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Du Plessis v. De Klerk: South Africa's Bill of Rights and the Issue of Horizontal Application

Cover Page Footnote

International Law; Commercial Law; Law

NOTES

***Du Plessis v. De Klerk*:¹ South Africa's Bill of Rights and the Issue of Horizontal Application**

I. Introduction

On April 27, 1994, South Africans of all races went to the polls to vote² in the first national election that black South Africans had ever had a voice.³ Nelson Mandela, their soldier of freedom, won and formed the Government of National Unity.⁴ On that same day the interim South African Constitution went into effect,⁵ ensuring that these free elections would not be the last.⁶

Although "apartheid," a word which for so long triggered notions of institutionalized, state-mandated oppression and racism, now triggers only a memory, the memory is a lasting one. The interim Constitution was written with the understanding that the past would have to be remembered, but never be repeated.⁷ Virtually every chapter was imbued with remorse for the past,

¹ 1996 (5) BCLR 658 (CC), 1996 SACLR LEXIS 1 (May 15, 1996).

² See Michael Higginbotham, *The Price of Apartheid*, 38 How. L.J. 371 (1995).

³ See *id.* at 376-77.

⁴ See Lisa M. Gonzalez, *The Importance of Political Parties in South Africa*, 20 FLETCHER F. WORLD AFF. 146, 147 (1996).

⁵ See S. AFR. CONST. (Constitution Act, 1993) ch. 15, § 251(1) [hereinafter CONSTITUTION 1993]. The interim Constitution was adopted as a transitional Constitution to provide for the governance of South Africa during a maximum five year period of transition to full democracy, during which period an elected Constitutional Assembly would draw up a permanent Constitution. See DION BASSON, SOUTH AFRICA'S INTERIM CONSTITUTION: TEXT AND NOTES 1 (1994) [hereinafter BASSON]. On May 8, 1996, the Constitutional Assembly adopted the Constitution of the Republic of South Africa, 1996. See S. AFR. CONST. (Constitution Act, 1996) (Explanatory Memorandum) [hereinafter CONSTITUTION 1996]. The new Constitution provides that it shall come into effect "on a date set by the President by proclamation, but no later than 1 January 1997." *Id.* § 244(1).

⁶ See CONSTITUTION 1993, *supra* note 5, § 40, schedule 2; see also DION BASSON, SOUTH AFRICA'S INTERIM CONSTITUTION 1-2 (1994).

⁷ See CONSTITUTION 1993, *supra* note 5, pmb1.

desire for reconciliation in the present, and hope for a color-blind South Africa in the future. Chapter 3 embodied South Africa's first Bill of Rights.⁸ To protect these rights the interim Constitution provided for a Constitutional Court,⁹ which exercised jurisdiction as the "court of final instance over all matters relating to the interpretation, protection and enforcement of the provisions of this Constitution."¹⁰ The Constitutional Court was established to determine the scope of the rights afforded by the interim Constitution and the manner in which they were to be enforced.

Fundamental to the issues of scope and enforcement was the question of horizontal application of the Bill of Rights.¹¹ As defined by the Constitutional Court in *Du Plessis v. De Klerk*,¹² "[t]he term 'horizontal application' . . . indicates that those rights also govern the relationships between individuals, and may be invoked by them in their private law disputes," while "[t]he term 'vertical application' is used to indicate that the rights conferred on persons by a bill of rights are intended only as a protection against the legislative and executive power of the state in its various manifestations."¹³ In general, conflicts over the horizontal applicability of a bill of rights—as opposed to the vertical applicability—frequently arise under constitutions that contain bills of rights which do not expressly address the issue of horizontal application.¹⁴

⁸ See *id.* ch. 3 (South African Charter of Fundamental Rights).

⁹ See *id.* ch. 7, § 98(1).

¹⁰ *Id.* ch. 7, § 98(2). The establishment of the Constitutional Court marked the end of parliamentary sovereignty in South Africa. See Helen Suzman, *Transformation in South Africa: Cause and Effect*, 32 STAN. J. INT'L L. 149, 154 (1996). Prior to April 27, 1994 an Act of Parliament could not be challenged for the constitutionality of its substantive provisions; the judiciary could only examine an Act for compliance with the constitutional procedures whereby the Act was passed. See BASSON, *supra* note 5, at 16-17.

¹¹ See BASSON, *supra* note 5, at 15.

¹² 1996 (5) BCLR 658, 1996 SACL R LEXIS 1, at *34 (May 15, 1996).

¹³ *Id.*

¹⁴ Different countries have varied in their approaches to the horizontal application of the bill of rights in their constitutions. See, e.g., *Shelley v. Kraemer*, 334 U.S. 1 (1948) (judicial enforcement of a racially restrictive covenant is state action which would violate the Fourteenth Amendment); *C.M. v. T.M.* (1991) I.L.R.M. 268 (Irish court held that constitutional rights directly apply to a private dispute); Retail,

After the interim Constitution went into effect, South Africa's lower courts reached different conclusions on whether the Bill of Rights was horizontally applicable. Although the Supreme Court of the Transvaal Provincial Division had held that the Bill of Rights was not horizontally applicable,¹⁵ the Bophuthatswana Supreme Court had held that the Bill of Rights "[is] within certain limits . . . to be applied horizontally."¹⁶ Faced with non-uniform treatment of the issue in the lower courts, the Constitutional Court addressed and resolved the issue of horizontal application in *Du Plessis*.¹⁷

Part II of this Note sets out the facts and procedural posture of the case and traces the Constitutional Court's reasoning for the decision on appeal.¹⁸ Part III focuses on the background law from the various lower courts that struggled with the issue of horizontal application of the Bill of Rights.¹⁹ Part IV suggests reasons why the *Du Plessis* opinion will prove significant under the new Constitution of the Republic of South Africa 1996, the successor to the interim Constitution that governed the *Du Plessis* decision.²⁰ This part will also discuss the aspects of the Court's decision which attempted to define the scope and enforceability of the fundamental rights enshrined in Chapter 3.²¹ Part V concludes that the issue of horizontal application of the Bill of Rights should be revisited so that the Constitutional Court can clarify its own jurisdictional scope and the role of the lower courts in applying the

Wholesale & Dep't Store Union, Local 580 v. Dolphin Delivery Ltd. (1987) 33 D.L.R. (4th) 174 (holding by Canadian court that provisions of Canada's Charter could not be invoked by parties to private litigation and that a court order did not constitute state action); see generally Peter E. Quint, *Free Speech and Private Law in German Constitutional Theory*, 48 MARYLAND L. REV. 247 (1989) (stating that rights afforded by the German Basic Law do not override established rules of private law but rather influence the development and interpretation of those rules).

¹⁵ See *Du Plessis v. De Klerk*, 1994 (6) BCLR 124 (T).

¹⁶ *Baloro v. Univ. of Bophuthatswana*, 1995 (4) BCLR 197, 234 (SA).

¹⁷ See 1996 (5) BCLR 658 (CC), 1996 SACLR LEXIS 1 (May 15, 1996).

¹⁸ See *infra* notes 23-78 and accompanying text.

¹⁹ See *infra* notes 78-156 and accompanying text.

²⁰ See *infra* notes 157-213 and accompanying text.

²¹ See *infra* notes 191-214 and accompanying text.

Bill of Rights to private litigation.²²

II. Statement of the Case

A. Facts

In February 1993 *The Pretoria News*, a daily newspaper, began running a series of articles on the supply of arms to rebel forces in Angola.²³ The articles implied that certain South African citizens were engaged in covert operations that were illegal under South Africa's air control regulations.²⁴ The covert flights were alleged to be "illegal" and were characterized as "pirate flights."²⁵ Two of the articles mentioned the respondents in *Du Plessis*, Mr. Gert De Klerk and his company, Wonder Air Ltd.²⁶ The articles also suggested that the persons conducting the flights were "fueling the war in Angola" for personal gain.²⁷ The March 9, 1993, article named Mr. De Klerk as one of several private air operators summoned by the Department of Foreign Affairs for questioning in connection with the Angolan war.²⁸

B. Procedure

The respondents (hereinafter "plaintiffs") instituted an action for defamation²⁹ in the Transvaal Provincial Division of the

²² See *infra* notes 215-27 and accompanying text.

²³ See *Du Plessis v. De Klerk*, 1996 (5) BCLR 658 (CC), 1996 SACLR LEXIS 1, at *25 (May 15, 1996).

²⁴ See *id.* at *25-26.

²⁵ See *id.* at *26.

²⁶ See *id.*

²⁷ *Id.*

²⁸ See *id.*

²⁹ The law of defamation in South Africa is undergoing development, apparently in light of the interim Constitution. In 1993, the Appellate Division of the Supreme Court held that South African law places the onus of proof on the defendant with regard to both the defense of truth and the defense of qualified privilege. See *Neethling v. Du Preez*, 1994 (1) SA 708 (A), 770. This burden derives from the presumption that arises upon publication of the matter at issue that the defendant intended to inflict injury and that the publication was unlawful. See *id.* at 768-69. In 1994, however, the Witwatersrand Local Division of the Supreme Court held that, in light of section 15 of the Constitution and due to the primacy of freedom of speech, the plaintiff's "private interest must yield to the larger public one." *Mandela v. Falati*, 1994 (4) BCLR 1 (SA),

Supreme Court, claiming damages for injuries to their personal reputation and for loss of business and injury to their commercial reputation.³⁰ The petitioners (hereinafter "defendants") responded with a plea denying that the articles were defamatory and denying any intention to implicate the plaintiffs in illegal activities.³¹ In the alternative, the defendants argued that the articles expressed opinions constituting "fair comment made in good faith on matters of public interest"³² and that any facts contained in the articles were true.³³ The defendants also argued that the public had a right to know the information published and that by publishing the articles the *Pretoria News* had fulfilled its duty to keep the public informed concerning the Angolan civil war.³⁴

In October 1994, the defendants sought to amend their plea to include their view that the publication of the articles was not unlawful because they were protected by section 15 of the Constitution of the Republic of South Africa.³⁵ The plaintiffs objected to the proposed amendment on the grounds that: (1) the publication of the articles and the resulting damages occurred prior to the effective date of the interim Constitution, which did not operate retrospectively,³⁶ and (2) the interim Constitution had no horizontal application.³⁷ The Supreme Court agreed that the interim Constitution did not operate retrospectively and ruled that the defendants could not invoke any of its provisions.³⁸ The court also held that the Bill of Rights had only vertical application. As a

1994 SACLX LEXIS 290, at *22-25 (Sept. 8, 1994) (denying an injunction to prevent the publication of allegedly defamatory material).

³⁰ See *Du Plessis v. De Klerk*, 1996 (5) BCLR 658 (CC), 1996 SACLX LEXIS 1, at *27 (May 15, 1996).

³¹ See *id.*

³² *Id.*

³³ See *id.*

³⁴ See *id.* at *28.

³⁵ See *id.* at *29. Section 15 provides in pertinent part that "[e]very person shall have the right to freedom of speech and expression, which shall include freedom of the press and other media." CONSTITUTION 1993, *supra* note 5, ch. 3, sec. 15(1).

³⁶ See *Du Plessis v. De Klerk*, 1996 (5) BCLR 658 (CC), 1996 SACLX LEXIS 1, at *31 (May 15, 1996).

³⁷ See *id.*

³⁸ See *id.* at *33.

result of this ruling, the defendants could not invoke section 15 as a defense in a civil action.³⁹ Upon the defendants' application for leave to appeal, the Supreme Court referred the issues of retrospective application and horizontal application to the Constitutional Court for a final determination.⁴⁰ In June 1995, the Constitutional Court granted the defendants leave to appeal from the Supreme Court's decision.⁴¹

C. The Constitutional Court

1. Retrospective Application

Although the bulk of the Court's opinion in *Du Plessis* concerned the issue of horizontal application of the Bill of Rights, the Court first dealt with the issue of the retrospective application of the Interim Constitution.⁴² The Court recognized that lower courts differed on this issue,⁴³ but nevertheless felt that its prior decisions "made clear that the Constitution did not affect acts performed before its commencement."⁴⁴ The Court conceded that the Constitution permitted the Court discretion to antedate an order of invalidity;⁴⁵ however, it noted that any such order would be retroactive only as to the date of the order and would not be retroactive with respect to the applicability of the Interim Constitution.⁴⁶ The Court also rejected the defendant's argument

³⁹ See *id.* at *35.

⁴⁰ See *id.*

⁴¹ See *id.* at *36.

⁴² See *id.* at *38.

⁴³ See *id.*

⁴⁴ *Id.* at *40 (citing *S. v. Mhlungu*, 1995 (3) SA 867 (CC)). The Court in *Mhlungu* declared unconstitutional the use in a criminal action of the presumption included in section 217(1)(b)(ii) of the Criminal Procedure Act 51 of 1977. See *id.* at *39. The Court also distinguished *Mhlungu* on the basis that the procedural actions yet to be taken were unconstitutional; in *Du Plessis* the pertinent actions had already occurred prior to the effective date of the Constitution. See *id.* at *38-40.

⁴⁵ See *id.* at *42 (citing *S. v. Mhlungu*, 1995 (3) SA 867 (CC)); see also CONSTITUTION 1993, *supra* note 5, ch. 7, § 98.

⁴⁶ Section 98 provides:

Unless the Constitutional Court in the interests of justice and good government orders otherwise, and save to the extent that it so orders, the declaration of

that they should be able to avoid liability for their actions even though any order of invalidity at the date of the decision could not render their actions lawful.⁴⁷ Finally, the Court held that the defendants could not invoke section 15 and dismissed their appeal.⁴⁸

2. *Horizontal Application*

Despite its holding that the defendants' appeal must be dismissed because the Bill of Rights did not apply retroactively, the Court addressed the issue of whether the Bill of Rights was horizontally applicable.⁴⁹ The Court reiterated the lower court's reasoning that the primary purpose of the Bill of Rights was to combat abuses of state power⁵⁰ and noted that the lower court had

invalidity of a law or a provision thereof—(a) existing at the commencement of this Constitution, shall not invalidate anything done or permitted in terms thereof before the coming into effect of such declaration of invalidity

CONSTITUTION 1993, *supra* note 5, ch. 7, § 98(6).

⁴⁷ See *Du Plessis*, 1996 SACLX LEXIS 1, at *45-48. In making this argument, the defendants relied on *S. v. Makwanyane*, 1995 (6) BCLR 665 (CC), 1995 SACLX LEXIS 218, at *128 (June 6, 1995), where the Court declared the death penalty unconstitutional because of section 11(2) (right to life). See *Du Plessis*, 1996 SACLX LEXIS 1, at *45-48. The Court distinguished *Makwanyane* on the grounds that the State had no accrued right to execute the defendant, whereas the plaintiffs in *Du Plessis* had an incorporeal property right to damages which accrued from the moment the defamatory material was published. See *id.* at *45.

⁴⁸ See *id.* at *43. The Court's reasoning seems to indicate that the competing interest of the plaintiffs in *Du Plessis* forms the basis of their holding; however, the Court was cognizant of the fact that another case may present more compelling circumstances in which the competing interests of the other party may not preclude antedating an order of invalidity. See *id.* at *49. The Court, therefore, "[left] open the possibility that there may be cases where the enforcement of previously acquired rights would in the light of our present constitutional values be so grossly unjust and abhorrent that it could not be countenanced . . ." *Id.*

⁴⁹ See CONSTITUTION 1993, *supra* note 5, ch. 7, § 102(8). Section 102 provides that constitutional issues may be referred to the Court "[i]f any division of the Supreme Court disposes of a matter in which a constitutional issue has been raised and such court is of the opinion that the constitutional issue is of such public importance that a ruling should be given thereon . . ." *Id.* Given this provision, which allows the Constitutional Court to decide constitutional issues even though a case has already been disposed of, the Court's decision regarding horizontal application should not be considered *dicta*.

⁵⁰ See *Du Plessis v. De Klerk*, 1996 BCLR 658 (CC), 1996 SACLX LEXIS 1, at *60 (May 15, 1996). The lower court arrived at this conclusion based on the historical context which gave rise to the Bill of Rights and a comparative review of constitutional jurisprudence. See *Du Plessis v. De Klerk*, 1994 (6) BCLR 124 (T). For a brief

emphasized that uncertainty would be injected into private relationships as a result of any wide application of the Bill of Rights to private legal relationships.⁵¹

The Court then undertook a survey of foreign case law⁵² and concluded that "there is no universal answer to the problem of vertical or horizontal application of a bill of rights."⁵³ After analyzing case law from the United States, Canada, and Germany, the Court expressed comparative approval of the German model of "indirect" horizontal application.⁵⁴

After undertaking this survey of international law, the Court reasoned that the "plain answer" issues involved in *Du Plessis* could be resolved by a proper reading of the Constitution.⁵⁵ The Court reformulated the issue of horizontal applicability into two distinct questions. First, "[t]o what law [does] the Chapter appl[y].

discussion of the current trend worldwide to apply bills of rights horizontally despite recognition of the primary purpose of such bills as protection against state abuses, see LOURENS DU PLESSIS AND HUGH CORDER, UNDERSTANDING SOUTH AFRICA'S TRANSITIONAL BILL OF RIGHTS 113 (1994).

⁵¹ See *Du Plessis v. De Klerk*, 1996(5) BCLR 658 (CC), 1996 SACLR LEXIS 1, at *62 (May 15, 1996).

⁵² Since the interim Constitution only came into force in 1994, South African courts had little indigenous constitutional jurisprudence on which to rely. The interim Constitution provided, however, that when interpreting provisions of the Bill of Rights, a court "may have regard to comparable foreign case law." CONSTITUTION 1993, *supra* note 5, ch. 3, § 35 (1).

⁵³ *Du Plessis*, 1996 SACLR LEXIS 1, at *63.

⁵⁴ See *id.* at *73-74. The Court emphasized that the German Constitutional Court, like the South African Constitutional Court, has jurisdiction only over constitutional issues. See *id.* at *73. This jurisdictional similarity to the German Constitutional Court rendered its approach more attractive than that of the United States Supreme Court. See *id.* Additionally, the Court believed that "in some cases the impact of the German Basic Law upon private law under the 'indirect' doctrine may be stronger than that of the United States Constitution." *Id.* See also *supra* note 14 (citing foreign cases the Court examined in its analysis).

The German model of "indirect horizontal application" may best be understood in terms of the German notion that the basic rights in the German Basic Law "not only establish subjective individual rights, but an objective order of values or an objective value system." *Du Plessis*, 1996 SACLR LEXIS 1, at *143 (Mahomed, J., concurring). When legal rules are unclear, they must be given the interpretation which conforms to the objective value system. There is only a violation of the basic rights if the court fails to interpret the law in light of this system. See *id.* at *153 (Mahomed, J., concurring).

⁵⁵ *Du Plessis*, 1996 SACLR LEXIS 1, at *77.

Does it apply to the common law or only to statute law?"⁵⁶ Second, "[w]hat persons are bound by the Chapter. Do the rights give protection only against governmental action or can they also be invoked against private individuals?"⁵⁷ With respect to the first question, the Court found the answer in section 7(2) of the Interim Constitution, which applied the provisions of Chapter 3 to "all law in force."⁵⁸ While admitting that the term "all law in force" was ambiguous, the Court resolved the ambiguity by referring to the Afrikaans text of the Constitution.⁵⁹ In the Afrikaans version of the text the word "reg," a word whose definition included common law as well as statutory law,⁶⁰ was used for "law."⁶¹ Based on this interpretation, the Court decided that the provisions of Chapter 3 applied to the common law and that "governmental acts or omissions in reliance on the common law may be attacked by a private litigant as being inconsistent with Chapter 3 in any dispute with an organ of government."⁶²

On the second question, which entities were bound by Chapter 3, the Court looked to section 7(1) to reach its decision.⁶³ The Court reasoned that any provision allowing horizontal application could have, and presumably would have, been made in expressly clear terms, and held that private entities were not directly bound by Chapter 3.⁶⁴ The Court found support for its conclusion in

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* Section 7(2) provides: "This Chapter shall apply to all law in force and all administrative decisions taken and acts performed during the period of operation of this Constitution." CONSTITUTION 1993, *supra* note 5, ch. 3, § 7(2).

⁵⁹ *Du Plessis*, 1996 SACLR LEXIS 1, at *78. The English version of the Constitution is deemed to be the signed version and is, therefore, the prevailing version in case of conflicts between the texts. *See id.* The Court, however, found that since there was merely ambiguity in the English text—rather than actual conflict between the two texts—the Afrikaans text could be referred to, giving preference to the unambiguous meaning that text contained. *See id.*

⁶⁰ *See id.*

⁶¹ *See id.*

⁶² *Id.* at *85-86.

⁶³ *See id.* at *78. Section 7(1) provides that the chapter "shall bind all legislative and executive organs of state at all levels of government." CONSTITUTION 1993, *supra* note 5, ch. 3, § 7(1).

⁶⁴ *See Du Plessis*, 1996 SACLR LEXIS 1, at *80. The Court quoted the express

section 33(4), which provided that Chapter 3 “shall not preclude measures designed to prohibit unfair discrimination by bodies and persons other than those bound in terms of section 7(1).”⁶⁵ The Court reasoned that there would be no legal entity or person left to whom this provision would apply if Chapter 3 were construed to apply horizontally.⁶⁶ Likewise, the Court reasoned that section 35(3) would be rendered superfluous by a construction of Chapter 3 that permitted direct horizontal application of its provisions.⁶⁷

Additionally, the Court noted that the absence of any reference to the judiciary in section 7(1), the section that set out the branches of government that were bound by the interim Constitution, was instructive in reaching its decision.⁶⁸ The Court assumed that the omission was purposeful and that the wording was meant to avoid the “state action” doctrine resorted to by United States courts.⁶⁹ The Court held that only legislative and executive organs would be directly bound by the Bill of Rights.⁷⁰

The Court proceeded to support this holding, in the context of its limited jurisdiction, based on the language of section 98.⁷¹

provision regarding direct horizontal application in Article 5 of the Namibian Constitution:

The fundamental rights and freedoms enshrined in this Chapter shall be respected and upheld by the Executive, Legislative and Judiciary and all organs of the Government and its agencies and, where applicable to them, by all natural and legal persons in Namibia, and shall be enforceable by the Courts in the manner hereinafter prescribed.

Id. at *80-81.

It has been suggested that reference to horizontal application was omitted from the interim Constitution as part of a compromise among the parties negotiating the document. *See* DU PLESSIS & CORDER, *supra* note 50, at 112-13 (1994).

⁶⁵ CONSTITUTION 1993, *supra* note 5, ch. 3, § 7(1).

⁶⁶ *See* Du Plessis v. De Klerk, 1996 (5) BCLR 658 (CC), 1996 SACLX LEXIS 1, at *81 (May 15, 1996).

⁶⁷ *See id.* at *82. Section 35(3) requires that a court, when interpreting common law, “have due regard to the spirit, purport and objects of [Chapter 3].” BASSON, *supra* note 5, at 56.

⁶⁸ *See* Du Plessis, 1996 SACLX LEXIS 1, at *82.

⁶⁹ *See id.*

⁷⁰ *See id.* at *84.

⁷¹ *See id.* at *88-109. Section 98 sets forth the jurisdictional parameters of the Constitutional Court:

Turning again to the word "reg" in the Afrikaans text, the Court noted the distinction between "reg," which meant common law and statutory law, and "wet," which meant "statute law."⁷² Because the Constitutional Court's jurisdiction only extended to "wet" as opposed to "reg" under section 98, a horizontal application of Chapter 3 would allow appeals to the Constitutional Court from judgments which the Court would not be competent to review.⁷³ Additionally, the Constitutional Court reasoned that striking down a portion of the common law would leave gaps in the law and require the reformulation of the common law, a duty which it felt properly fell within the jurisdiction of the Appellate Division of the Supreme Court.⁷⁴

The Court then reviewed the provisions in the Bill of Rights which bolstered its finding that the Appellate Division retained the function of developing the common law.⁷⁵ Because section 35(3) provided that courts must give due regard to the spirit of the Bill of Rights, adequate provisions were made in the interim Constitution for the development of the common law while ensuring the fundamental rights guaranteed in the Constitution were protected.⁷⁶ The Court's endorsement of the "indirect

(2) The Constitutional Court shall have jurisdiction in the Republic as the court of final instance over all matters relating to the interpretation, protection and enforcement of the provisions of this Constitution, including . . . (b) any dispute over the constitutionality of any executive or administrative act or conduct or threatened executive or administrative act or conduct of any organ of state; . . .

(5) In the event of the Constitutional Court finding that any law or any provision thereof is inconsistent with this Constitution, it shall declare such law or provision invalid to the extent of its inconsistency: Provided that the Constitutional Court may, in the interests of justice and good government, require Parliament or any other competent authority, within a period specified by the Court to correct the defect in the law or provision, which shall then remain in force pending correction or the expiration of the period so specified.

CONSTITUTION 1993, *supra* note 5, ch. 7, § 98.

⁷² See *Du Plessis v. De Klerk*, 1996 (5) BCLR 658 (CC), SACLX LEXIS 1, at *88 (May 15, 1996).

⁷³ See *id.* at *89-91.

⁷⁴ See *id.* The Court further noted that the "radical amelioration" of the common law is the function of Parliament. *Id.* at *91.

⁷⁵ See *id.* at *103-04.

⁷⁶ See *id.*

horizontality" model in German law⁷⁷ resulted in part from the Court's view that the German and South African constitutions both provided a division of constitutional jurisdiction between different appellate courts, depending on the issue presented for review.⁷⁸

III. Background Law

By the time *Du Plessis* reached the Constitutional Court, four lower courts, in five separate cases, had addressed the issue of horizontal application and concluded that parties could invoke the protection of the Bill of Rights in private litigation.⁷⁹ Although these four courts concluded that at least some provisions of the Bill of Rights were capable of direct horizontal application, they reached this conclusion in different ways.

In *Mandela v. Falati*,⁸⁰ the Witwatersrand Division of the Supreme Court addressed the issue of horizontal application in the context of whether an injunction to bar the publication of allegedly defamatory material was permissible.⁸¹ Although the opinion was unclear as to the exact content of the allegedly defamatory statements, they apparently concerned the applicant's prior conviction of assault and kidnapping.⁸² The respondent, the

⁷⁷ See *supra* note 54 for a description of the German model of "indirect horizontal application."

⁷⁸ See *Du Plessis*, 1996 SACLR LEXIS 1, at *104.

⁷⁹ See *Mandela v. Falati*, 1994 (4) BCLR 1 (W), 1994 SACLR LEXIS 290, at *16 (Sept. 8, 1994); *Gardener v. Whitaker*, 1994 (5) BCLR 19 (E), 1994 SACLR LEXIS 284, at *35 (Nov. 11, 1994); *Holomisa v. Argus Newspapers Ltd.*, 1996 (2) SA 588, 598; *Motala v. Univ. of Natal*, 1995 (3) BCLR 374 (D), 1995 SACLR LEXIS 256 (Feb. 24, 1995); *Baloro v. Univ. of Bophuthatswana*, 1995 (4) SA 197 (A), 226-28. The Supreme Court of South Africa is divided into an Appellate Division and provincial and local divisions. See BASSON, *supra* note 5, at 149-50. Appeals may be taken from the lower courts to the Appellate Division where issues of law may be finally determined. See *id.* at 151. Constitutional issues are appealed only to the Constitutional Court. See *id.* at 150. But see *De Klerk v. Du Plessis*, 1994 (6) BCLR 124 (T); *Potgieter v. Kilian*, 1995 (11) BCLR 1498 (N), 1995 SACLR LEXIS 272 (Oct. 6, 1995) (the Natal Division of the Supreme Court was the only appellate court that followed the lower *Du Plessis* decision and held the Bill of Rights only capable of vertical application).

⁸⁰ 1994 (4) BCLR 1 (W), 1994 SACLR LEXIS 290.

⁸¹ See *id.* at *9.

⁸² See *id.* at *1-3.

applicant's co-defendant at a prior trial, argued that under South African law a party must establish a "clear case" in order to obtain injunctive relief and that the plaintiff could not carry the burden of establishing that the defendant did not have a valid defense to the defamation suit.⁸³ It seems, although it is not clear from the opinion, that the reason the plaintiff could not prove the lack of a defense revolved around the potential for a defense based on section 15 of the Bill of Rights.⁸⁴

Faced with the issue of a possible defense based on section 15, the *Falati* Court addressed the broader issue of the horizontal application of the Bill of Rights.⁸⁵ After first looking at the Constitution's supremacy clause,⁸⁶ the court turned to section 7(2)⁸⁷ and determined that the reference to "all law in force" encompassed the common law.⁸⁸ The court found it particularly significant that the section included the judiciary as an entity bound by the Constitution.⁸⁹ After noting that section 7⁹⁰ contained language similar to section 4's, the court found that these sections implicitly supported the direct horizontal application of the Bill of Rights.⁹¹

The court then assessed the nature of the right to freedom of speech in terms of the framers' intentions when drafting the Bill of Rights⁹² and noted that section 33 required a heightened standard

⁸³ See *id.* at *15.

⁸⁴ See *id.* See also *supra* notes 29, 35.

⁸⁵ See *Mandela v. Falati*, 1994 (4) BCLR 1 (W), 1994 SACLR LEXIS 290, at *15 (Sept. 8, 1994).

⁸⁶ Section 4 provides:

(1) The Constitution shall be the supreme law of the Republic and any law or act inconsistent with its provisions shall . . . be of no force and effect to the extent of the inconsistency. (2) This Constitution shall bind all legislative, executive and judicial organs of state at all levels of government.

CONSTITUTION 1993, *supra* note 5, ch. 1, § 4.

⁸⁷ See *supra* note 58.

⁸⁸ *Mandela v. Falati*, 1994 (4) BCLR 1 (W), 1994 SACLR LEXIS 290, at *16 (Sept. 8, 1994).

⁸⁹ See *id.*

⁹⁰ See *supra* notes 58, 63, 86.

⁹¹ See *Falati*, 1994 SACLR LEXIS 290, at *15-17.

⁹² Chapter 3 of the interim Constitution contains the South African Bill of

when scrutinizing limitations of free speech relating to political activity.⁹³ Because political activity occurred between private citizens as well as between citizens and the government,⁹⁴ the court reasoned that “[t]he drafters of the Constitution must therefore have envisaged that the rights necessary to conduct such activity could be enforced as between individuals.”⁹⁵

The Witwatersrand Division faced the issue of horizontal application a second time in *Holomisa v. Argus Newspapers*.⁹⁶ Once again the dispute involved section 15’s guarantee of the right to freedom of speech and press in the context of a defamation suit.⁹⁷ The plaintiff was a public official⁹⁸ who alleged that the defendant newspaper had defamed him by printing a report wrongly connecting him to a hit squad that had infiltrated South Africa as part of a plan to assassinate a government official.⁹⁹ The court in *Holomisa*, as had the *Gardener* court, took a purposive approach¹⁰⁰ to the individual provisions of the Bill of Rights.¹⁰¹ Some provisions the court deemed could not have been intended to apply as between “legal strangers.”¹⁰² However, the court felt that the values of the Constitution must “inform every aspect of legal reason and decision-making,”¹⁰³ with the result that some provisions of the Bill of Rights necessitated changes in the

Rights.

⁹³ See *Falati*, 1994 SACLX LEXIS 290, at *17-18 (citing section 33(1)(bb)). Rights may be limited by laws of general application, but such limitations must be “necessary” with respect to, *inter alia*, section 15, “in so far as such right relates to free and fair political activity.” BASSON, *supra* note 5, at 48.

⁹⁴ See *Falati*, 1994 SACLX LEXIS 290, at *17.

⁹⁵ *Id.* at *18.

⁹⁶ 1996 (2) SA 588.

⁹⁷ See *id.*

⁹⁸ See *id.* at 593 (plaintiff was a military ruler of Transkei).

⁹⁹ See *id.*

¹⁰⁰ A purposive approach is one “which gives optimal effect to the objects and ideals of constitutionalism enshrined in the Constitution and in the Bill of Rights.” DU PLESSIS & CORDER, *supra* note 50, at 85. Such an approach “is predicated upon the purpose of the right, with the result being that the widest possible interpretation will not inevitably be the one which will be supported.” BASSON, *supra* note 5, at 56.

¹⁰¹ See *Holomisa v. Argus Newspapers Ltd.*, 1996 (2) SA 588, 597.

¹⁰² *Id.* at 596-97.

¹⁰³ *Id.* at 598.

common law.¹⁰⁴ The court ultimately found that section 15 was such a provision.¹⁰⁵

This decision was also influenced by policy considerations.¹⁰⁶ The *Holomisa* Court stated that the Constitution's success depended on "robust criticism of the exercise of power" and that the media must play a crucial role in the dissemination of such criticism.¹⁰⁷ Considering the media "an indispensable adjunct to free and fair political activity,"¹⁰⁸ the court determined that the preference given to protection of individual reputation over freedom of expression was irreconcilable with the purpose of the interim Constitution.¹⁰⁹ The court also noted that South African politicians had historically used the law of defamation to stifle criticism.¹¹⁰ Because of the perceived unreasonable weight given to the protection of an individual's reputation at common law and the history of its abuse, the court reformulated the law of defamation.¹¹¹ After *Holomisa*, the law of defamation in the Witwatersrand Division required a plaintiff to show that a statement in the context of political activity was "unreasonably made" even if the statement was false.¹¹²

A few months later the Eastern Cape Division of the Supreme Court faced the issue of the horizontal application of section 15 in *Gardener v. Whitaker*.¹¹³ The case involved a defamation suit in which the plaintiff, a town clerk, sought to hold the defendant, a city councillor, liable for suggesting in a committee meeting that the plaintiff was a liar.¹¹⁴ Before concluding that section 15 protected the speech in question, the court examined sections 7,

¹⁰⁴ See *id.* at 601-08.

¹⁰⁵ See *id.*

¹⁰⁶ See *id.* at 614.

¹⁰⁷ *Id.* at 609.

¹⁰⁸ *Id.* at 614.

¹⁰⁹ See *id.* at 611.

¹¹⁰ See *id.* at 614.

¹¹¹ See *id.* at 618.

¹¹² *Id.*

¹¹³ 1994 BCLR 19 (E), 1994 SACLR LEXIS 284 (Nov. 11, 1994).

¹¹⁴ See *id.* at *13-19.

33, and 35 of the Constitution.¹¹⁵ The court took notice of the use of the word "reg" for the word "law"¹¹⁶ in each of these sections and concluded that these sections applied to private actions under the common law as well as the public law.¹¹⁷

The court then surveyed foreign law and determined that in Canada, the United States, and Germany that the primary purpose of a bill of rights was to safeguard individual rights against unjustified intrusion by the State.¹¹⁸ Nevertheless, the court also identified in each body of law "an apparent need to ensure that the values inherent in the charters should permeate throughout the entire legal system."¹¹⁹ After defining the overall purpose of the Constitution, the court focused on the individual right at issue¹²⁰ and the law of defamation.¹²¹ The Court observed that South Africa's defamation law had historically placed greater weight on protecting a person's reputation than on protecting free speech, even when the speech concerned matters of public interest.¹²² Because the Bill of Rights had not set out a hierarchy of rights, the protection of reputation conflicted with the Constitution to a greater extent than the competing right to freedom of speech.¹²³ Faced with these competing rights, the court determined that the law should not favor one over the other.¹²⁴ For this reason, the court reallocated the burdens in the law of defamation in order to harmonize the law with the balance it felt must be struck in regard to the competing interests protected by the Bill of Rights.¹²⁵

In contrast to the cases which faced the issue of horizontal

¹¹⁵ See *id.* at *27-30; see *supra* notes 58, 63, 67, 89.

¹¹⁶ See *Gardener*, 1994 SACL R LEXIS 284, at *29; see also *supra* note 72 and accompanying text.

¹¹⁷ See *Gardener*, 1994 SACL R LEXIS 284, at *29.

¹¹⁸ See *id.* at *34-35.

¹¹⁹ *Id.* at *35.

¹²⁰ See *id.* at *38-39.

¹²¹ See *id.* at *41-42; see *supra* note 29.

¹²² See *Gardener*, 1994 SACL R LEXIS 284, at *54 (noting the common law rules which place the burden of proof on the defendant); see *supra* note 29.

¹²³ See *Gardener*, 1994 SACL R LEXIS 284, at *55.

¹²⁴ See *id.* at *56-58.

¹²⁵ See *id.* at *57-59.

application with respect to speech protected by section 15, *Motala v. University of Natal*¹²⁶ presented the Durban and Coast Local Division of the Supreme Court with a challenge to a university's admissions policy.¹²⁷ The policies in question instituted an affirmative action program that contained a quota for the admission of Indian students to the medical school at the University of Natal¹²⁸ and a non-uniform system for reviewing applicants.¹²⁹ The plaintiff in the case argued that such a system constituted unfair discrimination in violation of sections 8 and 32 of the Bill of Rights.¹³⁰

The court stated that the central issue was whether the provisions in question applied between the parties.¹³¹ After briefly considering the arguments on both sides of the horizontal applicability issue, the court held that sections 8 and 32 could be horizontally applied.¹³² The court refused to apply the principle of *expressio unius exclusio alterius*¹³³ to section 7(1) to infer that the absence of reference to the judiciary in that section excluded the judiciary from being bound by section 7.¹³⁴ Rather, the court read these constitutional provisions in combination¹³⁵ and determined that one of the main purposes of the Constitution was

¹²⁶ 1995 (3) BCLR 374 (D), 1995 SACL R LEXIS 256 (Feb. 24, 1995).

¹²⁷ See *id.*

¹²⁸ See *id.* at *14-15. The quota was set at 40. See *id.*

¹²⁹ See *id.* at *15-17.

¹³⁰ See *id.* at *20. Section 8 provides in part that "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, belief, culture or language." CONSTITUTION 1993, *supra* note 5, ch. 3 (South African Charter of Fundamental Rights) § 8(2). Section 32 provides in part: "Every person shall have the right (a) to basic education and to equal access to educational institutions." *Id.* § 32(a).

¹³¹ See *Motala*, 1995 SACL R LEXIS 256, at *20.

¹³² See *id.* at *22-23.

¹³³ *Expressio unius [est] exclusio alterius* is "[a] maxim of statutory interpretation meaning that the expression of one thing is the exclusion of another." BLACK'S LAW DICTIONARY 581 (6th ed. 1990).

¹³⁴ See *Motala*, 1995 SACL R LEXIS 256, at *23.

¹³⁵ See *id.*

parliamentary supremacy.¹³⁶ Given that this was a predominant purpose, the court inferred that the framers of the Constitution could not have “contemplated that the courts would leave it to the legislator to pass legislation aimed at bringing the common law into conformity with Chapter 3.”¹³⁷ The court determined that the framers “intended to make the Courts the custodians of those rights.”¹³⁸ Through this combined holistic¹³⁹ and purposive¹⁴⁰ approach to constitutional interpretation, the court concluded that at least some provisions of the Bill of Rights were capable of horizontal application.¹⁴¹

The Bophuthatswana Supreme Court considered the issue of horizontal application of the Bill of Rights in a factual context similar to that of *Motala*. In *Baloro v. University of Bophuthatswana*,¹⁴² the plaintiffs sought to challenge the university’s new employment policy which, the plaintiff argued, intentionally discriminated against non-nationals.¹⁴³ Although the defendant denied that the employment policy constituted a discriminatory practice,¹⁴⁴ the defendant also argued that such a determination would be irrelevant since the Bill of Rights did not apply horizontally.¹⁴⁵

The court approached the issue by surveying foreign case law¹⁴⁶ and focused primarily on United States jurisprudence and the “state action” doctrine.¹⁴⁷ The court examined the American

¹³⁶ See *id.* at *23-24; see *supra* note 10.

¹³⁷ *Motala*, 1995 SACLR LEXIS 256, at *24.

¹³⁸ *Id.*

¹³⁹ The holistic approach to constitutional interpretation involves determining the meaning of a particular provision by examining the relevant section in relation to the purpose and meaning of the Constitution as a whole, instead of examining each section as a separate and independent constituent part. Ed.

¹⁴⁰ See *supra* note 114 for the definition of a purposive approach.

¹⁴¹ See *Motala*, 1995 SACLR LEXIS 256, at *24-26.

¹⁴² 1995 (4) SA 197.

¹⁴³ See *id.*

¹⁴⁴ See *id.* at 209.

¹⁴⁵ See *id.*

¹⁴⁶ See *id.* at 213-24.

¹⁴⁷ See *id.* at 213-21. The court found this doctrine instructive and identified the

Constitution and the negotiations and debates that occurred during its drafting process.¹⁴⁸ The court noted that the final report of the Law Commission contained an expression admitting the possibility of applying the Bill of Rights to entities other than governmental organs.¹⁴⁹ The court determined that a joint reading of sections 7¹⁵⁰ and 35¹⁵¹ compelled the conclusion that the fundamental rights must also apply to private parties.¹⁵²

Despite this determination, the court held that horizontal application was limited and should be qualified in its use.¹⁵³ The court stated that one way to "circumscribe the horizontal dimension" would be to apply the "state action" doctrine as used by the United States' courts.¹⁵⁴ The court then endorsed an expanded definition of "organ of the State" which required inquiry into the extent that an entity was "integrated into the structures of authority in the State."¹⁵⁵ Combining the "state action" doctrine with this expanded notion of "organ of the state," the court found the University of Bophuthatswana was an organ of the state and its activities could be challenged as violating provisions of the Bill of Rights.¹⁵⁶

IV. Significance of the Case

The issue of the horizontal application of the Bill of Rights was one of the most important and most controversial issues

pertinent questions that application of the doctrine required as: (1) whether the activity in question served a public function; (2) whether the government is involved with the private actor so significantly as to hold the government responsible for conduct of the private actor; and (3) whether the government can be said to have encouraged the challenged conduct. *See id.* at 214.

¹⁴⁸ *See id.* at 226-28.

¹⁴⁹ *See id.* at 228.

¹⁵⁰ *See supra* notes 58, 63.

¹⁵¹ *See supra* note 67.

¹⁵² *See Baloro*, 1995 (4) SA at 229.

¹⁵³ *See id.* at 238.

¹⁵⁴ *Id.* at 239.

¹⁵⁵ *Id.* at 230 (quoting L. M. du Plessis, *The Genesis of the Provisions Concerned with the Application and Interpretation of the Chapter on Fundamental Rights in South Africa's Transitional Constitution*, 4 TYDSKRIF VIR DIE SUID-AFRIKAANSE REG. 709-10 (1994)).

¹⁵⁶ *See id.* at 246-48.

addressed by the Constitutional Court.¹⁵⁷ Due to the magnitude of the question, the Constitutional Court could have waited until a case arose in which the issue of horizontal applicability was central to the outcome of the litigation. However, the Court chose to invoke its authority under the interim Constitution to address the issue despite its mootness in relation to the outcome of the litigation.

The interim Constitution provided for the referral of issues to the Constitutional Court from the lower courts even when their determination was not essential to the disposition of the case at bar.¹⁵⁸ Because the Supreme Court could refer issues it found to be of public importance,¹⁵⁹ and because decisions of the Constitutional Court were binding,¹⁶⁰ the resolution of an issue not essential to the disposition of a case could nevertheless constitute binding precedent under the interim Constitution.

A. How Du Plessis Differs from the Background Law

The majority of the lower courts addressing the issue had determined that at least some of the provisions of the Bill of Rights were capable of horizontal application.¹⁶¹ Where the provisions of the Constitution were ambiguous, these courts had looked to the purpose behind the Bill of Rights as they related to the specific individual provisions before them.¹⁶² These decisions addressed the issue of horizontal application with respect to the specific rights embodied in Chapter 3 rather than pronouncing the entire Bill of Rights horizontally applicable.¹⁶³ These decisions ultimately rested on the determinations that the common law was inconsistent with the specific right relied on by the defendants in

¹⁵⁷ See BASSON, *supra* note 5, at 15.

¹⁵⁸ See CONSTITUTION 1993, *supra* note 5, ch. 5, § 102(8).

¹⁵⁹ See *id.*

¹⁶⁰ See *id.* sec. 98(4).

¹⁶¹ See *supra* notes 79-156 and accompanying text for this Note's treatment of background law.

¹⁶² See, e.g., *Holomisa v. Argus Newspapers Ltd.*, 1996 (2) SA 588; see *supra* notes 100-05 and accompanying text.

¹⁶³ See, e.g., *id.* (considering section 15's right to freedom of speech and press).

the respective cases.¹⁶⁴

In contrast, in *Du Plessis* the Constitutional Court held that the Bill of Rights was only indirectly horizontally applicable.¹⁶⁵ The Court made this determination in regard to the entire Bill of Rights, rather than to any specific individual provision.¹⁶⁶ In reaching its decision, the Court essentially took an "all-or-nothing" approach, holding that "Chapter 3 does not have a general direct horizontal application."¹⁶⁷ This "all-or-nothing" approach was necessary because the provisions that the Court ultimately found dispositive applied to the entire Constitution and to the entire content of Chapter 3.¹⁶⁸ The Court could not have logically held only certain provisions of Chapter 3 capable of direct horizontal application based on its reading of the relevant provisions.¹⁶⁹ The Court's interpretation of its jurisdiction and the perceived repercussions that would result from direct application¹⁷⁰ foreclosed a more selective approach that would have focused on the individual articles of Chapter 3.¹⁷¹

Nevertheless, the Court's opinion seemed to impeach its own logic when it clarified the use of the word "general" in its holding: "I insert the qualification 'general' because it may be open to a litigant in another case to argue that some particular provision of Chapter 3 must by necessary implication have a direct horizontal application."¹⁷² This qualification is problematic. For example, if found in a U.S. Supreme Court opinion, the statement would arguably have been dictum because the Court was not presented with a concrete issue implicating such a qualification. However, in *Du Plessis* the Court denominated the word 'general' a

¹⁶⁴ See, e.g., *id.*; *supra* notes 108-09 and accompanying text.

¹⁶⁵ See *Du Plessis v. De Klerk*, 1996 (5) BCLR 658 (CC), 1996 SACLR LEXIS 1, at *104 (May 15, 1996).

¹⁶⁶ See *id.*

¹⁶⁷ *Id.* at *108.

¹⁶⁸ See CONSTITUTION 1993, *supra* note 5, §§ 4, 7, 33, 35, 36, 98.

¹⁶⁹ See *Du Plessis*, 1996 SACLR LEXIS 1, at *77-94.

¹⁷⁰ See *id.* at *97.

¹⁷¹ See *id.* at *96-97.

¹⁷² *Id.* at *108.

qualification to its holding.¹⁷³ The argument that the statement is central to the holding is bolstered by section 102(8), which provided for the determination of issues not necessary for resolution of the dispute.¹⁷⁴

The Court's qualification may also prove problematic when the lower courts attempt to decide future cases in which direct horizontal application is asserted by one of the parties. The holding in *Du Plessis* created a presumption against direct horizontal application while at the same time the Court's qualification rendered the presumption rebuttable.¹⁷⁵ This result was foreshadowed by the Court's recognition that if the Bill of Rights was directly horizontally applicable, numerous provisions "could and would be invoked in private litigation."¹⁷⁶ In the end, the lower courts were left in no better position with regard to the horizontal applicability of Chapter 3 than before the Court reached its decision in *Du Plessis*.¹⁷⁷

Another problem presented by the Court's decision concerns indirect horizontal application, which was ultimately endorsed by the Court.¹⁷⁸ The Court's explanation lacked clarity because having to "resort to section 35(3) is likely to create even more uncertainty, as the phrase 'hav[ing] due regard' is surely a vague concept and 'spirit, purpose and objects' no less so."¹⁷⁹ For example, while a litigant may *always* invoke a provision of the

¹⁷³ See *id.*

¹⁷⁴ See CONSTITUTION 1993, *supra* note 5, ch. 5, § 102(8).

¹⁷⁵ See *Du Plessis*, 1996 SACLX LEXIS 1, at *108.

¹⁷⁶ *Id.* at *96.

¹⁷⁷ See *Mandela v. Falati*, 1994 (4) BCLR 1 (W), 1994 SACLX LEXIS 290, at *16 (Sept. 8, 1994); *Gardener v. Whitaker*, 1994 (5) BCLR 19 (E), 1994 SACLX LEXIS 284, at *35 (Nov. 11, 1994); *Holomisa v. Argus Newspapers Ltd.*, 1996 (2) SA 588, 598; *Motala v. Univ. of Natal*, 1995 (3) BCLR 374 (D), 1995 SACLX LEXIS 256 (Feb. 24, 1995); *Baloro v. Univ. of Bophuthatswana*, 1995 (4) SA 197 (A), 226-28.

¹⁷⁸ See *Du Plessis*, 1996 SACLX LEXIS 1, at *104.

¹⁷⁹ *Id.* at *190 (Kriegler, J., dissenting). The dissent pointed out that a "reading of the Constitution [allowing for horizontal application] avoids jurisprudential and practical conundrums inherent in the vertical, but indirectly horizontally irradiating interpretation." *Id.* at *198 (Kriegler, J., dissenting). Furthermore, allowing horizontal application would spare the Constitutional Court "the jurisprudential gymnastics forced on some courts abroad." *Id.* at *199 (Kriegler, J., dissenting).

Constitution against an organ of the government and can argue in private litigation that a statute relied upon by another litigant is unconstitutional,¹⁸⁰ a private litigant in a private litigation *may not* challenge common law rules as unconstitutional.¹⁸¹ The Court felt this result was necessary due to the restriction on the Court's jurisdiction; reasoning that if private litigants could invoke constitutional issues, every case could potentially be appealed to the Constitutional Court, which had no jurisdiction under the interim Constitution to alter the common law.¹⁸² Yet the Court also found that the Supreme Court, according to section 35, must "have due regard to the spirit, purport, and objects"¹⁸³ of Chapter 3 when developing the common law¹⁸⁴ and that "[t]he Constitutional Court has jurisdiction to determine what the 'spirit, purport and objects' of Chapter 3 are and to ensure that, in developing the common law, the other courts have had 'due regard' thereto."¹⁸⁵ It is difficult to see how this result remedies the potential for conflict with the Court's restricted jurisdiction in terms of the common law. Presumably litigants could appeal, albeit with the indirect assertion that the lower court did not "have due regard" for the Constitution, rather than with the direct assertion that a common law rule violated one or more constitutional provisions.

"Indirect horizontal application" as endorsed by the Constitutional Court eludes precise definition, even though the Court expressly sought to base its interpretation on a German model.¹⁸⁶ As the Court explained, "[p]rivate law is therefore to be developed and interpreted in the light of any applicable constitutional norm, and continues to govern disputes between litigants,"¹⁸⁷ and "that it [i]s for the ordinary courts to apply the constitutional norms to private law."¹⁸⁸ This explanation lacks

¹⁸⁰ See *id.* at *85.

¹⁸¹ See *id.* at *109.

¹⁸² See *id.* at *97.

¹⁸³ CONSTITUTION 1993, *supra* note 5, ch. 3, § 35.

¹⁸⁴ See *Du Plessis*, 1996 SACLRL 1, at *110.

¹⁸⁵ *Id.*

¹⁸⁶ See *id.* at *71-73.

¹⁸⁷ *Id.* at *72.

¹⁸⁸ *Id.*

reference to any discernible method of practical application. It is clear from the opinion that the common law is not to be developed by "striking down" rules of common law¹⁸⁹ and that the common law is to be developed incrementally.¹⁹⁰ Beyond that, it is difficult to see what "indirect" means. Is the application indirect as long as the judge considers constitutional issues *sua sponte* and not upon request of the parties? Are the parties not permitted to plead infringement of constitutional rights by actions of the other party if those actions accord with applicable common law rules? The Court managed to clarify the role of the judge somewhat when it approved of the process followed by the court in *Holomisa*; however, the Court never clearly demarcated "direct" and "indirect" application.

B. Differences in the New Constitution

While *Du Plessis* introduced uncertainty into the role of the lower courts when applying the Bill of Rights, any resulting confusion may be short-lived. The new Constitution contains different provisions than those in the interim Constitution that were determinative in the *Du Plessis* decision. Although a complete survey of the changes made in the new Constitution and the reasons for these changes is beyond the scope of this Note, the provisions which correspond to those factoring in the *Du Plessis* decision merit review. The supremacy clause of the new Constitution provides that "law or conduct inconsistent with [the Constitution] is invalid,"¹⁹¹ while the interim Constitution used the words "law or act inconsistent with [a Constitutional] provision."¹⁹² The substitution of the word "conduct" for the word "act" may very well be significant because "act" is capable of being interpreted as "legislative act." It is difficult to see how "conduct" will be limited to legislative "acts" in the future.

The 1996 Constitution also contains the provision that the Bill of Rights binds the judiciary.¹⁹³ The corresponding provision in

¹⁸⁹ *Id.* at *101.

¹⁹⁰ *See id.* at *100-01.

¹⁹¹ CONSTITUTION 1996, *supra* note 5, ch. 1, § 2.

¹⁹² CONSTITUTION 1993, *supra* note 5, ch. 1, § 4.

¹⁹³ CONSTITUTION 1996, *supra* note 5, ch. 2, § 8(1).

the interim Constitution, much relied on by the Court in *Du Plessis*, provided only that the Bill of Rights "shall bind all legislative and executive organs of state at all levels of government."¹⁹⁴ Additionally, the interim Constitution provided that "juristic persons" would be entitled to Chapter 3 rights and was silent regarding whether or not they were bound by the Bill of Rights.¹⁹⁵ The 1996 Constitution provides that juristic and natural persons are both entitled to and are bound by the rights guaranteed in the Bill of Rights.¹⁹⁶ With respect to the Constitutional Court's jurisdiction relative to that of the Appellate Division of the Supreme Court, the new Constitution does not deprive the Appellate Division of jurisdiction over constitutional matters, as did the interim Constitution.¹⁹⁷ However, the Constitutional Court retains its jurisdiction to decide "issues connected with decisions on constitutional matters."¹⁹⁸ These provisions substantively change the provisions of the interim Constitution on the perceived "jurisdictional divide" which factored in the *Du Plessis* Court's decision.

The most significant provisions of the new Constitution regarding the issue of horizontal application are those which give the Appellate Division of the Supreme Court jurisdiction to hear constitutional issues¹⁹⁹ and which cause the Bill of Rights to have binding effect with respect to natural and juristic persons.²⁰⁰ Because the Appellate Division can now hear and decide constitutional issues, subject only to an appeal to the Constitutional Court,²⁰¹ the *Du Plessis* Court's analytical emphasis on the jurisdictional incompetence of, and jurisdictional division between, the two courts loses most of its force. An argument against direct horizontal application can no longer be predicated on the Appellate Division's incompetence to hear constitutional

¹⁹⁴ See CONSTITUTION 1993, *supra* note 5, ch. 3, § 7(1).

¹⁹⁵ *Id.* § 7(3).

¹⁹⁶ See CONSTITUTION 1996, *supra* note 5, ch. 2, § 8.

¹⁹⁷ See *id.* ch. 8, § 168(3).

¹⁹⁸ *Id.* ch. 8, § 167(3)(b).

¹⁹⁹ See *id.* ch. 8, § 168(3).

²⁰⁰ See *id.* ch. 2, § 8(2).

²⁰¹ See *id.* ch. 8, § 167(3)(a).

issues. However, the second prong of the jurisdictional divide—the Constitutional Court's incompetence to develop the common law—has not been resolved by the new Constitution.²⁰² Because the Constitutional Court's own limitations weighed heavily in the majority's opinion in *Du Plessis*,²⁰³ this provision of the Constitution, absent additional changes, should have little effect on the holding in *Du Plessis*.

The second change, the one altering the binding effect of the Bill of Rights on natural and juristic persons, may constitute new evidence of the framers' intentions regarding horizontal application. One significant section is the provision that natural and juristic persons are bound by Chapter 3.²⁰⁴ Even more significant, in terms of horizontal application, are the limitations placed on the binding effect of Chapter 3.²⁰⁵ Natural and juristic persons are bound "if, and to the extent that, [a provision] is applicable, taking into account the nature of the right and of any duty imposed by the right."²⁰⁶ This provision appears to endorse the provision-specific approach that the lower courts took when applying the Bill of Rights²⁰⁷ rather than the "all-or-nothing" approach taken by the Constitutional Court.²⁰⁸

This provision does not address the "direct" versus "indirect" application issue. Section 8(3) touches on this issue implicitly by providing limited guidance to the courts when applying the Bill of Rights to private persons.²⁰⁹ This provision apparently endorses an indirect application because a court must "apply, or where necessary, develop, the common law to the extent that legislation does not give effect to that right; and may develop rules of the

²⁰² See CONSTITUTION 1996, *supra* note 5, ch. 8, § 167(3)(c).

²⁰³ See *Du Plessis v. De Klerk*, 1996 (5) BCLR 658, 1996 SACLX LEXIS 1, at *97 (May 15, 1996).

²⁰⁴ See CONSTITUTION 1996, *supra* note 5, ch. 2, § 8(2).

²⁰⁵ See *id.*

²⁰⁶ *Id.*

²⁰⁷ See *supra* notes 79-156 and accompanying text for this Note's treatment of background law.

²⁰⁸ See *Du Plessis v. De Klerk*, 1996 (5) BCLR 658 (CC), 1996 SACLX LEXIS 1, at *77-94 (May 15, 1996).

²⁰⁹ See CONSTITUTION 1996, *supra* note 5, ch. 2, § 8(3).

common law to limit the right, provided that the limitation is in accordance with section 36(1).²¹⁰ While this provision does not forbid other approaches to the application of the Bill to private party disputes, it does appear to express the indirect application endorsed by the Court in *Du Plessis*.²¹¹ Certainly it falls short of the express, clear statement of direct horizontal application that the Court stated it would have expected to find if such an application were intended.²¹² Given the language of section 8 and the *Du Plessis* standard for the language that would indicate direct application was intended, section 8 seems to settle the issue in favor of indirect application.²¹³ Based on this language it would also seem that *Du Plessis* remains good law under the new Constitution, although the issue of horizontal application may need to be revisited to establish this result conclusively.

V. Conclusion

Although *Du Plessis* could have been decided without the resolution of the issue of horizontal application of the Bill of Rights,²¹⁴ the Court reached the issue upon request of the Supreme Court pursuant to section 102(8).²¹⁵ The holding was unnecessary because the case was already determined and because the new Constitution had already been adopted and would soon come into force.²¹⁶

When the Court held that the Bill of Rights was capable of indirect horizontal application but not general direct application,²¹⁷ it injected an unnecessary measure of confusion into the role of the lower courts regarding the application of Chapter 3 rights and the

²¹⁰ *Id.* Section 36 corresponds to section 33 in the interim Constitution. See CONSTITUTION 1993, *supra* note 5, ch. 3, § 33.

²¹¹ See CONSTITUTION 1996, *supra* note 5, ch. 2, § 8(2). See also *Du Plessis*, 1996 SACLR LEXIS 1, at *100.

²¹² See *Du Plessis*, 1996 SACLR LEXIS 1, at *80-81.

²¹³ See CONSTITUTION 1996, *supra* note 5, ch. 2, § 8(3).

²¹⁴ See *Du Plessis*, 1996 SACLR LEXIS 1, at *57.

²¹⁵ See CONSTITUTION 1996, *supra* note 5, ch. 5, § 102(8).

²¹⁶ See *id.* ch. 14, § 244(1).

²¹⁷ See *Du Plessis*, 1996 SACLR LEXIS 1, at *108.

development of the common law.²¹⁸ The holding was confusing because it did nothing to clarify the process by which the lower courts were to apply constitutional norms. Even more confusing was the Court's determination that its own jurisdictional limitations precluded direct horizontal application of the *entire* interim Constitution, while recognizing that there might be instances in which direct application would be necessary by the terms of a *specific* provision. Furthermore, the Court's concern that *direct* horizontal application would open the door for all private litigation to reach the Constitutional Court cannot be reconciled with the Court's recognition that litigants may seek *indirect* horizontal application through appeals to the Constitutional Court on the ground that the lower court failed to "[give] due regard for the spirit, purport, and objects" of Chapter 3. Presumably, this holding would have also allowed all private litigation to ultimately reach the Constitutional Court as well.

While the terms of the new Constitution vary from those of the interim Constitution, the confusion introduced by *Du Plessis* is not totally erased by the changes in the relevant provisions considered by the Court. Section 8 apparently resolves the issue in favor of indirect application,²¹⁹ but when read in conjunction with *Du Plessis* it does little to clarify how the lower courts are to apply the provisions under indirect horizontal application.²²⁰

When the horizontal applicability issue is revisited, the Court must clear up the confusion it introduced regarding the extent of its own jurisdiction to develop the common law and answer the question of how far the Court can extend its jurisdiction over the common law in order to determine whether the lower courts have had "due regard for the spirit, purport, and objects" of Chapter 3?²²¹ The Court must also address the question of how this approach differs from taking appeals that directly assert a violation

²¹⁸ See *id.* at *190 (Kriegler, J., dissenting).

²¹⁹ See *id.* ch. 2, § 8(3).

²²⁰ See *id.*

²²¹ See CONSTITUTION 1993, *supra* note 5, ch. 3, § 35(3). The corresponding section in the new Constitution provides that "[the] tribunal or forum must *promote* the spirit, purport, and objects of the Bill of Rights." CONSTITUTION 1996, *supra* note 5, ch. 2, § 39 (emphasis added).

of the Constitution by a common law rule in terms of the scope of permissible common law development by the Constitutional Court? These issues must be addressed in order for the lower courts to know their jurisdiction and which issues can only be addressed on appeal.

Additionally, the Court must clarify the role of the lower courts in developing the common law since the new Constitution mandates such development.²²² Can the lower courts accept pleadings which directly attack rules of the common law on grounds that such rules or actions are unconstitutional? Are the courts limited to "incremental"²²³ rather than more dramatic change? How are competing rights to be balanced in terms of sections 8²²⁴ and 36²²⁵ to ensure "due regard for the spirit, purport, and objects" of Chapter 3?²²⁶ While resolution of these issues was not necessary to the *Du Plessis* Court's determination that Chapter 3 is only indirectly horizontally applicable, it would seem that their resolution is necessary to guide the lower courts in their indirect horizontal application to private disputes of the Bill of Rights under the new Constitution. The lower courts must now await a *Du Plessis* Part II to settle these questions.

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²²² See CONSTITUTION 1996, *supra* note 5, ch. 2, § 8(3).

²²³ See *Du Plessis v. De Klerk*, 1996 (5) BCLR 658, 1996 SACLR LEXIS 1, at *106 (May 15, 1996).

²²⁴ See *supra* notes 205-11 and accompanying text.

²²⁵ Section 36 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.

CONSTITUTION 1996, *supra* note 5, ch. 2, § 36.

²²⁶ See BASSON, *supra* note 5, at 16.

