk of losing the ability to perform its most vital function. In the *ACDP* case, the majority of the Court, therefore, played a dangerous game in disregarding the text of the statutory provision. Being the apex court, the majority also runs the risk of opening the door to unbridled judicial law-making.

All this is not to say that judges never have the ability to create law. As mentioned above, legislation may sometimes be drafted especially vague so as to allow the judiciary to develop the law on a case-to-case basis. There are also those who would argue that every instance of statutory interpretation is an exercise in law-making.[80] According to Popkin, all approaches to statutory interpretation are ultimately decisions about law-making responsibility.[81] It is submitted that the disregard of text in favour of regard to general constitutional values and other elements of interpretation in the *ACDP* case shows a willingness by the majority of the Court to engage in unashamed judicial law-making.

6.6 ACDP and its impact

There have been other cases in which the Constitutional Court and other lesser courts have opted to disregard the text of legislative provisions. Although it is not possible to properly survey all Constitutional Court cases here, the recent case of *National Union of Metal Workers of South Africa v Commission for Conciliation Mediation and Arbitration*[82] is a prime example of a case where the Court was similarly divided. The majority may similarly have been said to have disregarded the explicit instructions of the text in favour of resorting to extra-textual considerations which are contradictory to the text itself. It, therefore, would come as a surprise that the most often cited dictum on contemporary statutory interpretation in South

Africa has, however, come from the Supreme Court of Appeal when Wallis JA in *Natal Joint Municipal Pension Fund v Endumeni Municipality*[83] endorsed an approach to the interpretation of statutes which is teleological yet emphasises the importance of the text of a given legislative provision. The Court noted:

> *"The present state of the law can be expressed as follows. Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document."*[84]

The focus of the approach adopted by the Supreme Court of Appeal on the importance of language is clearly at odds with the practices of the Constitutional Court and other courts in disregarding the text of a statutory provision. The *ACDP* case serves as a precedent for other courts to disregard the text of statutory provisions. Nevertheless, the Constitutional

Court has expressly endorsed the dictum in *Natal Joint Municipal Pension Fund* in a host of cases.[85] This, in a sense, is unsurprising as the Constitutional Court itself had previously commented on the importance of text during the interpretive process and the function of the Court *vis-à-vis* that of the legislature. It is, however, also surprising as the Court had, in the *ACDP* case and in others, completely disregarded the text of statutory provisions. From this, the impression is created that the court understands that it is not within its powers to disregard the text of a statutory provision but that it is still willing to do so. What is missing, however, is any guidance as to the circumstances under which a court may disregard the text of a statutory provision. Is it in cases of presumed unconstitutionality where the text is seemly at odds with constitutional rights or values? And, if so, why not simply utilise the available constitutional remedies? It is submitted that the text should not be disregarded during the processes of statutory interpretation at all, as the courts are entitled to do so in terms of their powers of providing a remedy following the finding of unconstitutionality.

6.7 Conclusion

Can a meaning of a statutory provision be preferred that is animated by extra-textual factors such as values and purpose, even when it is clearly at odds with the text of a legislative provision, or should a teleological interpretation which fits within the range of possibilities provided for within the text be preferred? Teleological interpretation requires interpreters to have regard to all the elements of a statutory provision. These elements are the text, context, values, history and comparative environment. A statutory norm can never come to rest on any one of its potential modes of being. The text is considered the starting point when determining the purpose of legislation in light of constitutional values.

When a defence of the text as a key component of statutory interpretation is written, an author inevitably sets the stage for criticism and being labelled "dogmatic",

"formalistic" or "literalist". But literalism maintains that meaning may *only* be determined in dealing with the text (although some literalists would accept that it is possible to look beyond the text in cases of ambiguity or absurdity). This is, however, not the central argument of this Chapter. Instead, this Chapter acknowledges that text is never the sole determinant to discover statutory meaning. In fact, courts ought also to be criticised when other elements of statutory interpretation, such as history and context, are disregarded.

The majority of the Court in the *ACDP* case played a dangerous game in disregarding the text of the statutory provision. As the apex court, as mentioned above, it runs the risk of opening the door to unbridled judicial law-making. The South African constitutional project will be crippled if the judiciary loses its moral authority. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or business-like for the words actually used. Not only is this approach dangerous, but it is also entirely unnecessary. The courts are already empowered to achieve the same ends through the granting of constitutional remedies.

The focus of the approach adopted by the Supreme Court of Appeal is at odds with the practices of the Constitutional Court and other courts in disregarding the text of a statutory provision. The court's approach creates the impression that it understands that it is not within its powers to disregard the text but is still willing to do so.

Endnotes

1 2006 3 SA 305 (CC) (*ACDP*).
2 See in general Cowen "Prolegomenon to a restatement of the principles of statutory interpretation" 1976 *Tydskrif vir die Suid-Afrikaanse Reg* 131.
3 Du Plessis "Interpretation of the Bill of Rights" in Woolman, Roux and Bishop (eds) *Constitutional Law of South Africa* (2014) 32-1 32-29.
4 See *Grey v Pearson* 1843–60 All ER Rep 21 (HL) 36. The golden rule became established in case law as a softened position to crude literalism. See *Venter v R* 1907 TS 910 914–915; *Principal Immigration Officer v Hawabu* 1936 AD 26 30–31; *S v Toms; S v Bruce* 1990 2 SA 802 (A) 807H–J; *Van Heerden v Joubert* 1994 4 SA 793 (A) 795E–G; *Poswa v Member of the Executive Council for Economic Affairs, Environment and Tourism, Eastern Cape* 2001 3 SA 582 (SCA) par 10-13. See also Cowen "The interpretation of statutes and the concept of 'the intention of the legislature'" 1980 *THRHR* 374 379.
5 See Van Staden "The role of the judiciary in balancing flexibility and security" 2013 *De Jure* 30.
6 *ACDP* (n 1) par 1–37.
7 *ACDP* (n 1) par 38–65.
8 Le Roux "Directory provisions, section 39(2) of the Constitution and the ontology of statutory law: *African Christian Democratic Party v Electoral Commission*" 2006 *SA Publiekreg/Public* Law 382
9 Du Plessis (n 3) 32-35.
10 1995 4 BCLR 401 (CC).
11 par 17 and 18.
12 Cowen (n 2) 137.
13 Intentionalism, writes Du Plessis (n 3) 32-31 "claims that the paramount rule of statutory interpretation is to discern and give effect to the real intention of the legislature." See also *Farrar's Estate v Commissioner for Inland Revenue* 1926 TPD 501 508; *SANTAM Versekeringsmaatskappy Bpk v Roux* 1978 2 SA 856 (A) 868E–F; *Suliman v Minister of Community Development* 1981 1 SA 1108 (A) 1120A–B; *S v Masina* 1990 4 SA 709 (A) 713G; *Dodd v Multilateral Motor Vehicle Accidents Fund* 1997 2 SA 763 (A) 769D; and *Coin Security Group Pty Ltd v SA National Union for Security Officers* 1998 1 SA 685 (C) 688E.
14 According to Du Plessis (n 3) 32-33 "[c]ontextualism is the theory of statutory interpretation that holds that the meaning of an enacted provision and its words and language can only be determined in light of its context or 'background conditions'". See also *West Rand Estates Ltd v New Zealand Insurance Co Ltd* 1925 AD 245 261; *Jaga v Dönges; Bhana v Dönge* 950 4 SA 653 (A) 662D–667H; *Secretary for Inland Revenue v Brey* 1980 1 SA 472 (A) 478A–B, *S v Makwanyane* 1995 3 SA 391

(CC) par 10; *Ferreira v Levin NO; Vryenhoek v Powell* 1996 1 SA 984 (CC) par 52, 54, 57, 70, and 170; *S v Motshari* 2001 2 All SA 207 (NC) par 8; and *Department of Land Affairs v Goedgelegen Tropical Fruits Pty Ltd* 2007 6 SA 199 (CC) par 24.

15 "A proponent of purposivism", writes Du Plessis (n 3) 32–35, "will attribute meaning to such a provision in the light of the purpose or object it has (most probably) been designed to achieve". See also *Qozoleni v Minister of Law and Order* 1994 3 SA 625 (E) 634I–635C; *Potgieter v Kilian* 1995 11 BCLR 1498 (N) 1515B–F; *Stellenbosch Farmers' Winery Ltd v Distillers Corp (SA) Ltd* 1962 (1) SA 458 (A) 473F; *Nasionale Vervoerkommissie van Suid-Afrika v Salz Gossow Transport* 1983 4 SA 344 (A) 357A; *Kanhym Bpk v Oudtshoorn Munisipaliteit* 1990 3 SA 252 (C) 261C–D; *Raats Röntgen and Vermeulen Pt Ltd v Administrator Cape* 1991 1 SA 827 (C) 837A; and *Stopforth v Minister of Justice; Veenendaal v Minister of Justice* 2000 1 SA 113 (SCA) par 21.

16 According to Du Plessis (n 3) 32-32 "[t]he principal purpose of interpretation is said to be determining the intention of the legislature. The legislature couches or encodes its intention in the language of the statutory provision to be construed. When the words used for this purpose are clear and unambiguous, their literal, grammatical meaning must prevail and they must be given their ordinary effect. This, it is believed, will disclose and convey, without further ado, the true intention of the legislature and thereby the 'correct' meaning of the provision construed." See also *Randburg Town Council v Kerksay Investments Pty) Ltd* 1998 1 SA 98 (SCA) 107A–B; *Public Carriers Association v Toll Road Concessionaries Pty Ltd* 1990 1 SA 925 (A) 942I–J; *Manyasha v Minister of Law and Order* 1999 2 SA 179 (SCA) 185B–C; and *Commissioner, SA Revenue Service v Executor, Frith's Estate* 2001 2 SA 261 (SCA) 273G–I.

17 See *Goldberg v P J Joubert Ltd* 1960 1 SA 521 (T) 523D; *Naboomspruit Munisipaliteit v Malati Park (Edms) Bpk* 1982 2 SA 127 (T) 133F; *Oertel v Direkteur van Plaaslike Bestuur* 1983 1 SA 354 (A) 370D–G and *Reynolds Bros Ltd v Chairman, Local Transportation Board, Johannesburg* 1984 2 SA 826 (W) 828G.

18 Cowen (n 2) 144.

19 Cowen (n 2) 144.

20 1875 Buchanan 50 64-65. The Court held that "[i]f the rules of the Roman-Dutch law (following those of the Roman law) for the proper construction of statutes were to guide this Court, there would be no difficulty in construing the clause… But in construing statutes made in this colony after the cession to the British Crown, this Court should, in my opinion, be guided by the decisions of the English Courts, and not by the Roman-Dutch authorities …. There seems no doubt … that the enlarged or extensive interpretation of statutes which was admitted in former times has given way (except it would appear in old statutes) to a strict observance of the literal

and grammatical sense of the words employed. The current of modern decisions seems to be in favour of considering the literal meaning of the words in which the statute is expressed as the primary index to the intention with which the statute was made, and to abide by the literal meaning even where it varies from other indications of the actual intention of the Legislature."

21 Cowen (n 2) 145.
22 This rule was applied in cases such as *Venter v R* 1907 TS 910 914–915; *Principal Immigration Officer Hawabu* 1936 AD 26 30–31; and *S v Toms; S v Bruce* 1990 2 SA 802 (A) 807H–J. Reliance were also placed on this rule by court after the adoption of South Africa's first justiciable constitutions. See *Van Heerden v Joubert* 1994 4 SA 793 (A) 795E–G; and *Poswa v Member of the Executive Council for Economic Affairs, Environment and Tourism, Eastern Cape* 2001 3 SA 582 (SCA) par 10–13.
23 See Botha *Waarde-aktiverende Grondwetuitleg: Vergestalting van die Materiële Regstaat* (1996 thesis UNISA).
24 Du Plessis (n 3) 32–52.
25 2009 1 SA 337 (CC) (*Wary Holdings*).
26 *Wary Holdings* (n 25) par 46.
27 Botha *Statutory Interpretation: An Introduction for Students* (2005) 10, 66, 75. The author does not repeat this supposition in Botha *Statutory Interpretation: An Introduction for Students* (2012) but does not deny it either.
28 Du Plessis (n 3) 32–54.
29 Du Plessis (n 3) 32–54.
30 Du Plessis (n 3) 32–55.
31 Du Plessis (n 3) 32–55.
32 Botha (n 27) 59.
33 Devenish *Interpretation of Statutes* (1992) 40.
34 Devenish (n 33) 39.
35 *ACDP* and *Department of Land Affairs v Goedgelegen Tropical Fruits Pty Ltd* 2007 6 SA 199 (CC).
36 2006 3 SA 305 (CC) par 34.
37 Le Roux (n 8) 386.
38 Devenish "*African Christian Democratic Party v Electoral Commission*: The new Methodology and Theory of Statutory Interpretation in South Africa" 2006 *South African Law Journal* 399–408.
39 These arguments were also identified by Marais and Muller "The right of an ESTA occupier to make improvements without an owner's permission after *Daniels*: *quo vadis*; statutory interpretation and development of the common law?" 2018 *South African Law Journal* 766–798. See the reply thereto by Davis "The right of an ESTA occupier to make improvements without an owner's permission after *Daniels*: a different perspective" 2019 *South African Law Journal* 420.
40 Du Plessis (n 3) 32–44 and 32–84.

41 Sunstein *The Partial Constitution* (1993) 104. This presupposition stands in stark contrast to the maxim *clara non sunt interpretanda* (transparent text requires no interpretation).
42 Endicott "The value of vagueness" in Marmor and Soames (eds) *Philosophical Foundations of Language and Law* (2013) 14 15.
43 Endicott (n 42) 16.
44 Endicott (n 42) 16.
45 Maley "The language of the law" in Gobbons (ed) *Language and the Law* (1994) 17.
46 *National Credit Regulator v Opperman* 2013 2 SA 1 (CC) par 49. S 1(*c*) of the Constitution states that the Republic is founded upon the values of "supremacy of the constitution and the rule of law". See also *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC) par 102 where the Constitutional Court stated that "[t]he need for accessibility, precision and general application flow from the concept of the rule of law. A person should be able to know of the law, and be able to conform his or her conduct to the law."
47 Du Plessis *Re-interpretation of Statutes* (2002) 248.
48 Du Plessis "The (re-) systematization of the canons of and aids to statutory interpretation" 2005 *SALJ* 591 611.
49 Le Roux (n 8) 398.
50 Le Roux (n 8) Du Plessis (n 48) 612.
51 Du Plessis "Interpretation of statutes and the Constitution" in *LexisNexis* (ed) *Bill of Rights Compendium* (2012) 2C32.
52 Rosenau *Post-Modernism and the Social Sciences: Insights, Inroads, and Intrusions* (1992) 25.
53 *Xaba v Portnet Ltd* 2000 21 ILJ 1739 (LAC) par 3.22.
54 *Bertie Van Zyl Pty Ltd v Minister for Safety and Security* 2010 2 SA 181 (CC) par 21. The Court went on to say that "[i]t is indeed an important principle of the rule of law, which is a foundational value of our Constitution, that rules be articulated clearly and in a manner accessible to those governed by the rules. A contextual interpretation of a statute, therefore, must be sufficiently clear to accord with the rule of law."
55 *S v Zuma* (n 10) par 17-18.
56 Wallis "Interpretation Before and After *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 4 SA 593 (SCA)" 2019 *PER/PELJ* 1 14.
57 Wallis (n 56) 14.
58 Endicott "The value of vagueness" in Marmor and Soames (eds) *Philosophical Foundations of Language in the Law* (2013) 14 25.
59 Hart *The Concept of Law* (1994) 130 and 251-252.
60 2002 5 SA 246 (CC) par 88.
61 s 172(1)(*b*) of the Constitution.
62 *Dawood v Minister of Home Affairs* 2000 3 SA 936 (CC); *Janse van Rensburg v Minister of Trade and Industry* 2001 1 SA 29 (CC);

Booysen v Minister of Home Affairs 2001 4 SA 485 (CC), *Volks v Robinsion* 2005 5 BCLR 446 (CC); *Moseneke v The Master of the High Court* 2001 2 SA 18 (CC); and *South African Liquor Traders Association v Chairperson, Gauteng Liquor Board* 2006 8 BCLR 901 (CC). Note however that in *J v Director General, Department of Home Affairs* 2003 5 SA 621 (CC) par 22 it was held that "[w]here the appropriate remedy is reading in words [or severance or notional severance] in order to cure the constitutional invalidity of a statutory provision, it is difficult to think of an occasion when it would be appropriate to suspend such an order. This is so because the effect of reading in is to cure a constitutional deficiency in the impugned legislation. If reading in words does not cure the unconstitutionality, it will ordinarily not be an appropriate remedy. Where the unconstitutionality is cured, there would usually be no reason to deprive the applicants or any other persons of the benefit of such an order by suspending it. Moreover, the legislature need not be given an opportunity to remedy the defect, which has by definition been cured. In the present case, the effect of the order is not to leave a lacuna but to remedy the constitutional defect complained of by the applicants by a combination of reading in and striking down. Under the circumstances, it is not an appropriate case for our order to be suspended." Bishop "Remedies" in Woolman *et al Constitutional law of South Africa* (2008) 9-125, however, defends the practice on the ground that, when a court awards this hybrid remedy it has already concluded that reading in, notional or actual severance is an inappropriate permanent measure but requires a "stop-gap measure" until the legislature gets around to deciding how to cure the defect.

63 Du Plessis (n 3) 32-141.

64 "Fashioning constitutional remedies in South Africa: some reflections" 2011 *Advocat* http://www.sabar.co.za/law-journals/2011/april/2011-april-vol024-no1-pp41-44.pdf (2021-01-23). In *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 2 SA 1 (CC) par 24 the Constitutional Court held as follows: "There is a clear distinction between interpreting legislation in a way which 'promote[s] the spirit, purport and objects of the Bill of Rights' as required by section 39(2) of the Constitution and the process of reading words into or severing them from a statutory provision which is a remedial measure under section 172(1)(*b*), following upon a declaration of constitutional invalidity under section 172(1)(*a*). … What is now being emphasised is the fundamentally different nature of the two processes. The first process, being an interpretative one, is limited to what the text is reasonably capable of meaning. The latter can only take place after the statutory provision

in question, notwithstanding the application of all legitimate interpretative aids, is found to be constitutionally invalid."

65 Le Roux "Undoing the past through statutory interpretation: the Constitutional Court and marriage laws of apartheid" 2005 *Obiter* 526.

66 (n 67) par 105.

67 *Daniels v Campbell* 2004 5 SA 331 (CC) par 104.

68 Du Plessis (n 3) 32-168.

69 Du Plessis (n 3) 32-169.

70 *Zinmat Insurance Co Ltd v Chawanda* 1991 (2) SA 825 (ZSC) 832H-I. See also Du Plessis *The Interpretation of Statutes* (1986) 143, Labuschagne "Die uitlegvermoede teen staatsgebondenheid" *1978 TRW* 42 62, Labuschagne "Regsdinamika: opmerkings oor die aard van die wetgewingsproses" 1983 *THRHR* 422 422 and Le Roux (n 65) 537.

71 See, for example, *Arlington Central School District Board of Education v Murphy* 548 US 291 (2006) where the majority of the Court per Justice Alito at 296 held that courts must "begin with the text" and "enforce [that text] according to its terms". The minority, per Justice Breyer at 309 however held that the statutory purpose could supersede the text of a statutory provision.

72 5 US (1897).

73 Manning "Textualism and the equity of the statute" 2001 Columbia Law Review (2001) 1 101.

74 22 US (1824) 738.

75 Consider *Du Plessis v De Klerk* 1996 3 SA 850 (CC) par 181 where the Constitutional Court remarked on the function of the courts within democracy. The Court warned that the Constitution does not contemplate a dikastocracy and that the "role of the courts is not effectively to usurp the functions of the legislature". Courts, it was held, "should not establish new, positive rights and remedies on its own". Instead, judicial function is described as ensuring that legislation does not violate fundamental rights, interpreting legislation in a manner that furthers the values expressed in the Constitution, and ensuring that common law and custom is developed as to harmonise with the Constitution. Refer to *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 2 SA 1 (CC) par 78; *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division)* 2004 1 SA 406 (CC) par 87; and *Glenister v President of the RSA* 2009 2 BC LR 136 (CC) par 43.

76 2006 6 SA 416 (CC) par 37.

77 *S v Mamabolo* 2001 3 SA 409 (CC) par 16.

78 2012 4 SA 593 (SCA) (*Natal Joint Municipal Pension Fund*) par 22.

79 Smith *Judicial Review in an Objective Legal System* (2015) 88.

80 See in general Singh and Bhero "Judicial law-making: unlocking the creative powers of judges in terms of section 39(2) of Constitution" 2016 *PER/PELJ* 1.
81 Popkin "Law-making responsibility and statutory interpretation" 1993 *Indiana Law Journal* 865.
82 2021 ZACC 47. The minority of the Court held that "[i] n addition to the point on the requisite jurisdictional fact, the language of section 62 indicates that the power to determine demarcation disputes was exclusively conferred on the CCMA's commissioners. Where the *language* of the empowering statute suggests that Parliament had deliberately chosen a particular functionary to exercise power, a court may not substitute the decision of that functionary with its own." Emphasis added.
83 *Natal Joint Municipal Pension Fund* (n 78).
84 *Natal Joint Municipal Pension Fund* (n 78) par 18.
85 The dictum was first referred to in *Democratic Alliance v Speaker of the National Assembly* 2016 3 SA 487 (CC) and the expressly endorsed in *Transport and Allied Workers Union of South Africa obo Ngedle v Unitrans Fuel and Chemical (Pty) Ltd* 2016 37 ILJ 2485 (CC). In total, the Constitutional Court had referred to or endorsed the principles as set out in this dictum in 35 cases.

Chapter 7

The right to equality and the adoption of a concrete test for unfair discrimination

Harksen v Lane[1]

"We have interpreted [the equality clause] as a clause which is primarily a buffer against the construction of further patterns of discrimination and disadvantage. Underpinning the desire to avoid such discrimination is the Constitution's commitment to human dignity. Such patterns of discrimination can occur where people are treated without the respect that individual human beings deserve and particularly where treatment is determined not by the needs or circumstances of particular individuals, but by their attributes and characteristics, whether biologically or socially determined." (Harksen v Lane par 90)

7.1 Introduction

In *Harksen v Lane*, Mrs Jeanette Harksen, the wife of an insolvent businessman, Jurgen Harksen, challenged the constitutional validity of certain provisions of the Insolvency Act[2] that caused her property (as that of the solvent spouse) to vest in the Master of the High Court and later in the trustee of the insolvent estate upon her husband's insolvency being declared. The Insolvency Act permits the solvent spouse's property to be released only provided she produces proof of a valid legal title to the property. If the solvent spouse fails to do so, the property will be regarded as part of the insolvent estate and will benefit the insolvent estate's creditors. Mrs Harksen contended that the Act unfairly discriminated against couples

based on their marital status. The court disagreed, holding that the Act's purpose is to protect the interests of creditors. While it did treat spouses differently from other persons, the Court held that it did not violate the right to equality because the differentiation served a legitimate purpose.[3] In coming to this conclusion, the Constitutional Court developed a controversial test to determine if unfair discrimination had occurred. Although the test was developed in terms of the somewhat differently worded equality clause of the Interim Constitution,[4] it was subsequently accepted[5] that the test also applied to the equality clause in the Final Constitution.[6] This test is especially useful in allowing the courts to distinguish between mere differentiation, fair discrimination and unfair discrimination. The test is as follows:

> "*(a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not then there is a violation of section 8(1). Even if it does bear a rational connection, it might nevertheless amount to discrimination.*
>
> *(b) Does the differentiation amount to unfair discrimination? This requires a two stage analysis:*
>
> *(i) Firstly, does the differentiation amount to "discrimination"? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.*
>
> *(ii) If the differentiation amounts to "discrimination", does it amount to "unfair discrimination"? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by*

> *the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation.*
>
> *If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of section [9 of the Constitution].*
>
> *(c) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause (section [36 of the Constitution]).”*[7]

Much criticism has however been levelled against the test. Nevertheless, the Constitutional Court has endorsed the test in more than 221 cases.[8] Notwithstanding, the test has, on several occasions, also been incorrectly applied – even by the Constitutional Court itself.[9] The test in *Harksen* was developed specifically to deal with the equality clause in the Constitution. Due to the subsidiarity principle, “[w]here there is legislation giving effect to a right in the Bill of Rights, a claimant is not permitted to rely directly on the Constitution”.[10] The Constitution requires that national legislation be enacted to prevent or prohibit unfair discrimination.[11] The Promotion of Equality and Prevention of Unfair Discrimination Act[12] (PEPUDA) provides measures for the promotion of equality in addition to preventative and prohibitive provisions and is meant to deal with the promotion of equality and the prevention of unfair discrimination in South African society generally.[13] The Employment Equity Act[14] (EEA) specifically deals with the promotion of equality and the prevention of unfair discrimination within the workplace context. As a result of the subsidiarity principle, litigants – claiming that they have been unfairly discriminated against – will be unable to rely directly on the provisions of the Constitution and, therefore, on its test in *Harksen.* Instead, these litigants will have to rely on the tests provided in either the PEPUDA or the EEA. Nevertheless, as will be shown, these tests, although moving beyond the *Harksen* test and often formulated

differently than the *Harksen* test, have been significantly influenced thereby.

In this chapter, we consider legislative precedents which proceeded *Harksen*, chief criticisms against *Harksen*, and how the legislative tests which have been adopted in PEPUDA and the EEA relate to *Harksen.* We conclude that it is necessary to revisit the *Harksen* test and that a uniform approach to the determination of unfair discrimination enquiries is needed.

7.2 The road to Harksen v Lane

The concept of equality in any jurisdiction is determined by the society's historical, socio-political, and legal contexts.[15] The test developed in *Harksen* is not an accident of history. Instead, the test should be viewed as an attempt by the Court to summarise and codify the jurisprudence of the early Constitutional Court in dealing with matters of alleged unfair discrimination. The Court relied especially on *Prinsloo v Van der Linde* (*Prinsloo*)[16] and *President of the Republic of South Africa v Hugo* (*Hugo*),[17] which were only handed down six months prior to the *Harksen* case. It should be noted that the Court in *Harksen* was weary of giving an infinitive interpretation of the equality clause. Indeed, the Court stated that its aim was to "take stock of this Court's equality jurisprudence" without in any way departing from that cautious approach described in *Prinsloo*.[18] In the *Prinsloo* case, the Constitutional Court warned that the judiciary

> *"should be astute not to lay down sweeping interpretations at this stage but should allow equality doctrine to develop slowly and, hopefully, surely. This is clearly an area where issues should be dealt with incrementally and on a case by case basis with special emphasis on the actual context in which each problem arises."*[19]

As such, it is doubtful if the Court in *Harksen* intended what it essentially viewed as a summary of various approaches to the equality clause to serve as a test for future cases. In fact, in the *Prinsloo* case, the Court stated that "there are no universally

accepted bright lines for determining whether or not an equality or non-discrimination right has been breached".[20] In fact, the Court in *Prinsloo* took the view that whether conduct amounted to unfair discrimination or legislative provisions contravened the equality clause was a function of contextual interpretation.[21]

In *Prinsloo*, the court proceeded from the starting point that the text of the equality clause was a product of South Africa's history of racial discrimination.[22] This equality clause, according to the Court, referred to equality both positively ("equality before the law and equal protection of the law") and negatively (insofar as it prohibited direct and indirect unfair discrimination).[23] While the Court acknowledged the two sides of the equality concept, it was quick to add that this does not necessitate their compartmentalisation.[24] It is this finding that accounts for the absence of any criteria related to the positive and negative character of the equality clause in the *Harksen* test. The Court stated that differentiation is "at the heart of equality jurisprudence".[25] Section 8 distinguished between differentiation that amounts to unfair discrimination and differentiation that does not involve unfair discrimination, according to the Court.[26] The latter is required in any modern society and entails rational, non-arbitrary classification that does not reveal "naked preferences".[27] As a result, the application of the equality clause is based on a rationality analysis, which determines whether there is a rational relationship between the differentiation in question and the governmental purpose sought thereby.[28] However, the presence of a rational connection does not shield a person from a claim of unfair discrimination because rational differentiation can still be considered unfair discrimination.[29] Section 8(4) of the Interim Constitution stated that discrimination was presumed to be unfair on specified grounds and that unfairness had to be proven on unspecified grounds.[30] The Court used the history of South Africa to define unfairness to accomplish this task, claiming that the "humanity of the majority of this country's inhabitants was denied".[31] According to the Court, unfair discrimination "principally means treating

persons differently in a way that impairs their fundamental dignity as human beings, who are inherently equal in dignity".[32] *Prinsloo* did not consider how a limitation of rights analysis fits into the unfair discrimination enquiry.[33] The Court did, however, find that

> *"[i]f each and every differentiation made in terms of the law amounted to unequal treatment that had to be justified by means of resort to section 33, or else constituted discrimination which had to be shown not to be unfair, the courts could be called upon to review the justifiability or fairness of just about the whole legislative programme and almost all executive conduct".*[34]

This statement probably has more to do with the Court's finding that not all differentiations amounted to unfair discrimination. Nevertheless, the statement situates the justifiability enquiry in terms of the limitation clause at the end of the enquiry and after a finding that a differentiation amounts to unfair discrimination has been finally made.

Therefore, several important parts (and omissions) of the *Harksen* test formed in the *Prinsloo* case: First, cases of positive equality and negative equality should be treated the same. Second, differentiation is at the heart of unfair discrimination. Third, certain differentiations amount to unfair discrimination, whilst others do not. Fourth, there must be a rational relationship between differentiation and the governmental purpose. Fifth, even though such a rational relationship exists, the differentiation may still be regarded as unfair discrimination. Sixth, discrimination is presumed to be unfair if it is on a specified ground, whilst unfairness has to be proven on unspecified grounds. Seventh, the chief criterion to determine unfairness is human dignity. Eight, the limitation enquiry in terms of section 36 of the Final Constitution was only to follow after a finding of unfair discrimination was made.

There were, however, still certain missing elements from the *Harksen* test. First, although many elements of the

Harksen test were enunciated in the *Prinsloo* case, no particular order had been endorsed as to how the enquiry must proceed. However, the Court itself dealt with the rationality matter in dealing with *differentiation* which does not involve unfair discrimination.[35] Second, the *Prinsloo* case seemingly provides no guidance as to how mere discrimination, as opposed to unfair discrimination, is to be determined. *Harksen*, however, breaks the question of what differentiations amount to unfair discrimination down into two distinct questions. (*Does the differentiation amount to discrimination?* and *Does the discrimination amount to unfair discrimination?*) Although this does not negate the finding in *Prinsloo*, that human dignity is at the heart of equality, the *Harksen* case makes it clear as to where this heart is situated – in the question whether differentiation amounts to discrimination.

The *Hugo* case was instrumental in the further development, which led to the two different steps in considering if the differentiation amounted to unfair discrimination. The majority of the Court, per Goldstone, reaffirmed the importance of human dignity to the Court's equality jurisprudence. The Court held as follows:

> *"At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups. The achievement of such a society in the context of our deeply inegalitarian past will not be easy, but that is the goal of the Constitution should not be forgotten or overlooked."*[36]

The Court, however, continued and, unlike the *Prinsloo* case, illustrated the importance of the *impact* of the differentiation. The Court continued:

> *"It is not enough for the appellants to say that the impact of the discrimination in the case under consideration affected members of a group that were not historically disadvantaged. They must still show in the context of this particular case that*

> *the impact of the discrimination on the people who were discriminated against was not unfair. Each case, therefore, will require a careful and thorough understanding of the impact of the discriminatory action upon the particular people concerned to determine whether its overall impact is one which furthers the constitutional goal of equality or not. A classification which is unfair in one context may not necessarily be unfair in a different context."*[37]

The majority of the Court held that, to determine whether that impact was unfair, "it is necessary to look not only at the group who has been disadvantaged but at the nature of the power in terms of which the discrimination was effected and, also at the nature of the interests which have been affected by the discrimination".[38] The Court will have to consider the position of the complainants in society and their vulnerability in society during this enquiry. The more vulnerable a group, the more likely it is that a court would find that they have been discriminated against.[39] On this account, our country's history shows patterns of disadvantage, and the prohibition of unfair discrimination is aimed at eradicating these patterns. When determining the impact of prejudice on a specific complainant, the court must consider whether one or more of these patterns of disadvantage were represented in the discriminating behaviour.

The *Harksen* judgment interpreted the findings of the *Hugo* judgment to mean that the central criteria to determine if the differentiation amounted to discrimination was that of human dignity. Thereafter, a finding that the discrimination was unfair would be determined based on the criteria of the *impact* of the discriminatory action. This conclusion followed logically from the *Hugo* judgment. In *Hugo*, the Court required that the *impact* of the *discriminatory action* should have been considered before a finding could be made about the unfairness of the discrimination. As such, it is clear that the court had already considered the differentiation to have amounted to discrimination. The *Hugo* judgment, therefore, gave rise

to the two-stage analysis used by the Court to determine if differentiation amounted to unfair discrimination.

That it had already become accepted that the limitation enquiry was to follow the unfair discrimination enquiry had also become clear in the *Hugo* judgment. In her minority judgment, Mokgoro J accepted that the differentiation amounted to unfair discrimination but held "that the unfair discrimination is justified under section 33(1) of the Constitution".[40]

7.3 Criticism of *Harksen*

7.3.1 Rationality, equality and the limitation clause

Much criticism has been levelled against the test, including that the guidelines are not well integrated with the right to equality as a whole and with the general provisions on the application of the Bill of Rights.

The limitation of the rights guaranteed in the South African Bill of Rights is regulated by the general limitation clause contained in section 36 of the Constitution. Rationality forms part of the factors in the limitation clause (namely section 36(1)(*d*), "the relation between the limitation and its purpose"), which entails that the limitation should have a legitimate purpose and that the limitation should promote that purpose. A limitation that is not capable of promoting the specified purpose may, therefore, not be imposed. As the rationality test forms part of the factors in section 36, it means that the rationality of a limitation of a right should only be considered after it has been established that the limitation of the right has, in fact, occurred.[41]

Some of the Constitutional Court's earlier judgments considered the rationality question alongside the definition or ambit of the right (which, strictly speaking, forms part of the first stage of the limitation analysis). The *Prinsloo* case is such an example[42] and explains why the rationality requirement was included within the *Harksen* test as occurring during the determination of whether a violation of the equality

clause has occurred (and before it is to be determined if the differentiation may be regarded as unfair discrimination. Van der Schyff referred to this approach as a "worrying trend", which requires an applicant to prove that a limitation is "*arbitrary* before the Court will find an interference that calls for justification".[43] This approach is particularly evident in the *New National Party v Government of the RSA*[44] judgment, where the court stated: "An objector who challenges the electoral scheme on these grounds bears the onus of establishing the absence of a legitimate government purpose, or the absence of a rational relationship between the measure and that purpose."

This strategy is flawed for two reasons. First, the approach is logically incorrect in that the rationality component should be addressed during the second stage of the restriction analysis, i.e., after it has been proven that a right has been factually limited. Second, and probably more importantly, it has an impact on the onus of proof in limitation proceedings. The onus is on the aggrieved party to prove that his or her right has been factually limited during the first step of the restriction inquiry (the factual limitation). During the second step of the investigation, the alleged infringer of the right must demonstrate that the limitation is still justifiable. This means that the putative infringement of the right – not the offended person – must demonstrate that a logical relationship exists between the limitation and its aim. The statement of the court in the *New National Party* case is, therefore, clearly wrong. It is the alleged infringer of the right and not the "objector" who must prove the rationality of the limitation.[45] As an alternative to this argument, it is also possible, although not preferable, that the rationality requirement in the *Harksen* test could be replaced with a rationality investigation based only upon the rule of law as a constitutional value in section 1 of the Constitution. Rule-of-law rationality is then considered to be an alternative for the application of rationality to the right to equality. Such an approach has been adopted by the Constitutional Court in several cases. However, in *Savoi v National Director of Public*

Prosecutions,[46] the Constitutional Court itself conceded that using a rule-of-law approach removes the two-stage analysis that would be applicable in terms of section 36 and that such an approach would effectively deny the respondents the opportunity to place necessary evidence before the court (par 29).

Although the constitutional court has moved away from the approach of dealing with the rationality question before the limitation enquiry in some cases,[47] this (arguably incorrect) approach to rationality has been all but entrenched in cases relating to the right to equality (s 9 of the Constitution) and especially the judgment of the constitutional court in *Harksen*.[48]

The imposition of the rationality requirement at the start of the enquiry means that the application of the general limitation clause to unequal treatment that does not amount to unfair discrimination is problematic. The minimum rationality test means that most assertions based on "simple differentiation" will be ruled out as rational by the Harken test's rationality phase and will not be exposed to a higher bar of justification. If, on the other hand, a legislative provision is judged to be irrational, it is difficult to see how such irrationality can be salvaged by the limitation clause, which sets a higher level of justification than the Harken test's rationality threshold. Measures that fail the *Harken* test's reason requirement are more likely to be judged to be irreversibly unconstitutional.[49] In fact, it has been said that it is "logically impossible" for differentiation which serves no rational government purpose, to be justified under the limitation clause. This point was illustrated in *Van der Merwe v Road Accident Fund*,[50] where the Constitutional Court found that the absence of a legitimate purpose for the legislation rendered this enquiry impossible:

> *"[T]he pursuit of a legitimate government purpose is central to a limitation analysis. The court is required to assess the importance of the purpose of a law, the relationship between a limitation and its purpose and the existence of less restricted*

> *means to achieve the purpose. However, in this case there is nothing to assess. The lack of a legitimate purpose renders, at the outset, the limitation unjustifiable."*[51]

The question could, however, be asked if differentiation which serves a legitimate government purpose but is nonetheless judged to be unfair discrimination, could be justified in terms of the limitation clause. It is difficult to foresee, however, how differentiation which has been found to amount to unfair discrimination, may be found to be "reasonable and justifiable in an open and democratic society based upon human dignity, equality and freedom". It has therefore been stated that a finding of unfairness will probably exhaust all possible justifications that might be offered under the limitation clause.[52] Because the nature and extent of the effects of unfair discrimination are so significant (human dignity damage or a comparable serious result), the limitation clause will be strictly enforced. Apart from ensuring the presence of a rational relationship between the limitation and its objective, much emphasis will have to be placed on the importance of the limitation's purpose. It should be highlighted that the logical relationship requirement applies to both unfair discrimination and differentiation that does not amount to unfair discrimination. In the case of unfair discrimination, the limitation can only be justified by a highly pressing objective, the promotion of which demands the limitation, in addition to the existence of a reasonable link. There is very little choice in terms of various approaches to attain the goal, and there may be cases where no freedom to choose between alternatives will be allowed.[53]

7.3.2 Human dignity and equality

It has also been pointed out that the test requires that the value of dignity do all the heavy lifting. The *Harksen* test requires that unfair discrimination is differentiation and discrimination that impairs human dignity or affects bearers of the right in a comparably serious manner, for example, when it inflicts serious damage through the serious violation of any other

right.[54] According to Rautenbach, the use of human dignity has been an especially useful tool in the formulation of the equality test:

> *"First, the test implies that unfair discrimination occurs when individuals and groups are excluded and degraded as less than human simply because they do not conform to the standards of "normality" of those who wield social, economic or political power. It underlines the offensiveness of unfair discrimination and the ethos of a Bill of Rights founded on the value of human dignity. Second, the test deals with the effect of a differentiating measure and not with its purpose or the intention with which it is employed. In this sense, it provides a clear basis for the distinction between the first phase of the inquiry during which the factual infringement of the right is determined and the second phase when justification for the infringement within the framework of the general limitation clause is investigated. Third, as envisaged by section 9(3), it also enables us to determine whether unfair discrimination exists in the case of differentiations not based on the grounds expressly referred to in section 9(3). Fourth, the test provides an explanation for the application within the framework of section 36 of stricter standards for the justification of unfair discrimination than for the justification of differentiations that do not amount to unfair discrimination. The nature and extent of the limitation of the right to equality by unfair discrimination is much more serious than limitation of the right by other forms of differentiation."*[55]

However, as a result of the use of human dignity, instead of comparably serious effects on other rights, to determine whether or not differentiation amounts to discrimination (before asking if the discrimination amounts to unfair discrimination), the question may be asked why those who suffer the consequences of differentiation which significantly impacts upon the complainant should not be entitled to the protections of the equality clause for its own sake. Several scholars have raised concerns that the centrality of using the dignity requirement in the *Harksen* analysis might reinforce an individualised and abstract conception of equality divorced

from actual social and economic disadvantage and the systemic nature of inequality. Some commentators suggested that more content should be given to the value of equality so that the right might better address structural disadvantages and inequalities. Other legal scholars argued that dignity could be interpreted in a way that addressed group-based inequalities and disadvantages. It has been argued that the value of equality should be given more weight so that the right can better address structural disadvantages and inequality and that dignity should be understood to overcome group-based inequities and disadvantages.[56] The dignity-centred approach focuses on the subjective experience of an individual complainant and therefore has the potential to isolate the complainant from the broader social group.[57] As such, the approach has the potential to militate against the transformation of South African society.[58]

7.3.3 Impact of discrimination and equality

In the previous paragraph, the question was raised why differentiation which did not impact upon the human dignity but nevertheless significantly impacts upon the complainant in ways other than their human dignity, should not be protected by the equality clause. The converse should also be questioned. Why should acts that are discriminatory in nature have to have a significant impact upon the claimant (at least on the Constitutional Court's conception of *impact*) if the differentiation affects the human dignity of the claimant? Is the impairment of the claimant's human dignity (subjectively assessed) not significant enough to be regarded as significant for its own sake? Recall that in assessing impact, the Constitutional Court has found that to determine whether that impact was unfair, it is necessary to look at the group who has been disadvantaged, the nature of the power in terms of which the discrimination was affected and the nature of the interests which have been affected by the discrimination.[59] It may, however, be argued that all instances in which the human dignity of a complainant has been affected are significantly impacted. Arguably, the impact requirement could be useful

to determine if differentiations that do not impact upon the human dignity of a complainant but nevertheless still impacts the complainant based on the nature of the power in terms of which the discrimination was affected and the nature of the interests which have been affected by the discrimination. This will ostensibly solve many of the problems identified in the previous paragraph but will lead to a drastic reformulation of the test.

7.4 Legislative tests for unfair discrimination

7.4.1 Promotion of Equality and Prevention of Unfair Discrimination Act

PEPUDA outlaws unfair discrimination in almost every sphere of South African society.[60] These provisions of PEPUDA were significantly influenced by *Harksen* and the influence of the *Harksen* test is clearly illustrated in the differentiation made in section 13 of the Act to listed (or "prohibited") and unlisted grounds. Section 13 reads as follows:

> *"13 Burden of proof*
>
> *(1) If the complainant makes out a prima facie case of discrimination–*
>
> *(a) the respondent must prove, on the facts before the court, that the discrimination did not take place as alleged; or*
>
> *(b) the respondent must prove that the conduct is not based on one or more of the prohibited grounds.*
>
> *(2) If the discrimination did take place–*
>
> *(a) on a ground in paragraph (a) of the definition of 'prohibited grounds', then it is unfair, unless the respondent proves that the discrimination is fair;*
>
> *(b) on a ground in paragraph (b) of the definition of 'prohibited grounds', then it is unfair–*

(i) if one or more of the conditions set out in paragraph (b) of the definition of 'prohibited grounds' is established; and

(ii) unless the respondent proves that the discrimination is fair."

Section 1 of PEPUDA defines "prohibited grounds" as follows:

"(a) race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, birth and HIV/AIDS status; or

(b) any other ground where discrimination based on that other ground–

(i) causes or perpetuates systemic disadvantage;

(ii) undermines human dignity; or

(iii) adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on a ground in paragraph (a)."

Section 14 of PEPUDA contains a test for unfair discrimination and has been described as the heart of the Act.[61]

"14 Determination of fairness or unfairness

(1) It is not unfair discrimination to take measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination or the members of such groups or categories of persons.

(2) In determining whether the respondent has proved that the discrimination is fair, the following must be taken into account:

(a) the context;

(b) the factors referred to in subsection (3);

(c) whether the discrimination reasonably and justifiably differentiates between persons according

to objectively determinable criteria, intrinsic to the activity concerned.

(3) The factors referred to in subsection (2)(b) include the following:

(a) whether the discrimination impairs or is likely to impair human dignity;

(b) the impact or likely impact of the discrimination on the complainant;

(c) the position of the complainant in society and whether he or she suffers from patterns of disadvantage or belongs to a group that suffers from such patterns of disadvantage;

(d) the nature and extent of the discrimination;

(e) whether the discrimination is systemic in nature;

(f) whether the discrimination has a legitimate purpose;

(g) whether and to what extent the discrimination achieves its purpose;

(h) whether there are less restrictive and less disadvantageous means to achieve the purpose;

(i) whether and to what extent the respondent has taken such steps as being reasonable in the circumstances to-

(i) address the disadvantage which arises from or is related to one or more of the prohibited grounds; or

(ii) accommodate diversity."

The factors referred to in subsection (3) are not a closed list. The equality courts are therefore entitled to consider any other factor in addition to those listed in the subsection to determine if discrimination is unfair. Nevertheless, Kok has indicated that the section could benefit from a legislative amendment.[62] First, the author advocates for the deletion of section 14(2)(*c*) from the Act – "whether the discrimination reasonably and justifiably differentiates between persons according to objectively determinable criteria, intrinsic to the activity

concerned". This section was inserted into the Act as a result of heavy lobbying from the banking and insurance sectors during Parliamentary hearings to include a clause that would have served as a complete defence for so-called commercial differentiation. This provision means that, for example, objective actuarially and commercially based evidence should not be regarded as unfair discrimination. Several authors have argued that the provision could undermine genuine socio-economic equality and transformation since it invites courts to rule on whether market-related service fees and prices are reasonable and justifiable discrimination.[63]

Second, the author indicates that the scheme outlined in section 14 does not follow constitutional jurisprudence on the approach to be taken when determining whether discrimination is fair or unfair. When dealing with a law of general application that unfairly discriminates, a court must consider whether the unfair discrimination is still reasonable and justifiable. When discrimination does not take the form of general law, no inquiry into reasonableness and justifiability is conducted. The Act makes no distinction and subjects all inquiries to an assessment of fairness/unfairness, reasonableness/justifiability, and so on. The Act should have followed a three-stage approach as well: (a) did discrimination occur; (b) if so, was the discrimination unfair; and (c) if so, was the discrimination reasonable and justifiable?[64]

To this should be added that section 14 incorporates factors that are part of the rationality enquiry to determine if discrimination is fair (whether the discrimination has a legitimate purpose; whether and to what extent the discrimination achieves its purpose; and whether there are less restrictive and less disadvantageous means to achieve the purpose). In *Harksen*, the rationality enquiry is linked to the *differentiation* enquiry.

Nevertheless, the impact of the *Harksen* test on the section 14 enquiry is clear. The first two factors (whether the discrimination impairs or is likely to impair human dignity; and the impact or likely impact of the discrimination on the

complainant) are taken directly from Harksen, although section 14 links all factors to the fairness enquiry and *Harksen* links the first to the *discrimination* enquiry. Other factors (such as the position of the complainant in society and whether he or she suffers from patterns of disadvantage or belongs to a group that suffers from such patterns of disadvantage; the nature and extent of the discrimination; and whether the discrimination is systemic in nature) may be regarded as a manifestation of the first two factors.

7.4.2 Employment Equity Act

Section 6(1) of the EEA contains a prohibition on unfair discrimination:

> *"No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, birth or on any other arbitrary ground."*

Several commentators have advanced an interpretation of "arbitrary ground" in the phrase "on any other arbitrary ground" that refers merely to an unlisted ground.[65]

According to the Memorandum of Objectives of the Employment Equity Bill, the new section 11 was created to provide consistency with section 13 of PEPUDA.[66] Section 13 of the EEA reads as follows:

> *"11 Burden of proof*
>
> *(1) If unfair discrimination is alleged on a ground listed in section (1), the employer against whom the allegation is made must prove, on a balance of probabilities, that such discrimination–*
>
> *(a) did not take place as alleged; or*
>
> *(b) is rational and not unfair, or is otherwise justifiable.*

> (2) *If unfair discrimination is alleged on an arbitrary ground, the complainant must prove, on a balance of probabilities, that–*
>
> *(a) the conduct complained of is not rational;*
>
> *(b) the conduct complained of amounts to discrimination; and*
>
> *(c) the discrimination is unfair."*

The predecessor of section 11 provided only that the employer against whom a claim for unfair discrimination is alleged must establish that the discrimination is fair. Section 11 now distinguishes between listed grounds in section 11(1) and arbitrary grounds in section 11(2) in respect of the burden of proof and the reference to arbitrary grounds in section 11(2) should be interpreted to refer to unlisted grounds.[67] The test in section 11 of the EEA essentially follows the structure of the *Harksen* case and section 11 creates several defences against a claim of unfair discrimination which draws from *Harksen*.

The following defences are available if it is alleged that discrimination occurred on a listed ground. First, the employer may prove that the discrimination did not take place as alleged. The employer may be able to demonstrate that the discrimination did not occur. If the employer is successful in showing this, the employee's case is over. Note that, unlike *Harksen*, the section 11 EEA test does not differentiate between differentiation and discrimination. Whilst *Harksen* starts off by dealing with differentiations, section 11 starts off by dealing with *discrimination*. Section 11 treats the presence of discrimination as a factual question and discrimination is not determined with reference to human dignity as in the *Harksen* case. This situation is likely the result of poor legislative drafting. Rautenbach and Fourie eloquently express this idea as follows:

> *"It has also crossed our minds – in a highly speculative way – that the confusion about unfair discrimination in labour law circles could possibly be ascribed to the failure of the drafters of labour legislation to refer expressly to differentiations that do*

> *not amount to unfair discrimination. For some or other reason they have concentrated only on 'unfair discrimination'. Could it be that they have tried to compensate (perhaps instinctively) for this neglect by inserting the word 'arbitrary' somewhere in their formulation of unfair discrimination?"*[68]

In all likelihood, even though section 11 of the EEA is expressed in a different language, it should be understood to refer to *differentiation.* Interpreted in this way, there would be no conflict with *Harksen.*

Second, the employer may prove that the discrimination is rational. The employer does so by showing that the discrimination is rationally related to a legitimate purpose.[69] Like *Harksen* and section 13 of PEPUDA, section 11 emphasises the importance of the existence of a rational connection to a rational purpose. Section 11, however, follows suit with section 13 of PEPUDA in that it requires that *discrimination* would be unfair if it is not connected to a legitimate purpose. *Harksen*, on the other hand, requires that the *differentiation* must be connected to a legitimate purpose. Again, as indicated in the preceding paragraph, the first defence should be understood to refer to the *differentiation* criteria in *Harksen.* This approach has the added benefit of preserving the human dignity enquiry for the following defence. As Rautenbach and Fourie point out, the rationality test is, in any event, a weak test which requires little effort to comply with.[70] It can simply be submitted that the differentiation serves "genuine and legitimate business and operational needs".[71] Even if the employer has passed the logic test, the next obstacle that must be surmounted is one that provides more protection for employees.[72]

Third, and therefore more importantly, the employer may prove that the discrimination is not unfair. Unlike section 13 of PEPUDA or the *Harksen* test, section 11 of the EEA provides no guidance as to what amounts to *unfair* discrimination. This provision, in light of *Harksen*, must be interpreted to mean that the *differentiation* was not unfair in the sense that it did not disparage human dignity or did not have a similarly

serious consequence and that the impact of the *discrimination* was not significant.

Fourth, the employer may prove that the discrimination is otherwise justifiable. This test aligns with *Harksen.* Within the framework of the South African Bill of Rights, this means that there may be permissible reasons for the factual limitation of rights in an open and democratic society based on human dignity, equality and freedom in terms of the limitation clause.[73] As many of the elements of the limitation clause have been dealt with under "rationality" and "fairness", this fourth defence has arguably become superfluous.[74]

If it is alleged that unfair discrimination occurred on an arbitrary (read non-listed ground), the employee must prove the following. First, that the conduct complained of is not rational. Second, that the conduct complained of amounts to discrimination. Third, that the discrimination is unfair. Although the word "and" at the end of section 11(2)(*b*) gives the impression that a complainant must prove all three matters referred to in sections 11(2)(*a*), (*b*), and (*c*), it simply does not make legal or practical sense to require a complainant who has proven the absence of rationality to also prove discrimination and the unfairness of the discrimination. Again, this subsection seems to be the product of poor legislative drafting.

7.5 Conclusion

The Constitution itself provides little guidance as to what amounts to a breach of the equality clause and what does not. Although the Court in *Harksen* expressed caution in giving an infinitive interpretation of the equality clause, it did invertible do so and, in essence, the organic development of our understanding of equality and unfair discrimination was stifled. It could be argued that it is no accident that the Constitution itself contains little guidance as to what conduct or provisions would amount to unfair discrimination. In legal parlance, imprecise, undefined or vague language is frequently regarded as bad, whereas exact language is regarded as good.

Poor legislative drafting is blamed for the use of ambiguous wording. This concern is understandable. The goal of any legislative provision is to provide a standard to which persons can conform their behaviour. When a standard is ambiguous, it appears incapable of influencing a citizen's behaviour (nor does it control the conduct of the officers or public officials responsible for applying them). How, then, can individuals adjust their behaviour to the norm? Concerns have also been expressed about the separation of powers and the role of the legislature in relation to the judiciary. This is because the responsibility of providing content to and establishing the scope of a vague norm's application is delegated first to an applying authority but eventually to the courts. In fact, ambiguous norms allow for judicial law-making.

Our legal system, on the other hand, contains both vague and specific standards, and imprecise norms are not always "bad" but might even be politically beneficial. As a result, legislators may purposefully design legislative measures in a vague manner. The impact would be to produce a vague standard whose application is ambiguous. The processes of the courts mean that general rules would develop only after taking cognisance of both the complainant and the alleged perpetrator. The Court would then use contextual factors and equity considerations, including any alleged transgression of the human dignity of the complainant and the impact upon the complainant to determine in the complainant was unfairly discriminated against. Ultimately, however, the courts would be guided by the subjective criterion of "fairness". Our courts have done this before. Consider, for example, the vague concept "unfair labour practice" as contained in section 23 of the Constitution. When the concept was first introduced in South Africa, it was defined as "any labour practice that in the opinion of the Industrial Court is an unfair labour practice".[75] From here, much of South Africa's current system of labour protection emerged. At no stage, however, was it necessary to develop a test as to what amounted to unfair labour practices and what did not.

Criticism of the *Harksen* test is rife, and the test is often improperly understood by interpreters of the equality clause and equality legislation. In addition, the tests in PEPUDA and the EEA are not necessarily compatible with the *Harksen* test. Whilst several authors have suggested changes to be made thereto,[76] it may be necessary to do away with a test for unfair discrimination in its entirety and to focus on the foundational criteria of fairness based on the contextual factors present in any given case. Differentiation which bears no rational connection to a legitimate government purpose, for example, will inevitably be regarded as unfair. The debate about the proper stage to conduct such an enquiry ultimately is of lesser concern as long as the law is able to provide an effective remedy to a complainant of unfair discrimination. So too, conduct which affects the human dignity of the complainant or seriously impacts the complainant would be more likely to lead to a conclusion that unfair discrimination is unfair. These considerations should, however, be subordinate to the foundational criteria of "fairness". From here, a body of unfair discrimination law, freed from the shackles of the *Harksen* case will be allowed to develop.

Endnotes

1 1998 1 SA 300 (CC) (*Harksen*).
2 24 of 1936.
3 *Harksen* (n 1) par 61.
4 S 8 of the Constitution of the Republic of South Africa Act 200 of 1993 (the Interim Constitution) provided as follows: "8(1) Every person shall have the right to equality before the law and to equal protection of the law. (2) No person shall be unfairly discriminated against, directly or indirectly, and without derogating from the generality of this provision, on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience or belief, culture or language. (3)(*a*) This section shall not preclude measures designed to achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination, in order to enable their full and equal enjoyment of all rights and freedoms. (*b*) … (4) Prima facie proof of discrimination on any of the grounds specified in subsection (2) shall be presumed to be sufficient proof of unfair discrimination as contemplated in that subsection, until the contrary is established."
5 In *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 2 SA 1 (CC) the judgment under s 9 of the Constitution was delivered "on the assumption that the equality jurisprudence and analysis developed by this Court in relation to s 8 of the interim Constitution is applicable equally to s 9 of the 1996 Constitution, notwithstanding certain differences in the wording of these provisions".
6 S 9 of the Constitution of the Republic of South Africa, 1996 (the Final Constitution) provides as follows: "9(1) Everyone is equal before the law and has the right to equal protection and benefit of the law. (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken. (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination. (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."

7 *Harksen* (n 1) par 53.
8 According to Lexis Library Legal Citator available at mylexisnexis.co.za (accessed 15 Feb 2022).
9 See for example *Mahlangu v Minister of Labour* 2021 (2) SA 54 (CC). In this case the majority of the Court found that the differentiation served no legitimate governmental purpose. In a strict application of the *Harksen* test the enquiry should have ended there. The majority of the court however went on to consider the impact of the discrimination with reference to the interrelatedness of the grounds of discrimination.
10 *Sali v National Commissioner of the South African Police Service* 2014 9 BLLR 827 (CC) par 4, 72 and n 2. See also *S v Mhlungu* 1995 3 SA 867 (CC) par 59; *MEC for Education: KwaZulu Natal v Pillay* 2008 1 SA 474 (CC); and *South African National Defence Union v Minister of Defence* 2007 5 SA 400 (CC) par 51.
11 s 9(4).
12 4 of 2000.
13 S 2 of the PEPUDA.
14 55 of 1998.
15 Albertyn and Goldblatt "Equality" in Woolman and Bishop (eds) *Constitutional Law of South Africa* (2018) 35-3.
16 1997 3 SA 1012 (CC) (*Prinsloo*).
17 1997 4 SA 1 (CC) (*Hugo*).
18 *Harksen* (n 1) par 40.
19 *Prinsloo* (n 8) par 20.
20 *Prinsloo* (n 8) par 18.
21 *Prinsloo* (n 8) par 17, 20 and 21. See also Kruger "Equality and unfair discrimination: refining the *Harksen* test" 2011 *South African Law Journal* 479 483.
22 *Prinsloo* (n 8) par 21.
23 *Prinsloo* (n 8) par 22.
24 *Prinsloo* (n 8) par 22.
25 *Prinsloo* (n 8) par 23.
26 *Prinsloo* (n 8) par 23.
27 *Prinsloo* (n 8) par 25.
28 *Prinsloo* (n 8) par 26.
29 *Prinsloo* (n 8) par 26.
30 *Prinsloo* (n 8) par 28. Section 8(4) of the Interim Constitution stated that "[*p*]*rima facie* proof of discrimination on any of the grounds specified in subsection (2) shall be presumed to be sufficient proof of unfair discrimination as contemplated in that subsection, until the contrary is established."
31 *Prinsloo* (n 8) par 31.
32 *Prinsloo* (n 8) par 31.
33 S 36(1) of the Final Constitution reads as follows: "The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into

account all relevant factors, including (*a*) the nature of the right; (*b*) the importance of the purpose of the limitation; (*c*) the nature and extent of the limitation; (*d*) the relation between the limitation and its purpose; and (*e*) less restrictive means to achieve the purpose." The limitation provision in s 33 of the Interim Constitution, which would have been in front of the Court when the early equality cases and *Harksen* was decided, was more verbose. It read as follows: "(1) The rights entrenched in this Chapter may be limited by law of general application, provided that such limitation (*a*) shall be permissible only to the extent that it is (i) reasonable; and (ii) justifiable in an open and democratic society based on freedom and equality; and (*b*) shall not negate the essential content of the right in question, and provided further that any limitation to … [certain rights] … shall, in addition to being reasonable as required in paragraph (*a*)(i), also be necessary. (2) Save as provided for in subsection (1) or any other provision of this Constitution, no law, whether a rule of the common law, customary law or legislation, shall limit any right entrenched in this Chapter. (3) The entrenchment of the rights in terms of this Chapter shall not be construed as denying the existence of any other rights or freedoms recognised or conferred by common law, customary law or legislation to the extent that they are not inconsistent with this Chapter. (4) This Chapter shall not preclude measures designed to prohibit unfair discrimination by bodies and persons other than those bound in terms of section 7(1). (5) (*a*) The provisions of a law in force at the commencement of this Constitution promoting fair employment practices, orderly and equitable collective bargaining and the regulation of industrial action shall remain of full force and effect until repealed or amended by the legislature. (*b*) If a proposed enactment amending or repealing a law referred to in paragraph (*a*) deals with a matter in respect of which the National Manpower Commission, referred to in section 2A of the Labour Relations Act, 1956 (Act 28 of 1956), or any other similar body which may replace the Commission, is competent in terms of a law then in force to consider and make recommendations, such proposed enactment shall not be introduced in Parliament unless the said Commission or such other body has been given an opportunity to consider the proposed enactment and to make recommendations with regard thereto."

34 *Hugo* (n 9) par 17.
35 *Harksen* (n 1) par 34.
36 *Hugo* (n 9) par 41.
37 *Hugo* (n 9) par 41.
38 *Hugo* (n 9) par 41.
39 *Hugo* (n 9) par 42.

40 *Hugo* (n 9) par 89.
41 See Laubscher "The COVID-19 lockdown regulations and the courts' irrational rationality-test – *De Beer v Minister of Cooperative Governance and Traditional Affairs* (21542/2020) [2020] ZAGPPHC 184 (2 June 2020) and *Fair Trade Independent Tobacco Association v President of the RSA* (21688/2020) [2020] ZAGPPHC 246 (26 June 2020)" 2021 *THRHR* 110 and Rautenbach "Die verband tussen die gelykheidbepaling en die algemene beperkingsbepaling in die handves van regte" 1997 *TSAR* 571.
42 *Prinsloo* (n 8) par 31.
43 Van der Schyff *Limitation of Rights* (2005) 107.
44 1999 3 SA 191 (CC) par 19.
45 Van der Schyff (n 41) 107-108.
46 2014 5 SA 317 (CC).
47 *Sarrahwitz v Maritz* 2015 4 SA 491 (CC) par 59-67.
48 Rautenbach "Die Konstitusionele Hof se riglyne vir die toepassing van die reg op gelykheid" 1998 *TSAR* 316-325 and Rautenbach "Die Konstitusionele Hof se riglyne vir die toepassing van die reg op gelykheid II" 2001 *TSAR* 329-340.
49 Albertyn and Goldblatt (n 14) 35-23.
50 1997 3 SA 1012 (CC).
51 par 63.
52 Albertyn and Goldblatt (n 14) 35-25.
53 Rautenbach "Introduction to the Bill of Rights" in LexisNexis (eds) *Bill of Rights Compendium* (2018) § 1A57.2.2.2.
54 *Harksen* (n 1) par 53. In *MEC for Education: KwaZulu-Natal v Pillay* 2008 1 SA 474 (CC) par 94 the Constitutional Court held that "the extent to which discrimination impacts on other rights will be a relevant consideration in the determination of whether the discrimination is fair".
55 Rautenbach (n 52) § 1A57.2.2.1.
56 See Albertyn and Goldblatt (n 14) 35-9 and the sources referred to there.
57 Pieterse "Finding for the applicant: Individual equality plaintiffs and group-based disadvantage" 2008 *SAJHR* 397 421-422.
58 Albertyn "Substantive equality and transformation in South Africa" 2007 *SAJHR* 253 259.
59 *Hugo* (n 9) par 41.
60 See the Schedule to the Act that contains an "Illustrative list of unfair practices in certain sectors". The Schedule to the Act.
61 Kok "The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000: proposals for legislative reform 2008 *SAJHR* 460.
62 Kok (n 61) 467.
63 Liebenberg "The new equality legislation: can it advance socio-economic rights?" 2000 *ESR Review* 2 5 and Liebenberg

and O'Sullivan "South Africa's new equality legislation: a tool for advancing women's socio-economic equality?" Paper presented at a conference titled "Equality: Theory and Practice in South Africa and Elsewhere" at the University of Cape Town from 18 to 20 January 2001, copy of paper in author's possession, page 36-37.

64 Kok (n 61) 469.

65 Rautenbach and Fourie "The Constitution and recent amendments to the definition of unfair discrimination and the burden of proof in unfair discrimination disputes in the Employment Equity Act" 2016 *TSAR* 110 122. See also De Villiers "Arbitrêre gronde vir onbillike diskriminasie en die bewyslas in arbeidsgeskille" 2014 *Litnet* 169 170.

66 *Memorandum on objects of Employment Equity Amendment Bill, 2012 Employment Equity Amendment Bill* [B 31B-2012] – https://jutalaw.co.za/media/filesto (24 February 2022).

67 Rautenbach and Fourie (n 60) 123.

68 Rautenbach and Fourie (n 60) 124.

69 *Prinsloo* (n 8) par 25 and 26.

70 Rautenbach and Fourie (n 60) 123.

71 *Mbana v Shepstone Wylie* 2015 6 BCLR 693 (CC) par 38.

72 Rautenbach and Fourie (n 60) 124.

73 s 36 of the Constitution.

74 Refer to 7.3.1 above.

75 s 1(*f*) of the Industrial Conciliation Amendment Act 94 of 1979.

76 See for example Rautenbach (n 52) § 1A57.4.

Chapter 8

The constitutionalisation of labour law in South Africa

National Education Health and Allied Workers Union (NEHAWU) v University of Cape Town[1]

"Where the legislature enacts legislation in the effort to meet its constitutional obligations, and does so within constitutional limits, courts must give full effect to the legislative purpose. Moreover, the proper interpretation of such legislation will ensure the protection, promotion and fulfilment of constitutional rights and as such will be a constitutional matter. In this way, the courts and the legislature act in partnership to give life to constitutional rights." (National Education Health and Allied Workers Union (NEHAWU) v University of Cape Town par 14)

8.1 Introduction

A case that has been especially significant within the context of the constitutionalisation of labour law and has strengthened the public law nature of labour law is the case of *National Education Health and Allied Workers Union (NEHAWU) v University of Cape Town*. This case also describes the ambit and scope of applying the right to fair labour practices as contained in section 23(1) of the Constitution and endorsed a teleological or broad purposive approach to interpreting labour legislation. Section 23(1) of the Constitution states that "[e]veryone has the right to fair labour practices".[2]

The case arose from a decision by the University of Cape Town to outsource some of its services to contractors. In an appeal to the Labour Court, NEHAWU challenged this decision, arguing that the employees who were dismissed due to outsourcing should be taken over by the contractors, as provided by section 197 of the Labour Relations Act (LRA).[3] The Labour Court dismissed the case submitted by NEHAWU.[4] In this case, the critical question was whether, in terms of section 197, employees are immediately transferred to the company's new owner as a part of the transaction when a business is transferred as a continuing concern.[5]

The Labour Appeal Court (LAC) denied the appeal by NEHAWU in a majority judgment, holding that the employees can only be taken over by the new owner where there is a prior understanding between the employer of the transferor and the employer of the transferor that the employees or the majority of them are part of the transaction.[6] NEHAWU approached the Constitutional Court seeking special leave to appeal against the LAC decision arguing that the interpretation of section 197 by the majority of the Court in the LAC case did not give effect the constitutional right of the dismissed workers to fair labour practices. UCT and two contractors opposing the appeal argued that because it does not pose a constitutional question, the Constitutional Court does not have jurisdiction to hear the matter and that the correct interpretation of section 197 is that of the majority of the LAC.[7]

Furthermore, the case posed crucial concerns regarding the situations in which the Constitutional Court would hear such appeals. The Court found that the case posed a constitutional issue. It was argued that the proper reading of these laws is a constitutional matter where statutes are passed to give effect to constitutional rights. The Court held that where the legislation falls within "constitutional limits", a court, interpreting the legislation, must then give full effect to the legislative purpose and that the "proper interpretation of such legislation will ensure the protection, promotion and fulfilment of constitutional rights and as such will be a constitutional matter".[8]

The effect of this requirement, the Court held, was that it would have jurisdiction in all labour matters. This is so because where statutes are enacted to give effect to constitutional rights, the proper interpretation of these statutes is a constitutional matter. Indeed, the Court found nothing to prevent a litigant from appealing directly to the Constitutional Court.[9] The Court thus unequivocally asserted its right to adjudicate constitutional issues in all labour matters. It was further held that the main object of section 197 is to protect employees as a going concern against job loss in the event of a company relocation.[10]

The Court found that both employers and employees benefit from section 197 as it encourages the transfer of businesses while protecting workers.[11] The applicant's argument that "everyone" in section 23(*c*) of the Constitution referred only to workers, and excluded employers, was based on the mistaken view that all employers were juristic persons and thus not embraced by the term "everyone". The Court, however, held that the right applied equally to workers and employers and that not all employers were juristic persons and that the right should apply to all employers, juristic or otherwise. Therefore, it was concluded that employees are automatically transferred to the new owner after the sale of a business as a going concern, as contemplated in section 197, without needing a prior arrangement between the old and new employer. Thus, the section's consequence is that the new employer takes over the workers and all the rights and responsibilities resulting from their employment contracts.

The Constitutional Court found that the focus of the right to fair labour practice in section 23(1) of the Constitution is, broadly speaking, the relationship between workers and employers and the continuation of that relationship in terms that are fair to both parties.[12] It held that the right was incapable of precise definition and that the tension between the interests of workers and employers compounded problems relating to its meaning. Thus, it was neither necessary nor desirable to define the right. What was fair would depend on the circumstances of each case and would "essentially involve

a value judgment".[13] It further held that the concept of a fair labour practice "must be given content by the legislature and after that left to gather meaning, in the first instance, from the decisions of the specialist tribunals including the LAC and the Labour Court", and, in the second instance, concerning domestic and international law.[14]

The Court, therefore, held that upon the transfer of a business as a going concern as contemplated in section 197, workers are automatically transferred to the new owner without needing a prior agreement between the old and new employer.[15] This finding has been met with little controversy and has influenced many cases related to the transfer of undertakings. The focus of this chapter will, however, be the constitutional law principles invoked in the judgment.

8.2 The teleological approach to the interpretation of labour legislation

The Constitutional Court held that the interpretation of section 197 of the LRA, in particular, and labour matters in general, was to proceed as follows:

> *"The proper approach to the construction of section 197 is to construe the section as a whole and in the light of its purpose and the context in which it appears in the LRA. In addition, regard must be had to the declared purpose of the LRA to promote economic development, social justice and labour peace. The purpose of protecting workers against loss of employment must be met in substance as well as in form. And, as pointed out earlier, it also serves to facilitate the transfer of businesses" (par 62).*[16]

In labour law, statutory interpretation is critical, not only because all legislative provisions, including labour legislation, must be legally interpreted to assign meaning to them but also because labour legislation often utilises vague terms, concepts and standards to regulate the employment relationship. As Smit has indicated, "the judiciary has through its power of interpretation the potential to contribute to the

transformation of South African society".[17] It may be argued that the judiciary can contribute to the transformation of society and the achievement of social justice through its power of interpretation. This is because the Constitutional Court has firmly established the subsidiary principle, which has the effect that "[w]here there is legislation giving effect to a right in the Bill of Rights, a claimant is not permitted to rely directly on the Constitution".[18]

Subsidiarity does not mean that the Constitution will play no role in adjudication as a provision in question must be interpreted in terms of section 39(2) of the Constitution to "promote the spirit, purport and objects of the Bill of Rights". The Constitutional Court has stated that "[a] ll statutes must be interpreted through the prism of the Bill of Rights".[19] Subsidiarity means that the Constitution must inspire the meaning attributed to legislative provisions. If this is not done, primarily because of an adherence to outdated and literalistic modes of statutory interpretation, it may be argued that the requirements of the Constitution will become obsolete (except to the extent that it may be argued that the legislation concerned has been adopted to give effect to a constitutional provision).

The method of statutory interpretation, which goes beyond merely asking what the purpose of a statutory provision is, is generally referred to as "teleological interpretation",[20] a "value-activating strategy",[21] or the "value-coherent theory" of statutory interpretation.[22] It has become commonplace for this principle to guide the interpretation of legislation and has been endorsed by the Constitutional Court.[23] The approach was best described (although not explicitly endorsed) in *African Christian Democratic Party v Electoral Commission*:

> *"[I]n approaching the interpretation of provisions of … legislation, courts … must understand those provisions in the light of their legislative purpose within the overall … [legislative] framework. That framework must be understood in the light of the important constitutional rights and values that are relevant."*[24]

According to Le Roux, this "[b]roader approach" favoured by the Court has four distinct steps: Firstly, the purpose of the provision must be established. Secondly, it should be asked if "that purpose would be obstructed by a literal interpretation of the provision". If that is the case, thirdly, "an alternative interpretation of the provision that 'understands' its central purpose" must be adopted. Fourthly, it must be ensured "that the purposive reading of the legislative provision also promotes the object, purport and spirit of the Bill of Rights".[25] It may thus be argued that "broad" purposivism, with its alliance with constitutional values, is a preferred alternative and a solution to the problems of conventional purposivism.

Teleological interpretation requires interpreters to have regard for all the elements of a statutory provision to determine what the broad purpose of a provision is. These elements are a provision's text, context, values, history and comparative environment.[26] In this chapter, these five elements of teleological interpretation will be explored as they pertain to identifying the parties to the employment relationship. Grammatical interpretation limits the possible meaning of a provision and focuses on how the natural language assists the interpreter.[27] Grammatical interpretation is not a throwback to literalism as it does not claim that only textual elements may be considered or that it is only possible to look beyond the text if specific criteria are met.[28] Grammatical interpretation acknowledges that in all interpretations, the statutory text should serve as a starting point and that the richness of the textual environment can assist the interpreter in determining the meaning of a statutory provision. Interpreters must observe the conventions of the natural language in which the provision is couched.[29]

Contextual interpretation requires that legislative provision be understood in light of the intra-textual and extra-textual environment in which the provision forms part.[30] Contextual interpretation requires that we understand a legislative provision in the light of the text of the Act (ie the Constitution) as a whole (the "intra-textual environment") and of principles outside of the Act (the "extra-textual

environment"). The "intra-textual environment" includes the preamble of the Act, the long title, the definition clause, the objects of an Act and interpretation provisions, headings above chapters and articles and annexures. The "extra-textual environment" refers to the "wider network of enacted law and other normative law-texts such as precedents" as well as to "the political and constitutional order, society and its legally recognized interests and the international legal order".[31] When these intra-textual and extra-textual text components are not integrated with the particular statutory provision, it becomes disintegrated from the rest of the legal system. They will be understood in isolation from each other.[32]

Teleological interpretation requires that statutes must be understood in light of their purpose.[33] It is presumed that the purpose of all legislation is to advance broader societal purposes.[34] Teleological interpretation endeavours to promote the values of the legal order.[35] Purposive interpretation has traditionally been anchored in two objective elements. Firstly, interpreters should assume that the legislature comprises "reasonable people seeking to achieve reasonable goals in a reasonable manner".[36] Secondly, interpreters should accept that the legislature "sought to fulfil their constitutional duties in good faith".[37] Section 3(*a*)-(*b*) of the LRA states that "[a]ny person applying this Act must interpret its provisions to give effect to its primary objects in compliance with the Constitution".

Historical interpretation requires interpreters to consider the tradition from which a provision emerged and allows the interpreter to consider materials relevant to the text's genesis and other historical events.[38] Historical interpretation requires that the interpreter identify the historical situation that gave rise to the law, although it is sufficient that the spirit of the history is taken into account.[39] Teleological interpretation without the historical dimension is not possible.[40]

Comparative interpretation allows the interpreter to understand a provision in light of international standards

and to seek guidance from other legal systems.[41] According to section 39(1) of the Constitution, "[w]hen interpreting the Bill of Rights, a court, tribunal or forum … must consider international law"[42] and "may consider foreign law".[43] The Constitutional Court has held that international and foreign authorities are necessary because courts in these jurisdictions have already analysed arguments for and against certain prepositions and have shown how they have dealt with the matter.[44] The Constitutional Court has held that the most important source of South Africa's public international law obligations regarding labour law is the Conventions and Recommendations of the ILO.[45] Section 3(*c*) of the LRA states that "[a]ny person applying this Act must interpret its provisions in compliance with the public international law obligations of the Republic".

8.3 The Constitutional Court as the apex court in labour matters

In *NEHAWU*, the Constitutional Court held that when a statute, such as the LRA, gives effect to a constitutional right, the correct interpretation of that statute raises a constitutional issue:

> *"The LRA was enacted 'to give effect to and regulate the fundamental rights conferred by s 27 of the Constitution'. In doing so the LRA gives content to s 23 of the Constitution and must therefore be construed and applied consistently with that purpose. Section 3(b) of the LRA underscores this by requiring that the provisions of the LRA must be interpreted 'in compliance with the Constitution . . . Therefore, the proper interpretation and application of the LRA will raise a constitutional issue . . . This is because the legislature is under an obligation to respect, protect, promote and fulfill the rights in the Bill of Rights' . . . In this way, the courts and the legislature act in partnership to give life to constitutional rights."*[46]

The Constitutional Court will therefore exercise jurisdiction over a matter if it involves the interpretation of the LRA's

provisions and those of other labour legislation, which typically presents a constitutional problem.[47] This is specifically so because labour legislation has been adopted to give effect to section 23 of the Constitution.[48] Du Plessis, therefore, refers to these categories of legislation as "subsidiary constitutional legislation" designed to amplify and give more concrete effect to critical provisions of the Constitution.[49] Although the LRA was enacted to affect and regulate the right to fair labour practices, section 23 does not explicitly require nor envisage legislation amplifying and giving more concrete effect to it. Sections 23(5) and (6) of the Constitution do, however, envisage and authorise legislation to regulate collective bargaining and recognise union security arrangements contained in collective agreements. The LRA and other labour legislation are intended to effect section 23 of the Constitution, as it involves the constitutional right to fair labour practices. In addition, labour matters can also engage other constitutional rights, such as the right to a fair hearing and access to justice, which may strengthen the argument that the Constitutional Court should hear a case.[50] Litigants may also attack the constitutionality of provisions in labour legislation. Although any high court may make such a finding, such a finding must be certified by the Constitutional Court.[51]

There are, however, several limits to the jurisdiction of the Constitutional Court in labour matters. However, The Constitutional Court has confirmed numerously that it would not exercise its constitutional or expanded jurisdiction in an application for leave to appeal against the misapplication of a settled legal test.[52] Therefore, the Constitutional Court will not hear a case if the alleged error committed by the Labour Appeal Court was merely a misapplication of the settled test.[53] In addition, the Constitutional Court will only assume jurisdiction in a labour-related matter if it is in the interest of justice to do so.[54] Whether or not it is in the interests of justice to grant leave to appeal will depend on various case-sensitive factors and the reasonable prospects of success will carry significant weight.[55] The Court will also not assume jurisdiction if the dispute relates only to a dispute of fact.[56]

There can be no doubt that the constitutionalisation of labour rights, coupled with judicial enforcement within an apex court, has improved employees' quality of life in many ways.[57] Although it is understandable that the Constitutional Court, as the bastion of constitutional protection, should hear matters in which the interpretation of constitutional rights and values are at play, there are nevertheless reasons why the Constitutional Court should not easily permit litigation on labour-related matters before it, based on interest of justice considerations. Ideally, labour conflicts should be resolved swiftly. As a result, a lengthy hierarchy of appeals should be avoided. Protracted periods of uncertainty without legal recourse (and potentially the remedy of reinstatement) impose a significant strain on dismissed employees. Constitutional Court litigation is often lengthy. Employees also frequently lack the financial means to pay for costly legal fees. Constitutional Court litigation will inevitably require the incursion of expensive legal services, which, absent union or third-party intervention, would be out of reach of most employees. Apart from the fact that employees are typically in a worse financial situation than their employers, fired employees frequently lack any source of income. Therefore, it is necessary to establish conflict resolution bodies in which applicants feel comfortable representing themselves or through representatives of their trade unions or employee organisations. Often, only employers have the financial means to drag out a dispute and wear down an opposing employee through litigation. Employees should have access to labour dispute settlement institutions through streamlined procedures and proximity. The absence of formal procedures and legalistic arguments often enhances accessibility.[58]

8.4 The vague "unfair labour practice" concept

The general vagueness of the language employed in section 23(1) of the Constitution means that the courts will have to rely on considerations outside of the provision's language to determine the content of the unfair labour practice concept. Such considerations may include other textual

provisions, the context in which the provision operates, relevant constitutional and other public law values, historical reflections and comparative considerations. The vagueness employed may therefore be regarded as an invitation to the judiciary to decide what amounts to an unfair labour practice for section 23(1) and what does not. As such, this process would inevitably draw the ire of those who regard it constitutionally inappropriate for the judiciary to "create law".

The concern is understandable. The purpose of any provision is to create a norm to which citizens may conform their conduct. When a norm is vague, it cannot guide behaviour (nor does it control the behaviour of the officers or public officials responsible for applying the norm or resolving a dispute). How then is it possible for these individuals to conform their conduct to the norm? Concerns related to the separation of powers are also raised. This is so, as giving content to a vague norm is transferred first to an applying official but ultimately to the courts. In effect, vague norms open the doors for judicial law-making. Even the most adamant defenders of positivism concede this point.[59]

Our legal system consists of vague and precise norms, and it will be argued that vague norms are not always "bad" but sometimes politically desirable. Legislatures may choose to frame legislative provisions vaguely. The effect would be to create a vague norm so that its application is unclear.[60] The judiciary is given the discretion to decide what the norm means. Additionally, there may be instances where, although the text of a legislative provision is seemingly precise, the technical effect of legal language means that rules of interpretation may give a vague effect to a precise term. This is so because there is no general relation between the language of a provision and the law that is made.

To understand why vagueness can be valuable, the starting point must inevitably be to ask why precision is valuable. Precision has guidance value because a precise standard makes it clear what people's rights and obligations are. Precision also has process value because it directs officials

in a legal system.[61] From here, it is easy to formulate the chief points of criticism against the judiciary's reliance on values: the vagueness of values does not make it clear what the obligations of affected parties are. But when a legislature decides to draft a norm vaguely, that does not mean to say that this is always a result of poor legislative drafting. It might be helpful for the legislature to leave it to the judiciary to give content to a legislative norm. According to Endicott, this choice has power allocation and private ordering values.[62]

Substantively, the effect of vague terms is to delegate the power to determine the content to the courts. This is justifiable because judges possess specialised expertise to develop norms and because the doctrine of precedent will allow them to develop the norm incrementally to revise general principles through appeal processes. The processes of the courts mean that general rules would develop after taking cognisance of parties to a dispute in which the value is deployed. It may be valuable to leave persons affected by a rule uncertain as to its application, as parties will be incentivised to devise creative ways to avoid accountability, which might not have occurred to the legislature. The uncertainty incentivises parties to prevent the risk of being found to have contravened the value.[63]

It is important to note that what is vague or precise is contextual[64] and that it would be wrong to describe values as either ambiguous or precise. Every communication act contains different kinds of content. In addition to semantic content, communication acts have assertive and implicated content. There may be presuppositions that speakers rely on and take for granted in the context of a conversation.[65] It is indisputable that values are vague, but this does not mean that these terms do not contain at least assertive content. It also does not mean that the interpretive choice of the presiding officer will be as arbitrary as flipping a coin. The judiciary will not have an unfettered discretion. Not any decision will do. The interpreter's task will be to figure out what the (reasonable) drafter of the Constitution intended to convey through its choice of words and, to this end, the assertive content, which is context-dependent, must be considered.

Following the above, it would be logical to ask how we could determine the assertive content of a value. The starting point should be to acknowledge that actors in the legal profession constantly partake in this exercise. A decision about the appropriate interpretation of a legislative provision can only be "good" if it is principled (and not arbitrary). The principles on which these cases are determined are contained in the legislative provision itself and other sources of our legal system. When terms are employed that may be said to be vague, it merely means that the principles outside of the legislative provision are perhaps more important than the provision itself.

The shift in the interpretive approach endorsed by the Constitutional Court (from "the strict legalistic to the substantive"),[66] and which had been expressly supported in *NEHAWU*, is therefore suited to give life to the unfair labour practice concept in section 23(1) of the Constitution as it invites the interpreter explicitly to look beyond the text of the constitutional provision to other elements such as context, history, values and the comparative dimension.

From a historical perspective, the idea that the concept should be left to gather meaning within the courts is also specifically apt. When the idea was introduced in South Africa more than 40 years ago, it was defined as "any labour practice that in the opinion of the Industrial Court is an unfair labour practice".[67] In effect, the former Industrial Court was therefore given extensive discretion to decide for itself what conduct amounted to unfair labour practices and what did not and this leeway, according to some, "amounted to a license to legislate".[68] The introduction of the concept marked the beginning of an equity-based labour jurisprudence and "equity" in this context implied "fairness" of conduct.[69] Later interventions by the legislature to introduce more specific definitions could also not produce the intended certainty and created general and open-ended descriptions requiring the court to use discretion in interpreting them.[70] From here, most of South Africa's labour protection developed – including protection from dismissal and discrimination,

minimum labour standards and rules relevant to industrial action. It was to these rules and principles that the drafters of South Africa's first labour legislation following the advent of constitutionalism looked and, in many regards, these legislative instruments may be regarded as codifications of the jurisprudence of the former Industrial Court.

In *NEHAWU*, the Constitutional Court similarly found it "neither necessary nor desirable" to define this concept as it is currently contained in the Constitution.[71] Instead, the court preferred the concept to be left to gather meaning within the courts. The benefit of such an approach is that the concept will develop within the courts organically. The principles and interpretations enunciated in dealing with real-world situations will then enter into our legal system through the doctrine of precedent. The principles and interpretations will also be subject to a system of judicial review and appeal and will be subject to public and academic discussion and criticism. This approach also means that the legislature can intervene at any given time should the interpretation and principle contradict other governmental purposes (subject to constitutional limits). The approach also means that the concept could apply to cases that the judiciary could not have pre-empted and to problems that may only become apparent in future, for example, within the context of the advent of the Fourth Industrial Revolution.

The vagueness of the constitutional concept stands in strong contrast to the preciseness employed in defining the idea for purposes of the Labour Relations Act (LRA).[72] Section 185(*b*) of the LRA states that every employee has the right not to be subjected to unfair labour practices. Section 186(2), containing the last-named three of the "residual" unfair labour practices (in other words, those unfair labour practice categories that developed within the jurisprudence of the former Industrial Court which didn't find its way into a dedicated part of the LRA or its own statute) together with a newly defined category, reads as follows:

> *"'Unfair labour practice' means any unfair act or omission that arises between an employer and an employee involving–*
>
> *(a) unfair conduct by the employer relating to the promotion, demotion, probation (excluding disputes about dismissals for a reason relating to probation) or training of an employee or relating to the provision of benefits to an employee;*
>
> *(b) the unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee;*
>
> *(c) a failure or refusal by an employer to reinstate or re-employ a former employee in terms of any agreement; and*
>
> *(d) an occupational detriment, other than dismissal, in contravention of the Protected Disclosures Act, 2000 (Act No. 26 of 2000), on account of the employee having made a protected disclosure defined in that Act."*

Notwithstanding the *NEHAWU* judgment, it has been accepted that, unlike than its constitutional counterpart, the unfair labour practice concept in the LRA is a closed list referring only to the instances mentioned therein. Sub-section 186(2) of the LRA, therefore, only protects unfairness cases related to demotion, probation or training, suspension and a failure or refusal by an employer to reinstate or re-employ a former employee in terms of any agreement.

By inference, the constitutional right to fair labour practices is broader in scope than the LRA's definition of unfair labour practices. This could result in a constitutional challenge if it is determined that the restriction is unjustifiable in an open and democratic society founded on human dignity, equality, and freedom. No such constitutional challenge has yet arisen. Therefore, some authors have argued that the LRA should be amended to "open up" the LRA's definition of unfair labour practice to open the range of constitutional protection to which workers are entitled to.[73] Recall that, due to the subsidiarity principle, in terms of which litigants are prohibited from relying directly on a provision in the Constitution where legislation has been enacted to give effect

to that constitutional provision, employees (and employers) are not permitted from relying on the constitutional protection against unfair labour of section 23(1) as a body of legislation had been adopted to give effect to the right.[74]

There are many instances in which the unfair labour practice provision in section 186(2) of the LRA may arguably fall short of the protection afforded in section 23(3) of the Constitution. One such instance may be that of workplace bullying. Remedies for workplace bullying are provided in the EEA as discrimination protection[75] and in the LRA, where employees can claim constructive dismissal.[76] The unfair discrimination remedies afforded by the EEA, which include damages and compensation awards, are available only if harassment is based on one of the listed grounds and does not address instances of bullying that occur, for example, because of professional jealousy or because an employee does not perform their tasks in a way required by the bully.[77] Even if these employees are not maltreated because they possess a specific immutable characteristic, their human dignity may be equally affected. For constructive dismissals, bullied employees would effectively have to resign, and they would have to prove that continued employment prospects had become "intolerable".[78] Intolerability has been interpreted to mean more than everyday workplace irritations, frustrations, and tensions, and implies a situation insufferable and too great to bear.[79] It requires conduct "which no reasonable employee could be expected to tolerate or put up with".[80] Mere unhappiness is not sufficient to justify a claim of constructive dismissal. In practice, constructive dismissals are also notoriously hard to prove.[81] As such, it may be questioned if the constructive dismissal remedy is an effective strategy for dealing with bullying. Constructive dismissal invariably focuses on compensation for the bullying rather than a remedial or therapeutic approach to resolving the situation and preserving the job.[82] This remedy will not be an option for many South Africans who depend on their jobs to provide for their families, even though their dignity may be demeaned by bullying at work.

Although bullied employees may claim that they had been subjected to an unfair labour practice if the bullying effects or is related to promotion, demotion, training, or the provision of benefits (often manifestations of bullying), it may still be argued that sub-section 186(2) of the LRA falls foul of the protections afforded in the Constitution against workplace bullying. The introduction of a tailor-made category of workplace bullying in sub-section 186(2) of the LRA would lower the standards necessary to prove that workplace bullying occurred, and such an approach could allow the judiciary to introduce tailor-made remedies aimed at restoring and continuing the employment relationship.

In addition, opening the definition of unfair labour practice in section 186(2) of the LRA would allow the legislature to add protections specifically designed to protect employers.

However, essential policy considerations militate against opening the unfair labour practice concept in the LRA. Chief amongst these is concerns about the distinction between disputes of rights and disputes of interests. The previous Industrial Court created a distinction between "disputes of right" and "disputes of interest" in this process of providing substance to the term "unfair labour practice". The former was interpreted as involving the infringement, application, or interpretation of pre-existing rights embodied in an employment contract, collective bargaining agreement, or statute. In contrast, interest disputes involved the creation of new rights, such as higher wages, modification of pre-existing collective bargaining agreements, and so forth. Rights conflicts were viewed as lying under the court's authority, whereas interest conflicts were left to negotiation and power play, such as strike action.[83] Therefore, the objection against opening the unfair labour practice concept of the LRA is understandable. An open-ended definition would water down the distinction between disputes of interest and disputes of rights.

Nevertheless, in instances such as workplace bullying, it is doubtful that organised labour would take up the plight

of individually bullied employees unless bullying becomes widespread and systemic within an organisation. Without opening the definition of unfair labour practice in section 186(2) of the LRA, the legislature can intervene by amending the section. In any event, although the LRA endorses the distinction between disputes of rights and disputes of interests,[84] the distinction has never been watertight.[85]

8.5 Constitutional protections afforded to employers

It is often argued that the protection afforded in labour legislation is primarily skewed towards employees. Indeed, the purpose of labour law has traditionally been to aid the weaker of the parties to the employment relationship – employees.[86] Nevertheless, in *NEHAWU*, the Constitutional Court made it plain that the constitutional protections afforded in section 23(1) of the Constitution are afforded to both employees and employers:

> *"Where the rights in the section are guaranteed to workers or employers or trade unions or employers' organizations as the case may be, the Constitution says so explicitly. If the rights in s 23(1) were to be guaranteed to workers only, the Constitution should have said so. The basic flaw in the applicant's submission is that it assumes that all employers are juristic persons. That is not so. In addition, section 23(1) must apply either to all employers or none. It should make no difference whether they are natural or juristic persons."*[87]

A critical charge that labour law needs to contend with is that it protects only employees. Such a charge is understandable and accords with the traditionally held view that the purpose of labour law is to be a mitigating factor against employer power. The employment contract specifies the rights of workers and the obligations of employers. In contrast, the employer's rights and the worker's obligations remained open and status-like.[88] Kahn-Freund stated that:

> *"[T]he relation between an employer and an isolated employee or worker is typically a relation between a bearer of power and*

> *one who is not a bearer of power. In its inception it is an act of submission, in its operation it is a condition of subordination, however much the submission and subordination may be concealed by that indispensable figment of the legal mind known as the 'contract of employment'. The main object of labour law has always been, and we venture to say will always be, to be a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship."*[89]

Therefore, the rules governing labour relations are an attempt to *mitigate* this disequilibrium.[90] It is mainly because of the failure of the common-law contract of employment to recognise the true nature of the employment relationship that labour law has developed.[91] Adopting legislation is an apparent response to address this inequality of positions. According to Du Toit, legislation interfaces with the contract of employment in five distinct ways:[92] Firstly, legislation can fill a gap in the common law that governs the contract of employment.[93] Secondly, legislation can expressly or implicitly override the terms of a contract.[94] Thirdly, labour legislation may only apply to those who find themselves party to a contract of employment.[95] Fourthly, legislation can coexist with certain common-law principles and values, such as mutual trust and confidence and the duties of fair dealing and good faith.[96] Fifthly, legislation can impose new rights and obligations that may compete with common-law rights and responsibilities but do not override them.[97]

Legislation has, however, not been accepted as an effective way to mitigate the disequilibrium in the employment relationship. According to Davies and Freedland, history has shown that legislation is ineffective in mitigating the disequilibrium between the parties of the employment relationship. According to the authors:

> *"acts of Parliament, however well intentioned and well designed, can do something, but cannot do much to modify the power relationship. The law has important functions but they are secondary if compared with the impact of the labour*

> *market. Even the most efficient inspectors can do but little if the workers dare not complain to them about infringements of the legislation that they are seeking to enforce. The law does, of course, provide its own sanctions ... but in labour relations, legal norms cannot often be effective unless they are backed by social sanction as well. Therefore collective bargaining is much more effective than legislation has ever been or can ever be."*[98]

As a result, another essential purpose of labour law is to strengthen and protect the collective bargaining institution by providing for protected strikes and shielding employees from dismissal who participate in protected strike action.

Most of these legislative instruments are, however, geared towards protecting employees. However, it is also possible to argue that these employee rights protect employers as they act as the "rules of the game" in employment relations. Consider, for example, the employee's right not to be unfairly dismissed. Conversely, an employer can dismiss an employee for a fair reason and in terms of a fair procedure.

Some examples of protection of the employer's right to fair labour practices in legislation include the following. First, employers may claim compensation from unions and employees for a loss from an unprotected strike.[99] Second, employers may, subject to specific requirements, attach the value in an employee's pension or provident fund to satisfy a claim for damages arising from, among other things, theft, fraud, dishonesty or misconduct on the part of an employee.[100] Third, employers may institute claims for payment of specific amounts against employees.[101] Fourth, the LRA substantially curtails the right of employees to strike[102] and picket[103] during industrial action.[104] Fifth, although styled as employee protection, the right not to be subjected to unfair labour practice protection related to demotion was a significant development for employers as, at common law, the demotion of an employee amounted to a repudiation of the contract of employment.[105] The LRA now allows for the demotion of an employee, provided that it is done fairly.[106] Nevertheless, employers are, through the employment contract, in a

substantially stronger bargaining position than that of employees. It is generally regarded that the function of labour law is primarily to protect employees.

In *Maseko v Entitlement Experts*,[107] the employer requested a declaration that an employee's desertion constituted an unfair labour practice because one of the principal purposes of the LRA is to give effect to the Constitution's fundamental rights, which include the right to fair labour practices for everybody in section 23. Even though the LRA did not directly address employee-committed unfair labour practices, it was argued that the CCMA was nonetheless required to mediate such issues. However, the commissioner determined that he could only arbitrate disputes when the LRA compelled arbitration. The employer had no means of implementing its constitutional right to fair labour under the LRA, as clause 186(2) of the LRA denied the CCMA power to hear the case.

8.6 Conclusion

NEHAWU illustrates the importance of the LRA, and other labour legislation, as subsidiary constitutional legislation designed to amplify and give life to the provisions of section 23(1) of the Constitution. As the Court in *NEHAWU* pointed out, the South African Constitution uniquely constitutionalises the right to fair labour practice.[108] Due to the subsidiarity principle, it is essential that labour legislation should be interpreted per the Constitution and that the legislature should consistently be amended to deal with evolving societal problems. The teleological approach to interpreting labour legislation, as adopted in *NEHAWU*, in considering the five elements of interpretation and its emphasis on constitutional values, is uniquely suited to give life to section 23(1) of the Constitution through the powers of interpretation. The most significant impediment to realising the constitutional right to fair labour practices in section 23(1) of the Constitution is the closed list of residual unfair practices in section 186(2) of the LRA. It is submitted that legislative interventions must be sought, not to open the list entirely, but to introduce new categories of unfair

labour practices as society progresses and to provide fuller protection to more vulnerable workers.

Although the majority of labour protection is extended to employees, it is argued that these legislative protections are also for employers' benefit as they set the rules of allowable conduct within the workplace. There may, however, be instances where the judiciary would do well to extend the definition of unfair labour practices in the LRA to protect unscrupulous employees.

As a result of *NEHAWU*, the Constitutional Court is also the apex court in labour disputes. Laudable as this may be, and despite the significant impact which the constitutional enforcement of rights has had on employees, the possibility of future litigation may inevitably lead to uncertainty of outcome for labour litigants. In addition, litigation may be more expensive and timeous to pursue.

Endnotes

1 2003 3 SA 1 (CC) (*NEHAWU* (CC)).
2 Constitution of the Republic of South Africa, 1996.
3 66 of 1995.
4 *NEHAWU v University of Cape Town* 2002 4 BLLR 311 (LAC) (*NEHAWU* (LC)).
5 *NEHAWU* (LC) (n 4) par 1.
6 *NEHAWU v University of Cape Town* 2000 7 BLLR 803 (LC) (*NEHAWU* (LAC)).
7 *NEHAWU* (CC) (n 1) par 15.
8 *NEHAWU* (CC) (n 1) par 14.
9 *NEHAWU* (CC) (n 1) par 22.
10 *NEHAWU* (CC) (n 1) par 14.
11 *NEHAWU* (CC) (n 1) par 70.
12 *NEHAWU* (CC) (n 1) par 40.
13 *NEHAWU* (CC) (n 1) par 33.
14 *NEHAWU* (CC) (n 1) par 34.
15 *NEHAWU* (CC) (n 1) par 71.
16 *NEHAWU* (CC) (n 1) par 62.
17 Smit "Towards social justice: an elusive and challenging endeavour" 2010 *TSAR* 1 11.
18 *Sali v National Commissioner of the South African Police Service* 2014 9 BLLR 827 (CC) par 4, 72 and n 2. See also *S v Mhlungu* 1995 3 SA 867 (CC) par 59; *MEC for Education: KwaZulu Natal v Pillay* 2008 1 SA 474 (CC); and *South African National Defence Union v Minister of Defence* 2007 5 SA 400 (CC) par 51.
19 *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd. In re: Hyundai Motor Distributors (Pty) Ltd v Smit* 2001 1 SA 545 (CC) par 21.
20 Botha *Statutory Interpretation: An Introduction for* Students (2005) 10, 66, 75. The author does not repeat this supposition in Botha Statutory Interpretation: An Introduction for Students (2012) but does not deny it either.
21 Devenish *Interpretation of Statutes* (1992) 40.
22 Devenish (n 21)39.
23 *African Christian Democratic Party v Electoral Commission* 2006 3 SA 305 (CC); and *Department of Land Affairs v Goedgelegen Tropical Fruits Pty Ltd* 2007 6 SA 199 (CC).
24 2006 3 SA 305 (CC) par 34.
25 Le Roux "Directory provisions, section 39(2) of the Constitution and the ontology of statutory law *African Christian Democratic Party v Electoral Commission*" 2006 *SAPR/PL* 382 386.
26 Du Plessis *Re-interpretation of Statutes* (2002) 248.
27 Interpretation" in Woolman, Roux and Bishop (eds) *Constitutional Law in South Africa* (2008) 32-159.
28 Du Plessis (n 26) 198.
29 Du Plessis (n 26) 208.

30 Du Plessis (n 27) 32-159.
31 Du Plessis (n 27) 32-159, 32-166.
32 Du Plessis (n 27) 32-160; Tribe and Dorf *On Reading the Constitution* (1991) 21-30.
33 Du Plessis (n 27) 32-160.
34 Du Plessis (n 27) 32-168.
35 Du Plessis (n 27) 247.
36 Barak *Purposive Interpretation in Law* (2005) 87.
37 Above.
38 Du Plessis (n 27) 32-160.
39 Du Plessis (n 27) 32-170.
40 Du Plessis (n 27) 32-170.
41 Du Plessis (n 27) 32-160.
42 s 39(1)(*b*).
43 s 39(1)(*c*).
44 *S v Makwanyane* 1995 3 SA 391 (CC) par 34.
45 *National Union of Metalworkers of South Africa v Bader Bop Pty Ltd* 2003 3 SA 513 (CC) par 28.
46 par 14.
47 *Member of the Executive Council for Health, Western Cape v Coetzee* 2020 41 ILJ 1303 (CC) par 36.
48 *Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration* 2009 1 SA 390 (CC) par 30; *South African Police Service v Police and Prisons Civil Rights Union* 2011 6 SA 1 (CC) par 15; *Aviation Union of South Africa v South African Airways (Pty) Ltd* 2012 1 SA 321 (CC); 2012 (2) BCLR 117 (CC) par 28 and *SATAWU v Moloto* 2012 6 SA 249 (CC) par 10.
49 Du Plessis "The status and role of legislation in South Africa as a constitutional democracy: some exploratory observations" 2011 PER 92 95.
50 *National Union of Mineworkers obo Masha v SAMANCOR Limited (Eastern Chromes Mines)* 2021 42 ILJ 1881 (CC) par 23.
51 *Association of Mineworkers and Construction v Royal Bafokeng Platinum Limited* 2020 3 SA 1 (CC) par 23.
52 *University of Johannesburg v Auckland Park Theological Seminary* 2021 6 SA 1 (CC) par 49; *General Council of the Bar of South Africa v Jiba* 2019 8 BCLR 919 (CC) par 49.
53 *Commercial Stevedoring Agricultural and Allied Workers' Union v Oak Valley Estates (Pty) Ltd* (CCT 301/20) 2022 ZACC 7 (1 March 2022) par 15.
54 *Union for Police Security and Corrections Organisation v South African Custodial Management (Pty) Ltd* 2021 42 ILJ 2371 (CC) par 18.
55 *S v Ramabele* 2020 11 BCLR 1312 (CC) par 35 and *General Council of the Bar of South Africa v Jiba* 2019 8 BCLR 919 (CC).
56 *McGregor v Public Health and Social Development Sectoral Bargaining* Council 2021 5 SA 425 (CC) par 11.
57 Beatty "Constitutional labour rights: pros and cons" 1993 *Industrial Law Journal* 12. See also Kahn-Freund "The impact

of constitutions on labour law" 1976 *Cambridge Law Journal* 240. See however Arthurs "The constitutionalization of employment relations: multiple models, pernicious problems" 2010 *Social & Legal Studies* 403 403 who argues that although "the constitutionalization of employment relations is productive in the sense that it requires engagement with the pernicious problems of articulating a 'new normal' — a 'new normativity' — that represents a better balance between workers' interests and those of employers", that the constitutionalisation of labour law is "unlikely to produce positive practical results for workers". According to the author "on some European countries whose constitutions entrench labour rights, workers indeed seem to enjoy higher living standards, greater security and more influence in workplace decision-making than American workers. But should this lead us to conclude that constitutionalization produces better outcomes for workers, or only that countries in which there is widespread political and social support for decent employment relations are more likely than others to constitutionalize arrangements designed to produce those outcomes?" (406).

58 Van Eck "The constitutionalisation of labour law: no place for a superior Labour Appeal Court in labour matters (part 1): background to South African labour courts and the Constitution" 2005 *Obiter* 549 552.

59 Raz *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (1994) 332 and Waluchow *Inclusive legal Positivism* (1994) 157. According to Waluchow this is so as the statute in such cases obliges judges to seek guidance from non-legal sources.

60 Endicott "The value of vagueness" in Marmor and Soames (eds) *Philosophical Foundations of Language in the Law* (2013) 16.

61 Endicott (n 60) 19.

62 Endicott (n 60) 26-28.

63 Endicott (n 60) 26-28.

64 Saomes "What vagueness and inconsistency tell us about interpretation" in Marmor and Soames (eds) *Philosophical Foundations of Language and Law* (2013) 31 32.

65 Marmor "Introduction" in Marmor and Soames (eds) *Philosophical Foundations of Language in the Law* 6 and Marmor "On some pragmatic aspects of strategic speech" in Marmor and Soames (eds) *Philosophical Foundations of Language and Law* (2013) 8.

66 *African Christian Democratic Party v Electoral Commission* (n 23) par 25.

67 s 1(*f*) of the Industrial Conciliation Amendment Act 94 of 1979.

68 Vettori *Alternative Means to Regulate the Employment Relationship in the Changing World of Work* (2005 thesis University of Pretoria) 301; Thompson and Benjamin South African Labour Law (1997) A-60.
69 *NUM v ERGO* (1991) 12 ILJ 1221 (A) 1237; *Marievale Consolidated Mines Ltd v President of the Industrial Court* (1986) 7 ILJ 152 (T).
70 The definition was amended by s 1(*h*) Labour Relations Act Amendment Act 95 of 1980, s 1(h) Labour Relations Act Amendment Act 83 of 1988 and s 1 Labour Relations Act Amendment Act 9 of 1991.
71 par 26.
72 66 of 1995.
73 Cheadle "Regulated Flexibility: Revisiting the LRA and the BCEA" 2006 *ILJ* 663 par 141-142.
74 *Sali v National Commissioner of the South African Police Service* 2014 9 BLLR 827 (CC) par 4, 72 and n 2. See *also S v Mhlungu* 1995 3 SA 867 (CC) par 59; *MEC for Education: KwaZulu Natal v Pillay* 2008 1 SA 474 (CC); and *South African National Defence Union v Minister of Defence* 2007 5 SA 400 (CC) par 51.
75 s 6(3) of the EEA.
76 s 186(1)(*e*) of the LRA.
77 s 6(1) of the EEA.
78 *Mafomane v Rustenburg Platinum Mines* 2003 10 BLLR 999 (LC).
79 *Jordaan v CCMA & Others* 2010 12 BLLR 1235 (LAC) 1239.
80 2020 3 BLLR 280 (LC) at para 50.2.
81 *Eastern Cape Tourism Board v CCMA* 2010 11 BLLR 1161 (LC).
82 Le Roux "Sexual harassment in the workplace: A matter of more questions than answers or do we simply know less the more we find out?" 2006 *Law, Democracy & Development* 49 65.
83 Rycroft and Jordaan *A Guide to South African Labour Law* (1992) 168–169.
84 s 65(1)(*c*) states that "[n]o person may take part in a strike or a lock-out or in any conduct in contemplation or furtherance of a strike or a lock-out if the issue in dispute is one that a party has the right to refer to arbitration or to the Labour Court in terms of this Act [and] the issue in dispute is one that a party has the right to refer to arbitration or to the Labour Court in terms of this Act or any other employment law".
85 *Trans-Caledon Tunnel Authority v CCMA* 2013 9 BLLR 934 (LC).
86 Davies and Freedland *Kahn-Freund' s Labour and the Law* (1983) 15 and 18.
87 par 39.
88 Wedderburn "Labour law, corporate law and the worker" 1993 *ILJ* 517 523.

89 Kahn-Freund *Labour and the Law* (1972) 8. The Constitutional Court in *Sidumo v Rustenburg Platinum Mines* 2008 2 SA 24 (CC) par 72 held that "[t]he relationship between employer and an isolated employee and the main object of labour law is set out in [this] now famous dictum".
90 Kahn-Freund (n 89) 15 and 18.
91 Hock "Covenants in restraint of trade: do they survive the unlawful and unfair termination of employment by the employer?" 2003 *ILJ* 1231 1237.
92 Du Toit "Oil on troubled waters? The slippery interface between the contract of employment and statutory labour law" 2008 *SALJ* 95.
93 Du Toit (n 92) 128.
94 Du Toit (n 92) 128.
95 Du Toit (n 92) 128.
96 Du Toit (n 92) 128.
97 Du Toit (n 92) 129.
98 Davies and Freedland (n 86) 19-21.
99 s 68 of the LRA.
100 s 37D of the Pension Funds Act 24 of 1956.
101 the Basic Conditions of Employment Act 75 of 1997, as amended ("the BCEA") also permits employers to institute claims for payment of certain amounts against employees. In *Rand Water v Stoop* 2013 23 ILJ 576 (LAC), the Labour Appeal Court held that such claims include delictual counterclaims against employees for damages, both liquid and illiquid.
102 s 65 of the LRA. In Ceramic Industries Ltd v NCBAWU 1997 6 BLLR 697 (LAC) at 700 the Labour Appeal Court described the purpose of this provision as follows: "Broadly speaking . . . the Act seeks to give effect to the fundamental right to strike by insulating participation in a protected strike from the legal consequences that might otherwise have followed in its wake. On the other hand, it regulates that right both procedurally and substantively. Procedurally it does so by requiring that certain formal requirements have to be met before protection follows. Substantively, it imposes limitations, one of which is to limit protected strikes to issues that are not arbitrable or justiciable in terms of the Act."
103 s 17 of the Constitution.
104 s 69(5) provides that no picket in support of a protected strike or in opposition to a lockout may take place unless the said picketing rules have been established in terms of Section 208 of the Code of Good Practice.
105 *Nxele v Chief Deputy Commissioner, Corporate Services, Department of Correctional Services* 2008 12 BLLR 1179 (LAC).
106 s 186(2)(*a*) of the LRA.

107 1997 3 BLLR 317 (CCMA).
108 par 33.

Chapter 9

Constitutional promises and access to housing (deferred)

Government of the Republic of South Africa v Grootboom[1]

> *"The issues here remind us of the intolerable conditions under which many of our people are still living. The respondents are but a fraction of them. It is also a reminder that unless the plight of these communities is alleviated, people may be tempted to take the law into their own hands in order to escape these conditions. The case brings home the harsh reality that the Constitution's promise of dignity and equality for all remains for many a distant dream. People should not be impelled by intolerable living conditions to resort to land invasions. Self-help of this kind cannot be tolerated, for the unavailability of land suitable for housing development is a key factor in the fight against the country's housing shortage." (Government of the Republic of South Africa v Grootboom par 2)*

9.1 Introduction

From the outset, the inclusion of socio-economic rights[2] in the Constitution of the Republic of South Africa, 1996, had been controversial.[3] Significantly, the question of the limits of public power and the extent to which a court can inquire into the reasonableness of state action or inaction when the judiciary's decisions have budgetary implications is raised. As such, the justiciability of these rights poses questions surrounding the separation of powers and the powers of the judiciary vis-à-vis that of the legislature. In the *First Certification* judgment, the Constitutional Court explained the controversy as follows:

> *"It is true that the inclusion of [socio-economic] rights may result in courts making orders, which have direct implications for budgetary matters. However, even when a court enforces civil and political rights such as equality, freedom of speech and the right to a fair trial, the order it makes will often have such implications … The fact that [socio-economic] rights will almost inevitably give rise to such implications does not seem to be a bar to their justiciability. At the very minimum [socio-economic] rights can negatively be protected from improper invasions".*[4]

In several early cases involving socio-economic rights in general, with many of these touching on social security rights, the South African Constitutional Court laid a solid foundation for a justiciable system of socio-economic rights. The most significant of the Constitutional Court cases in which socio-economic rights cases were adjudicated is the *Government of the Republic of South Africa v Grootboom* (*Grootboom*).[5] The case concerned 900 persons (390 adults and 510 children) who lived in an informal settlement in deplorable cold and wet conditions and were evicted from low-cost land they had illegally occupied. Eventually, they were left homeless. They relied on sections 26[6] and 28(1)(*c*)[7] of the Constitution to compel the government to provide them with sufficient accommodation until they could obtain adequate housing and shelter.

The Court ruled that the socio-economic rights are directly enforceable by the judiciary. The State must provide those that are unable to support themselves and their dependents with access to housing, health care, adequate food and water, and social security. The Court stressed that neither section 26 nor section 28(1)(*c*) of the Constitution granted the respondents the right to demand immunity from the State automatically. It then pointed out that the policy falls well short of the obligations of section 26 of the Constitution put on the State. In this case, the Constitutional Court has developed a standard of review for assessing compliance with constitutional obligations in the State's social and

economic rights. The much-criticised standard of scrutiny, the reasonableness test, allows for an assessment of the reasonableness of the measures taken by the government to realise social and economic rights within its available resources. The Court found that

> *"[i]t is fundamental to an evaluation of the reasonableness of state action that account be taken of the inherent dignity of human beings. The Constitution will be worth infinitely less than its paper if the reasonableness of state action concerned with housing is determined without regard to the fundamental constitutional value of human dignity".*[8]

In addition, the Court found that

> *"[a] court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question would be whether the measures that have been adopted are reasonable. It is necessary to recognise that a wide range of possible measures could be adopted by the State to meet its obligations. Many of these would meet the requirement of reasonableness. Once it is shown that the measures do so, this requirement is met".*[9]

The Court held that the State's housing policy was unreasonable and, therefore, unconstitutional because it focused on long-term housing development but did not provide shelter for those currently homeless. Although the standard of reasonableness was entrenching within the context of the review of state policy, many questions about the meaning of "reasonableness" and its scope of application remained, and the South African judiciary has had to grapple with these questions. *Grootboom* has been described as "seminal", "landmark", "watershed", "arguably the farthest reaching of the Court's socio-economic rights decisions", and the "undisputed canon of the constitutional democratic guarantee of social and economic rights".[10]

In addition to establishing important legal principles relevant to the adjudication of socio-economic rights in South Africa, the case has also been highly criticised and caused outrage in South African society when it was later reported that Irene Grootboom, the person in whose name the case was brought, had died some eight years later in her shack in the Wallacedene informal settlement without ever receiving a house or escaping the squalor which had so impacted upon her dignity. While the percentage of households that received some form of government subsidy to access housing increased from 5,6% in 2002 to 13,7% in 2019, 12,7% of South African households still lived in informal dwellings.[11] Nevertheless, in 1996 this figure stood at 16%,[12] indicating that, despite increased population and the conjoining increase in demand, the government has made some inroads towards the South African housing crisis.

According to Pillay, the *Grootboom* judgment has been interpreted narrowly, with the result that "there has been little tangible or visible change in housing policy so as to cater for people who find themselves in desperate and crisis situations".[13] Although *Grootboom* has been cautiously welcomed in some academic circles,[14] the judgment was also severely criticised.[15] In what follows, the authors consider the reasoning of the Constitutional Court in *Grootboom* and the criticisms which have been levelled against the decision. Following this, the article considers if, more than two decades after *Grootboom*, a reworked approach to the adjudication of socio-economic rights in South Africa is required.

9.2 The Constitutional Court's reasoning

The decision in *Grootboom* laid the foundation for the future adjudication of socio-economic rights in South Africa.[16] The defining features of the *Grootboom* judgment are as follows: First, the Constitutional Court reaffirmed the principle that socio-economic rights are justiciable. The Court held that socio-economic rights are expressly included in the Bill of Rights and cannot exist on paper only.[17] The Court found that this is a requirement of section 7(2) of the Constitution, which

requires the state "to respect, protect, promote and fulfil the rights in the Bill of Rights". Having accepted these rights were justiciable, the Court found that "[t]he question is therefore not whether socio-economic rights are justiciable under our Constitution, but how to enforce them in a given case".[18]

Second, the Constitutional Court established the criteria for reviewing social and economic rights.[19] The Court affirmed the test of reasonableness of the government's action[20] that incorporated consequentialist and contextual considerations into social and economic rights discourse while rejecting more categorical interpretations. Although the Court had previously used this test,[21] *Grootboom* was the first case in which the Constitutional Court held that a statute or policy was unreasonable, lending credence to a constitutional rationale for the right to access housing. In conclusion, the Court stated that the right to access housing encompassed more than shelter and was integrally connected with human dignity. In *Khosa v Minister of Social Development*; *Mahlaule v Minister of Social Development* (*Khosa*), the Constitutional Court ruled that the circumstances of each instance are crucial for establishing the reasonableness of a specific measure. This exercise, the Court determined, could be accomplished most effectively by examining the measure's intended purpose.[22] In *Dladla v City of Johannesburg (Centre for Applied Legal Studies as amici curiae)* (*Dladla*), the Constitutional Court held that the reasonableness test enunciated in *Grootboom* was also applicable to housing rules which established criteria that had the effect of excluding persons from obtaining housing.[23]

While the Court largely approved the government's housing development resourcing and planning, it ruled that it had overlooked a critical constituency: a disadvantaged population in crisis conditions. This understanding of reasonableness became central to the reviewability of social and economic rights in several other South African cases. As a result, the Court in *Grootboom* rejected the notion that section 26 of the Constitution entitles citizens to approach a court to claim a house from the government immediately.[24] Consequently, the state's failure to provide an individual

with a house or social assistance on demand cannot give rise to damages.[25] Such litigants would be entitled only to an order declaring the housing policy invalid and directing the government to cure the defect in the policy.[26]

For this reason, Sunstein describes the *Grootboom* case as based on administrative law principles. In a typical administrative law case, he says, an agency has a responsibility of accountability; it must explain why it picked a specific resource allocation rather than another. The Court must protect against arbitrariness by ensuring that the agency's resource distribution decisions are rational. Sunstein contends that the Constitutional Court's conclusion in the *Grootboom* case was reached using this method.[27] However, this proposition has been denied by Wesson, who argues that the Court was not engaged with administrative law processes in *Grootboom*, which involved considerations of *arbitrariness, irrationality,* and *proportionality*.[28]

Third, the Court prioritised vulnerable people in material crises:

> *"Issues of development and social welfare are raised in respect of those who cannot afford to provide themselves with housing. State policy needs to address both these groups. The poor are particularly vulnerable and their needs require special attention."*[29]

The court held that reasonable measures are those that take into account "the degree and extent of the denial of the right they endeavour to realise" and they should not ignore people "whose needs are the most urgent and whose ability to enjoy all the rights therefore is most in peril".[30] The Court held that "[a] programme that excludes a significant segment of society cannot be said to be reasonable".[31] The Court determined that a specific group of persons or sector of society – those in immediate and desperate need of shelter – had been unfairly excluded from the state's housing program. The state should give them precedence, the Court ruled, even if it means jeopardising long-term goals. As a result, the state's housing

program was invalid as it failed to give emergency help to homeless persons.

In this regard, the Court emphasised the interrelationship between the rights to access to housing and the right to social security, including appropriate social assistance.[32] The Court held that if "the state has in place programmes to provide adequate social assistance to those who are otherwise unable to support themselves and their dependants, that would be relevant to the state's obligations in respect of other socio-economic rights".[33] The Court held that the interconnectedness of socio-economic rights must be considered in interpreting the socio-economic rights, particularly in determining whether the state has met its obligations.[34] Indeed, the Court found that "[a]ll the rights in our Bill of Rights are inter-related and mutually supporting" and that [t]here can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing or shelter".[35] The Court held that the right of access to adequate housing, for some, requires the government to provide "access to services such as water, sewage, electricity and roads".[36] In taking into consideration the history of discrimination and the patterns of inequality caused by especially Apartheid, the Court held that the realisation of socio-economic rights are "key to the advancement of race and gender equality and the evolution of a society in which men and women are equally able to achieve their full potential".[37]

Fourth, the Court refused to adopt a "minimum core" approach established by the Committee on Economic, Social and Cultural Rights.[38] The Court explained the concept of the "minimum core" as follows:

> *"The concept of minimum core obligation was developed by the committee to describe the minimum expected of a state in order to comply with its obligation under the Covenant. It is the floor beneath which the conduct of the state must not drop if there is to be compliance with the obligation. Each right has a 'minimum essential level' that must be satisfied by the states*

> *parties. … Minimum core obligation is determined generally by having regard to the needs of the most vulnerable group that is entitled to the protection of the right in question."*[39]

The minimum core is intended to establish certain classes of needs as enjoying priority over others. The state must realise these "core" needs as individual rights immediately.[40] The basis for this strategy is that, according to the argument, these demands are the most urgent and must take precedence over those beyond the minimum core.

However, the Constitutional Court explained why a minimum core approach could not be followed. The Court considered it impossible to establish a minimum threshold for the progressive realisation of the right to appropriate housing without defining the needs and opportunities for such enjoyment. These will differ depending on circumstances such as income, unemployment, land availability, and poverty. It will also vary across urban and rural populations. Variations are ultimately determined by a country's economic and social history and conditions. All of this highlights the difficulty of identifying a minimal core requirement for the progressive realisation of the right to sufficient housing without having the necessary information on the needs and opportunities to enjoy this right. The Court stated that it did not have enough information to make such a finding.[41] In addition, the Court found that establishing a minimum core in the context of the right to housing is problematic as the needs in the context of access to housing are diverse. Some people require land, others require land and dwellings, and others require financial support. It would also have to be determined whether the minimum core duty should be defined broadly for all citizens or specific groups.[42] However, the Court did consider that it may be appropriate under ideal conditions to determine what a minimum threshold would entail, provided that the Court should be provided with sufficient information.[43] According to Bilchitz, "the Court essentially charges that the minimum core approach is rigid, absolutist and cannot deal with the exigencies of the real world, and the limitations imposed

by scarcity. Its own approach is designed to avoid these shortcomings by being flexible and sensitive to the difficulties of realising these rights".[44]

Fifth, the Court was sensitive to the resources available to the government to realise the right to access housing. The Court declared as follows:

> *"The measures must establish a coherent public housing programme directed towards the progressive realisation of the right of access to adequate housing within the state's available means. ... A court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question would be whether the measures that have been adopted are reasonable. It is necessary to recognise that a wide range of possible measures could be adopted by the state to meet its obligations. Many of these would meet the requirement of reasonableness. Once it is shown that the measures do so, this requirement is met."*[45]

This sentiment echoes the constitutional proviso that the state must take reasonable legislative and other measures, *within its available resources*, to achieve the progressive realisation of the right to housing.[46]

Finally, the Court's remedy aimed to overcome the remedial difficulties of social and economic rights. The Court made a declaration that "[s]ection 26(2) of the Constitution requires the state to devise and implement within its available resources a comprehensive and coordinated programme progressively to realise the right of access to adequate housing"[47] in conjunction with the approval of a negotiated settlement between the parties. According to Young, by imposing a declaratory decision, the Court avoided the structural injunctions potentially usurping and politicising managerialism.[48]

9.3 Criticisms against *Grootboom*

According to the *Grootboom* approach, the state must attend to the needs of vulnerable groups, but the Court will not necessarily specify the precise content of this obligation. If state action is *reasonable*, it will stand. This approach has given rise to the justified concern that minimal or restricted governmental efforts will be adequate to ensure conformity with the Court's decisions. The three chief points of criticism all relate hereto. The first relates to the use of "weak form review", the second to the rejection of the minimum-core approach, and the third to the court's refusal to exercise supervisory jurisdiction.

9.3.1 The Court's use of "weak form review"

In *Grootboom*, the Court rejected the notion that section 26 of the Constitution entitles citizens to approach a court to claim a house from the government immediately.[49] Instead, the Constitutional Court determined that the scope of the positive obligation imposed on the State by section 26 is carefully delineated by section 26(2). Section 26(2) explicitly states that the government must take *reasonable* legislative and other measures to realise the right to access adequate housing within available resources.[50] The Court noted that government has several options and that "[t]he precise contours and content of the measures to be adopted" are "primarily a matter for the legislature and the executive".[51] The Court held that "[i]t is essential that a reasonable part of the national housing budget be devoted to this, but the precise allocation is for national government to decide in the first place".[52] The Court held in the *TAC* case that

> *"[c]ourts are ill-suited to adjudicate upon issues where court orders could have multiple social and economic consequences for the community. The Constitution contemplates rather a restrained and focused role for the courts, namely, to require the State to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation."*[53]

In *Mazibuko*, the Constitutional Court explained this idea further:

> *"[O]rdinarily it is institutionally inappropriate for a court to determine precisely what the achievement of any particular social and economic right entails and what steps government should take to ensure the progressive realisation of the right. This is a matter in the first place for the Legislature and the executive, the institutions of government best placed to investigate social conditions in the light of available budgets and to determine what targets are achievable in relation to social and economic rights. Indeed, it is desirable as a matter of democratic accountability that they should do so, for it is their programmes and promises that are subject to democratic popular choice."*[54]

What is clear from the above is that the Court was moved by considerations of separation of powers and with respect for the domain of the legislature and the executive in its interpretation of the right to housing. Several authors lauded the Court in *Grootboom* for finding a way to reconcile two previously unreconcilable imperatives – the enforcement of the constitutional socio-economic rights and the imperative that courts should not exceed their democratic legitimacy and capacity by encroaching on the domains of the legislature or executive. Tushnet argued that the Constitutional Court's approach established a new type of judicial review called "weak form review" that permitted courts to enforce fundamental rights judicially without immersing them in complex public policy judgements or running roughshod over the legislature and executive.[55] The Court, therefore, walked a tightrope between giving the right "some judicially enforceable content" while also granting "very extensive discretion to legislatures over delivering" the right.[56] Similarly, Sunstein argued that the Constitutional Court effectively steered a middle course between holding socio-economic rights to be nonjusticiable and holding them to establish an absolute responsibility.[57] Kende had argued that given that these socio-economic challenges were unprecedented when they were first heard by

the Constitutional Court and concerns regarding separation of powers and judicial fitness, it makes logical sense for the Court to have proceeded with caution. In addition, the Court's decision delivered a strong message that the government must reasonably meet the needs of the weakest parts of society.[58] Kende is moved by counter-majoritarian concerns[59] and the danger of relying too heavily on the unelected judiciary for governance.[60] The author warns that "a super-activist Constitutional Court could actually undermine its own institutional reputation".[61] Put differently, the concern is that the Court would have entered into the terrain of politics had it strongly interpreted the Constitutional housing right.

Many scholars have criticised the Grootboom court's approach as too weak.[62] A chief argument that was employed to justify this standpoint is that "the Court in *Grootboom*, even as it went further than any other court in the world has gone in giving effect to socio-economic rights, did not in the end embrace the full extent of the South African Constitution's transformative vision".[63] The South African Constitution is a transformative document designed to foster and agitate for large-scale social change. As part of its commitment to transformation, it requires that the transformative potential of the Constitution is a function of both the constitutional text and the nature of its community of interpreters. Interpreters are inevitably needed to infringe upon the terrain of (what is traditionally or in conservative legal culture) regarded as the proper domain of the legislature. In this view, the judiciary must inevitably enter politics to fulfil its constitutional objectives.[64] The Constitutional Court itself remarked in *Grootboom*[65] and elsewhere[66] that when assessing the scope of socio-economic rights, it is essential to remember the Constitution's transformative intent to heal the injustices of the past and address the ongoing repercussions of Apartheid and colonialism.

Bilchitz has also shown that the Constitutional Court's approach runs the risk of doing exactly what it seeks to prevent: usurping the judiciary's powers. According to the author, in current socio-economic jurisprudence, the

standard of reasonableness stands for whatever beneficial aspects of state policy the Court deems desirable. For the author, this technique lacks a principled basis on which to base decisions in socio-economic rights matters, which is problematic. Such a base is essential for two reasons. First, there have been apprehensions that the Court will exceed its authority by mandating government policy decisions. In light of this, the Court needs a framework for defining its role in such circumstances. Although the Court is sensitive to this concern, its current method of determining the broad and nebulous concept of reasonableness does not limit its role in such situations. More explicit articulation of the principles upon which such litigation is to be conducted will provide precisely a reasoned description of the criteria the Court will employ when evaluating the state's obligations. This will aid in elucidating the grounds for its involvement in these situations and defining the scope of its decision-making authority by identifying the significant interests at stake.[67]

If it is accepted that the Court's approach was too weak, then the question is raised about how much stronger the approach should have been.[68] Some scholars have argued that the Constitutional Courts' "weak" approach to interpreting the right is appropriate. Still, to overcome legislative and executive inertia regarding the implementation of the right, the Court should have preferred a "strong" approach to the remedy granted.[69] So too, Pieterse has argued that "the flaw in the decision is to be found not so much in the Court's substantive reasoning, but rather in the form of the order made. In failing to back up its declaration of constitutional invalidity with a proper enforcement mechanism, the Court did not do justice to the remedies available under the South African Constitution".[70] Later in this chapter, it will be considered how the court could have effectively utilised its supervisory jurisdiction. However, other scholars have argued that the Court was wrong to narrowly interpret the ambit of the right to housing, chiefly in its rejection of the minimum core approach. As a starting point, it is argued that the Constitutional Court must establish the obligations imposed

on the state by socio-economic rights. This would require that the state is not left with a nebulous norm by which to evaluate its behaviour but is instead able to assess it against concrete standards. The current method of using the vague concept of reasonableness does not give a clear and logical basis for evaluating the state's actions in future cases by courts or other branches of government.[71]

9.3.2 The Court's rejection of the minimum-core approach

The concept of a minimum core for socio-economic rights derives from the work of the United Nations (UN) Committee on Economic, Social and Cultural Rights (the Committee on ESCR), which seeks to establish a minimum legal content for socio-economic rights that State Parties to the International Covenant on Economic, Social and Cultural Rights (ICESCR) must realise (1966). The Committee on ESCR interprets the nature of State Parties' minimum core duties under the ICESCR as follows:

> *"On the basis of the extensive experience gained by the Committee, as well as by the body that preceded it, over a period of more than a decade of examining State parties' reports, the committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent on every State party. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential health care, of basic shelter and housing, or of the most basic forms of education is, prima facie, failing to discharge its obligations under the Covenant. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would largely be deprived of its raison d'etre. By the same token, it must be noted that any assessment as to whether a State has discharged its minimum core obligation must also take account of resource constraints applying within the country concerned. Article 2(2) obliges each State party to take the necessary steps 'to the maximum of its available resources'. In order for a State party to be able to*

> *attribute its failure to meet at least its minimum core obligation to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations."*[72]

In this approach, non-core needs are less urgent and should not be addressed until core needs are met.[73] The most prominent proponent of the minimum-core approach has been Professor David Bilchitz. He rejects the notion that the minimum-core approach is too rigid. As a starting point, the author argues that the minimum-core approach is uncompromising in only one sense:

> *"[I]t requires us to recognise that it is simply unacceptable for any human being to have to live without sufficient resources to maintain their survival. A state must do everything within its power to rectify such a situation, and we must be intolerant of such living conditions. Such rigidity may indeed be a feature of the minimum core approach; but such rigidity occurs in exactly the right place. We should have a principled and strong commitment to eradicating such terrible living conditions as soon as possible. One of the main ideas behind constitutional rights is to protect the vulnerable; there is none so vulnerable as those who lack basic shelter, food, water and health-care. The fact that, on the interpretation I support, our Constitution takes a strong approach to eradicating such conditions does not, however, imply it is out of touch with reality."*[74]

For the author, the reasonableness approach requires less than *everything within the state's power* to realise the right to access housing. Indeed, eradicating homelessness and vulnerability among citizens are critical to the transformative vision of the Constitution. It has been pointed out that the minimum core obligation imposes a higher burden of justification than "reasonableness" in cases of non-compliance by the legislature and executive.[75] This does not mean to say, however, that the adoption of a minimum core approach requires that there should be an individually enforceable right to housing in

South Africa. The minimum core approach "merely requires an understanding that one right can involve different levels of provision; the state can be obligated to provide a minimum threshold of a right while increasing its level of provision progressively over time".[76] Therefore, adopting the minimum-core approach is imperative to achieving the Constitution's transformative vision. As Liebenberg states:

> *"the meeting of minimum core obligations should enjoy prioritised consideration in social policy-making and in the judicial enforcement of these rights, due to the urgency of the interests they protect. Without meeting minimum essential needs which people require to survive, the States obligation to progressively achieve the full realisation of the rights becomes meaningless".*[77]

Adopting a minimum-core approach would also not be a rejection of the standard of reasonableness. Instead, reasonableness must be assessed regarding whether the government has complied with its minimum core obligations regarding the right to housing.[78] The minimum core should be regarded chiefly as a means of specifying societal priorities.[79] Priority must be given to the most vulnerable persons in society whose survival is most immediately threatened. The minimum-core approach acknowledges that some are more vulnerable than others and should be given priority.[80]

It is also argued that the Court's approach and the adoption of the reasonableness standard defer the responsibility for defining the "substantive" or "core" content of socio-economic rights to the executive and legislative branches of the government.[81] It is argued that the Court should first establish and define a norm or general standard and determine the minimal requirements that such a standard imposes on the government before examining the reasonableness of government measures adopted to realise socio-economic constitutional rights. Critics argue in this fashion because the concept of a minimum core does not refer to the mechanisms by which socio-economic rights must be realised. Instead, it relates to the expected norm or the

standard imposed by the provision required to meet people's fundamental needs.[82]

Proponents of the minimum-core approach argued that "defining the minimum core does not require courts to rewrite policy or prescribe specific government measures, such as, the passing of specific legislation".[83] In this view, the judiciary should establish a universally applicable norm against which the government's compliance with its socio-economic rights obligations can be measured. Without such a norm, it is argued, the judiciary will be unable to determine whether the government's actions are reasonable in the first place. A universal norm will serve as a reference or benchmark against which the appropriateness of government policies can be analysed and evaluated. It will also provide a mechanism for government to be informed about the most vulnerable individuals in society whose survival is threatened by extreme deprivation.

The Court stated that determining the minimum threshold for realising socio-economic rights is impossible because the needs and opportunities for enjoying a right vary depending on various conditions. It argued that it lacked the institutional competence to do so.[84] Critics have claimed that this consideration is immaterial in determining the content of the minimum core because everyone is entitled to the same level of provision (in the case of housing). It is argued that people's differing needs should dictate how government should support them. While individual demands may vary, the general and standard obligations imposed on the government concerning people's socio-economic needs should not.[85] According to Fuo and Du Plessis, "[w]hat this argument means in effect is that what differs (and needs to be addressed) in an unequal society is how far off from the minimum core (or the 'universal' standard) each person lies, and therefore what must be provided by the State for each to alleviate his or her needs up to the set minimum level or standard".[86]

How, then, should it be determined what the minimum core entails? In a series of general comments, the CESCR has

attempted to isolate the core rights elements such as food, health and water. There is no apparent reason why these could not be judiciously adapted to the South African context. It has also been claimed that through its powers of interpretation, the judiciary can provide content to constitutional socio-economic rights and play a quasi-law-making role in translating these rights into enforceable legal claims.[87] Through such an approach, the judiciary can, on a case-to-case basis, consider factors in front of it and presented to it by the parties to the proceedings, develop what minimum entitlements should be. Among these considerations should be the vulnerability of persons affected by state policy. Such an approach can do much in realising the transformative vision of the Constitution. Furthermore, in *Grootboom v Oostenberg Municipality*,[88] the Court *a quo* adopted what was effectively a minimum-core approach by requiring that the children before the Court and their parents should be entitled to "shelter", which was interpreted to mean something less than "adequate housing".[89] According to the Court, the degree of protection denoted by shelter entails a "significantly more rudimentary form of protection from the elements than is provided by a house" and, therefore, "tents, portable latrines and a regular supply of water (albeit transported) would constitute the bare minimum".[90]

As such, Wesson has identified several benefits to the minimum-core approach.[91] According to the author, adopting the minimum-core approach will allow resources to move where they are most needed, i.e., where individual needs are most urgent and individuals are most vulnerable. It will also clarify the Court's socio-economic jurisprudence by ensuring the government understands its priorities. Furthermore, the minimum-core approach would allow for a more precise explanation of progressive realisation by assuring that the state has a starting point from which to operate. Finally, society benefits from converting programmatic socio-economic rights into individual entitlements. It may be claimed that doing so would put resources directly into the hands of individuals, contributing to the achievement

of substantive equality and the transformation of South African society.

It is worth noting that even if a minimum-core approach is adopted, this does not mean to say that individuals would be entitled to an individual remedy based on their right to access housing. In addition, it may also be true that the state would not necessarily be able to meet its minimum-core obligations regarding the socio-economic right in question. After all, tents, portable latrines, and a regular water supply are expensive. However, if such an approach is taken and the core needs are unmet, the state must justify this under the limitation clause.[92] Non-core allocations must be viewed as violations of constitutional rights and justified if they result in unmet core needs elsewhere. However, the onus would be on the state to explain why non-compliance with the minimum core is justifiable.[93]

9.3.3 The failure of the Court to exercise supervisory jurisdiction

It has been argued that the Court's exercise of supervisory power in particular circumstances is the most effective way of promoting the interests of disadvantaged groups of society and furthering the Constitution's transformative agenda.[94] Supervisory orders have two primary purposes: "to determine the terms of a more detailed future order; and ensure that the state complies with an order".[95] The most prevalent type of order is an interdict with the condition that the government produces periodic updates on its compliance with the order. These reports are usually presented to the courts and the other original parties. Still, they might also be directed to be submitted to persons who were not involved in the initial action. The Court will then issue another order after the other parties have had an opportunity to react to the reports. The order may also indicate a specific re-hearing date to review the reports. The option of re-hearing may be left open, with the Court only holding a future hearing if the reports appear to necessitate it. This fundamental form can be utilised to achieve both compliance and determinative intent. It is also

possible that the Court will delegate case monitoring to another authority.[96] The exercise of supervisory jurisdiction can be described as a strategy to "pierce the political veil".[97]

In *Grootboom*, the Constitutional Court declined to exercise any supervisory powers. The Court did not consider itself qualified in *Grootboom* to dictate the exact budget amount the state should devote to programs targeting persons in dire need. Instead, the state was just given recommendations. The Court decided that the precise allocation must be reasonable but that it is ultimately up to the government to determine how resources should be allocated. Instead, the Constitutional Court preferred the Human Rights Commission to monitor enforcing the right to housing.[98] However, it should be noted that the Constitutional Court did not specifically require the Human Rights Commission to investigate and report to the Court on the progress the state has made toward the progressive realisation of the right to access housing. Instead, the Court held that the Human Rights Commission could report it as necessary.[99] In recent cases, the South African judiciary has appointed the Auditor General and a panel of experts,[100] an independent contractor,[101] a claims administrator,[102] and a special master[103] to investigate and report back to the Court. The Court has also, in the past, exercised supervisory jurisdiction itself.[104]

It has been argued that when the enforcement of orders is left to the government, without any supervision by the Court, the state will inevitably interpret such an order narrowly. In the case of *Grootboom*, Pillay has argued that there was generally a "lack of clear under-standing that the judgment requires systemic changes to national, provincial and local housing programs to cater for people in desperate and crisis situations".[105]

9.4 Conclusion

The Constitution Court has repeatedly confirmed and applied the principles enunciated in *Grootboom*.[106] Indeed, as Ray argues, the Constitutional Court has demonstrated "a marked

reluctance to revisit *Grootboom*".[107] Millions of South Africans still lack access to housing or adequate housing within which the human dignity of the most vulnerable of society can be fostered.[108] Nevertheless, it is also undoubtedly so that, following the advent of Constitutional democracy in South Africa, the government has done much to alleviate housing pressures. The question, however, arises if the government has done enough and if the government's housing policy has therefore been reasonable. *Grootboom* fails to provide valuable guidelines that can be used to assess the reasonableness of state housing policy. The Constitutional Court lets vague constitutional values such as human dignity do much of the heavy lifting.[109] As such, it is wholly unclear what the impact of *Grootboom* on government policy has been, if at all. It would have been politically foolish for a government elected by the majority of South Africans on a manifest geared towards transforming the lives of ordinary South Africans not to have implemented a housing policy geared towards that end.

At its adoption, the South African Constitution was heralded for its progressive and transformative nature. For many, *Grootboom*'s reasonableness review has brought less than what the drafters of the Constitution may have hoped for. The *Grootboom* approach can be summarised as follows: The right to access housing (and other socio-economic rights are enforceable. The right does, however, not provide for an individually enforceable right to housing. The right to access housing merely guarantees reasonable government policy. Courts will be hesitant to prescribe to the government how to implement the right to access housing.

Adopting the minimum core could have done much to give content to the right to access housing and other socio-economic rights. Two decades on, coupled with a remedy of supervisory jurisdiction, standards of what constituted a minimum core informed by international law principles and South African contextual considerations could have emerged. Such an approach entails acknowledging the significance and relevance of some essential items in improving people's lives and necessitating immediate action. While a reasonableness

analysis is vital, it does not compel a government to address such demands fully. This cautious approach can arguably be attributed to the fact that the Court in *Grootboom* was, in all likelihood, motivated by considerations of politics to encroach as little as possible on the terrain of the legislature. The time has, however, come for the Court to embrace a more activistic approach to socio-economic rights adjudication, which is geared towards achieving a socially just society.

Endnotes

1 2000 11 BCLR 1169 (CC) (*Grootboom*). Wesson "Grootboom and beyond: reassessing the socio-economic jurisprudence of the South African Constitutional Court" 2004 *SAJHR* 284 285.

2 According to Khoza *Socio-Economic Rights in South Africa: A Resource Book* (2007) 20: "[s]ocio-economic rights are those rights that give people access to certain basic needs necessary for human beings to lead a dignified life".

3 See Trilsch "What's the use of socio-economic rights in a constitution? Taking a look at the South African experience" 2009 *Verfassung und Recht in Übersee / Law and Politics in Africa, Asia and Latin America* 552.

4 *Ex parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa 1996* 1996 10 BCLR 1169 (CC).

5 2000 11 BCLR 1169 (CC). Wesson "Grootboom and beyond: reassessing the socio-economic jurisprudence of the South African Constitutional Court" 2004 *SAJHR* 284 285.

6 S 26 of the Constitution of the Republic of South Africa, 1996 (the Constitution) provides as follows: "(1) Everyone has the right to have access to adequate housing. (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right. (3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions."

7 S 28(1)(*c*) provides that "[e]very child has the right "to basic nutrition, shelter, basic health care services and social services".

8 *Grootboom* (n 1) par 83.

9 *Grootboom* (n 1) par 41.

10 Wilson and Dugard "Constitutional jurisprudence: the first and second waves" in Langford et al *Socio-Economic Rights in South Africa: Symbols or Substance?* (2014) 35 41; Kende "The South African constitutional court's embrace of socio-economic rights: a comparative perspective" 2003 Chapman Law Review (2003) 137; Saul et al *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases and Materials* (2014) 957 and Young "The canons of social and economic rights" 2021 *Boston College Law School Legal Studies Research Paper Series (Research Paper 553)* 1 2.

11 South African Government "Human settlements" https://www.gov.za/about-sa/humansettlements (11-05-2022).

12 Statistics South Africa "Primary tables South Africa: Census '96 and 2001 compared" http://www.statssa.gov.za/census/census_2001/primary_tables/RSAPrimary.pdf (11-05-2022).

13 Pillay "Implementing Grootboom: supervision needed" 2002 *ESR Review: Economic and Social Rights in South Africa* 1 2.

14 See, for example, Liebenberg "The right to social assistance: the Implications of *Grootboom* for policy reform in South Africa" 2001 *SAJHR* 232; De Vos "*Grootboom*, the right of access to housing and substantive equality as contextual fairness' 2001 *SAJHR* 258 and Sunstein *Designing Democracy: What Constitutions Do* (2001) 224-237.

15 See, for example, Bilchitz "Giving socio-economic rights teeth: the minimum core and its importance" 2002 *SALJ* 484 and Bilchitz "Towards a reasonable approach to the minimum core: laying the foundations for future socio-economic rights jurisprudence" 2003 *SAJHR* 1.

16 Klaasen "The quest for socio-economic rights: the rule of law and violent protest in South Africa" 2020 *Sustainable Development* 478 482.

17 *Grootboom* (n 5) par 20.

18 *Grootboom* (n 5) par 20.

19 Such as the right of access to land (s 25(5)), to adequate housing and to health care, food, water and social security (s 27). They also protect the rights of the child (s 28) and the right to education (s 29(1)).

20 The Court held at par 42 that "[t]he state is required to take reasonable legislative and other measures. Legislative measures by themselves are not likely to constitute constitutional compliance. Mere legislation is not enough. The state is obliged to act to achieve the intended result, and the legislative measures will invariably have to be supported by appropriate, well-directed policies and programmes implemented by the executive. These policies and programmes must be reasonable both in their conception and their implementation. The formulation of a programme is only the first stage in meeting the state's obligations. The programme must also be reasonably implemented. An otherwise reasonable programme that is not implemented reasonably will not constitute compliance with the state's obligations."

21 *Soobramoney v Minister of Health, Kwazulu-Natal* 1998 1 SA 765 (CC).

22 2004 6 BCLR 569 (CC) par 49.

23 2018 2 BCLR 119 (CC) par 58.

24 *Mazibuko v City of Johannesburg* 2010 3 BCLR 239 (CC) par 48 (*Mazibuko*) and *Daniels v Scribante (Trust for Community*

Outreach and Education as amicus curiae) 2017 8 BCLR 949 (CC) par 42.

25 *Residents of Industry House, 5 Davies Street, New Doornfontein, Johannesburg v Minister of Police* 2022 1 BCLR 46 (CC) (*Residence of Industry House*).

26 *Residence of Industry House* (n 25) par 143.

27 Sunstein (n 14) 237.

28 Wesson (n 5) 289–293.

29 *Grootboom* (n 5) par 36.

30 *Grootboom* (n 5) par 44.

31 *Grootboom* (n 5) par 43.

32 s 27(1)(c) of the Constitution.

33 *Grootboom* (n 5) par 36.

34 *Grootboom* (n 5) par 24. See also *Mahlangu v Minister of Labour (Commission for Gender Equality as amici curiae)* 2021 1 BCLR 1 (CC) par 61 (*Mahlangu*).

35 *Grootboom* (n 5) par 23.

36 *Grootboom* (n 5) par 37.

37 *Grootboom* (n 5) par 23.

38 CESCR *General Comment 3: The Nature of States Parties Obligations* (1990) par 10.

39 *Grootboom* (n 5) par 31.

40 CESCR *General Comment 15: The Right to Water* (2002) par 44.

41 *Grootboom* (n 5) par 32.

42 *Grootboom* (n 5) par 33.

43 *Grootboom* (n 5) par 33. It should be noted that the Constitutional Court has continued in its rejection of minimum core approach. See, for example *Minister of Health v Treatment Action Campaign (no. 2)* 2002 5 SA 721 (CC) (*TAC*) par 26–39 and *Mazibuko* (n 24) par 46–68.

44 Bilchitz (n 15; 2003) 15.

45 *Grootboom* (n 5) par 41.

46 s 26(2) of the Constitution.

47 *Grootboom* (n 5) par 99.

48 Young (n 10) 7.

49 *Mazibuko* (n 24) par 48.

50 *Mazibuko* (n 24) par 49.

51 *Grootboom* (n 5) par 41.

52 *Grootboom* (n 5) par 66.

53 *TAC* (n 43) par 38.

54 *Mazibuko* (n 24) par 61.

55 Tushnet "New Forms of Judicial Review and the Persistence of Rights- and Democracy-Based Worries" 2003 *Wake Forest Law Review* 813 821 and 835 and Tushnet "Social welfare rights and the forms of judicial review" 2004 *Texas Law Review* 1895.

56 Tushnet "Weak courts, strong rights: judicial review and social welfare rights in comparative constitutional law" (2008) 240-244.
57 Sunstein "Social and economic rights? Lessons from South Africa" 2001 https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1454&context=law_and_economics (16-05-2022).
58 Kende "The South African Constitutional Court's construction of socioeconomic rights: a response to critics" 2004 *Connecticut Journal of International Law* 617 624.
59 Kende (n 58) 625.
60 Kende (n 58) 628.
61 Kende (n 58) 629.
62 See, for example, Bilchitz (n 15; 2002); Bilchitz (n 15; 2003); Roux "Understanding *Grootboom* - a response to Cass R. Sunstein" 2002 *Constitutional Forum* 12.
63 Roux (n 62) 43.
64 Klare "Legal culture and transformative constitutionalism" 1998 *SAJHR* 146.
65 *Grootboom* (n 5) par 25.
66 *TAC* (n 43) par 24 and *Mahlangu* (n 34) par 55.
67 Bilchitz (n 15; 2003) 10.
68 Pieterse "Coming to terms with judicial enforcement of socioeconomic rights" 2004 *SAJHR* 383.
69 Dixon "Creating dialogue about socioeconomic rights: strong-form versus weak-form judicial review revisited" 2007 *International Journal of Constitutional Law* 391.
70 Pieterse (n 68) 42.
71 Bilchitz (n 15; 2003) 10.
72 CESCR (n 38) par 10. The African Commission on Human and People's Rights (ACHPR) has also adopted the concept of the minimum core obligation in its interpretation of State Parties' responsibilities under the African Charter on Human and People's Rights. According to the ACHPR, State Parties are required to ensure that each of the socio-economic rights enshrined in the Charter is at least satisfied to the minimal essential level. This responsibility requires State Parties to ensure that no considerable number of individuals are deprived of a socioeconomic right's fundamental elements. According to the ACHPR, the minimum core duty is non-derogable and exists independent of the availability of resources. The ACHPR has emphasized that even if a State Party has evident resource limits, it is nevertheless obligated to fulfil the minimum essential levels of each right for vulnerable and disadvantaged groups by giving them priority in all legislative and policy measures. See Fuo and Du Plessis "In the face of judicial deference: taking the 'minimum

core' of socio-economic rights to the local government sphere" 2015 *Law Democracy and Development* 1 6.

73 Wesson (n 5) 303.
74 Bilchitz (n 15; 2003) 15.
75 Bilchitz (n 15; 2003) 17-18; Wesson (n 5) 302.
76 Bilchitz (n 15; 2003) 13.
77 Liebenberg *Socio-economic Rights: Adjudicating under a Transformative Constitution* (2010) 164.
78 Bilchitz (n 15; 2003) 12.ß
79 Bilchitz (n 15; 2003) 15.
80 Bilchitz (n 15; 2003) 16.
81 Bilchitz (n 15; 2003) 488.
82 See Bilchitz (n 15; 2003) 5-13; Bilchitz (n 15; 2003) 487-488
83 Fuo and Du Plessis (n 72) 11. See also Bilchitz (n 15; 2002) 492-493; Stewart L "Adjudicating socio-economic rights under a transformative constitution" 2010 *Penn State International Law Review* 487 494 and Stewart "Interpreting and limiting the basic socio-economic rights of children in cases where they overlap with the socio-economic rights of others" 2008 *South African Journal on Human Rights* 472 482.
84 *Grootboom* (n 5) par 32-33.
85 Bilchitz (n 15; 2002) 89.
86 Fuo and Du Plessis (n 72) 11.
87 See Liebenberg (n 77) 40; Pieterse "Legislative and executive translation of the right to have access to health care services" 2010 *Law, Democracy and Development* 231 232; Brand and Heyns (eds) Socio-economic rights in South Africa (2005) 12 and Stewart (n 83; 2010) 506.
88 2000 3 BCLR 277 (C).
89 288B-C.
90 293A.
91 Wesson (n 5) 299-300.
92 s 36 of the Constitution. The provision reads as follows: "(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including - (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose. (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights."
93 Wesson (n 5) 305.
94 Wesson (n 5) 306.

95 Bishop "Remedies" in Woolman and Bishop (eds) *Constitutional Law of South Africa* (2014) 75-179.
96 Bishop (n 95) 75-179 – 75-180.
97 Woolman "A politics of accountability: how South Africa's judicial recognition of the binding legal effect of the public protector's recommendations had a catalysing effect that brought down a President" 2018 *Constitutional Court Review* 155 185 n 12. In *Modder East Squatters v Modderklip Boerdery (Pty) Ltd, President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2004 3 All SA 169 (SCA) par 39 this idea was described as follows: "Structural interdicts . . . have a tendency to blur the distinction between the executive and the judiciary and impact on the separation of powers. They tend to deal with policy matters and not with the enforcement of particular rights. Another aspect to take into account is the comity between the different arms of the state. Then there is the problem of sensible enforcement: the state must be able to comply with the order within the limits of its capabilities, financial or otherwise. Policies also change, as do requirements, and all this impacts on enforcement".
98 *Grootboom* (n 5) par 97. S 184(1)(*c*) of the Constitution places a duty on the Commission to "monitor and assess the observance of human rights in the Republic". S (2)(*a*) and (*b*) give the Commission the power "(*a*) to investigate and to report on the observance of human rights; [and] (*b*) to take steps to secure appropriate redress where human rights have been violated".
99 *Grootboom* (n 5) par 97.
100 *Black Sash Trust v Minister of Social Development* 2017 3 SA 335 (CC); *Black Sash Trust v Minister of Social Development (Freedom Under Law NPC Intervening)* 2017 9 BCLR 1089 (CC) and *Black Sash Trust (Freedom Under Law Intervening) v Minister of Social Development* 2018 ZACC 36 (CC).
101 *Madzodzo v Minister of Basic Education* 2014 3 SA 441 (ECM).
102 *Linkside v Minister for Basic Education* [2015] ZAECGHC 36.
103 *Director-General for the Department of Rural Development and Land Reform v Mwelase; Mwelase v Director-General for the Department of Rural Development and Land Reform 2019* 2 SA 81 (SCA).
104 *August v Electoral Commission* 1999 3 SA 1 (CC).
105 Pillay (n 13) 1.
106 See, for example, *Road Accident v Mdeyide* 2011 2 SA 26 (CC); *Residence of Industry House* (n 25).
107 Ray *Engaging with Social Rights: Procedure, Participation and Democracy in South Africa's Second Wave* (2016) 238.
108 According to Sen "The standard of living: concepts and critiques" in Hawthorn (ed) *The Standard of Living: The Tanner Lectures* (1987) 18 "to lead a life without shame, to

be able to visit and entertain one's friends … requires a more expensive bundle of goods and services in a society that is generally richer and in which most people have, say, means of transport, affluent clothing, radios or television sets".

109 *Grootboom* (n 5) par 83: "It is fundamental to an evaluation of the reasonableness of state action that account be taken of the inherent dignity of human beings. The Constitution will be worth infinitely less than its paper if the reasonableness of state action concerned with housing is determined without regard to the fundamental constitutional value of human dignity."

Chapter 10

Gay marriage, equality and the need for substantive protection for same-sex and new forms of intimate relationships

Minister of Home Affairs v Fourie[1]

> "Finding themselves strongly attracted to each other, two people went out regularly and eventually decided to set up home together. After being acknowledged by their friends as a couple for more than a decade, they decided that the time had come to get public recognition and registration of their relationship, and formally to embrace the rights and responsibilities they felt should flow from and attach to it. Like many persons in their situation, they wanted to get married. There was one impediment. They are both women." (*Minister of Home Affairs v Fourie* par 1)

10.1 Introduction

South Africa was the first country[2] to safeguard sexual orientation as a human right in the Interim Constitution[3] and the Final Constitution.[4] The Constitutional Court has defined sexual orientation regarding erotic attraction: for heterosexuals, to members of the opposite sex; for gays and lesbians, to members of the same sex.[5] Therefore, a potential homosexual, gay, or lesbian is anyone who is erotically attracted to members of their own sex. It also covers bisexuals, transsexuals and those who may, on a single occasion, experience eroticism towards a member of their own sex.[6] Including sexual orientation in the Constitution

recognises that confident choices inherent to human identity should be safeguarded, particularly given that homosexual and lesbian individuals have historically been subjected to disadvantageous conditions.[7]

Since its inception, the South African Constitutional Court has championed LGBTQ+ rights. First, the judiciary extended to same-sex life partners the ability to conduct their "private affairs" as they wished.[8] The judiciary also recognised the reciprocal duty of support between same-sex partners and extended medical insurance benefits to these persons.[9] It extended immigration benefits to same-sex foreign partners of South African citizens.[10]

After that, the Constitutional Court came to the aid of those excluded from the institution of marriage. At common law, marriage was defined as a union of one man and one woman who mutually agree to live together as spouses until the marriage is dissolved by the death of one of them or as otherwise provided by law.[11] The case of *Minister of Home Affairs v Fourie (Doctors for Life International, Amici Curiae)*; *Lesbian and Gay Equality v Minister of Home Affairs* (*Fourie*)[12] was a landmark case for equality and LGBTQ+ rights, both globally and internationally. In the case, the appellants (who, in the words of the Court *a quo,* were "two adult persons who on the undisputed evidence love each other")[13] had been in a same-sex relationship for more than ten years when they approached the courts for permission to marry. The problem lay in the fact that they were of the same sex, and before the judgment, marriage was understood as a social and legal institution reserved for opposite-sex couples. The appellants did not challenge the Marriage Act[14] but instead requested the Court to develop the common law in accordance with the Constitution to allow for same-sex marriages. The High Court had dismissed their application for this reason. The Constitutional Court, however, held that section 173 of the Constitution grants inherent power to the Constitutional Court, the Supreme Court of Appeal and the High Courts to develop the common law, considering the interests of justice. In terms of section 8(3) of the Constitution, when a court is

called upon to give effect to a person's constitutional right before it, it must develop the common law to the extent that legislation does not give effect to that right.

The Court found that the Constitution enshrines the right not to be discriminated against by the state on the ground of sexual orientation and the Court undertook a detailed examination of the history of our equality jurisprudence, culminating in several decisions in which same-sex partners have been granted equal rights in certain other areas of law. It was evident that marriage forms a cornerstone of society, and its significance extends to many aspects of an individual's existence. As such, the Court found that to exclude same-sex couples from institutions and, therefore, exclude them from the advantages brought about thereby, militated against the Constitution's spirit and specific provisions. The Court found that such exclusion could not be justified and constituted unfair discrimination that violated the equality of the appellants.

The Court declared the exclusion of same-sex relationships from the institution of marriage unconstitutional. It gave Parliament one year to develop a remedy allowing same-sex partners to formalise their relationships. The Court had also cautioned Parliament to be sensitive and not to provide a remedy that would be calculated or perceived as producing new forms of marginalisation.

The judgment resulted in adoption of the Civil Union Act[15] on 1 December 2006. South Africa became one of the few countries to confer legal protection and marriage benefits on partners in same-sex relationships. With the Act, Parliament opted to develop a separate institution of marriage, apart from the existing forms of marriage such as civil or customary marriages. This new institution of marriage has generated extensive and complex questions concerning the quality of legal protection accorded to partners in same-sex relationships.

This Chapter considers the remedy adopted by the Constitutional Court and the remedy adopted by the

Parliament to provide for marriage or civil unions for same-sex couples. The Chapter also shows why the remedies adopted by both institutions are problematic. After that, the Chapter investigates if the current regulation of relationships in South Africa can accommodate new forms of intimate relationships. Specifically, it will be considered if protection can be extended to those in polyamorous relationships, in domestic partnerships and for relationships including trans, gender diverse, and intersex people.

10.2 The remedy adopted by the Constitutional Court

Section 172(1) of the Constitution sets out the powers and competencies of the judiciary in terms of the remedies it is entitled to make following a finding of unconstitutionality:

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

It is helpful to set out the principles related to granting constitutional remedies. The first is that courts must first attempt to interpret legislative provisions in such a manner as to avoid a finding that the provision is unconstitutional.[16] Only if this is not possible, then it is incumbent upon the courts to declare the relevant provision invalid.[17] Suppose the Court chooses to remedy the unconstitutionality itself. In that case, it can order notional or actual severance of the

offending parts or read in words into the provision to cure it of its unconstitutionality.[18] The Court can also make an order limiting the retrospective effect of the declaration of invalidity and suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.[19] In *Fourie*, it was held that it was necessary "to look at the precise circumstances of each case with a view to determining how best the values of the Constitution can be promoted by an order that is just and equitable".

Moreover, the Constitutional Court has made it clear that effective relief necessitates that it be granted to the specific claimant and everyone in a similar situation.[20] A remedy that supports only the litigants in the case does not qualify as effective relief. In *Fourie*, the ability of same-sex couples to marry was extended to all same-sex couples, not only the litigating pair.

While acknowledging that rules of common law and statutory provisions that prevented same-sex life partners from entering civilly sanctioned marriages were unjustifiably limiting their rights to equality and dignity, the *Fourie* Court went out of its way to note that religious prohibitions on gay and lesbian marriage did not constitute an unjustifiable infringement and that religious officials could legitimately refuse to consecrate a marriage between members of the same religion.[21] This finding seems dubious at best. It may be argued that the Court attempted to appease a society vehemently opposed to same-sex marriages that neither they nor their religious institutions would be affected by the outcome of the *Fourie* case. In the case of *Gaum v Van Rensburg*,[22] the High Court nullified the decision of the General Synod of the Dutch Reformed Church not to recognise same-sex marriage. Consequently, homosexual persons could only be ordained as a Minister (or *Dominees*) if they were celibate, and no same-sex marriage could be solemnised within the church. Previously the Church had allowed for the solemnisation of same-sex marriages but placed no positive duty on a Minister of the Church to do so.[23] The High Court found that differentiating between heterosexual members and members of the LGBTQ+

community constituted discrimination that was presumed unfair in terms of section 9 of the Constitution. The Court found that "[t]he differentiation caused by the decision does inherently diminish the dignity of *Gaum* because same-sex relationships are tainted as being unworthy of mainstream church ceremonies and persons in same-sex relationships cannot be a minister of the church".

It should be noted that the decision was only applicable to the conclusion of the General Synod of the Dutch Reformed Church. The decision does not affect the position that individual clergy may refuse to solemnise same-sex marriages due to religious objections. The Civil Union Act allows any secular marriage officer who informs the Minister of Home Affairs in writing that they object on the ground of conscience, religion or belief to solemnising same-sex civil unions will not be compelled to solemnise such civil unions.[24] This provision certainly falls foul of the equality clause in the Constitution as it curtails the rights of same-sex couples to enter into a civil union as freely as their heterosexual counterparts. For many, the fact that many clergy will refuse to marry same-sex couples will be a significant obstacle towards entering into a marriage and consequently achieving marriage equality.[25] In addition, these provisions may be potentially exploited to perpetuate discrimination against same-sex couples, mainly where the impact of a conscientious objection clause is significantly more significant on the couple than on the possible objector. The Green Paper of Marriages in South Africa states that the ability to refuse to marry same-sex couples subjective and tends to lend itself to discriminatory behaviour. The Green Paper suggests that

> "*[m]arriage officers assume these positions voluntarily. In doing so, they perform a public function and not a cultural or religious function. This is an important distinction. In choosing to accept the position as a marriage officer and its corresponding responsibilities, the officer will not be permitted to refuse to perform his or her duties on these grounds. As a*

> *matter of policy, marriage officers must therefore serve all members of the public who wish to marry, without exception."*[26]

In *Fourie*, the majority of the Constitutional Court declared the common-law definition of marriage inconsistent with the Constitution and invalid as it did not permit same-sex couples to enjoy the status, benefits, and responsibilities accorded to heterosexual couples. Still, it suspended the declaration of invalidity for a year to give Parliament time to fix the defect as provided for in section 172(1)(*b*)(ii) of the Constitution. It also ordered the removal or severance of the words "or spouse" from subsection 30(1) of the Marriage Act to be inconsistent with the Constitution and void to the extent of the inconsistency. Again, the declaration of invalidity was put on hold for a year so that Parliament may remedy the flaw.

In *Fourie*, the unconstitutionality of limiting marriage to heterosexual couples was suspended to allow the legislature to address the issue because there were multiple options and because any reform was more likely to be accepted if it originated from the legislature.[27] Frequently, the suspension is justifiable because the issue has various viable resolutions, and it is more appropriate to let the legislature decide how the unconstitutionality should be remedied.[28] In coming to this conclusion, the Court was cognisant that the matter "touches on deep public and private sensibilities" and that Parliament was better suited to deal with the matter. The Court reminded that "not only the courts are responsible for vindicating the rights enshrined in the Bill of Rights. The legislature is on the frontline in this respect. One of its principal functions is to ensure that the values of the Constitution as set out in the Preamble and section 1 permeate every area of the law".[29] According to Bishop:

> *"One senses here a genuine separation of powers concern: if legislatures possess greater political legitimacy by virtue of their election and ongoing accountability, then the legislature, and not an ostensibly unaccountable judiciary, should take responsibility for crafting a remedy that better fits the 'mores' and the inclinations of the electorate."*[30]

Nevertheless, the Court ordered the legislature to cure the constitutional defect in line with specific guiding principles. The first is that "Parliament will have to bear in mind that the objective of the new measure must be to promote human dignity, the achievement of equality and the advancement of human rights and freedoms".[31] The second is that "Parliament [should] be sensitive to the need to avoid a remedy that on the face of it would provide equal protection, but would do so in a manner that in its context and application would be calculated to reproduce new forms of marginalisation".[32]

Incidentally, the Constitutional Court itself set out the benefits of providing a direct remedy itself, albeit in the context of the government not fulfilling its obligations in terms of the court order timeously. The Court held:

> *"Reading-in of the words 'or spouse' has the advantage of being simple and direct. It involves minimal textual alteration. The values of the Constitution would be upheld. The existing institutional mechanisms for the celebration of marriage would remain the same. Budgetary implications would be minimal. The long-standing policy of the law to protect and enhance family life would be sustained and extended. Negative stereotypes would be undermined. Religious institutions would remain undisturbed in their ability to perform marriage ceremonies according to their own tenets, and thus if they wished, to celebrate heterosexual marriages only. The principle of reasonable accommodation could be applied by the state to ensure that civil marriage officers who had sincere religious objections to officiating at same-sex marriages would not themselves be obliged to do so if this resulted in a violation of their conscience. If Parliament wished to refine or replace the remedy with another legal arrangement that met constitutional standards, it could still have the last word."*[33]

The majority of the Court did not suspend this order because immediate invalidity would create a gap in the law, but because there was a limited range of choices regarding how same-sex couples could be accommodated.[34] The minority

judgment disagreed with the majority's decision to suspend the judgment. Instead, the majority preferred that

> *"this Court should develop the common-law rule as suggested by the majority in the Supreme Court of Appeal, and at the same time read in words to [the Marriage Act] that would with immediate effect permit gays and lesbians to be married by civil marriage officers (and such religious marriage officers as consider such marriages not to fall outside the tenets of their religion)".*[35]

Although the minority of the Court acknowledged that "the doctrine of the separation of powers is an important one in our Constitution", it was argued that the doctrine could not be used "to avoid the obligation of a court to provide appropriate relief that is just and equitable to litigants who successfully raise a constitutional complaint".[36] The minority argued[37] that orders of the Court should only be suspended where the relief cannot properly be tailored by a court[38] or where even though a litigant would otherwise be successful, other interests or matters would preclude an order in their favour[39] or where an order would otherwise produce such disorder or administrative difficulties that the interests of justice served by an order in favour of a successful litigant are outweighed by the social dislocation such an order might occasion.[40] The minority argued that its preferred order "would not preclude Parliament from addressing the law of marriage in the future, and would simultaneously and immediately protect the constitutional rights of gay and lesbian couples pending parliamentary action".[41] The minority of the court held that the judiciary should not shy away from its constitutional duty to protect the rights of litigants. The minority denied the presupposition that a remedy by Parliament *vis-à-vis* that of the Court carries greater democratic legitimacy.[42] The approach of the minority seems to be best in line with that of the Constitutional Court in *Fose v Minister of Safety and Security*:[43]

> *"Our object in remedying these kinds of harms should, at least, be to vindicate the Constitution, and to deter its further*

> *infringement. Deterrence speaks for itself as an object, but vindication needs elaboration. Its meaning, strictly defined, is to 'defend against encroachment or interference'. It suggests that certain harms, if not addressed, diminish our faith in the Constitution. It recognises that a Constitution has as little or as much weight as the prevailing political culture affords it. The defence of the Constitution — its vindication — is a burden imposed not exclusively, but primarily, on the judiciary. In exercising our discretion to choose between appropriate forms of relief, we must carefully analyse the nature of a constitutional infringement, and strike effectively at its source."*[44]

The difference in approach between the majority and the minority of the Court is related to the problem that judicial remedial discretion poses for the legitimacy of judicial review.[45] Roux contends that the *Fourie* case is best interpreted as the Court's attempt to strike a compromise between three distinct forms of legitimacy: legal legitimacy (the plausibility – not the correctness – of a judicial decision in light of accepted standards of legal reasoning), public support (confidence of the citizens in the judiciary) and institutional security (the judiciary's capacity to resist attacks on its independence).[46] The first determines if a decision is persuasive within the legal community, the second whether it obtains popular support, and the third the Court's power to resist actual or potential attacks on its independence. He contends that the Constitutional Court operates out of mixed motives of principle and pragmatism to ensure its institutional security without surrendering its legal or public legitimacy. Roux believes, for instance, that viewing the decisions in *Fourie* through this lens is preferable. As a starting point, the author accepts that the challenging question of whether the Court should delay its judgment allowing same-sex couples to marry, lacked a clear legal answer. The majority judgment can be interpreted to have favoured suspension of the order to enlist the legislature's cooperation in the execution of a legal reform that was sure to be very controversial and ran the risk of eroding public support for the Court.[47]

The minority judgment, who would have made the order immediately, believed that suspension would damage the Court's legal validity, which was ultimately a more crucial issue in securing public support for the Court.[48] As Bishop argues, the approach of the majority of the Court seems to be based on the Court's knowledge that same-sex marriage was incredibly unpopular in South Africa when the judgment was delivered.[49] Suppose the majority of citizens were overwhelmingly in favour of allowing same-sex couples to marry. In that case, it is impossible to conceive that the Court would have deemed it essential to delay the decision. Therefore, the remedy granted by the majority in *Fourie* relies entirely on an alleged need for stability and greater public acceptance.[50] According to Bishop, where a remedy aims to achieve multiple goals, one may have to be sacrificed for another:

> *"A similar conflict confronted the Court in Fourie. Effective relief clearly demanded that same-sex couples be permitted to marry immediately, but the Court was aware that it was necessary to attain social recognition and stability for those unions. Such legitimacy, the majority concluded, would best be achieved if the change came from Parliament."*[51]

10.3 The remedy adopted by Parliament

Following the *Fourie* judgment, South Africa was only the fifth country in the world and the first in Africa to legalise same-sex marriage.[52] Instead of changing the Marriage Act and allowing same-sex couples to engage in civil marriage, the legislature attempted to appease religious groups, traditional leaders and the majority of the populace vehemently opposed to same-sex marriage by establishing a distinct legal institution for same-sex couples.[53] As a separate legal institution with a lower standing than civil marriage would have obviously violated the Constitution, the legislature produced the Civil Union Bill 2006, which allowed same-sex couples to engage in a civil partnership with the same legal ramifications as a civil marriage. The Bill was harshly criticised since it created a completely different regime for same-sex couples and did

not let the legally acknowledged relationship of same-sex couples be referred to as marriage except during the ceremony of solemnisation.[54] In response to the criticism, the Bill was changed to include both heterosexual and same-sex couples and to allow couples of any sexual orientation to refer to their civil union as a marriage or a civil partnership for all reasons.

The modified Bill became the Civil Union Act of 2006,[55] which came into effect on November 30, 2006. However, the common law meaning of "marriage" has not been altered, and same-sex couples have not been brought under the 1961 Marriage Act. Thus, same-sex couples are limited to civil unions, but heterosexual couples may choose between civil marriage and civil unions. It might be argued that the separate regime created by the new Civil Union Act did not rectify the unconstitutional failure to permit same-sex couples to marry which was identified by the Court in *Fourie*. If it did not, then the suspended consequences specified in the *Fourie* order (altering the common law and reading in "or spouse" to the Marriage Act) should, in theory, have come into effect on the expiry of the suspension period.[56]

Although the Constitutional Court set strict parameters within which Parliament was tasked to remedy the unconstitutionality of the exclusion of same-sex partners from the 1961 Marriage Act, the Constitutional Court did not require the regulation of same-sex relationships to be precisely the same as for homosexual relationships.

> *"It is precisely sensitivity to context and impact that suggest that equal treatment does not invariably require identical treatment. Thus corrective measures to overcome past and continuing discrimination may justify and may even require differential treatment."*[57]

The Court went on to state:

> *"Equality means equal concern and respect across difference. It does not presuppose the elimination or suppression of difference. Respect for human rights requires the affirmation of*

> *self, not the denial of self. Equality therefore does not imply a levelling or homogenisation of behaviour."*[58]

Although the legislature sought to deal with same-sex relationships in a separate piece of legislation, the consequences of entering into a marriage or civil union are precisely the same as a traditional heterosexual marriage. No special provisions were adopted to deal specifically with same-sex relationships. In terms of the definition of "civil union" in the Civil Union Act, same-sex and heterosexual persons who are 18 years or older may enter into a civil union.[59] A civil union may take the form of a marriage or a civil partnership.[60] It is entirely up to the couple whether they want their civil union to be called a marriage or a civil partnership.[61] The consequences of a civil union are precisely the same regardless of the couples' choice as to its designation.[62] However, a significant difference between the requirements for a civil marriage and a civil union is that a person under the age of 18 years may not enter into a civil union.[63] They may enter into a civil marriage if certain people consent.[64] A minor has the capacity to enter into a customary marriage, subject to the necessity of consent.[65] These provisions undoubtedly amount to discrimination against LGBTQ+ youth and certainly impact their dignity.[66]

The Court in *Fourie* set out the benefits of the institution of marriage. First, it brings "the most intense private and voluntary commitment into the most public, law-governed and state-regulated domain".[67] Second, the formalities needed to enter into the institution "make certain that it is known to the broader community precisely who gets married and when they get married".[68] Third, "the most important invariable consequences of marriage is the reciprocal duty of support".[69] Fourth, "marriage affects the property regime of the parties to the marriage".[70] Fifth, "[m]arriage also produces certain invariable consequences in relation to children".[71] Sixth, "[t]he law also attaches a range of other consequences to marriage – for example, insolvency law provides that where one spouse is sequestrated, the estate of the other spouse also vests in the Master in certain circumstances, the law of evidence creates

certain rules relating to evidence by spouses against or for one another, and the law of delict recognises damages claims based on the duty of support".[72] Seventh, "formalization of marriages provides for valuable public documentation".[73] Eight, marriage is often "the only source of socio-economic benefits such as the right to inheritance, medical insurance coverage, adoption, access to wrongful death claims, spousal benefits, bereavement leave, tax advantages and post-divorce rights".[74]

However, a series of Constitutional Court judgments have illustrated that, due to societal pressures and stigmatisation, the protections associated with marriages or civil unions remain outside of the reach of many same-sex couples. In *Volks NO v Robinson*,[75] which dealt with a claim in terms of the Maintenance of Surviving Spouses Act[76] which entitles a surviving spouse to institute a maintenance claim against the deceased spouse's estate, the majority of the Constitutional Court held that it is not necessarily unfair to discriminate on the ground of marital status between those who are married and those who are not, and thus to attach more benefits to a marriage than to persons who simply live together.[77] This reasoning was based on significant social, legal and moral differences between marriage and cohabitation.[78] In contrast to marriage, the majority found that a life partnership could be continued or terminated at the behest of either party without state intervention. Notably, no legal impediment prevented the surviving spouse and the deceased from marrying before the deceased partner's death.[79] However, the minority of the court pointed out that the option of marrying often exists only in theory.[80] Goldblatt explains this point as follows:

> *"The libertarian presumption of free choice is incorrect. It is itself premised on the idea that all people entering into family arrangements are equally placed. This is not so. Men and women approach intimate relationships from different social positions with different measures of bargaining power. Gender inequality and patriarchy result in women lacking the choice freely and equally to set the terms of their relationship."*[81]

The same court employed this reasoning in *Laubscher v Duplan.*[82] It was held that the exclusion of same-sex life partners from inheriting in terms of the Intestate Succession Act[83] amounts to unfair discrimination on the ground of marital status.[84] The court found that the *Volks* case was to be distinguished from the present matter as it related to benefits flowing from an entirely different Act and because homosexual life partners are a vulnerable group that has been stigmatised in the past.[85] It has been submitted that because of the pervasiveness of homophobia in South Africa, which dissuades same-sex partners from marrying one another, it may be argued that even though same-sex partners have a choice in law to enter into a civil union, they may not necessarily have a choice to do so in reality.[86] It has also been argued that the continued bestowal of spousal benefits on same-sex life partners is justified by the injunction of substantive equality enshrined in section 9(2) of the Constitution.[87]

In *Du Toit v Minister of Welfare and Population Development*,[88] the Constitutional Court found that excluding same-sex life partners from the joint adoption of children constituted unfair discrimination based on sexual orientation and marital status. The court accepted that the unfair effect of the discrimination was squarely founded on an intersection of the grounds of sexual orientation and marital status and that the applicants' status as unmarried persons, which at that stage precluded them from joint adoption, was inextricably linked to their sexual orientation.[89] In *Satchwell v The President of the Republic of South Africa*,[90] a case dealing with the denial of pension benefits to same-sex partners of judges, it was found that such differentiation amounted to unfair discrimination on the grounds of marital status and sexual orientation.[91]

Ntlama argues that the new legal regime fell short on three accounts:

> *"It is argued, firstly, that the Act has the potential to produce new forms of marginalisation, despite the caution by the Court. Secondly, the categorisation of marriages into heterosexual and homosexual marriages or civil unions has created legal*

> *uncertainty about the essence of the notion of equal rights for all, without distinction, as envisaged in the Constitution. Lastly, the allocation of people into various categories rather than allowing them to be just 'human beings' could defeat the purpose of establishing a 'just' society based on democratic values, social justice and fundamental human rights".*[92]

It is clear from the litany of cases in which the Constitutional Court extended benefits to same-sex life partners that would typically have been reserved for marriage or civil union partnerships that the current legislative regime is not fit to purpose to regulate same-sex partnerships fully. The utilisation of especially heteronormative ideas of relationships has meant that the law has failed to address much of the stigmatisation surrounding same-sex marriage. Many same-sex partners still find themselves unable to marry due to societal and religious pressures. The South African Law Reform Commission (SALRC) has advocated that a single legislative instrument in a unified marriage law should be adopted to rationalise the marriage laws pertaining to all types of relationships.[93] If this suggestion is accepted, much of the criticism against categorising marriages into heterosexual and homosexual marriages or civil unions should disappear.

10.4 New forms of intimate relationships

During the last couple of decades, more and more people have entered non-traditional relationships. In addition, many couples choose not to enter a traditional or customary marriage or a civil union. Current legal regimes are also inadequate in protecting those who identify as non-binary or are already in a legally recognised relationship but are transitioning to a different sex. A chief argument against recognising same-sex marriage has always been the so-called "slippery slope" argument. According to this argument, recognising same-sex marriage leads to a "slippery slope" that inevitably sanctions new forms of intimate relationships such as multiple-partner marriage, bestiality, and incest.[94] Although this argument has been debunked and may be regarded as highly offensive,

specifically concerning the last two instances, the argument seems valid concerning new forms of intimate relationships. If the equal treatment and dignity of same-sex partners are deserving of protection, then why should the equal treatment and dignity of those in new forms of relationships not equally be deserving of protection? The Constitutional Court has also stressed that some family forms, such as those created by marriage, should not be entrenched at the expense of others.[95]

Like a civil marriage, a civil union is monogamous.[96] A growing number of persons choose to enter intimate relationships with two or more persons. Polyamory is a relationship in which people openly enter into committed multiple romantic, sexual, and/or affective relationships.[97] As in the case of the stigmatisation of same-sex relationships, polyamorous relationships face challenges regarding disclosure, legal exclusion, stigma, custodial issues, and relationships with families of origin. In South Africa, polygamous relationships are only allowed in limited circumstances. Polygamous marriages entered into according to the provisions of the Recognition of Customary Marriages Act[98] are legal. The husband in an existing customary marriage wishing to marry a second wife must apply to a competent court for such a marriage to be legally recognised. However, customary law does not recognise the right of a woman to take more than one husband. In the United States of America, 4% to 5% of the population indicated that they are in polyamorous relationships. Although statistics on polyamorous relationships are not available in South Africa, media coverage suggests that such relationships have recently become more commonplace.[99] Although the SALRC's proposed unitary legislation would allow for protected polyamorous relationships, this would seem to follow the patriarchal system currently allowed in customary law in that it only allows one man to enter into a protected relationship with several women.[100] The SALRC was seemingly moved by the fact that a wide range of religious and cultural traditions in South Africa practises polygamy. Extending this right to only certain religious and cultural communities may be

considered unconstitutional, especially concerning changing societal norms and values. The SALRC has suggested that the requirements should be a permanent, intimate relationship between two adults (aged 18 years) of the same or opposite sex who live together and have consented to do so.[101] However, the SALRC has suggested that "perhaps the number of intimate partners should not be limited in a statute regulating intimate relationships, it might be a partnership between two men and three women".[102] The Green Paper of Marriages in South Africa has suggested that polyandry should be legally recognised in South Africa, arguing that it is discriminatory to allow only men to enter such relationships.[103] If this suggestion is implemented, problems surrounding unrecognised religious marriages, such as those found in the Islamic tradition because they are potentially polygamous, would be put to rest.

Increasingly, many partnerships choose not to enter into protected relationships. In addition, many members of the LGBTQ+ community remain unmarried due to marriage officers who are often unwilling to marry members of these communities or because of continued societal stigmatisation. As a result, some members of the LGBTQIA+ community choose unregistered domestic partnerships. A domestic partnership or cohabitation is a legal relationship between two individuals who live together and share a common domestic life but are not married or in a civil union. Domestic partnerships are currently not formally recognised by legislation and can be protected only through other avenues of law, such as contracts, universal partnerships, estoppel and unjustified enrichment. A domestic partnership is brought about by stated or inferred agreement. It may be integrated with or take place concurrently with a religious ceremony. The omission of marriage formalities may be intentional or unintentional. If it is deliberate, the parties have chosen to enter a partnership that lacks the characteristics of marriage unless they have decided otherwise, and the law allows them to do so.

Heterosexual domestic partnerships have different implications than marriage in the following ways:[104] First,

because there is no reciprocal responsibility of support in the context of cohabitation, there is no claim for maintenance upon separation. If the breadwinner's death is caused unlawfully, no claim for loss of support can be filed. Second, domestic partnership children have a parent-child relationship with their mothers. Fathers are obligated to support them but have no parental rights. Third, domestic partners maintain separate estates unless they agree differently in writing. People who join into a relationship in accordance with a recognised religious norm can enter into an agreement under which they operate a partnership of all property or some other defined property such as income. Fourth, domestic partners can end their relationship by mutual consent or unilaterally, with or without cause. A court order is not required and cannot be obtained. Fifth, domestic partners can only inherit from each other through a testamentary disposition and, unlike married partners, will be subjected to a different and burdensome tax regime. Some South African statutes bestow recognition on all life partners, such as the Medical Schemes Act,[105] the Domestic Violence Act,[106] the Estate Duty Act,[107] the Compensation for Occupational Injuries and Diseases Act[108] and the Insolvency Act.[109] All these Acts define "dependants" as including life partners. Currently, no legislation in South African law directly regulates or protects domestic partnerships.[110] The SALRC has recommended that the new proposed unitary law should also provide measures for protecting domestic partnerships and registering domestic partnerships.[111] According to the SALRC, registered unmarried partners would be treated like married partners.[112] Unregistered partnerships would get no protection. However, a court should be able to decide that a partnership may (or must) be registered retrospectively if either party can prove a long relationship.[113]

Existing legislation does not provide a transitional mechanism for persons who initially married under the provisions of the Marriage Act but who subsequently undergo a sex change. One of the issues that trans and gender diverse people continue to face is how marriage registries are preserved and how this connects with the changing gender

markers in identifying documents for trans, gender diverse, and intersex people. The Department of Home Affairs often compels transgender people who are married under the Marriages Act to divorce their spouses to change their gender officially.[114] The SALRC has found that the parties' relationship status before such an alteration order is granted must be recognised as a protected relationship in the proposed legislation.[115] Ultimately, a single and unitary protected relationships regime could be genderless to avoid problems of this nature.

10.5 Conclusion

Public opinion about same-sex marriage is changing. In 2015, 45% of South Africans supported same-sex marriage, while 13% supported civil unions or legal recognition.[116] In 2021, 59% of South Africans favoured same-sex marriage, 11% were for civil partnerships but not marriage, 15% were against legal recognition for same-sex couples, and 14% were on the fence about the issue.[117] There can be little doubt about the transformative nature of the legalisation of same-sex marriage in South Africa. According to Picarra, the Civil Union Act may one day be viewed as the first link in a chain of change regarding the more troublesome aspects of family law in South Africa when she writes that "the possibility may well now exist for unwed heterosexual and same-sex domestic relationships to be brought under the protection of the law".[118] These possibilities now exist because of a course of action ignited by the *Fourie* case.

Some of the consequences of the *Fourie* judgment may be the following: First, adopting a unitary statute and institution to protect protected intimate relationships can do much to militate against continued stigmatisation surrounding same-sex and other intimate relationships. Second, marriage officers should not be able to refuse to solemnise same-sex or other intimate relationships. In coming to this conclusion, it should be realised that the harm suffered by those officers when they are offended due to cultural, religious or personal moral

considerations is infinitely less than the harm suffered by those affected by their decision, their families and the community at large. These actions discriminate and infringe on the human dignity of same-sex and other intimate partners, leading to further societal stigmatisation. Third, such a unitary statute should protect polyamorous relationships outside the confines of religious or customary traditions, which may include more than one male partner. Fourth, such a unitary statute should protect domestic partnerships and the registration thereof. Fifth, such a unitary statute should be degendered to militate against negative public stereotypes of trans, gender diverse, and intersex people, making transitioning easier within existing relationships.

Although the Constitutional Court was moved by concerns about the separation of powers in its decision to defer the remedy to the legislature, the results have not been entirely undesirable. It is telling that the Constitutional Court has not since employed such a remedy. We will never know what the consequences of an order along the lines of the minority judgment in *Fourie* would have been. What is clear, however, is that as we are confronted with changing societal norms and new forms of intimate relationships, protections will inevitably have to be increased to provide protection for new forms of intimate relationships and to fight societal stigmas related to the LGBTQ+ community.

Endnotes

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5 *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC) (*National Coalition for Gay and Lesbian Equality*) par 20. See also Cameron "Sexual orientation and the Constitution: a test case for human rights" 1993 *SALJ* 450.
6 *National Coalition for Gay and Lesbian Equality* (n 5) par 21.
7 Cheadle and Davis *South African Constitutional Law: The Bill of Rights* (2021) par 4-40.
8 *National Coalition for Gay and Lesbian Equality* (n 5). In this case, the Constitutional Court held that the criminalisation of sodomy amounted to an unjustifiable constitutional infringement of several human rights such as human dignity, equality and privacy.
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11 D 23 2 1; Gr 1 5 1; Arntzenius 2 3 1; Van der Linden *Koopmans Handboek* 1 3 1.
12 2006 1 SA 524 (CC).
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14 25 of 1961.
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16 In *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd In re: Hyundai Motor Distributors (Pty) Ltd v Smit* 2001 1 SA 545 (CC) par 23 it was held that "judicial officers must prefer interpretations of legislation that fall within constitutional bounds over those that do not, provided that such an interpretation can be reasonably ascribed to the section".
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18 *Van Rooyen* (n 17) par 88.
19 s 172(1)(*b*)(i) and (ii).
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28 *Fourie* (n 12) par 134. With reference to *Dawood, Shalabi and Thomas v Minister of Home Affairs* 2000 3 SA 936 (CC) (*Dawood*) par 63.
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34 *Fourie* (n 12) par 139.
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