

## SELECTED CASES

## SEPARATION OF POWERS

LCP4806 Selected Cases summarised by Pierre Louw. The provision does not imply 100% accuracy. Please ensure accuracy for yourself.

The judgment of the Supreme Court of Appeal in *National Director of Public Prosecutions v Zuma* 2009 (4) BCLR 393 (SCA) has restored the essence of the independence of the judiciary after its image and integrity had been seriously compromised by the Nicholson judgment (the judgment of the KwaZulu-Natal High Court, Pietermaritzburg in *Zuma v National Director of Public Prosecutions* 2009 (1) BCLR 62 (N) (also available at [www.saflii.org.za](http://www.saflii.org.za)), in the matter between the NPA and Mr Zuma. SG 50

The SCA established that the court a quo failed to distinguish between facts and political conspiracy theories to the extent of moving beyond what the court was required to deal with. At para 15, the court held that:

*"[I]t is crucial to provide an exposition of the functions of a judicial officer because, for reasons that are impossible to fathom, the court below failed to adhere to some basic tenets, in particular that in exercising the judicial function judges are themselves constrained by the law.*

*The underlying theme of the court's judgment was that the judiciary is independent; that judges are no respecters of persons; and that they stand between the subject and any attempted encroachments on liberties by the executive (para 161–162).*

***This commendable approach was unfortunately subverted by:***

- *a failure to confine the judgment to the issues before the court;*
- *by deciding matters that were not germane or relevant;*
- *by creating new factual issues;*
- *by making gratuitous findings against persons who were not called upon to defend themselves;*
- *by failing to distinguish between allegation, fact and suspicion; and*
- *by transgressing the proper boundaries between judicial, executive and legislative functions".*

**At para 19, the court continued as follows:**

*"[T]he independence of the judiciary depends on the judiciary's respect for the limits of its powers. Even if, in the words of the learned judge, the judiciary forms a 'secular priesthood' (para 161) this does not mean that it is entitled to pontificate or be judgmental especially about those who have not been called upon to defend themselves – as said, its function is to adjudicate the issues between the parties to the litigation and not extraneous issues".*

However, the integrity of the judiciary itself is subject to further compromise, as the ruling party (ANC) has initiated a process that will look at the NPA itself and how its powers can be curtailed.

The Constitution requires the courts to remain above party politics and apply the law without fear or favour, regardless of status and membership of a particular group. **Judicial review should not be seen as an attack on the integrity of any person, but as a tool to affirm the foundational values and principles entrenched in the Constitution.**

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*South African Association of Personal Injury Lawyers v Heath* 2000 (1) BCLR 77 (CC) Whilst there is no express mention of the doctrine of separation of powers in the Constitution, the Constitutional Court in paras 18–22 held that:

- *“there can be no doubt that our Constitution provides for such a separation [of powers], and that laws inconsistent with what the constitution requires in that regard, are invalid”.*
  - The Court further held that *“the separation of powers is an unexpressed provision that is ‘implied’ in or ‘implicit’ to the Constitution. Its presence is based on inferences drawn from the structure and provision of the Constitution, rather than on an express entrenchment of the principle.”*
  - The Court however excluded the performance of executive functions by organs of state i.e Special Investigating Unit performing functions that are inconsistent with the judicial functions of a judge, which included the presidential appointment of a judge to head an investigating unit. The Court held this provision as unconstitutional.
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***Glenister v The President of the Republic of South Africa and Others*** (Centre for Constitutional Rights as amici curiae) CCT 41/08 Handed down: 22 October 2008

- Application for leave to appeal against an order of the Pretoria High Court which held that that Court lacked jurisdiction to hear the applicant's challenge to the decision by Cabinet to initiate legislation dissolving the Directorate of Special Operations (Scorpions).
- The applicant alternatively sought direct access to the Constitutional Court for an order compelling the government to withdraw the relevant legislation.
- The unanimous judgment dealt only with the question of whether the doctrine of the separation of powers permitted the Court to consider the validity of Cabinet's decision while the legislative process was still underway.
- The Court held that in order to justify such an intervention, the applicant would have had to prove that material and irreversible harm had arisen, which he had failed to do. The applications for leave to appeal and for direct access were dismissed.

Judgment: Langa CJ (unanimous).

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***Doctors for Life International v Speaker of the National Assembly & Others*** <sup>2006 (6) SA 416 (CC)</sup>

**Judge:** Langa CJ, Mosenke DCJ, Madala J, Mokgoro J, Ngcobo J, Nkabine J, O'Regan J, Sachs J, Skweyiya J, Van Der Westhuizen J Yacoob J

**Judgment:** August 17, 2006

**Flynote : Sleutelwoorde**

**Constitutional practice - Courts - Constitutional Court - Jurisdiction - Powers of - Declaratory relief - Legislation - Enactment** - Exclusive jurisdiction of CC under s 167(4) of Constitution - relating to separation & to facilitate public involvement in its legislative and other processes & principle of representative and participatory democracy & Separation of powers requiring other branches of government to refrain from interfering in parliamentary proceedings. Court accordingly having jurisdiction to consider constitutional challenge to **Dental Technicians Amendment Act 24 of 2004, Choice on Termination of Pregnancy Amendment Act 38 of 2004 and Traditional Health Practitioners Act 35 of 2004**. Constitutional Court not only having right but also duty to ensure that law-making process prescribed by Constitution observed - If not complied with, Court having duty to say so and declare statute invalid.

**UITSPRAAK:**

Obligation on the NCOP to facilitate public involvement & Constitutionality of Legislation. If both of these propositions were sound in law, the applicant was entitled to come directly to the CC. & This Court is afforded exclusive jurisdiction to decide whether Parliament has complied with its constitutional obligation to facilitate public involvement.

Held, accordingly (Yacoob J, Skweyiya J and Van der Westhuizen J dissenting), that an order should be granted declaring that Parliament had failed to comply with its constitutional obligation to facilitate public involvement before passing the Choice on Termination of Pregnancy Amendment Act 38 of 2004 and the Traditional Health Practitioners Act 35 of 2004 as required by s 72(1)(a) of the Constitution and that these Acts were, as a consequence, adopted in a manner that was inconsistent with the Constitution and had therefore to be declared invalid. The declaration of invalidity was, however, to be suspended for 18 months to enable Parliament to re-enact these statutes in a manner consistent with the Constitution.

Order

In the event, I make the following order:

- (a) It is declared that Parliament has failed to comply with its constitutional obligation to facilitate public involvement before passing the Choice on Termination of Pregnancy Amendment Act 38 of 2004 and the Traditional Health Practitioners Act 35 of 2004 as required by s 72(1)(a) of the Constitution. I

- (b) The Choice on Termination of Pregnancy Amendment Act, 2004, and the Traditional Health Practitioners Act, 2004, were, as a consequence, adopted in a manner that is inconsistent with the Constitution and are therefore declared invalid.
- (c) The order declaring invalid the Choice on Termination of Pregnancy Amendment Act, 2004, and the Traditional Health Practitioners Act, 2004, is suspended for a period of 18 months to enable Parliament to re-enact these statutes in a manner that is A consistent with the Constitution.
- (d) The constitutional challenges relating to the Dental Technicians Amendment Act 24 of 2004 and the Sterilisation Amendment Act 3 of 2005 are dismissed.

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***Doctors for Life International v Speaker of the National Assembly and Others*** CCT 12/05

Handed down: 17 August 2006

Application directly challenging the constitutional validity of four health-related Bills on the basis that Parliament failed to fulfill its constitutional obligation to facilitate public involvement when passing the Bills.

**The case concerns, generally:**

- the role of the public in the law-making process;
- the nature and scope of the constitutional obligation of a legislative organ of the state to facilitate public involvement in its legislative processes;
- the consequences of the failure to comply with that obligation;
- whether it is competent for this Court to interfere during the legislative process before a parliamentary or provincial bill is signed into law; and whether this Court is the only court that may consider the questions raised in this case.

The Court found that it had **exclusive jurisdiction** over this matter under section 167(4)(e) of the Constitution.

The majority held that the **obligation to facilitate public involvement** as required by the provisions of sections 72(1)(a) and 118(1)(a) of the Constitution is a material part of the law-making process and failure to comply with it renders the resulting legislation invalid.

The Traditional Health Practitioners Act and the Choice on Termination of Pregnancy Amendment Act were declared invalid for lack of proper public consultation and the order of invalidity was suspended for eighteen months.

The Court did not consider the Sterilisation Amendment Bill as it was still a Bill when the proceedings were commenced in this Court. The Court did not have competence to consider validity of a bill except on a reference from the President.

It was also held that lawmakers did not breach their obligation to facilitate public involvement in terms of the *Dental Technicians Amendment Act* because when the Bill was first published for comment *no submissions were received and thus it did not have a threshold level of public interest.*

Majority:

Ngcobo J (Langa CJ, Moseneke DCJ, Madala J, Mokgoro J, Nkabinde J, O'Regan J and Sachs J concurring).

Dissent: Yacoob J (Skweyiya J concurring);

Separate Concurrence: Van der Westhuizen J.

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In *De Lange v Smuts NO* 1998 (3) SA 785 (CC), Ackerman J reiterated that **there is no universal model of separation of powers, and that it is not absolute**. An absolute separation of powers would lead to inefficiency and inflexibility.

Ackermann J conceded that:

*".... over time our courts will develop a distinctively South African model of separation of powers, one that fits the particular system of government provided for in the Constitution and that reflects a delicate balancing, informed both by South Africa's history and its new dispensation, between the need, on the one hand, to control government by separating powers and enforcing checks and balances and, on the other hand, to avoid diffusing power so completely that the government is unable to take timely measures in the public interests"*

(De Lange & Smuts para 60).

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## SELECTED CASES

## THE APPLICATION &amp; INTERPRETATION OF THE CONSTITUTION

**The starting point for an understanding of separation of powers upon which our Constitution is based must be the text of the Constitution.**

This can be traced back to the *First Certification judgment (Ex parte Certification of the Constitution of the Republic of South Africa, 1996 (4) SA 744 (CC)*, in which the Constitutional Court held that the text of the Constitution did comply with Constitutional Principle VI.

- The court rejected the argument that the new constitutional text did not comply with Constitutional Principle VI, because unlike in the US and France, cabinet ministers remained Members of Parliament.
  - This principle proclaimed that “[t]here shall be a separation of powers between the legislature, the executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness”.
  - The Constitutional Court approached this issue with flexibility and found that there is no universal model for separation of powers, and that the separation of powers is not absolute anywhere, as each state follows its own model. It was held that the overlap between the legislature and the executive in the South African Constitution strengthens the accountability of the executive to the legislature and does not infringe the doctrine of separation of powers.
  - As a matter of fact, the Constitution reflects a balance between an overconcentration of power and the need for effective government. The Constitutional Principles only require that there should be separation of powers in the Constitution. They do not prescribe what form this should take. The form it took in the Constitution is not inconsistent with the Constitutional Principles.
  - The court also followed a functional approach to separation of powers and indicated (at paras 106–113) that the inclusion of socio-economic rights in the Bill of Rights did not confer a task on the courts so different from their ordinary function that it was inconsistent with separation of powers.
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***Zuma v National Director of Public Prosecutions*** (2009 (1) BCLR 62 (N):

In this matter the applicant in this case was the current president of the African National Congress. He sought a declaration that a decision to prosecute him, taken by the National Prosecuting Authority during or about June 2005, was invalid. Zuma also sought to declare invalid an indictment served pursuant to the decision to prosecute.

The proceedings had nothing to do with the guilt or otherwise of the applicant on the charges brought against him. They dealt with the disputed question of a procedural step that the State was required to comply with prior to instituting proceedings against the applicant.

If there were defects, at best for the applicant, the indictment might be set aside. Once the defects were cured, subject to any other applications that are brought, the State was at liberty to proceed with any charges they deemed met.

The crux of the dispute was whether the applicant was entitled to make representations to the prosecuting authorities before the decision was taken to prosecute him. It was common cause that the applicant was not afforded an opportunity to make representations. The obligation to hear representations forms part of the *audi alteram partem* principle.

Addressing the question of the nature of the proceedings, the Court concluded that the application was in the nature of a civil review. The Court went on to express the opinion that the executive might have interfered in the decision to prosecute the applicant.

**The application succeeded.**

***National Director of Public Prosecution v Zuma*** [2009] ZASCA

The judgment of the Supreme Court of Appeal ("**SCA**") in *National Director of Public Prosecution v Zuma* [2009] ZASCA 1 ("**the Zuma judgment**") is a good illustration of how constitutional and administrative law issues underlie a political saga and may influence the country's political future.

Former Deputy-President Jacob Zuma challenged the decision of the National Director of Public Prosecution ("**the NDPP**") to indict him on an array of criminal charges on the basis of a legitimate expectation to be invited to be heard prior to the decision to indict him.

He founded this expectation on sections 33 and 179(5)(d) of the Constitution of the Republic of South Africa 1996 ("**the Constitution**").

**Section 33 enshrines the constitutional right to just administrative action, whereas section 179(5)(d) provides that the NDPP may review a decision not to prosecute after consulting the relevant Director of Public Prosecutions ("DPP") and taking representations from the accused.**

The SCA analysed the meaning of section 179(5)(d) and concluded that section 179(5)(d) does not apply to a reconsideration by the NDPP of his own earlier decisions not to prosecute but is limited in its application to a review of a decision made by a DPP or a prosecutor. The 2007 decision by Mr Mpshe, the then acting NDPP, to indict Mr Zuma was not a review of the 2003 decision by Mr Ngcuka, the previous NDPP, not to indict Mr Zuma.

**The decision by Mr Mpshe was a "fresh decision" based upon additional and compelling evidence which justified the indictment of Mr Zuma. A fresh decision falls outside the purview of section 179(5)(d) and as a result Mr Zuma was not entitled to an invitation to make representations prior to the making of the decision.**

Insofar as the legitimacy of Mr Zuma's expectation was concerned, the SCA confirmed the long established principle that an expectation will only be legitimate if it is based on a practice of or a clear and unambiguous representation by the decision-maker.

**The SCA found that Mr Zuma's expectation appeared somewhat self-created**, based upon his version of the facts and not upon an established practice or a representation by the NDPP, which effectively debased its legitimacy and enforceability.

The decision to indict and the subsequent events surrounding the indictment of Mr Zuma has fuelled a political controversy. Ironically, the less captivating and more principled interpretation of the Constitution had resolved the controversy.

The role of judges and legal interpretation in guiding the political future of the country remains to be seen.

In the case of *National Director of Public Prosecutions v Zuma* (573/08) [2009] ZASCA 1 (12 Jan 2008). upheld an appeal by the NDPP against a judgment by Nicholson J in which he had set aside the indictment of Mr Zuma on 18 main counts of racketeering, corruption, money laundering, tax evasion and fraud.

**The effect of the judgment on appeal is that the prosecution may proceed.**

The case concerned in the main the interpretation of section 179 of the Constitution. The SCA held that the section did not require that the NDPP had to invite Mr Zuma to make representations as to why he should not be prosecuted before indicting him and to provide him with a full explanation why a former decision not to prosecute was not adhered to.

**The SCA also held that Mr Zuma had no legitimate expectation** that he would have received such an invitation and explanation. It noted that Mr Zuma, knowing that he could make representations, chose not to make any.

Aware of the possible political implications of the judgment, the SCA emphasised that the judgment is not about the guilt of Mr Zuma; it is not about the question whether the decision to prosecute was justified; it is not about who should be the president of the ANC; it is not about whether the decision of the ANC to ask Mr Mbeki to resign was warranted; and it is not about who should be the ANC's candidate for the presidency in 2009. More particularly, it is not about whether there was political meddling in the decision-making process.

The judgment, however, deals with the question whether the findings by Nicholson J relating to political meddling were appropriate or could be justified.

**It came in this regard to the conclusion that his findings were inappropriate and could not be justified on the papers before him.** The SCA found that the learned judge had failed to have regard to some basic tenets concerning the judicial function and that he had failed to apply fundamental rules of procedure. This led to the erroneous findings.

The SCA nevertheless dismissed an application by Mr Mbeki and the Government of the RSA to intervene on the ground that they had no interest in the relief but only in the reasons of the court below.

The members of the Court were Harms DP and Farlam, Ponnann, Maya and Cachalia JJA.

- The SCA established that the court *a quo* failed to distinguish between facts and political conspiracy theories to the extent of moving beyond what the court was required to deal with. At para 15, the court held that:
- *"[I]t is crucial to provide an exposition of the functions of a judicial officer because, for reasons that are impossible to fathom, the court below failed to adhere to some basic tenets, in particular that in exercising the judicial function judges are themselves constrained by the law.*
- *The underlying theme of the court's judgment was that the judiciary is independent; that judges are no respecters of persons; and that they stand between the subject and any attempted encroachments on liberties by the executive (para 161–162).*

***This commendable approach was unfortunately subverted by:***

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  - However, the integrity of the judiciary itself is subject to further compromise, as the ruling party (ANC) has initiated a process that will look at the NPA itself and how its powers can be curtailed.
  - The Constitution requires the courts to remain above party politics and apply the law without fear or favour, regardless of status and membership of a particular group. **Judicial review should not be seen as an attack on the integrity of any person, but as a tool to affirm the foundational values and principles entrenched in the Constitution.**
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## BRIEF EXTRACTS - SEPERATION OF POWERS

On several subsequent occasions the Constitutional Court has adopted a rather strict approach to the doctrine of separation of powers. For instance...

In *Executive Council of the Western Cape Legislature v President of the Republic of South Africa* 1995 10 BCLR 1253 (CC), 1996 4 SA 744 (CC) paras 106 to 113, it was decided that it was inconsistent with the doctrine of separation of powers for Parliament to delegate its power to amend the laws to the president as head of the executive.

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In *Bernstein v Bernstein* NO 1996 4 BCLR 449 (CC) para 105 it was stated that “*the right of access to the courts was inter alia, aimed at protecting the independence of the courts and thus separation of powers*”.

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In *S v Dodo* 2001 5 BCLR 423 (CC), 2001 3 SA 382 (CC) paras 22–25, it was held that, although sentencing is a judicial function, a law *prescribing a mandatory minimum sentence was not inconsistent with the separation of powers, as the legislature also has a responsibility in respect of sentencing*.

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The second - *Certification of the Constitution of the Republic of South Africa, 1996*

*The issue of cooperative governance* was recognised and acknowledged by the Constitutional Court even prior to the coming into effect of the 1996 Constitution.

In *Certification of the Constitution of the Republic of South Africa*, 1996 (10) BCLR 1253 (CC) (paras 87–292), the Constitutional Court had to decide whether Chapter 3 of the constitutional text, and in particular the requirement that the different spheres of government should avoid legal proceedings against each other, violated Constitutional Principle XX, which provides for the recognition of provincial autonomy.

The Court emphasised that the Constituent Assembly was free to select a model of cooperative government rather than one of competitive or divided federalism

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**The significance of the Constitutional Court as the final arbiter** in the resolution of disputes between the spheres of government in order to affirm the principles of co-operative governance was confirmed in *Premier of the Province of the Western Cape v President of the Republic of South Africa* (1999 (4) BCLR 382 (CC), in which Chaskalson P held that:

- *[t]he principle of cooperative government is established in section 40 where all spheres of government are described as being “**distinctive, inter-dependent and interrelated**”. This is consistent with the way powers have been allocated between different spheres of government.*
- ***Distinctiveness** lies in the provision made for elected governments at national, provincial and local levels.*
- ***The interdependence and interrelatedness** flow from the founding provision that South Africa is “one sovereign, democratic state”, and a constitutional structure which makes provision for framework provisions to be set by the national sphere of government.*
- ***These provisions vest concurrent legislative competence** in respect of important matters in the national and provincial spheres of government, and contemplate that all provincial executives will have responsibility for implementing certain national laws as well as provincial laws (at para 50).*

**Coordination of the legislative and executive activities of the different spheres of government is crucial to the cooperative form of government.** Cooperation is of particular importance when it comes to concurrent lawmaking and implementation. Conflict between laws in respect of concurrent matters must be avoided, and the responsible organ for the execution of laws must be clearly identified.

Chaskalson CJ in the *Premier of the Province of the Western Cape* judgment further held that:

- *"[c]o-operation is of particular importance in the field of concurrent legislative making and implementation of laws. It is desirable, wherever possible, to avoid conflicting legislative provisions, to determine the administrations which will implement laws that are made therefore in the budgets of the different governments". (at para 55).*

This judgment endorsed the vertical separation of powers between the three spheres of government, namely, the national, provincial and local spheres.

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## ***Makwanyane & Constitutionalism***

***S v Makwanyane* 1995:** In *S v Makwanyane* the death penalty for murder was declared unconstitutional by the Constitutional Court. In this matter two accused were convicted in the Witwatersrand Local Division of the Supreme Court on four counts of murder, one count of attempted murder and one count of robbery with aggravating circumstances. They were sentenced to death on each of the counts of murder and to long terms of imprisonment on the other counts. The Appellate Division dismissed their appeals against the convictions.

### **ACKERMAN J:**

According to Ackerman J in *S v Makwanyane* (para 156), the concept and values of a constitutional state, of the *Rechtsstaat*, and the constitutional right to equality before the law are foundational to the creation of the “*new order*”. He indicated that the detailed enumeration and description in section 33 [limitation of rights] of the interim Constitution and in the general limitation clause of the criteria that must be met before the legislature could limit a right entrenched in Chapter 3 (the Bill of Rights) of the interim Constitution emphasise the importance, in our new constitutional state, of reason or justification when rights are sought to be limited.

This signalled a radical departure from a past, characterised by arbitrariness and inequality before the law to a present and a future in a constitutional state where state action must be such that it can be analysed and justified rationally.

155 The constitutional importance of equality is further underscored in section 35(1) which enjoins the courts to promote the values which underlie an open and democratic society based on freedom and equality in interpreting the provisions of Chapter 3.

156 We have moved from a past characterised by much which was arbitrary and unequal in the operation of the law to a present and a future in a constitutional state where state action must be such that it is capable of being analysed and justified rationally. Neither arbitrary action nor laws or rules which are inherently arbitrary or must lead to arbitrary application can, in any real sense, be tested against the precepts or principles of the Constitution.

157 - 163 As to the more general principle that arbitrariness conflicts with the idea of a right to equality and equality.

[166] The conclusion which I reach is that the imposition of the death penalty is inevitably arbitrary and unequal. Whatever the scope of the right to life in section 9 of the Constitution may be, it unquestionably encompasses the right not to be deliberately put to death by the state in a way which is arbitrary and unequal. I would therefore hold that section 277(1)(a) of the Criminal

Procedure Act is inconsistent with the section 9 right to life. They render the death penalty a cruel, inhuman and degrading punishment.

[167] It is one which the framers of our Constitution borrowed in part from article 19(2) of the German Basic Law ("Grundgesetz") which provides that - *"In keinem Falle darf ein Grundrecht in seinem Wesensgehalt angetastet werden"* "In no case may the essence of a basic right be encroached upon"

[168] However important it undoubtedly is to emphasise the constitutional importance of individual rights, there is a danger that the other leg of the constitutional state compact may not enjoy the recognition it deserves. I refer to the fact that in a constitutional state individuals agree (in principle at least) to abandon their right to self-help in the protection of their rights only because the state, in the constitutional state compact, assumes the obligation to protect these rights.

[172] Article 102 of the German Basic Law declares that capital punishment is abolished. The German Federal Constitutional Court considered the constitutionality of life imprisonment in 1977<sup>19</sup>. The provision in the criminal code which prescribes life imprisonment for murder was challenged on the basis that it conflicted with the protection afforded to human dignity (art 1.1) and personal freedom (art 2.2) in the German Basic Law.

[215] **LANGA J:**

[216] The death sentence, in terms of the provisions of section 277 of the Criminal Procedure Act, No. 51 of 1977, is unconstitutional, violating as it does:

- (a) the right to life which is guaranteed to every person by section 9 of the Constitution;
- (b) the right to respect for human dignity guaranteed in section 10;
- (c) the right not to be subjected to cruel, inhuman and degrading punishment as set out in section 11(2).

[220] When the Constitution was enacted, it signalled a dramatic change in the system of governance from one based on rule by parliament to a constitutional state in which the rights of individuals are guaranteed by the Constitution. It also signalled a new dispensation, as it were, where rule by force would be replaced by democratic principles and a governmental system based on the precepts of equality and freedom.

[222] Implicit in the provisions and tone of the Constitution are **values of a more mature society**, which relies on moral persuasion rather than force; on example rather than coercion. In this new context, then, the role of the State becomes clear.

[224] **Ubuntu** The concept is of some relevance to the values we need to uphold. It is a culture which places some emphasis on communality and on the interdependence of the members of a community. It recognises a person's status as a human being, entitled to unconditional respect, dignity, value and acceptance from the members of the community he happens to be part of.

- humanist disposition towards the world - Compassion, tolerance, fairness.
- ubuntu translates as humanness. Collective unity.
- ubuntu lives on the references to human dignity in the Constitution.
- Forms a bridge between individual western approach and unity approach of ubuntu.

### [300] **MOKGORO J:**

[301] Now that constitutionalism has become central to the new emerging South African jurisprudence, legislative interpretation will be radically different from what it used to be in the past legal order. In that legal order, due to the sovereignty of parliament, the supremacy of legislation and the absence of judicial review of parliamentary statutes, courts engaged in simple statutory interpretation, giving effect to the clear and unambiguous language of the legislative text - no matter how unjust the legislative provision.

[302] The constitution makes it particularly imperative for courts to develop the entrenched fundamental rights in terms of a cohesive set of values, ideal to an open and democratic society. To this end common values of human rights protection the world over and foreign precedent may be instructive.

[303] While it is important to appreciate that in the matter before us the court had been called upon to decide an issue of constitutionality and not to engage in debate on the desirability of abolition or retention, it is equally important to appreciate that the nature of the court's role in constitutional interpretation, and the duty placed on courts by Section 35, will of necessity draw them into the realm of making necessary value choices.

[304] The application of the limitation clause embodied in Section 33(1) to any law of general application which competes with a Chapter 3 right is essentially also an exercise in balancing opposing rights. To achieve the required balance will of necessity involve value judgements. This is the nature of constitutional interpretation. Indeed Section 11(2) which is the counterpart of Section 15(1) of the Constitution of Zimbabwe<sup>1</sup>, and provides protection against cruel, inhuman or degrading punishment, embodies broad idealistic notions of dignity and humanity.

In order to guard against what Didcott J, in his concurring judgement terms the trap of undue subjectivity, the interpretation clause prescribes that courts seek guidance in international norms and foreign judicial precedent, reflective of the values which underlie an open and democratic society based on freedom and equality.

[305] The described sources of public opinion can hardly be regarded as scientific. Yet even if they were, constitutional adjudication is quite different from the legislative process, because "the

court is not a politically responsible institution”<sup>2</sup> to be seized every five years by majoritarian opinion. The values intended to be promoted by Section 35 are not founded on what may well be uninformed or indeed prejudiced public opinion. One of the functions of the court is precisely to ensure that vulnerable minorities are not deprived of their constitutional rights.

[307] In interpreting the Bill of Fundamental Rights and Freedoms, as already mentioned, an all-inclusive value system, or common values in South Africa, can form a basis upon which to develop a South African human rights jurisprudence. It is well accepted that the transitional Constitution is a culmination of a negotiated political settlement. It is a bridge between a history of gross violations of human rights and humanitarian principles, and a future of reconstruction and reconciliation.

308 ***Ubuntu*** - *The concept was applied and explained by the Constitutional Court in this case*

*"Generally, ubuntu translates as 'humaneness'. In its most fundamental sense, it translates as 'personhood' and 'morality'... While it envelops the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity; in its fundamental sense it denotes humanity and morality".*

Completing the triad of good faith - *ubuntu* - was defined by *Langa J* in ***S v Makwanyane*** as encompassing the communality, solidarity, interdependence, unconditional respect, dignity, value, acceptance and reciprocal responsibility that binds the greater society.

[309] In American jurisprudence, courts have recognised that the dignity of the individual in American society is the supreme value. Even the most evil offender, it has been held, “remains a human being possessed of a common human dignity” (*Furman v Georgia* 408 US 238 at 273 (1972)), thereby making the calculated process of the death penalty inconsistent with this basic, fundamental value.

The International Covenant on Civil and Political Rights in its preamble, makes references to “the inherent dignity of all members of the human family” and concludes that “human rights derive from the inherent dignity of the human person”. This, in my view, is not different from what the spirit of *ubuntu* embraces.

[311] South Africa now has a new constitution however, which creates a constitutional state. This state is in turn founded on the recognition and protection of basic human rights, and although this constitutes a revolutionary change in legal terms, the idea is consistent with the inherited traditional value systems of South Africans in general - traditional values which hardly found the chance to bring South Africa on par with the rest of the world.

[313] Our new Constitution, unlike its dictatorial predecessor, is value-based. Among other things, it guarantees the protection of basic human rights, including the right to life and human dignity.

[317] It is inconsistent with Section 11(2) of the Constitution. In my view, therefore, the death penalty is unconstitutional. Not only does it violate the right not be subjected to cruel, inhuman or degrading treatment or punishment, it also violates the right to life and human dignity.

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### ***Makwanyane & the role of public opinion in judicial decision making***

The “**counter-majoritarian dilemma**” revolves around the legitimacy of judicial review. *The argument is that unelected and allegedly unaccountable judges should not be allowed to strike down legislation enacted by elected and legitimate representatives of the people in Parliament. The issue is, therefore, whether judicial review is compatible with popular sovereignty and democracy.*

### ***S v Makwanyane 1995***

In this matter two accused were convicted in the WWR Local Division of the Supreme Court on 4 counts of murder, one count of attempted murder and 1 count of robbery with aggravating circumstances. They were sentenced to death on each of the counts of murder and to long terms of imprisonment on the other counts. The Appellate Division dismissed their appeals.

### **CHASKALSON P:**

- **The question of unelected judges versus the will of the majority was settled in *Makwanyane*.** The judgment dealt with the constitutionality of the death penalty. *The Court dismissed the argument of the state that since South African society does not regard the death penalty for extreme cases of murder as a cruel, inhuman, and degrading form of punishment, the death penalty should not be abolished.*
- ***The issue of public opinion:***
- **As indicated by Chaskalson P,** “[t]he question before us, however, is not what the majority of South Africans believe a proper sentence for murder should be. It is whether the Constitution allows the sentence.” At para 87, he went on to say that: “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”.
- **Public opinion might be a relevant factor, but it is definitely not a decisive one.** As indicated by Chaskalson P (para 88) in the *Makwanyane* case, the court must interpret and uphold the constitution without fear or favour, and public opinion should not be a substitute for this duty. *Public opinion is relevant to the law-making function of Parliament because Parliament is mandated by and accountable to the public, while the court is accountable to the Constitution.*

**KENTRIDGE AJ:**

- **According to Kentridge AJ** in *Makwanyane* (para 200), “were public opinion on the question clear it could not be entirely ignored”. In the same paragraph, he added that: “[t]he accepted mores of one’s own society must have some relevance to the assessment whether a punishment is impermissibly cruel and inhuman ”.

**DIDCOTT J:**

- **Didcott J** (para 188) reasoned that "even assuming that public opinion supports the retention of the death penalty, that support is given in the belief that there is a unique deterrent force in the death penalty, and that the public is safer with it than without it". & that this would be an understandable belief if its premise was a good one. SG 64
  - He further stated that no “homage” need be paid to public opinion if it is founded on a false premise. He also held that in any event it would be wrong “[t]o allow ourselves to be influenced unduly by public opinion”.
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The first judgment dealing with the rule of law directly was the decision of the Constitutional Court in *Fedsure Life Assurance LTD v Greater Johannesburg Transitional Metropolitan Council* 1998 (12) BCLR 1458 (CC); 1999 SA 374 (CC), where the Constitutional Court stated the following:

*"It seems central to the conception of our constitutional order that the legislature and the executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred by law. At least in this sense, then, the principle of legality is implied within the terms of the interim constitution. Whether the principle of the rule of law has greater content than the principle of legality is not necessary for us to decide here. We need merely hold that the fundamental to the interim Constitution is a principle of legality (at para 58).*

This means that although local government law could not be classified as administrative action and, therefore, need not comply with the principles of administrative justice, local government legislation and conduct still needed to comply with the constitutional requirement of legality. As Devenish (2005:7) points out, this is indeed a seminal premise of the rule of law, which in turn is fundamental to the philosophy of constitutionalism.

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Another case in which the rule of law arose is that of *New National Party of South Africa v Government of the Republic of South Africa* (1995 5 BCLR 489 (CC); 1999 3 SA 191 (CC) para 24).

In this case, which involved a challenge to the provisions of the Electoral Act under which voters could only register to vote if they produced barcoded identity documents issued after 1986 or a temporary identity certificate on the grounds that this would practically violate the right to vote of people who did not have such documentation, the Court dismissed the challenge and held that the rule of law, as set out in the Constitution, required Parliament to act in a rational way in devising a scheme for the achievement of a legitimate purpose. Its conduct in this regard should not be perceived as arbitrary.

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**A third case involving the rule of law** is *President of the Republic of South Africa v South African Rugby Football Union* (1999 (10) BCLR 1059 (CC); 2000 1 SA 1 (CC) (SARFU) para 148).

This case dealt with the power of the president to appoint a commission of enquiry in terms of section 84(2)(f) of the Constitution. As in the *Fedsure* decision, the Constitutional Court (para 34) held that the conduct in question did not constitute administrative action and, therefore, was not subject to the principles of administrative justice.

The question then arose whether there were other constraints in relation to the exercise of the president's power to appoint a commission. This question was answered in the affirmative as follows:

*The constraints upon the President when exercising his powers s 84(2) are clear: the President is required to exercise powers personally and any such an exercise of power must be recorded in writing and signed; ... the exercise of the powers is clearly also constrained by the principle of legality and, as is implicit in the Constitution, the President must act in good faith and must not misconstrue the powers. These are significant constraints upon the exercise of the president's power. They arise from provisions of the Constitution other than the administrative justice clause, (at par 148).*

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In the **Pharmaceutical** judgment [*Pharmaceutical Manufacturers Association of South Africa, In re: Ex Parte Application of President of South Africa* (2000 (3) BCLR 241 (CC) paras 84–85] the Constitutional Court (para 85) discussed the constraints the Constitution places on the exercise of power in terms of the rule of law as follows:

*[I]t is a requirement of the rule of law that the exercise of public power by the executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given; otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the executive and other functionaries must, at least, comply with this requirement. If it does not, it falls short of the standards demanded by the Constitution for such action, (at para 85).*

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In **Lesapo** the [*Lesapo v North West Agricultural Bank* (paras 11 and 17)] the Constitutional Court made it clear that the rule of law did not apply only to organs of state but to everyone within the state. The Court held that no one is entitled to take the law into his or her own hands, as self-help is inimical to a society in which the rule of law prevails (at paras 11 & 17). SG 60

The **Lesapo** case clearly demonstrates that the rule of law constitutes more than “***the value-neutral principle of legality***”. It has both procedural and substantive attributes.

***The procedural component***                      of the rule of law forbids arbitrary decision making.

***The substantive component***              of the rule of law requires that the state should respect an individual’s basic rights.

This is in accordance with the new constitutional scheme and is a radical departure from the previous apartheid regime, where legality was merely a procedural formality.

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## SELECTED CASES

## ADMINISTRATIVE ACTION - PUBLIC CONSULTATION:

In *Matatiele Municipality and Others v President of the Republic of South Africa and Others* (2007 (1) BCLR 47 (CC) par 1–85).

In this matter the Constitutional Court found that this part of the Twelfth Amendment to the Constitution of 2005 that changed the boundary of KwaZulu-Natal and that the promulgation of the Act on the Repeal of Laws on Cross-boundary Municipalities and Related Matters 23 of 2005, related to the area previously comprising Matatiele Local Municipality, were found to be invalid as they were not adopted in a manner consistent with the Constitution.

The section of the amendment which promulgated the transfer of an area of the Matatiele Local Municipality, was declared invalid. The order of invalidity was suspended for 18 months to enable Parliament, if so inclined, to promulgate an amendment consistent with the requirements of the Constitution.

In this matter Ncobo J held that:

*[O]ur constitution contemplates a democracy that is representative, and that also contains elements of participatory democracy. As the Preamble openly declares, what is contemplated is “a democratic and open society in which government is based on the will of the people”. Consistent with the constitutional order, section 118(1)(a) calls upon the provincial legislatures to facilitate involvement in [their] legislative and other processes, including those of their committees. As was held in *Doctors for Life International v Speaker of the National Assembly and Others* (CCT 12/05), our Constitution calls for open and transparent government and requires legislative organs to facilitate public participation in the making of laws by all legislative organs of the State.*

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***Merafong Demarcation Forum and Others v President of the Republic South Africa and Others***

(2008 (5) SA 17 .... Judgment - June 13, 2008

**Judge:** Langa CJ, Moseneke DCJ, Madala J, Ngcobo J, Nkabinde J, Sachs J, Skweyiya J, Van Der Westhuizen J, Yacoob J and Mpati AJ

**Headnote : Kopnota:** The Constitution Twelfth Amendment Act of 2005 changed provincial boundaries, including the boundary between the provinces of Gauteng and North West, with the result that one part of *Merafong City Local Municipality* was relocated from Gauteng to North West. A public hearing on the issue was publicised and held, and the views thus expressed indicated that the overwhelming majority of people were opposed to the relocation.

**The applicants' argument:**

- (i) That the process of public involvement was not meaningful because the Portfolio Committee changed its position after the negotiating mandate and before the final voting mandate without further consultation with the community and that this was unreasonable. Their argument regarding
- (ii) was based on the contentions
  - (a) that the change of position was irrational, and
  - (b) that the decision to relocate Merafong lacked merit.

**UITSPRAAK:**

- (i), that s 118(1)(a) read with s 74(8) of the Constitution mandated provincial legislatures to facilitate public involvement in the process of considering Bills altering provincial boundaries.
- that since the obligation to facilitate public involvement was open to innovation, legislatures had a discretion as to how to proceed, provided that the populace was given a meaningful opportunity to be heard.
- The question was whether the legislature had done what was reasonable re the approach & degree of public participation that were reasonable, inter alia, on nature and importance of the legislation and the intensity of its impact on the public.
- As such the failure of the Portfolio Committee to report back to the Merafong community when the Gauteng delegates realised that they were unable to fulfil their mandate and amend the Bill in the NCOP did not rise to the level of unreasonableness that would result in the invalidity of the Twelfth Amendment. It could also not result in a finding that Gauteng failed to take reasonable measures to facilitate public involvement.
- It could not be found that the Gauteng Provincial Legislature had materially misunderstood its constitutional powers or obligations when it voted in accordance with the final voting

mandate &, that it could not in the circumstances be said that the Gauteng Provincial Legislature had exercised its powers irrationally. **Application dismissed.**

**Conclusion:**

The applicants have not shown that the Gauteng Provincial Legislature failed to facilitate public involvement or acted irrationally in supporting the Twelfth Amendment Bill in the NCOP. The legislature created a reasonable opportunity for the public to express its views and those views were taken into account. It also did not exercise its powers G irrationally. Based on the submissions of the public, the Portfolio Committee formulated a negotiating mandate and indeed negotiated accordingly. After being informed of the legal position the Committee considered the available options and decided on a final voting mandate. The Committee explained its change of position. The legislature debated H the issue and took a decision. It did not materially misunderstand its constitutional role. The merits of its decision also do not indicate irrational conduct. The application cannot succeed

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*Doctors for Life International v Speaker of the National Assembly and Others* (2006 (12) BCLR 1399 (CC) paras 1–11 & 73–197).

In this matter *Doctors for Life International* brought application directly challenging the constitutional validity of four health-related Bills on the basis that Parliament failed to fulfill its constitutional obligation to facilitate public involvement when passing the Bills.

**The case generally concerned:**

- the role of the public in the law-making process;
- the nature and scope of the constitutional obligation of a legislative organ of the state to facilitate public involvement in its legislative processes;
- the consequences of the failure to comply with that obligation;
- whether it is competent for the Constitutional Court to interfere during the legislative process before a parliamentary or provincial bill is signed into law; and
- whether the Constitutional Court was the only court which had jurisdiction to consider the questions raised.

**The Court held...**

That the Constitutional Court found had exclusive jurisdiction over this matter under section 167(4)(e) of the Constitution.

The majority held that the obligation to facilitate public involvement as required by the provisions of sections 72(1)(a) and 118(1)(a) of the Constitution is a material part of the law-making process and failure to comply with it renders the resulting legislation invalid.

The *Traditional Health Practitioners Act* and the *Choice on Termination of Pregnancy Amendment Act* **were declared invalid** for lack of proper public consultation and the order of invalidity was suspended for eighteen months.

The Court did not consider the *Sterilisation Amendment Bill* as it was still a Bill when the proceedings were commenced in this Court. The court made it clear that it did not have competence to consider validity of a bill except on a reference from the President.

It was also held that lawmakers did not breach their obligation to facilitate public involvement in terms of the *Dental Technicians Amendment Act* because when the Bill was first published for comment no submissions were received and thus it did not have a threshold level of public interest.

**Judge: Langa CJ**, Mosenke DCJ, Madala J, Mokgoro J, Ngcobo J, Nkabine J, O'Regan J, Sachs J, Skweyiya J, Van Der Westhuizen J Yacoob J

**Judgment:** August 17, 2006

**Flynote : Sleutelwoorde**

**Constitutional practice - Courts - Constitutional Court - Jurisdiction - Powers of - Declaratory relief - Legislation - Enactment** - Exclusive jurisdiction of CC under s 167(4) of Constitution - relating to separation & to facilitate public involvement in its legislative and other processes & principle of representative and participatory democracy & Separation of powers requiring other branches of government to refrain from interfering in parliamentary proceedings. Court accordingly having jurisdiction to consider constitutional challenge to **Dental Technicians Amendment Act 24 of 2004, Choice on Termination of Pregnancy Amendment Act 38 of 2004 and Traditional Health Practitioners Act 35 of 2004**. Constitutional Court not only having right but also duty to ensure that law-making process prescribed by Constitution observed - If not complied with, Court having duty to say so and declare statute invalid.

**DECISION:**

Obligation on the NCOP to facilitate public involvement & constitutionality of Legislation. If both of these propositions were sound in law, the applicant was entitled to come directly to the CC. & This Court is afforded exclusive jurisdiction to decide whether Parliament has complied with its constitutional obligation to facilitate public involvement.

Held, accordingly (Yacoob J, Skweyiya J and Van der E Westhuizen J dissenting), that an order should be granted declaring that Parliament had failed to comply with its constitutional obligation to facilitate public involvement before passing the Choice on Termination of Pregnancy Amendment Act 38 of 2004 and the Traditional Health Practitioners Act 35 of 2004 as required by s 72(1)(a) of the Constitution and that these Acts were, as a consequence, adopted in a manner that was inconsistent with the Constitution and had therefore to be declared invalid. The declaration of invalidity was, however, to be suspended for 18 months to enable Parliament to re-enact these statutes in a manner consistent with the Constitution.

Order

**In the event, I make the following order:**

- (a) It is declared that Parliament has failed to H comply with its constitutional obligation to facilitate public involvement before passing the *Choice on Termination of Pregnancy Amendment Act 38 of 2004* and the *Traditional Health Practitioners Act 35 of 2004* as required by s 72(1)(a) of the Constitution. I
- (b) The *Choice on Termination of Pregnancy Amendment Act, 2004*, and the *Traditional Health Practitioners Act, 2004*, were, as a consequence, adopted in a manner that is inconsistent with the Constitution and are therefore declared invalid.
- (c) The order declaring invalid the *Choice on Termination of Pregnancy Amendment Act, 2004*, and the *Traditional Health Practitioners Act, 2004*, is suspended for a period of 18 months to enable Parliament to re-enact these statutes in a manner that is A consistent with the Constitution.
- (d) The constitutional challenges relating to the *Dental Technicians Amendment Act 24 of 2004* and the *Sterilisation Amendment Act 3 of 2005* are dismissed.



## The judiciary and the right to vote - incarcerated persons

In *August v Electoral Commission* (1999 (4) BCLR 363 (CC) paras 1–6, 8–11 & 14–33). Just before the 1999 elections the constitutionality of actions by the Independent Electoral Commission (IEC), which denied prisoners the right to vote, came under judicial scrutiny in this case.

- The Court held that it was unconstitutional for the Electoral Commission to disenfranchise prisoners by omission and thus deny them the right to vote.
  - The Constitutional Court further held that the right to vote “*by its very nature imposes positive obligations upon the legislature and the executive*”. It also imposes an affirmative obligation on the Commission to take reasonable steps to ensure that eligible voters are registered.
  - By omitting to take any steps, the Commission failed to comply with its obligations to take reasonable steps to create the opportunity for eligible prisoners to register and vote. In effect, the omission would have disenfranchised all prisoners without constitutional or statutory authority.
  - Accordingly, the Court ordered the Electoral Commission to make reasonable arrangements to ensure that prisoners could register and thus be able to vote later. It is important to note that the Constitutional Court explicitly stated that its judgment should not be read as suggesting that parliament was not allowed to disenfranchise certain categories of prisoners by means of legislation, but simply that any such attempt at disenfranchisement was a limitation of the right to vote and, therefore, had to be supported by a law of general application to stand any chance of justification.
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## SELECTED CASES

## THE JUDICIARY AND THE RIGHT TO VOTE - INCARCERATED PERSONS

In *Minister of Home Affairs v National Institute for Crime Prevention and Re-integration of Offenders (NICRO) and Others* (2004 (5) BCLR 445 (CC) (paras 12, 14, 16, 25 & 31). the **constitutionality of section 8(2)(f) and the phrase “and not serving a sentence of imprisonment without the option of a fine”** in section 24B(1), and section 24B(2) of the Electoral Laws Amendment Act was challenged.

*Shortly before the 2004 elections, Parliament amended the Electoral Act 73 of 1998 by the Electoral Laws Amendment Act 34 of 2003. This amendment effectively disenfranchised prisoners serving sentences of imprisonment without the option of a fine, as it prevented them from registering as voters and voting while in prison.*

Prisoners who had not yet been sentenced and prisoners who were incarcerated because they were unable to pay fines were allowed to register and vote.

The applicants argued that the above-mentioned sections were inconsistent with the provisions of sections 1(d) and 3(2) of the Constitution, which are absolute and not subject to limitation.

**1 Republic of South Africa**

The Republic of South Africa is one, sovereign, democratic state founded on the following values:

- (d) **Universal adult suffrage**, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.

**3 Citizenship**

- (2) All citizens are-
- (a) equally entitled to the rights, privileges and benefits of citizenship; and
  - (b) equally subject to the duties and responsibilities of citizenship.

**19 Political rights**

- (3) Every adult citizen has the right-
- (a) to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret;

This argument was dismissed by the Court on the grounds that neither of these sections, which deal with the values of the Constitution and rights of citizens respectively, requires voting rights to be absolute and immune from limitation. These sections are indeed subject to the limitation clause in the Constitution.

However, the Court declared the above-mentioned provisions of the Electoral Act, as amended, to be unconstitutional and invalid on the grounds that they were inconsistent with the right to vote as enshrined in section 19(3)(a) read with section 1(d) of the Constitution, and there was no justifiable limitation of this right in accordance with section 36 of the Constitution.

## SELECTED CASES

## THE JUDICIARY AND THE RIGHT TO VOTE - CITIZENS LIVING ABROAD

*Richter v Minister of Home Affairs and Others (DA and Others Intervening)* 2009 (5) BCLR 448 (CC) paras 1–3, 5, 11, 15–16, 20–24, 32–36, 40–41, 44–45 & 47–98) and *The AParty v Minister for Home Affairs and Others; Moloko and Another v Minister for Home Affairs* 2009 (6) BCLR 611 (CC) paras 1–11, 13–25, 33–34, 36–42, 53–56, 67–70, 72–78 & 80).

On 12 March 2009, the **Court handed down its decision on various applications challenging the constitutional validity of certain sections of the Electoral Act and its regulations.** On 9 February 2009, Ebersohn AJ of the Gauteng North High Court ruled that section 33 of the Electoral Act [special votes] and some of its regulations were unconstitutional. This was in response to an urgent application brought by **Willem Richter**, a South African teacher who was a registered voter, but was living and working in the UK at the time. *The Minister for Home Affairs applied to the Constitutional Court for permission to appeal against the Gauteng North High Court ruling and opposed the Richter application and two more similar applications.*

The Court decided on the application of the **AParty** for an order declaring not only section 33 of the Act unconstitutional, but also sections 7, 8, 9 and 60. It held that these sections violated the right to vote and the right to equal treatment of South African citizens living abroad.

**Two separate judgments were handed down at the same time.**

The Court decided unanimously that South Africans living abroad had the right to vote if they were registered.

The Court further held that section 33 of the Electoral Act unfairly restricted the right to cast special votes while abroad to a very narrow class of citizens. This section was, therefore, declared unconstitutional and invalid.

The implication of this judgment for the elections that were to be held on 22 April 2009 was that all citizens who were registered voters at that time, and who would be out of the country on the date of the elections, would be allowed to vote in the national but not the provincial elections “*provided they give notice of their intention to do so, in terms of the Election Regulations, on or before 27 March 2009 to the Chief Electoral Officer and identify the embassy, high commission or consulate where they intend to apply for the special vote*”.

Handing down the first of two separate judgments, **O’ Regan J** in the **Richter** judgment (para 53), held that the right to vote had a symbolic and democratic value and those who were registered should not be limited by unconstitutional and invalid limitations in the Electoral Act.

However, a second judgment by Ngcobo J in the AParty judgment (paras 59–70, 72–78 & 80) found that unregistered voters who were overseas could not vote.

This was held to be due to the fact that the limitations on the right to vote of South Africans living abroad who did not fall within certain categories had been in effect since 2003 and the applicants had not explained why they had waited so long to challenge it.

## SELECTED CASES

### CONSTITUTIONAL INTERPRETATION & THE ROLE OF COURTS SG 68 - 88

#### **Interpretation of the Bill of Rights:**

*S v Mhlungu* 1995 (3) SA 867 (CC); 1995 (7) BCLR 793 (CC) (par 63) however seems to suggest that there is no difference between the two. In this case, despite the divided opinion of the court on the meaning of section 241(8) of the Interim Constitution, the court left no doubt, in the words of Kentridge AJ that a purposive construction is as appropriate here as in other parts of the Constitution.

The interim Constitution prescribed that all proceedings which are pending must be dealt with as though the Constitution had not been passed.

#### **The criminal trial of Mhlungu was pending on 27 April 1994.**

- Mhlungu argued he was entitled to the constitutional right to a fair trial (certain evidence was no longer admissible). The state rejected this according the interim constitutional provision.

#### **The CC was divided:**

- Majority held the provision only meant the old apartheid courts should complete the cases before them. The Constitution had to be applied and the evidence excluded.
- Minority held the courts had to conclude pending cases under the old law as though the Constitution had not been passed and the evidence therefore allowed.
- Majority rejected this as it violated the principle that every word and clause must be given meaning.
- The purpose was that the provision deals with jurisdictional issues and not with substantive law. The interpretation of the minority only focused on one section and not on the interpretation as a whole.
- Decided - There are no absolute, definite & final answers in constitutional interpretation
- Constitutional interpretation involves an ongoing but principled judicial dialogue with society, in this dialogue marginalised groups must be empowered to participate in the dialogue to be heard
- Constitutional values must be actively promoted in the interpretation of the BOR
- The separation of powers must be respected when the BOR is interpreted;
- The Constitution must be used as an instrument for social & economic empowerment.

## SELECTED CASES

## INTERPRETATION OF THE CONSTITUTION

***Matiso v Commanding officer, Port Elizabeth Prison, and another* 1994**

The difference between constitutional interpretation and statutory interpretation also lies in **the role of judges when interpreting a statute and when interpreting a constitution.**

This was stressed by Froneman J in the case of *Matiso v Commanding officer, Port Elizabeth Prison, and another* 1994 (4) SA 592 at 596 E–I as follows:

*The interpretation of the Constitution will be directed at ascertaining the foundational values inherent in the Constitution, whilst the interpretation of the particular legislation will be directed at ascertaining whether that legislation is capable of an interpretation which conforms to the fundamental values or principles of the Constitution.*

*Constitutional interpretation is aimed at ascertaining the fundamental values inherent in the Constitution and legislation interpretation is directed at ascertaining the purpose of the legislation and whether it is capable of interpretation which conforms with the values of the Constitution.*

*Constitutional interpretation in this sense is thus primarily concerned with the recognition and application of constitutional values and not with the search to find the literal meaning of statutes.*

It was further held that:

- That the courts bear a responsibility of giving specific content to the wide and general values contained in the Constitution. **In doing so, the courts will invariably create new law.**
- That the Constitution should be considered in its complete context and that the courts should adopt a contextual and purposive approach to both legislative and constitutional interpretation. This is known as interpretation *ex visceribus actus*, in other words, all the parts of the particular legislation have to be studied.

**Du Plessis** refers to this as the **"structural wholeness of the enactment"**.

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