CONSTITUTIONAL LAW

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LEGISLATION

Money Bills Amendment Procedure and Related Matters Act 9 of 2009

Section 77 of the Constitution of the Republic of South Africa, 1996, establishes a special procedure for the passage of money bills. According to section 77(1), a bill is a 'money bill' if it: *(a)* appropriates money; *(b)* imposes national taxes, levies, duties, or surcharges; *(c)* abolishes or reduces, or grants exemptions from, any national taxes, levies, duties or surcharges; or *(d)* authorises direct charges against the National Revenue Fund, except a Bill envisaged in section 214 authorising direct charges. A money bill can deal only with these and related matters (s 77(2)). According to the Constitution, money bills are ordinarily passed according to the procedure in section 75 which deals with ordinary bills not affecting the provinces (s 77(3)), with two exceptions. In the first instance, only the Minister of Finance can introduce money bills (s 73(2)). Secondly, section 77(3) requires an Act of Parliament to establish a procedure to amend money bills. It is unclear whether amendments to money bills were possible before this legislation was passed. The Rules of the National Assembly suggest that the practice was that only amendments required by the National Council of Provinces or introduced by the Minister of Finance could be considered (rules 287 and 295). In any event, the section 77(3) legislation — the Money Bills Amendment Procedure and Related Matters Act 9 of 2009 (the Money Bills Act) — was finally passed twelve years after the Constitution came into force and now provides clear procedures for amending money bills. We note the general structure of the Money Bills Act and two especially interesting innovations.

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The Act distinguishes between different types of money bills and provides different procedures for their passage and amendment. It also requires the National Assembly and the National Council of Provinces to establish committees on finance and appropriations (s 4). The Act also provides substantive principles that Parliament must 'consider' when amending a money bill (s 8(5)). These include ensuring that there is an appropriate balance between revenue, expenditure, and borrowing; that debt levels and debt interest cost are reasonable; and that the cost of recurrent spending is not deferred to future generations.

The first interesting facet of the Act is the establishment of the Parliamentary Budget Office (PBO), which is intended to 'provide independent, objective and professional advice and analysis to Parliament on matters related to the budget and other money Bills' (s 15). The PBO should provide substantial support to Parliament in providing oversight over the executive on financial issues. Without the PBO, Parliament was dependant on the executive for information about the consequences of money bills; now they have access to independent advice.

Secondly, the Act establishes 'norms and standards' that provincial legislatures must 'adhere to' if they pass legislation to provide for amending provincial money bills (s 16 read with the schedule). The constitutionality of this provision is questionable. On the one hand, Parliament gets the constitutional authority to dictate how provincial legislatures should pass their own money bills. The limits of provincial legislatures' powers are established by the Constitution and cannot be limited by national legislation. Furthermore, section 120(3) of the Constitution expressly assigns the responsibility to provincial legislatures to pass legislation for amending provincial money bills.

On the other hand, the Constitution does place certain national limitations on provinces' fiscal authority. For example, while provincial legislatures are given the power to impose taxes, they may not do so 'in way that materially and unreasonably prejudices national economic policies, economic activities across provincial boundaries, or the national mobility of goods, services, capital or labour' (s 228(2)*(a)*). The Constitution specifically authorises national legislation to regulate provinces' taxing power (228(2)*(b)*). Section 226(4)*(a)* permits national legislation to determine a framework within which provinces may withdraw money as a direct charge against the Provincial Revenue Fund.

The difficult question is whether the guidelines unconstitutionally regulate the legislative procedure for amending money bills,

or merely place national limits on the provinces' fiscal powers as specifically envisaged by the Constitution? There probably is not an absolute answer to this. The guidelines, like the Act itself, cover a range of topics. They require consistency with the national fiscal framework and that provincial legislatures consider the long-term implications of their actions. But they also contain more procedural standards demanding, for example, that any committee that proposes an amendment include the comments of the member of the Executive Council responsible for financial matters, and that the bill be passed within four months of the start of the financial year. In our view, the former, substantive standards may provide constitutionally permissible national guidance on fiscal matters, while the latter risk infringing the power of provincial legislatures to regulate their own procedure.

Traditional Leaders

Two pieces of legislation passed in 2009 affect the constitutional role of traditional leaders.

In the first instance, the National House of Traditional Leaders Act 22 of 2009 repeals and replaces the National House of Traditional Leaders Act 10 of 1997. Some of the most important changes are: an expansion of the powers and duties of the House (ss 11 and 13); additional qualifications for membership of the House (s 5); the introduction of a code of conduct for members of the House (s 23 read with schedule C); the regulation of the relationship between the House and provincial houses of traditional leaders (s 15); and some minor changes to the means of determining the composition of the House (s 3).

Secondly, the Traditional Leadership and Governance Framework Amendment Act 23 of 2009 amends the Traditional Leadership and Governance Framework Act 41 of 2003. None of the changes are groundbreaking. Some of the more interesting changes are: the definition, recognition, and regulation of 'kingships and queenships' and 'principal traditional leaderships' as new traditional leadership structures (ss 2A–2B); changes to the membership and functioning of the Commission on Traditional Leadership Disputes and Claims (ch 6); and affording the Minister responsible for traditional leadership the power to make regulations on any matters prescribed in the Act (s 27A).

CASE LAW

Constitutional Litigation

Challenging statutes in the alternative

In *Brümmer v Minister for Social Development* 2009 (6) SA 323 (CC), a journalist succeeded in challenging the constitutionality of section 78(2) of the Promotion of Access to Information Act 2 of 2000 (PAIA). The impact of the case in relation to the rights of access to information and access to courts is discussed in the Chapter on Bill of Rights Jurisprudence. It suffices to mention that the Constitutional Court concluded that the 30 days prescribed to appeal against the refusal of an information request did not provide 'an adequate and fair opportunity to seek judicial redress' (para [56]). It accordingly limited both the section 34 right of access to court, and the section 32 right of access to information.

Ngcobo J, writing for the unanimous court, concluded that the provision could not be saved under section 36 (para [62]). However, the court's dicta in relation to statutory challenges in the alternative warrant comment.

The High Court had first considered whether the late application qualified for condonation under the existing provision. After finding it did not, the High Court declared the provision unconstitutional. Effectively, the court considered whether it should grant condonation under an invalid provision (para [31]). The Constitutional Court held that the High Court should have first considered the constitutional challenge; only if that failed, could it then have considered the request for condonation. Ngcobo J then had this to say:

> 'The High Court should have put the applicant to an election: to either argue that the provisions of section 78(2) are unconstitutional, or accept that section 78(2) is not unconstitutional and argue that he is entitled to condonation. A litigant should not be allowed to blow hot and cold. It is impermissible for a litigant to ask a court to apply the provisions of a statute and, if this yields adverse results, then to ask the court to declare the statute unconstitutional. It is however permissible to urge a court to adopt a particular construction of a statute, and, if it should find that the statute is incapable of the construction contended for, then to contend that the provision is unconstitutional' (para [32]).

This passage does not make sense. Consider the matter from Brümmer's point of view. The easiest solution to his lateness was

to seek condonation. Not only was it likely to be a simpler application than a challenge to the constitutionality of section 78(2), it would not have to be confirmed by the Constitutional Court. The effect of the court's reasoning is that Brümmer — and any other litigant who might be negatively affected under a statute that may or may not be unconstitutional — must choose either to try their luck under the statute, or to carry the heavy burden of a constitutional challenge. It hardly seems fair to place that burden on litigants; especially considering that the only harm done by following the course Brümmer did is some academic damage when a court applies a statute it declares invalid a few pages later. The balance surely falls in favour of encouraging litigants to bring constitutional challenges, not forcing them into hard choices where they might elect not to do so. Furthermore, the last sentence of the quote shows that the court does not believe what it says in the first part of the passage. The Constitutional Court has regularly emphasised that courts must *always* interpret statutes in line with the Constitution, even if the applicant does not raise the issue. There is, therefore, no actual difference between a litigant who argues (as Brümmer did) for application in the main and unconstitutionality in the alternative, and a litigant who argues for constitutional interpretation — and application of the law, so interpreted — in the main and unconstitutionality in the alternative.

In our view, the court would do well to reconsider whether this approach coheres with its previous precedent and creates a just rule. However, we would advise litigants, for the sake of caution, to frame their alternative claims in line with the last sentence in the quoted passage.

Raising constitutional issues mero motu

Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development & others 2009 (4) SA 222 (CC), came to the Constitutional Court as confirmation proceedings. Two cases of child rape had been referred by the regional court to the High Court for sentencing. In both cases the child complainant testified. In the first matter ('the Phaswane matter') the child testified without an intermediary or any other protection. The magistrate found that she did not understand the import of an oath but that she understood the difference between truth and falsehood and was admonished to tell the truth. In the second case ('the Mokoena matter') the child complainant was

interviewed by a social worker who recommended that she testify through an intermediary and the court obliged.

Both matters came before Bertelsmann J, who invited submissions from the parties and several NGOs on the constitutionality of a wide range of provisions of the Criminal Procedure Act 51 of 1977 relating to child witnesses. He found the majority of the provisions unconstitutional for violating the right of children to have their best interests considered paramount, and the right to equality. He also made declaratory and supervisory orders against government to ensure the proper protection of children in criminal proceedings. He then referred the matter to the Constitutional Court for confirmation.

The question before the Constitutional Court was whether it was appropriate for Bertelsmann J to raise the constitutionality of the various statutory provisions when they were not raised by any of the parties. Ngcobo J wrote for the majority. Skweyiya J filed a concurring opinion that disagreed with the majority on this issue. The majority begins by affirming the power of courts to raise constitutional issues: 'a court cannot enforce a law that is inconsistent with the Constitution. It follows that a court may raise, of its own accord, the unconstitutionality of a law that it is called upon to enforce' (para [34]). The real question is not *whether* a court can raise a constitutional issue, but *when*. Ngcobo J provides a neat answer: 'A court may . . . of its own accord, raise and decide a constitutional issue where *(a)* the constitutional question arises on the facts; and *(b)* a decision on the constitutional question is necessary for a proper determination of the case before it; or it is in the interests of justice to do so' (para [43]). Read alone, this statement is perhaps ambiguous. It is unclear whether the 'interests of justice' requirement is a separate ground justifying raising an issue without anything else, or whether the issue must still arise on the facts. However, read in the context of the rest of the judgment, it is clear that *(a)* is an absolute requirement, requiring in addition either that (i) it is necessary for the court to consider the issue required for a proper determination of the dispute, or (ii) it is in the interests of justice.

With these principles in mind the court held (with one exception that it left undecided) that it was inappropriate for the High Court to raise the constitutionality of the statutory provisions. In the Mokoena matter the complainant testified through an intermediary and the proceedings were held in camera. The fact that the High Court confirmed Mokoena's conviction without waiting for

the outcome of the confirmation proceedings confirmed this finding. In the Phaswane matter, the only provision that might have arisen on the facts was the intermediary provision (s 170A(1)), as no intermediary had been appointed. The court did not decide whether this provision was appropriately considered as it later found that even if it was not, it was in the interests of justice for it to hear it. The court also noted that many of the sections considered by the High Court were, at the time the High Court directed the parties to address them, still in bill form.

Despite finding that the High Court had improperly raised the constitutional issues, Ngcobo J went on to consider whether it would nonetheless be in the interests of justice to consider them. He held that section 172(2) of the Constitution (which requires declarations of invalidity to be confirmed by the Constitutional Court) served two purposes. In the first instance, it is meant to ensure that only the Constitutional Court could declare legislation invalid. Secondly, section 172(2) is meant to ensure legal certainty by ensuring that any declaration of invalidity either be confirmed or set aside. If the Constitutional Court simply refused to consider the issue, the legislation would continue to exist, but with a cloud of potential unconstitutionality hanging over it. This purpose 'strongly suggests that the only circumstances in which a court may not deal substantively with an application for confirmation is where no uncertainty will arise from the court's not doing so' (para [63]). In this case uncertainty would follow and the mere fact that the High Court was mistaken in raising the issue should not prevent the Constitutional Court from deciding it. The court therefore decided to consider the constitutionality of all the sections considered by the High Court.

Despite the importance the court placed on the uncertainty created by an unconfirmed order of invalidity, Ngcobo J tried to place limits on that reasoning:

> 'It does not follow that this court will consider the constitutional validity of a legislative provision in every case where the High Court ought not to have decided the question simply because of the uncertainty that results from the existence of an unenforceable High Court order. . . . [I]t must be emphasised that, in future cases, it may be appropriate for this court not to consider whether the High Court was wrong in coming to the conclusion that a legislative provision is constitutionally invalid' (para [68]).

Ngcobo J did not, however, attempt to provide any examples of cases where uncertainty exists, yet it would still not be in the

interests of justice for the Constitutional Court to hear the confirmation proceedings.

There are many reasons to criticise the majority's somewhat contradictory approach, most of which are raised in the judgment of Skweyiya J. He held that the majority's reliance on the uncertainty caused by failing to confirm the decision was 'overstated and exaggerated' (para [216]) In addition, he believed that the court should have considered other additional factors in the interests of justice inquiry. First, it should have paid greater attention to rule of law and separation of powers, concerns that counsel against courts raising issues themselves. Skweyiya J correctly noted that the question had to be understood in light of the Constitution's exceptionally broad standing provisions that permit any person to bring an abstract review of legislation in the public interest. However, '[i]t is quite another thing for a judge, of his own accord, to raise questions about the constitutionality of provisions which do not arise on the facts of the case before him' (para [225]). The second factor raised by Skweyiya J was the inherent difficulty in deciding constitutional issues that do not arise on the facts. Parties are disinterested in the outcome and the evidence submitted is often inadequate. Thirdly, there are institutional implications:

> 'Foremost among these potential consequences is that judges may be encouraged to raise irrelevant constitutional issues, no matter how wide the gulf between the constitutional issues and the facts before the court, confident that almost any declaration of invalidity is entitled to constitutional assessment by this court. This concern extends to the conduct of litigants and lawyers, who may burden the courts with constitutional issues not pertinent to their cases' (para [235]).

The majority judgment criticises this conduct, but as Skweyiya J noted later: 'The impact of our judgments lies not in the sharpness of our critical dicta, but in the orders we issue or decline to issue, and in the arguments we consider or decline to consider' (para [243]). The consideration of irrelevant issues also causes undue delays in the finalisation of the matter, which redounds to the detriment of all parties who are interested in the actual underlying issue. Skweyiya J was willing to consider only section 170A(1), which did arise on the facts of the case and was not in bill form at the time the High Court heard the case. He would have refused to consider the confirmation proceedings with regard to all the other sections.

Interpretation

Three Constitutional Court cases reported in 2009 engaged in the interpretation of statutes in line with the Constitution. Read together, these cases provide significant insight into the Constitutional Court's developing approach to interpretation. We consider three specific issues: *(a)* when the interpretation of a statute amounts to a 'constitutional matter' within the Constitutional Court's jurisdiction; *(b)* whether courts should choose any constitutional interpretation, or the most constitutional interpretation; and *(c)* the proper method to interpret a statute.

Interpretation and jurisdiction

Although this is an issue also covered in the chapter on Civil and Constitutional Procedure and Jurisdiction, we discuss it here because the court's determination of what is a constitutional issue is inseparable from the substantive question of how to properly interpret statutes in the constitutional era.

In *Chagi & others v Special Investigating Unit* 2009 (2) SA 1 (CC), a unanimous court wrote:

> 'The correct interpretation and effect of a statutory provision is not ordinarily a constitutional matter. A debate on the construction of a particular provision does however raise a constitutional issue or a matter connected with a decision on one if the provision is capable of two reasonable constructions, the one being more constitutionally compliant than the other. A court is obliged always to interpret any legislative provision consistently with the Constitution and to avoid a construction that is inconsistent with the Constitution. Where one party champions a meaning of the disputed provision that will result in its unconstitutionality, a constitutional matter is raised if there is a reasonable prospect that the interpretation contended for is wrong and that there is another construction that results in the provision being constitutional' (para [14], footnote omitted).

There is a slight inconsistency in the above passage. At the start, Yacoob J refers to an interpretation that is 'more constitutionally compliant'. This suggests that more than one interpretation may be constitutionally compatible, but there is a 'most constitutional interpretation'. On this approach, it is a constitutional issue to ensure that the 'best' interpretation is assigned. Later, he implies that the rule only applies if one of the possible interpretations would render the law unconstitutional.

Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd & another 2009 (1) SA 337 (CC) removes any doubt as to which is the correct approach. Writing for the majority, Kroon AJ held:

> 'This court has not yet been called upon to deal with the situation where two conflicting interpretations of a statutory provision could both be said to promote the spirit, purport and objects of the Bill of Rights and the decision to be made is whether the one interpretation is to be preferred above the other. It seems to me that it cannot be gainsaid that this court is required to adopt the interpretation which *better* promotes the spirit, purport and objects of the Bill of Rights. That would, after all, be a more effective "[interpretation] through the prism of the Bill of Rights"' (para [46], footnote omitted, original emphasis).

This rule, which we call the 'most constitutional' approach, applies not only to interpretation in terms of section 39(2) to accord with the 'spirit, purport and objects of the Bill of Rights', but also to interpretation to accord with all the remaining 'structural provisions' of the Constitution (para [47]).

Writing for the minority *Wary*, Yacoob J agreed that the 'most constitutional' approach was appropriate. In his view, however, a 'constitutional matter would be raised for decision only if the [section] is reasonably capable of having two meanings. This issue, whether the [section] is reasonably capable of two meanings, must be determined first, for if it is not, the constitutional question does not arise for decision' (para [107]). However, deciding whether the section is capable of two meanings is 'an issue connected with a decision on a constitutional matter' and the court could therefore consider it. As far as jurisdiction is concerned, it does not make a difference whether one follows Kroon AJ's or Yacoob J's approach. The extent of jurisdiction is the same, the only difference is whether the whole interpretive exercise is a constitutional issue, or if part of that process is merely 'an issue connected with a decision on a constitutional matter'.

These decisions also, unsurprisingly, retain the Constitutional Court's wide jurisdiction. (For more on the court's jurisdiction, see F Michelman 'Rule of law, legality and the supremacy of the Constitution' in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (2005) ch 11.) It seems worth asking whether there are any cases of statutory interpretation that fall outside the court's jurisdiction. Considering the breadth of issues covered by the Bill of Rights and the other provisions in the Constitution, the Constitution will be relevant to the interpretation of many (if not most) statutory provisions. And, under the 'most constitutional' theory, the number of statutory provisions that actually threaten to violate a provision of the Constitution is

much smaller than the number of statutes that somehow raise constitutional issues, without threatening to violate any specific constitutional clause. In addition, on the reasoning of Yacoob J, determining whether the interpretation of a statute has constitutional implications is probably 'an issue connected with a decision on a constitutional matter' within the court's jurisdiction. Nonetheless, there are probably many sections in statutes that are either not capable of more than one interpretation or have no constitutional relevance. These decisions, however, confirm that they are a shrinking group.

'Most constitutional interpretation'

As discussed above, the *Chagi* court explicitly endorsed the idea that courts must adopt the 'most constitutional' interpretation of statutes. While we agree that this is the correct approach, we express two concerns about it. In the first instance, it has real implications for the rule of law. While it is possible, over time, to create relative clarity about whether a statutory provision violates a constitutional provision, the 'most constitutional' rule adds two entirely new layers of constitutional interpretation. One, in addition to knowing when a law outright violates a constitutional provision, we need (at least) one additional, lower standard which makes a constitutional provision relevant to interpretation. In *Wary*, for example, one of the arguments was that the interpretation of the statute impacted the right to food. There was no credible argument that either interpretation would actually violate the right, yet the court relied on this right in interpreting the provision. That implies that some threshold of relevance has been established. In theory, there must be such a 'relevant for interpretation threshold' for every constitutional provision.

In addition, there needs to be a process to weigh the impact of alternative interpretations on various constitutional provisions. It seems to us that many if not most laws that raise constitutional issues will have constitutional arguments on both sides. Imagine, for example, an ambiguous section dealing with detention: one interpretation will better accord with the right not to be arbitrarily deprived of freedom (s 12(1)*(a)*), the other better permits the state to protect citizens from 'public and private violence' (s 12(1)*(c)*). A court will have to balance the relative importance of each constitutional threat to determine which is the 'better' constitutional interpretation. When dealing with direct challenges to legislation under the Bill of Rights, section 36 provides a

mechanism for resolving these conflicts. In theory, a similar mechanism is necessary to resolve conflicting constitutional pulls in statutory interpretation. The court has not, as yet, endorsed a stable mechanism other than a case-specific, all-things-considered judgment. Secondly, insisting on the 'most constitutional' interpretation implicates the separation of powers. The legislature is constitutionally entitled to pass laws that limit rights provided the limitation is justifiable under section 36. When it comes to the other provisions of the Bill of Rights, the state is entitled to do everything short of actually violating a constitutional provision. If a provision is unclear, yet neither interpretation limits a right or violates a structural provision, why should the 'most constitutional' interpretation be preferred to the interpretation that justifiably limits a right but is endorsed by, for example, legislative history, statutory context and government testimony? By choosing the 'most constitutional' interpretation, a court effectively sets a different standard for the legislation than section 36. The answer, perhaps, is to force the legislature to be very clear when it treads in constitutional terrain, or risk having its intention overruled by constitutional concerns. That is a strong point, but it should be evaluated in light of the difficulty of anticipating all constitutional concerns and removing all ambiguity from statutory language.

We should note that the 'most constitutional' approach is clearly required by the text of section 39(2) and it would be strange to have a different rule for the non-rights provisions of the Constitution. The phrase 'promote the spirit, purport and objects' is not consistent with merely identifying all constitutional interpretations and then using non-constitutional means to choose between them. However, the difficulties we raise should, we believe, inform the way the court applies the 'most constitutional' test. The court should, for example, provide clearer guidance on how to determine whether a section of the Constitution is relevant to interpretation and how to weigh the influence of the various provisions. Further, the court should be aware that the legislature may purposely have intended to limit (but not violate) a constitutional provision.

Process of interpretation

Both *Chagi* and *Wary* provide useful insights into the process that the courts should follow in interpreting legislation. Read together, they show that there are multiple paths to follow in statutory interpretation.

In *Chagi*, the Constitutional Court considered whether a proclamation could be interpreted to exclude the ability to sue the state for damages. In 1997, acting under the Special Investigating Units and Special Tribunals Act 74 of 1996 ('SIU Act'), the President issued a proclamation ('1997 Proclamation') creating a Special Investigating Unit ('First Unit') to investigate the Transkei Agricultural Corporation. In a second proclamation enacted in 2001 ('2001 Proclamation'), he repealed the proclamation and replaced the First Unit with a new unit (the Second Unit). Just after the 2001 Proclamation was issued, the applicants sued the First Unit for defamation. The Second Unit defended the claim, arguing that the 2001 Proclamation had disestablished the First Unit and had not transferred its liabilities to the Second Unit. It was therefore impossible for the applicant to sue anyone for the alleged defamation. Both the High Court and the Supreme Court of Appeal upheld this defence.

The Constitutional Court first considered the meaning assigned by the Supreme Court of Appeal and supported by the respondent. That interpretation would prevent the applicants from suing the First Unit (it had been abolished), the Second Unit (it was not liable for the First Unit's actions) and the Minister of Justice (that possibility was excluded by the SIU Act). It held that this interpretation would violate section 34 and only then went on to consider if there was an alternative, constitutional interpretation.

The 2001 Proclamation itself was silent about the transfer of liabilities from the First Unit to the Second. Yacoob J noted that it was impossible for the Proclamation to exclude the liability of the First Unit because the liability was established by the SIU Act, which could not be altered by proclamation. Moreover, section 12(2)*(c)* of the Interpretation Act 33 of 1957 creates a presumption that the repeal of a law will not impact rights and liabilities. The Proclamation's silence could not, therefore, be interpreted to exclude the liability of the First Unit. Even though the First Unit no longer existed, it could still be sued by citing its head as the nominal defendant. 'The true party, the party that would satisfy the judgment, is the state' (para [42]). The court accordingly therefore interpreted the 2001 Proclamation to permit the action.

Chagi is interesting for two reasons. In the first instance, the court decides that the existing interpretation is unconstitutional before looking for alternative interpretations. Second, the interpretation it eventually adopts is, in its view, the best interpretation as a matter of ordinary statutory interpretation without any refer-

ence to the Constitution. That method differs from that followed by the majority in *Wary*.

The question in *Wary* was how to interpret the definition of 'agricultural land' in section 1 of the Agricultural Land Act 70 of 1970. The case arose out of an attempt by the applicant to transfer land that had been agricultural to be used for industrial purposes. What had to be decided was whether the approval of the Minister of Agriculture and Land Affairs was required for the sale. The respondent argued that the Minister's consent was not required. The applicant and the Minister contended (and the High Court held) that consent of the Minister had to be obtained. The Supreme Court of Appeal upheld the appeal against the High Court's decision. We explain the details of that debate below under 'Cooperative Government'. Here, we simply discuss how the process differs from *Chagi*.

Kroon AJ clearly set out his approach to statutory interpretation. First, a court must determine the words' meaning:

> 'A cardinal rule in the construction of any legislation is that the intention of the legislature must be sought in the words employed in the legislation. The first step in this exercise is a determination of the plain meaning to be ascribed to the words' (para [58]).

In this case, the majority held that both interpretations were textually plausible.

To solve that problem, the *Wary* court noted that another 'canon of statutory interpretation' requires 'that the ordinary meaning of the words in a statute must be determined in the context of the statute (including its purpose) read in its entirety' (para [61]). In the court's mind, the context implied that ministerial consent was not required. But that is not the end of the process. When a section is ambiguous 'regard must be had to other indicators of the legislature's intention' (para [63]). Kroon AJ considered a range of other pointers toward statutory intention — including some structural provisions of the Constitution — and ultimately concluded that they supported his conclusion that the Minister's consent was required.

Only after going through that process, almost as an afterthought, the court decided to 'return briefly to deal with . . . section 39(2) of the Constitution' (para [84]). It held that the relevant questions were whether the interpretation it had already all-but adopted promoted the 'spirit, purport and objects of the Bill of Rights or, if necessary, whether it did so 'better' than the

alternative interpretation. It held that its chosen interpretation did indeed 'better' fulfil the goal of section 39(2).

The differences between *Chagi* and *Wary* are as follows. In the first instance, the *Wary* court does not begin by determining whether an interpretation is unconstitutional, but by determining what the permissible textual meanings of the section are. Secondly, *Wary* considers all factors (contextual, constitutional, and others) before concluding what the correct interpretation is.

Neither is the 'correct' approach to interpretation. The lesson to take from these cases is that there are many different ways to conduct statutory interpretation under the Constitution. However, they must all consider the textual meaning of the section, the context in which the section appears, and any other relevant factors, as well as the impact of the Constitution.

Democracy and Elections

Right to vote abroad

Each set of national elections since the advent of democracy has generated a spate of litigation, which continues incrementally to carve out the scope of the political rights in section 19 of the Constitution, especially the right to vote. The 2009 elections continued that trend.

In *Richter v Minister for Home Affairs* 2009 (3) SA 615 (CC), the Constitutional Court decided whether the right to vote applies to citizens who are not in the country. The applicant Richter was a 27-year-old South African citizen, registered as a voter in South Africa but living and working in the United Kingdom. He sought the right to vote in the elections to be held on 22 April 2009. Richter successfully launched an urgent challenge in the High Court against those parts of section 33 of the Electoral Act 73 of 1998 which prevent certain categories of South African citizens who are absent from South Africa from voting in the national elections. The High Court order was referred to the Constitutional Court for confirmation.

Two issues of particular interest arise out of the Constitutional Court's decision in *Richter*: the test for identifying violations of the right to vote; and the extent of the remedy granted by the court, which confirmed the order of invalidity, but granted the right to vote in national, but not provincial elections, to South Africans living abroad.

O'Regan J, writing for a unanimous court, considered the ambit and purpose of the right to vote. She emphasised its symbolic and democratic value, and the obligations the right places on the state and the burdens imposed on the voting public in order to exercise the right (paras [53]–[56]). O'Regan J held that the right to vote is infringed if a registered voter is willing to take reasonable steps to exercise his or her right to vote, but is still prevented from doing so by a statutory provision. Apparently endorsing the majority approach in *New National Party v Government of the Republic of South Africa* 1999 (3) SA 191 (CC) ('*NNP*'), a case in which O'Regan J dissented, she formulated the test to determine whether the impugned provisions violate section 19 of the Constitution as follows:

> 'In approaching each of the provisions in question in this case, therefore, I would suggest that *to determine whether any provision constitutes an infringement of section 19 of the Constitution, we must establish whether the consequence of any of the challenged provisions is such that, were a voter to take reasonable steps to seek to exercise his or her right to vote, any of the provisions would prevent the voter from doing so*. In determining what would constitute reasonable steps for the voter to take, we should bear in mind both the fact that the process of voting inevitably imposes burdens upon a citizen as well as the important democratic value of fostering participation in elections that I discussed above. Should it be found that the provision would prevent a voter from voting despite the voter's taking reasonable steps to do so, the provision will constitute an infringement of section 19. The next question that will arise is whether the infringement is justifiable in terms of section 36 of the Constitution' (para [58], emphasis added).

In the quoted passage, O'Regan J emphasises, as the test for determining whether section 19 is violated, the reasonableness of steps that a voter is required to take in order to vote. This was one of two steps of the test established by the majority in *NNP*. In *NNP*, Yacoob J held that the court must ask, in the first instance, whether the regulatory scheme is rationally related to a legitimate government purpose (paras [23]–[24]). Secondly, a citizen must show that the probable consequence of the measure 'would be that those who want to vote would not have been able to do so, even though they acted reasonably in pursuit of the right' (para [23]).

In emphasising the second part of the *NNP* test, O'Regan J de-emphasises the first requirement of rationality. She does not refer to the dicta in *NNP* stating that restrictions on the right to

vote are subject to a test for (mere) rationality. One of the present authors has previously criticised the rationality test laid down by the majority in *NNP* as providing insufficient protection for the political rights in section 19, and argued that O'Regan J's dissenting approach in that case is to be preferred (J Brickhill & R Babiuch 'Political rights' in S Woolman et al *Constitutional Law of South Africa* 2 ed (OS 03–07) at 45–18–23). In *NNP*, O'Regan J had held that restrictions on the right to vote must be *reasonable* (*NNP* paras [126]–[127]).

To the extent that *Richter* re-interprets the majority decision in *NNP* to entail, at its core, a test for the reasonableness of steps required in order to exercise the right to vote, it is a welcome development that will promote democratic participation. Of course, there remains a distinction between applying reasonableness to the *steps that a voter must take* as contrasted with testing the reasonableness of *state restrictions* on the exercise of the vote. These two tests look down the same telescope from opposite ends and arguably place an onus on the citizen and the state respectively. However, the *Richter* reasonableness test nevertheless appears on the face of it to offer greater protection to the right to vote than the majority rationality approach in *NNP*.

O'Regan J applied the reasonableness test discussed above to the impugned provisions of the Electoral Act. The Electoral Act prevented many registered voters, outside South Africa for various reasons, including people in Richter's position, from voting. O'Regan J held that this exclusion limited section 19 of the Constitution. The heart of her reasoning lies in this passage:

> 'Can it be said that in requiring them to return home to South Africa to vote, the election regulations are imposing an obligation of reasonable compliance upon them? I do not think so. It is acceptable to ask voters to travel some distances from their homes to a polling station. One cannot quibble, either, at the fact that delays in casting votes at a polling station may require voters to queue for considerable periods of time to vote. It cannot be said, however, that requiring a voter to travel thousands of kilometres across the globe to be in their voting district on voting day is exacting reasonable compliance from a voter. All the more so, given that section 33(1)*(b)* expressly does not require those working abroad on government service to return home to vote, but provides voting facilities for them at embassies, high commissions and consulates.
>
> 'In reaching this conclusion, I am influenced by the fact that, as several of the parties noted, we now live in a global economy which provides opportunities to South African citizens and citizens from other countries to study and work in countries other than their own.

> The experience that they gain will enrich our society when they return, and will no doubt enrich, too, a sense of a shared global citizenship. The evidence before us, too, shows that many South African citizens abroad make remittances to family members in South Africa while they are abroad, or save money to buy a house. To the extent that citizens engaged in such pursuits want to take the trouble to participate in elections while abroad, it is an expression both of their continued commitment to our country and their civic-mindedness from which our democracy will benefit' (paras [68]–[69]).

Noting that the government had not advanced any basis on which this limitation could be justified under section 36 of the Constitution, O'Regan J held that the limitation of section 19 could not be saved under the limitations test (para [78]). In the result, O'Regan J confirmed the High Court's order of invalidity in its essential respects. She made an order extending the period within which those who were to be abroad on polling day could notify the Chief Electoral Officer of their intention to cast their vote. The effect of the order was that all South African citizens who were registered voters and who would be abroad on polling day would be entitled to vote in the election for the National Assembly on 22 April 2009 provided they gave notice of their intention to do so by 27 March 2009 to the Chief Electoral Officer and identified the embassy, high commission, or consulate where they intended to cast the special vote.

Urgent litigation on elections

The Constitutional Court's decision in *AParty & another v Minister of Home Affairs & others* 2009 (3) SA 649 (CC), involved two matters — the *AParty* and *Moloko* matters — in which the applicants made urgent application for direct access to the Constitutional Court (CC) at the eleventh hour before the general elections scheduled for 22 April 2009. *AParty*, which was handed down at the same time as *Richter*, may be read as an addendum and qualification to *Richter*. It was an addendum in that the court made orders in the *AParty* and *Moloko* matters providing the same relief granted in *Richter* (paras [34] and [86]).

However, the court in *AParty* also sounded an important qualification of *Richter*, drawing a line to separate the types of last-minute challenges to electoral law that are appropriate and permissible from those that are not. The applicants in *AParty* sought to go further than those in *Richter*, targeting a number of additional provisions of the Electoral Act and Regulations that related to the registration of voters (para [53]), whereas *Richter*

limited itself to those voters who were already registered. As the President had already proclaimed the date for elections, the voters' roll was closed. The challenge therefore threatened the election timetable (ibid). The court held that it was not in the interests of justice to grant direct access in relation to these issues and that urgency had not been established.

The reasons given by the court for refusing direct access in respect of all the further issues include: its reluctance to act as court of first and last instance in relation to important and complex issues (paras [55]–[56]); that the applicants had created their own urgency, since the impugned provisions had been enacted in 2003 and the applicants had waited until the eve of the election to challenge them (para [59]); that two of the applicants had failed to explain why they had failed to register in line with the duty to do so placed on them by the right to vote (paras [67]–[68]); and that the challenge in the applications went to the heart of the electoral scheme, such that the relief sought could have a negative impact on the election timetable and, ultimately, on the elections themselves (para [70]).

Ultimately, *AParty* stands as a powerful reminder that not all election-related litigation is self-evidently urgent and that the Constitutional Court is unwilling to consider challenges to the fundamental features of the electoral scheme at the eleventh hour simply because that is the 'season' for such litigation.

Political rights: naming political parties

African National Congress v Congress of the People 2009 (3) SA 72 (T) was one legal skirmish that arose out of the formation of a new political party, the Congress of the People (COPE). The applicant, the African National Congress (ANC), is the majority and ruling political party in South Africa. It launched an application in the North Gauteng High Court to interdict and restrain a breakaway political party from using the name 'Congress of the People' as its name and/or from persisting with its application under the Electoral Commission Act 51 of 1996 to register as a political party under that name. The applicant alleged that the use of the name 'Congress of the People' constituted the delict of unlawful competition as it conveyed to the public a false message through which COPE would unfairly attract votes, to the detriment of rival political parties generally and the ANC in particular. The alleged false message was that COPE was the 1955 Congress of the People *or* was exclusively entitled to be associated with and

identified by that name, *or* that it was the sole heir and upholder of the ideals that originated from the 1955 Congress.

A full bench of the High Court confirmed that the law of unlawful competition does apply to political parties and that a political party may not employ unlawful means to attract votes (para [9]). Therefore, a political party that deliberately conveyed a false message to voters by using a particular name would be competing unlawfully (para [10]).

However, the court held that the mere use of the name Congress of the People did not convey that COPE actually was the 1955 Congress of the People (para [12]). No reasonable voter, even those with but a passing knowledge of the relevant history, would think that COPE, a party established in 2008, was the event that took place in 1955. Those who had no knowledge of the history would not be deceived because they would not know that the term Congress of the People might refer to a historic event.

Du Plessis J, writing for the unanimous court, acknowledged that the use of the name 'Congress of the People' conveyed a message that COPE associated itself and wished voters to associate it with the 1955 Congress of the People as the birthplace of the Freedom Charter. He held that such use was not a misrepresentation, however, as the mere use of the name 'Congress of the People' did not convey that COPE had any exclusive claim to the 1955 event or to the Freedom Charter (para [13]).

The court concluded that COPE's use of the name Congress of the People did not convey a false message, and so did not amount to unlawful competition (para [16]). The court dismissed the application, with costs.

Although the court did not refer to the political rights entrenched in section 19 of the Constitution, that provision offers support for the outcome of this case in at least two respects: one interpretive, and the other principled.

In the first instance, in terms of section 39(2) of the Constitution, courts interpreting legislation or developing the common law are required to promote the spirit, purport, and object of the Bill of Rights. Accordingly, the court in this case was required to adopt an interpretation of the relevant provisions of the Electoral Commission Act and, if necessary, to develop the common-law principles of unlawful competition so as to promote the right of citizens to form political parties in section 19(1)*(a)*. That is,

section 19(1)(*a*) militates in favour of an approach that facilitates, rather than restricts, the ability to form political parties.

Secondly, the Constitution contemplates a form of democracy that is deliberative and participatory, in which informed citizens engage with democratic processes openly and rigorously (see T Roux 'Democracy' in Woolman, Roux & Bishop op cit 2 ed (OS June 2008) ch 10 at 10.5; see also J Brickhill & R Babiuch 'Political rights' in Woolman, Roux & Bishop op cit ch 45). It would be out of kilter with that conception of democracy to stifle debate over the heritage claims of the ANC and other political parties by restricting the formation of breakaway political parties whose names draw on that heritage.

Precedent, Rule of Law, and Legality

Doctrine of precedent in relation to Constitutional Court decisions

On the face of it, *True Motives 84 (Pty) Ltd v Mahdi* 2009 (4) SA 153 (SCA) was concerned with the proper interpretation of legislation governing approval for building plans. However, the real storm raging beneath the surface concerned whether the SCA was bound by the earlier decision of the Constitutional Court in *Walele v The City of Cape Town* 2008 (6) SA 129 (CC), which it considered to be wrong. Heher JA delivered the majority decision of the SCA, holding that the SCA was not bound by the relevant Constitutional Court dicta because they were wrong and, in any event, obiter. Jafta JA, who happened to have authored the majority decision of the Constitutional Court during an acting stint on that court, dissented. Separate judgments were also penned by Cameron JA and Scott JA, responding to some of the contentions advanced by Jafta JA.

In order to understand the debate about whether the Supreme Court of Appeal was bound by the Constitutional Court decision in *Walele*, it is necessary briefly to describe the facts and issues in *True Motives* that engaged this question. The second respondent, a local authority, had approved certain building plans submitted to it by the first respondent, proposing alterations to his home. The plans were approved under section 4(1) (which requires local authority approval for buildings and alterations requiring the submission of building plans) read with section 7(1) of the National Building Regulations and Building Standards Act 103 of 1977 ('NBR Act'). The appellant, the owner of the adjoining erf, unhappy with the look and extent of the alterations being

done to the first respondent's home, asked the High Court for a declaratory order to the effect that the second respondent had failed to lawfully approve the building plans as intended in section 6 (which regulates the functions of building control officers) and section 7 of the Act, alternatively for an order setting aside the second respondent's decision to approve the plans. The High Court dismissed the application and granted the appellant leave to appeal to the Supreme Court of Appeal (SCA) on the issue of whether or not the second respondent's decision fell to be set aside in the light of a proper interpretation and application of section 7.

The appellant advanced two principal arguments. In the first instance: Section 7 required a local authority to be satisfied that its approval of a building plan did not result in a building that would diminish (derogate from) the value of a neighbouring property. Secondly, the building control officer who had approved the plans had either not applied his mind to derogation of value, or had done so in a superficial manner that fell short of achieving the 'satisfaction' that section 7(1)*(b)*(ii) required of him.

The bite in relation to the doctrine of precedent arose in the context of the first argument. The appellant relied on a dictum in *Paola v Jeeva NO* 2004 (1) SA 396 (SCA), stating that once it was clear that the execution of proposed plans would diminish the value of adjoining property, section 7(1)*(b)*(ii)(aa)(ccc) would prohibit their approval. This dictum had subsequently been quoted with approval by the majority (per Jafta AJ) in paragraph [32] of *Walele*. The appellant also relied on a statement in paragraph [55] of *Walele,* to the effect that any approval of plans facilitating the erection of a building that devalued neighbouring properties was liable to be set aside on review.

Heher JA, Cameron JA, and Scott JA all delivered majority judgments attracting four votes. In his judgment, Heher JA stated:

> 'The dicta in paras 32 and 63 are in my view not supported by an examination of *Paola v Jeeva* and are, with respect, wrong. As I shall attempt to show, however, they were also delivered obiter. Paragraph 55, likewise, I respectfully suggest, contains wrong statements of the law and is also obiter' (para [35]).

Heher JA proceeds to consider the reasoning of the Constitutional Court in *Walele* in relation to the specific dicta relied upon by the appellant, concluding that they were all merely obiter dicta, but adding that they were also wrong in law (paras [36]–[39]). Having rejected the appellant's first submission,

which relied upon *Walele*, Heher JA ultimately dismissed the appeal.

Jafta JA dissented on two grounds.

In the first instance, he held that the interpretation advanced by the majority was based on a literal approach, which defeats the purpose of section 7(1)*(b)*(ii) and does not comply with the obligation imposed on courts by section 39(2) of the Constitution. Secondly, he held (para [64]) that the Supreme Court of Appeal was bound by the Constitutional Court decision in *Walele*.

Secondly, of particular constitutional significance, Jafta JA held that the Supreme Court of Appeal is bound by decisions of the Constitutional Court on constitutional matters even if it considers them wrong:

> 'According to the doctrine of judicial precedent this court is bound to follow decisions of the Constitutional Court on constitutional issues. In particular this court is bound by the interpretation given by the Constitutional Court to section 7(1)*(b)*(ii) in *Walele*, regardless of whether in its view such interpretation is correct or not. For even wrong decisions of the Constitutional Court are binding on this court until they are set aside by that court' (para [80]).

On the facts, Jafta JA found that, in any event, the appellant had not established that the erection of the building concerned had derogated from the value of its property. He would accordingly also have dismissed the appeal.

Cameron JA, who concurred in the judgment of Heher JA, also wrote separately, speaking specifically to the question of precedent. The thrust of Cameron JA's reasoning is that the contentious dicta in *Walele* were not part of the rationes decidendi of the case, but mere obiter dicta, on the basis that —

> '[t]he doctrine [of precedent] obliges courts of equivalent status and those subordinate in the hierarchy to follow only the binding basis of a previous decision. Anything in a judgment that is subsidiary is considered to be 'said along the wayside', or 'stated as part of the journey' (obiter dictum), and is not binding on subsequent courts' (para [101]).

Cameron JA describes Jafta JA's claim that the majority was failing to respect the doctrine of precedent as 'a grave charge' (para [102]). He acknowledged that the Constitutional Court is the highest court in constitutional matters (Constitution section 167(3)*(a)*); and that it is also the final arbiter of whether a matter is a constitutional matter (s 167(3)*(c)*). Accordingly, other courts, including the Supreme Court of Appeal, must follow the binding

basis of its decisions in all cases in which it has assumed jurisdiction (para [102]). Cameron JA concluded:

> 'The views the CC expressed on that point, though persuasive as coming from the highest court in the land on constitutional matters (a jurisdiction exercised in *Walele*), are therefore not automatically binding on other courts, nor on the CC itself, which will be free to reconsider the matter should it arise in that form before it. Presumably, the CC will in such a case have the benefit of the argument the amicus advanced before us, as well as of Heher JA's elucidation of the decision in *Paola v Jeeva*, whose expression seems to me to have been the source of much trouble in both *Walele* and this case.
>
> 'It follows that despite the high authority a considered expression of opinion by the country's highest court in constitutional matters should enjoy, I consider that this court is free, with proper deference to the CC, and with fidelity to the rule of law, to endorse the approach the amicus advocated' (paras [116]–[117]).

Scott JA, who formed part of the majority, also wrote a brief concurrence. He defended what Jafta JA described as the 'literal' interpretation of the relevant provisions and contended that there was nothing constitutionally untoward about such an interpretation. He summed up his reasons:

> 'What my colleague Jafta in effect seeks to do is to rewrite the section so as to impose a heavier burden on applicants in order to favour neighbouring property owners. I can see no justification for this. First, it is contrary to the manifest intention of the legislature; second, there is nothing in the Act to suggest that the purpose of section 7 was anything other than to achieve the result apparent from its ordinary meaning; and, third, there is nothing unconstitutional or contrary to the spirit, purport and object of the Bill of Rights about the section that would justify ignoring its plain meaning' (para [121]).

True Motives skirted against, but managed to avoid confronting directly, an especially controversial constitutional question — whether decisions of the Constitutional Court are binding (on that court, the Supreme Court of Appeal, and other courts) if clearly wrong. The Supreme Court of Appeal managed to avoid answering this question by holding that the problematic dicta in *Walele* were obiter. As Cameron JA noted, the Constitutional Court has been criticised recently for ignoring some of its own recent precedents, a charge that is not without some basis (Cameron JA referred (para [103] n 3) to Warren Freedman 'Constitutional application' (2008) 21 *SA CJ* 134 at 141; and, for general criticism of the court's fidelity to law, to Stu Woolman 'The amazing, vanishing Bill of Rights' (2007) 124 *SA LJ* 762). The time may

come, however, when the Constitutional Court is unable to distinguish a previous decision or the Supreme Court of Appeal cannot hold that Constitutional Court dicta are obiter. When that time comes, it may no longer be possible to avoid the question of the binding force of Constitutional Court decisions on constitutional matters.

Vagueness of legislation; conduct of state attorney in litigating case injurious to rule of law

The Constitutional Court's decision in *South African Liquor Traders' Association & others v Chairperson, Gauteng Liquor Board, & others* 2009 (1) SA 565 (CC) engaged aspects of the rule of law in two ways. In the first instance, the merits of the case concerned a challenge to legislation based on 'vagueness'. Secondly, the manner in which the case had been decided by the High Court, which gave no reasons for its order, and litigated by the respondent MEC (and State Attorney) fell short of what the Constitution requires of the State as a litigant in constitutional challenges to legislation.

The matter arrived at the Constitutional Court as confirmation proceedings. The High Court had declared invalid the definition of 'shebeen' in section 1 of the Gauteng Liquor Act 2 of 2003 on the ground that it was impermissibly vague, and struck down the limitation of the activities of a 'shebeen' to the selling of beer as being ultra vires the legislation. The High Court had ordered that the words 'and is selling less than ten cases . . . of beer' be severed from the definition of a shebeen, which read — 'any unlicensed operation whose main business is liquor and is selling less than ten cases of beer'. The order was granted by consent and no reasons were furnished by the court for its order. Despite repeated directions from the Chief Justice and even a court order requiring him to do so, the third respondent (the MEC), then represented by the State attorney, failed to file an affidavit or written argument in the matter. Only when the MEC changed attorneys did he eventually comply with the court order and file affidavits and argument. The State attorney even failed to appear timeously at the hearing at which the court ordered the MEC to file affidavits and argument despite having been asked to be present by an official from the registrar's office of the Constitutional Court.

O'Regan J, writing for the unanimous court, explained the need for any High Court striking down legislation to give reasons for its order (para [15]):

'No reasons were given by the High Court for its order as it was by

> consent. It is an undesirable practice for a court not to give reasons where an order is made declaring provisions of an Act of Parliament or provincial legislation to be inconsistent with the Constitution. There are two reasons for this: firstly, given the intense separation of powers concerns that arise whenever a court declares an act of a democratic legislature to be inconsistent with the Constitution, the constitutional principle of accountability requires a court to give its reasons for its order, even where that order is unopposed. Secondly, a decision of that sort requires confirmation by this court. In determining whether that order should be confirmed, the reasons of the court that made the original order are often of great assistance. Accordingly, once the applicants approached the Constitutional Court seeking confirmation of this order, this court requested the High Court judge to furnish reasons for his decision, which he did. We are grateful for the assistance.'

On the merits of the impugned provisions, O'Regan J concluded that the problem with the definition of 'shebeen' was that it did not stipulate the period within which the prescribed quantity of beer had to be sold, which rendered it vague; and there was nothing in the rest of the Act that assisted in providing a meaning to the term. The definition was impermissibly vague and hence unconstitutional (paras [26]–[28]). In the absence of a clear legislative purpose, O'Regan J stated that it was impossible to determine what tailored order of invalidity (severance or reading-in) would best serve the purpose of the legislation. It was best to declare the definition to be invalid (para [40]). As a temporary measure, to prevent all shebeens being rendered illegal, the court suspended the order for six months during which period the definition was to be read to permit 60 cases to be sold per week.

Finally, under the heading of costs, O'Regan J addressed the 'dilatory and unhelpful manner in which the MEC and his officials had conducted the litigation both in the High Court and in the Constitutional Court', stating that this was the fault of both the state attorney and the MEC. The MEC's legal advisors had been in possession of many of the documents and failed to take appropriate steps to ensure that the litigation proceeded smoothly and properly, and the MEC was responsible for their conduct (para [47]).

Liquor Traders demonstrates that principles deriving from the rule of law and the principle of legality may impact not only on substantive constitutional challenges to legislation, but also on the manner in which the state litigates those cases and lower courts decide them.

We discuss a second decision about the rule of law's demand

for clarity under the heading 'Presidential power to bring legislation into force' below. The case, *Kruger v President of the Republic of South Africa & others* 2009 (1) SA 417 (CC), questioned whether the President can amend a faulty proclamation bringing legislation into force.

Arrest for ulterior purpose

Sex Worker Education and Advocacy Task Force v Minister of Safety and Security 2009 (6) SA 513 (WCC) ('*SWEAT*') may be seen as a creative litigation strategy to provide palliative relief to sex workers in the wake of the Constitutional Court's refusal, in *S v Jordan (Sex Workers Education and Advocacy Task Force as amici curiae)* 2002 (6) SA 642 (CC), to strike down the law criminalising prostitution.

The applicant non-profit organisation, SWEAT, approached the court for relief aimed at preventing the unlawful and wrongful arrest of sex workers by members of the South African Police Service and the Cape Town City Police. The applicant argued that sex workers were often arrested in violation of the principle of legality, and that the police routinely arrested them for the ulterior purpose of harassing them, rather than for the lawful purpose of having them prosecuted.

Fourie J found that a reading of the affidavits filed by the respondents justified the conclusion that they did not seriously dispute that sex workers were arrested in circumstances where the arrestors knew with a high degree of probability that the arrestees would not be prosecuted (para [7]). The court referred to this practice as a 'revolving door' scenario in terms of which there were no consequences for the unlawful conduct of sex workers after an arrest (para [8]). It emerged that sex workers were invariably detained overnight in police cells after arrest, before being transferred to the magistrates' courts cells where they were held for a few hours and then released (para [13]).

Fourie J confirmed the principle that the purpose or object of an arrest must be to bring the suspect before a court of law to face due prosecution (para [20]). While it was so that police officers were constitutionally obliged to carry out arrests as part of their crime prevention duties, and that the discretion whether or not to prosecute vested with the National Prosecuting Authority, the officer making the arrest was still required to do so with the object of bringing the arrestee under the physical control of the state, so as to enable the prosecuting authority to institute

criminal proceedings if appropriate (para [26]). Even if the arresting officers had wished to have the sex workers prosecuted, they had known with a high degree of probability that this would not happen. Fourie J held that a peace officer who arrested a person while knowing with a high degree of probability that no prosecution would follow, acted unlawfully, even if he or she would have preferred a prosecution (para [27]).

Fourie J held that, given that the cause of action based on ulterior purpose had succeeded, and given that the applicant had, in its replying papers, restricted itself to this cause of action, it was not necessary to consider further the cause of action stemming from a possible violation of the principle of legality (para [33]).

As the principle prohibiting arrests for an ulterior purpose had already been decided by a court of competent jurisdiction, Fourie J declined to issue the declaration of rights the applicant sought in the first paragraph of its notice of motion, explaining that such an order would be 'merely abstract, academic or hypothetical' (paras [44]–[45]).

Fourie J did, however, grant an interdict prohibiting the police from arresting sex workers for a purpose other than to bring the arrestees before a court of law and, 'in particular, arresting sex workers while knowing with a high degree of probability that no prosecution will follow such arrests.' Further, state authorities were ordered to ensure that the police complied with that order.

SWEAT provides a good example of a case in which, where it is not possible to strike down an oppressive law, a litigant may seek instead to prevent its implementation. It will be interesting to observe the extent to which the principle confirmed in *SWEAT* will find application in other contexts, for example in relation to the arrests of groups such as the homeless for the ulterior purpose of clearing the streets of such persons.

Administrative action, jurisdiction of High Court, legality, and political interference

In *Mlokoti v Amathole District Municipality* 2009 (6) SA 354 (E), the applicant unsuccessfully applied for a position as the municipal manager of the Amathole District Municipality. Although Mlokoti had been ranked the best candidate by the selection committee, the Municipal Council appointed one Zenzile instead. Unsatisfied, Mlokoti applied to the High Court for the review of the decision not to appoint him under the Promotion of Administrative

Justice Act 3 of 2000 (PAJA). The decision reinforces important principles of legality.

In the first instance, Mlokoti alleged that the decision had been taken without a vote as required by the relevant legislation. It appeared from the minutes that, although a vote had been called for, it had not been taken. The Council alleged that a vote was not necessary as it was clear that a majority of councillors (the ANC caucus) supported appointing Zenzile. Pickering J held that the failure to hold a vote rendered the appointment a nullity. He emphasised that the Council could only act in accordance with the powers afforded to it. Those powers only permitted it to act after a vote.

Secondly, the Council contended that the decision was in fact an executive decision, not an administrative one. Pickering J rejected this contention. The Council 'cannot seek,' he held, 'merely by attaching the epithet ''political'' to its decision, thereby to evade its obligations in terms of the enabling legislation and its own recruitment policy' (at 377D).

Thirdly, the applicant alleged, based on a confidential letter between the Mayor and the Regional Secretary of the ANC that he had acquired, that the decision had not been taken by the councillors, but by the ANC Regional Executive Committee.

> 'This is not an example of democracy in action. . . , certainly not of constitutional democracy. It . . . amounted to an usurpation of the powers of [the] council by a political body which . . . does not appear even to have had sight of the documents relevant to the selection process. . . In my view, the involvement of the Regional Executive Council of the ANC . . . constituted an unauthorised and unwarranted intervention in the affairs of [the] council. It is clear that the councillors of the ANC supinely abdicated to their political party their responsibility to fill the position of the Municipal Manager with the best qualified and best suited candidate on the basis of qualifications, suitability and with due regard to the provisions of the pertinent employment legislation. . . . This was a responsibility owed to the electorate as a whole and not just to the sectarian interests of their political masters' (at 380A–D).

This intervention, too, invalidated the decision not to appoint Mlokoti. Finally, Pickering J held that it was an appropriate case for him to substitute his judgment for that of the Council. There was no sustainable objective basis not to appoint Mlokoti, so he ordered that Mlokoti be appointed as Municipal Manager.

Mlokoti strongly asserts the importance of legality in administrative action. While not naively ignoring the role that political

parties play in administration, the *Mlokoti* court draws a meaningful line between permissible and impermissible intervention. Government officials may consult with their political parties, but they are always ultimately required to exercise their own discretion. In addition, political considerations can never justify an otherwise unlawful decision or immunise it from judicial review. This is a powerful judgment that properly asserts the rule of law. However, it will normally be all but impossible to prove this type of intervention. It is only because Mlokoti obtained the mayor's letter that the truth was revealed. Normally the councillors could simply assert that they acted for their own reasons, and it would be all but impossible to disprove their assertions in application proceedings.

Co-operative Governance

Powers of municipalities

Wary Holdings v Stalwo (supra) concerned the powers of municipalities, in particular their powers in relation to planning, zoning, and rezoning of land and approval of applications for subdivision.

The first respondent had approached the High Court in 2005 for an order declaring that a contract for the sale of certain agricultural land the first respondent had purchased from the applicant was binding and directing the applicant to transfer the land accordingly. The applicant resisted, arguing that the contract was void because it did not comply with section 3 of the Subdivision of Agricultural Land Act 70 of 1970, which required ministerial consent in writing to the subdivision and sale of agricultural land. The proviso to the definition of agricultural land stated that 'land situated in the area of jurisdiction of a transitional council which immediately prior to the first election of members of the transitional council was classified as agricultural land, shall remain classified as such'.

It was common cause that the land in question was situated in the area of jurisdiction of a transitional council immediately prior to the first election of members of the transitional council. It was further common cause that with the disestablishment of transitional councils the land fell within the jurisdiction of a municipal council. The real issue in dispute was therefore whether the proviso applied only until transitional councils were superseded

by municipal councils or survived beyond that point. The High Court had concluded that the proviso's effects persisted, while the Supreme Court of Appeal disagreed, holding that it applied only during the existence of transitional councils.

The majority of the Constitutional Court, in a judgment by Kroon AJ, agreed with the High Court that the proviso was still operative (paras [61]–[62]). The majority accordingly upheld the appeal and reinstated the order of the High Court. Kroon AJ's reasoning in relation to the interpretation of the statute does not require comment here and is dealt with under 'Interpretation' above. However, his comments in relation to the status and powers of municipalities are of interest:

> 'Taking the reliance of the Supreme Court of Appeal on the enhanced status of present-day municipalities a step further, counsel for the first respondent argued that it was the intention of the legislature that what was formerly 'agricultural land' would now be administered by municipalities inter alia in terms of the still operative municipal ordinances which accord the municipalities various powers including those of planning, zoning and rezoning of land and approval of applications for subdivision.
>
> 'I am not persuaded, however, that the enhanced status of municipalities and the fact that they have such powers is a ground for ascribing to the legislature the intention that national control over ''agricultural land'' through the Agricultural Land Act, effectively be a thing of the past. There is no reason why the two spheres of control cannot co-exist even if they overlap and even if, in respect of the approval of subdivision of 'agricultural land', the one may in effect veto the decision of the other. It should be borne in mind that the one sphere of control operates from a municipal perspective and the other from a national perspective, each having its own constitutional and policy considerations. As adverted to earlier, land, agriculture, food production and environmental considerations are obviously important policy issues on a national level. An interpretation of the Agricultural Land Act that would attribute to the legislature the intention to retain the national government's role in effectively formulating national policy on these and other related issues, and to recognise the need for national policy to play a role in decisions to reduce 'agricultural land' and for consistency in agricultural policy throughout the country, is an interpretation that can and should properly be adopted. That interpretation is the one effectively applied by the High Court' (paras [79]–[80], footnotes omitted).

Kroon AJ's approach, which recognises the potential for the powers of different spheres of government to overlap and interrelate, has much to commend it. Though perhaps less conducive to certainty than a categorical approach preserving the exclusive

domains of each sphere, the reasoning of the majority is more attuned to the letter and spirit of co-operative government envisaged by the Constitution.

The concern of the minority appeared to be one of the proper balance of roles rather than an absolute aversion to such overlapping powers. Yacoob J, for the minority, expressed concern that the effective veto power being conferred on the Minister was 'entirely inappropriate' (para [140]). In addition, in relation to the relative roles and status of different spheres of government in respect of the subdivision of agricultural land, he commented that preserving such a power of the Minister in order to promote agricultural protection 'overstates the importance and competence of the executive head and minimises the role, importance and ability of municipal structures, the provincial legislature as well as the national legislature' (para [139]).

Municipal and provincial powers: town planning and provincial roads

Reflect-All 1025 CC & others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government, & another 2009 (6) SA 391 (CC) concerned the constitutionality of legislation governing the planning of provincial roads. The applicants, landowners in Gauteng province whose property fell within the provincial road network, brought a constitutional challenge to section 10(1) and (3) of the Gauteng Transport Infrastructure Act 8 of 2001 ('the Infrastructure Act').

The impugned provisions allow the provincial authorities to subject route determinations and preliminary designs of provincial roads, which have been approved under the previous regulatory scheme, to the regulatory measures under the Infrastructure Act. All consultations and environmental investigations required by the Act are deemed to have occurred once the Gauteng Member of the Executive Council for Public Transport, Roads and Works ('the MEC') has published the route determination or preliminary design in the *Government Gazette*.

The provisions were challenged on four grounds. The first two attacks related to the constitutional right to property in section 25. First, it was argued that the provisions arbitrarily deprive owners of their property; and, secondly, the applicants contended that they amount to expropriation without compensation. Thirdly, the provisions were attacked on the basis of their alleged inconsistency with the constitutional requirements of co-operative governance. The fourth challenge was based on the right to just

administrative action. The respondents, the MEC, and the Premier for the Province of Gauteng, maintained that the impugned provisions were constitutionally valid.

The South Gauteng High Court declared section 10(3) of the Infrastructure Act invalid and set aside its corresponding Notice 2626 on the basis that section 10(3) arbitrarily deprived property owners of their properties. However, Hutton AJ dismissed the challenge to section 10(1), holding that the restrictions it imposed were not excessive and that such deprivation was not arbitrary (paras [8]–[9]).

The declaration of constitutional invalidity was referred to the Constitutional Court for confirmation. The applicant landowners also sought leave to appeal against the High Court's finding that section 10(1) was constitutionally sound. A majority judgment was penned by Nkabinde J. In the result, the majority declined to confirm the order of constitutional invalidity made in favour of the landowners by the High Court and dismissed their application for leave to appeal. O'Regan J penned a dissenting judgment, although the dissent is not relevant to co-operative governance.

The decision is of interest from a number of perspectives, including the conception of constitutional property protection that emerges from the judgment, arbitrary deprivation, expropriation, and just administrative action, which are discussed in the Chapters on Bill of Rights Jurisprudence and Constitutional Property. For present purposes, we are concerned solely with the implications of the case for co-operative governance.

The applicants complained that the Infrastructure Act constituted an impermissible invasion of municipal authority. Nkabinde J stated that this argument needed to be understood in light of the provisions of the Constitution regulating municipal and provincial powers as well as co-operative governance (para [73]). She traced the contours of the general constitutional scheme relating to the powers of municipalities and their relationship to the other spheres of government, including sections 41(1), 151, 156(4) and (5), and section 157 (para [74]). Turning to the issues before the court, Nkabinde J reasoned (paras [74]–[75]):

> 'The powers of municipalities must be read and understood subject to their competence. Municipalities amend town-planning schemes and approve the establishment of townships not by virtue of their own by-laws, but by virtue of the Town-Planning and Townships Ordinance which is provincial legislation. They have no executive competence with respect to provincial roads. The road network that forms the

> subject of this litigation comprises provincial roads. The Constitution vests authority with regard to municipal planning in the local government.
>
> 'The applicants lost sight of the fact that provincial roads are, in terms of Part A of Schedule 5 to the Constitution, an exclusive provincial sphere of activity in respect of which it has legislative competence. These functional areas (provincial roads and traffic), as they have been included in the Constitution by its drafters, remain under the exclusive provincial sphere until they are assigned to municipalities. There is no indication in the record to suggest that those functional areas have been assigned to the relevant municipalities. In any event, the Infrastructure Act requires the MEC to consult with municipalities whose areas will be affected by route determinations and preliminary designs.'

Nkabinde J accordingly concluded that the Act does not offend the constitutional principles of co-operative governance (para [76]).

Co-operative governance and language policy in schools

According to the Supreme Court of Appeal, *Hoërskool Ermelo & another v Head, Department of Education, Mpumalanga, & others* 2009 (3) SA 422 (SCA), was 'not, as at first blush appears, about language policy at schools, a highly emotive issue in the South African context, but rather about the principle of legality and the proper exercise of administrative power' (para [3]). This introductory comment strikes us as a rather formalistic attempt to avoid the undoubtedly controversial issue underlying the dispute. The case may not have been about the substance of language policy for schools, but it was very much about who gets to determine language policy, which is ultimately the same thing.

A short comment is necessary at the outset to explain our classification of *Ermelo* as addressing co-operative governance. In traditional constitutional lexicon, 'co-operative governance' is understood to involve the relationships between government in the national, provincial and local spheres per se. As noted by Stuart Woolman, Theunis Roux, and Barry Bekink (Co-operative government' in S Woolman et al (eds) *Constitutional Law of South Africa* 2 ed (OS June 2004) 14–1), the Constitution, in sections 40 and 41, 'laid out principles designed to promote co-ordination, rather than competition, between the various tiers of government and organs of state'. However, the co-operative government obligations in section 41 extend to all organs of state. Public schools (and their governing bodies) acting in terms of national legislation would

ordinarily constitute 'organs of state' as defined in section 239 of the Constitution. As we attempt to tease out below, the Supreme Court of Appeal's determination of the dispute was indeed alive to considerations of the appropriate roles and powers of the protagonists in *Ermelo.* So while the case is about language policy for schools (despite the Supreme Court of Appeal's introductory disclaimer), it is also about the relationship between school governing bodies and the Head of Department of Education (representing provincial government).

The active litigants in the matter were, on the one hand, the first appellant, Hoërskool Ermelo ('the school'), a public school as defined in the South African Schools Act 84 of 1996 ('Schools Act') and its governing body, the second appellant, and, on the other hand, the first respondent, the Head of Department of Education in Mpumalanga ('HoD'), and the eighth respondent, the MEC for Education in Mpumalanga.

The school was an Afrikaans-medium high school near Ermelo in Mpumalanga. In 2007, the school was operating at just over half its total capacity. At the same time, all other high schools in the area were teaching above the 35:1 teacher to student ratio recommended by the government. In 2006 and 2007, the HoD repeatedly asked the school to reconsider its language policy to admit some English students. Although the school provided space, but not tuition, to some English students in a converted laundry, it refused to alter its language policy. Two days before the 2007 school year started, the HoD informed the school that it had to accommodate 113 English learners who could not be accommodated in other schools. The school refused. Two weeks later the HoD wrote to the school informing it that, in terms of sections 22 and 25 of the Schools Act it was relieving the school's governing body of the power to determine language policy and assigning it to a new interim committee (para [11]). Several days later, the new committee adopted a new policy, making the school a parallel English and Afrikaans school (para [12]). On the same day, the school went to court to have the power to determine language policy returned to the governing body.

A full bench of the High Court followed the Supreme Court of Appeal's interpretation of sections 22 and 25 in *Minister of Education, Western Cape v Governing Body, Mikro Primary School* 2006 (1) SA 1 (SCA). Section 22 allows the HoD to remove *any* of the governing body's functions (including the right to determine its language policy) where the governing body acts

unreasonably, and section 25 permits the HoD to appoint others to take over those functions. It held that the school had acted unreasonably in failing to review its language policy and accordingly rejected the application.

On appeal, the Supreme Court of Appeal rejected its earlier holding in *Mikro* (para [27]). It concluded that section 22 applied only to a limited list of functions set out in section 21; a list that did not include determining language policy (paras [21]–[22]). It held that the power to determine language policy vests exclusively in the governing body. In addition, the court concluded that the HoD had in any event acted procedurally unfairly in removing the power from the school and assigning it to the interim committee (para [31]).

Although the Supreme Court of Appeal does not articulate its reasons within an express 'co-operative governance' framework, such thinking, addressing the appropriate division of roles and powers as between the governing body and the HoD, appears from the following dictum (para [21]):

> 'Language is a sensitive issue. Great care is taken in the Act to establish a governing body that is representative of the community served by a school and to allocate to it the function of determining the language policy. The Act authorises only the governing body to determine the language policy of an existing school, and nobody else. As nobody else is empowered to exercise that function, it is inconceivable that section 22 was intended to give the head of department the power to withdraw that function, albeit on reasonable grounds, and appoint somebody else to perform it, without saying so explicitly.'

We agree that the manner in which the HoD exercised his statutory powers was inappropriate. However, the court's winner-take-all approach in *Ermelo* (as in *Mikro*, though with the opposite outcome) does not adopt the spirit of co-operative governance that the Constitution envisages. A collaborative, co-operative approach is particularly important where issues of such sensitivity as school language policy arise. Section 41(1)*(h)* of the Constitution enjoins all organs of state to —

> 'co-operate with one another in mutual trust and good faith by —
> (i) fostering friendly relations;
> (ii) assisting and supporting one another;
> (iii) informing one another of, and consulting one another on, matters of common interest;
> (iv) co-ordinating their actions and legislation with one another;
> (v) adhering to agreed procedures; and
> (vi) avoiding legal proceedings against one another.'

In addition, section 41(3) provides that an organ of state involved in an intergovernmental dispute must make every reasonable effort to settle the dispute by means of mechanisms and procedures provided for that purpose, and must exhaust all other remedies before it approaches a court to resolve the dispute. In our view, the conduct of the dispute and litigation in *Ermelo* falls short of this standard.

In a decision not reported in the year under review, the Constitutional Court upheld the Supreme Court of Appeal's decision, but for substantially different reasons that are far more compatible with the principles of co-operative government (*Head of Department: Mpumalanga Department of Education & another v Hoërskool Ermelo & another* 2010 (2) SA 415 (CC)).

Separation of Powers

Preventing the consideration of a bill

In *Glenister v President of the Republic of South Africa & others* 2009 (1) SA 287 (CC), the Constitutional Court dealt with a challenge to two bills ('the Bills') that proposed to move the Directorate of Special Operations (DSO) (better known as the Scorpions) from the National Prosecuting Authority (NPA) to the South African Police Service (SAPS). The Bills had been referred by Cabinet to Parliament. The applicant, a concerned businessman, approached the High Court for an order declaring Cabinet's decision to refer the Bills invalid and interdicting Parliament from moving the Bills forward in the legislative process. The High Court held that it did not have jurisdiction to hear the complaint. The applicant appealed to the Constitutional Court and made a concurrent application for direct access.

Langa CJ, writing for a unanimous court, repeated the principle of the separation of powers that the court had developed in several earlier cases, particularly in *Doctors for Life International v Speaker of the National Assembly & others* 2006 (6) SA 416 (CC). Describing the separation of powers as a 'system of checks and balances', the Chief Justice held that its purpose is 'to ensure that each branch of government performs its constitutionally allocated function and that it does so consistently with the Constitution' (para [35]). He continued:

> 'In our constitutional democracy, the courts are the ultimate guardians of the Constitution. They not only have the right to intervene in order to

prevent the violation of the Constitution, they also have the duty to do so. It is in the performance of this role that courts are more likely to confront the question of whether to venture into the domain of other branches of government and the extent of such intervention. It is a necessary component of the doctrine of separation of powers that courts have a constitutional obligation to ensure that the exercise of power by other branches of government occurs within constitutional bounds. But even in these circumstances, courts must observe the limits of their powers' (para [33], footnote omitted).

Having laid the basic framework, the court usefully laid out the specific questions for decision in this case (para [36]):

'(i) can courts ever intervene at this stage of the legislative process;
'(ii) if the answer to (i) is ''yes'', what are the circumstances that would warrant intervention; and
'(iii) are these circumstances present in this case?'

While noting that 'the Constitution is replete with provisions that make it plain that ordinarily a court will not interfere with the functioning of Parliament (para [39]), Langa CJ declined to answer (i). He assumed, for the sake of argument, that the court could intervene. The Chief Justice did, however, provide a fairly specific answer to (ii): a test for when a court can intervene before Parliament considers legislation:

'Intervention would only be appropriate if an applicant can show that there would be no effective remedy available to him or her once the legislative process is complete, as the unlawful conduct will have achieved its object in the course of the process. The applicant must show that the resultant harm will be material and irreversible' (para [44], footnotes omitted).

This test strikes the appropriate balance between the court's duty 'to ensure that all branches of government act within the law' and the equally important judicial obligation 'to refrain from interfering with the autonomy of the legislature and the executive in the legislative process' (para [42]). He stressed that this test was a 'formidable burden' (para [44]), and that cases justifying intervention would be 'extremely rare' (para [47]). He did not, however, give any examples of situations that might meet that standard.

The court then had to decide whether this case met the high hurdle it had set.

In the first instance, it was argued that if the applicant had to wait until the legislation had been passed to challenge it, the DSO would already have been abolished, making it impossible to obtain effective relief. The applicant pointed out that staff were

already leaving the DSO out of fear that it would be moved to the SAPS. This argument, Langa CJ held, was 'premised on the assumption that the legislation will be enacted without material change' (para [51]). It is impermissible for a court to operate on that assumption: 'Until the content of the legislation has been determined by Parliament, the effect of the legislation cannot be determined' (para [51]).

Secondly, the United Democratic Movement (UDM), supporting the application, argued that Cabinet had violated its constitutional obligation by blindly performing the will of the ruling party. The court rejected this proposal as well. '[T]here is nothing wrong,' the Chief Justice wrote, 'in our multi-party democracy, with Cabinet seeking to give effect to the policy of the ruling party' (para [54]). Cabinet may not violate the Constitution in doing so, but that could always be ensured by constitutional review after the legislation was passed. But, the UDM countered, the separation of powers was dynamic and should be adapted to take account of the dominance of the African National Congress (ANC) and the resultant marginalisation of Parliament. The court refused to consider this possibility, concluding that it would amount to the court 'assum[ing] powers that are not conferred upon it' (para [55]).

Thirdly, the Centre for Constitutional Rights (admitted as amicus curiae) argued that it would be inconsistent with the constitutional protection of the independence of the NPA to remove the DSO. Without deciding whether that allegation was sound, Langa CJ held, again, that this argument made the impermissible assumption that the legislation would not change before passage. Like Cabinet, Parliament has a duty not to enact unconstitutional legislation and '[i]t would be institutionally inappropriate for this court to intervene in the process of law-making on the assumption that Parliament would not observe its constitutional obligations' (para [56]).

Read strictly, *Glenister* is a very narrow case. It does not decide whether it is possible for courts to intervene. The standard it sets, although clear, is currently hypothetical. It is also difficult to determine what circumstances might justify intervention, as the court explicitly refuses to provide examples. All we know for sure is that, if intervention is permissible at all, it would not be permissible in this case.

However, it is difficult not to read more into the case.

In the first instance, this is the second time that the court has refused finally to decide whether courts can intervene at this

stage of the legislative process but endorsed the same test. (The court reached the same point in *Doctors for Life*.) There are two ways to read the court's reluctance to take a stand: it could be that there is disagreement within the court about whether intervention is ever permissible, or it could also be that the court is simply being cautious and the repeated yet tentative approval of the same test indicates that it is actually supported.

Secondly, the court's finding that 'there is nothing wrong, in our multi-party democracy, with Cabinet seeking to give effect to the policy of the ruling party' (para [54]) is extremely interesting. We generally support this finding but it needs to be read carefully. Cabinet must be able to give effect to the *policy* of the ruling party in order to implement the will of the electorate. However, it is a more difficult question whether Cabinet can try to give effect to the non-policy interests of the ruling party. Would it, for example, be permissible for Cabinet to introduce legislation designed to ensure that one of its members was not subject to criminal sanction? Or to settle a grudge against an institution that is not related to underlying policy concerns? *Glenister* does not decide this question as the court decided the issue on the basis that abolishing the DSO was a policy goal, not naked self-interest. In most cases, it will be easy to cloak self interest with defendable policy concerns. However, when there is evidence that Cabinet acts solely in the interest of the ruling party or its members, there is an argument in favour of court intervention. The High Court in *Mlokoti v Amathole District Municipality* (supra) was confronted with such evidence and held that it violates the legality principle for government officials to act solely on the instructions of their party, without applying their minds to the issue. Whether that principle (which we support) should be extended to the extremely sensitive issue of Cabinet introducing legislation is a different question.

Confirming flawed declaration of invalidity

As we discussed in more detail under 'Constitutional Litigation' above, in *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development* (supra), the Constitutional Court had to consider whether it could confirm a decision by the High Court to declare provisions of a bill invalid.

The majority held that the Constitution made clear that only the Constitutional Court had jurisdiction to consider the constitutionality of bills and even then only in the very limited circumstances

contemplated in section 79(4). The High Court accordingly lacked the requisite jurisdiction to consider these sections, even if they had arisen on the facts. However, the bill had since been enacted and the court held that, in order to avoid uncertainty, it was in the interests of justice for it to consider whether those decisions should be confirmed.

Skweyiya J implicitly, and correctly, criticises the court for assuming jurisdiction to consider sections that were still in bill form. If the High Court lacked jurisdiction because the legislation was still in bill form, then so, too, did the Constitutional Court. Even though the legislation had become an Act by the time it came before the Constitutional Court, as the majority itself noted, 'the crucial time for determining jurisdiction is when the court raises the issue' (para [56]). The court cannot afford itself jurisdiction that the Constitution does not confer, even if it is in the interests of justice. Skweyiya J quoted an earlier decision of the court to make this point: 'This court concluded that ''on a proper reading of the Constitution, *no court* may, save as provided in [sections] 79 and 121, consider the constitutionality of a Bill before the National Assembly or a provincial legislature''' (para [230], quoting *President of the Republic of South Africa v United Democratic Movement (African Christian Democratic Party Intervening; Institute for Democracy in South Africa as amici curiae)* 2003 (1) SA 472 (CC) para [26]).

Reconciliation

Legal consequences of amnesty

Du Toit v Minister of Safety and Security & another 2009 (1) SA 176 (SCA) most directly concerns the demand for reconciliation. Du Toit was employed in a high-ranking post in the South African Police Service (SAPS). In June 1996, he was convicted of the politically-motivated murder of the 'Motherwell Four'. As a result of the operation of section 36 of the South African Police Service Act 68 of 1995 ('SAPS Act'), that conviction cost him his job. Du Toit applied for amnesty in terms of the Promotion of National Unity and Reconciliation Act 34 of 1995 ('Reconciliation Act'). While he was waiting for the outcome of his amnesty application, Du Toit wrote to the National Commissioner of the SAPS asking if, presuming his application was successful, he would, in terms of section 20(10) of the Reconciliation Act, be re-instated. The Commissioner responded positively. Although the Truth and

Reconciliation Commission refused his application, on review to the High Court, he was granted amnesty. However, when Du Toit informed the SAPS, they refused to re-instate him. He sued the SAPS to get his job back but lost in the High Court. He appealed to the Supreme Court of Appeal.

Streicher JA wrote for a unanimous bench that dismissed the appeal. Du Toit raised three grounds on which he believed he was entitled to re-instatement.

In the first instance, he pointed to the following language in section 20(1): 'the conviction shall for all purposes, including the application of any Act of Parliament or any other law, be deemed not to have taken place'. He argued that the section should act retrospectively to undo his dismissal. Streicher JA applied the interpretative presumption against retrospectivity to reject this submission. More interestingly, he held that section 20(1) was 'not enacted to make the existing legal position more equitable or to avoid harsh results . . . but in order to promote national unity and reconciliation' (para [14]). Du Toit was not wronged by his conviction and dismissal, and reinstating him 'can therefore make no contribution to the object of the Act namely, to achieve reconciliation' (para [15]). He also noted that accepting Du Toit's argument would 'affect many other contracts and statutory relationships to the potential detriment of people who had not committed any wrong' (para [16]).

Secondly, Du Toit argued that section 36 of the SAPS Act required that he be re- instated if his conviction was set aside on 'appeal or review'. Du Toit submitted that being granted amnesty was equivalent to appeal or review. Streicher JA disagreed:

> 'Appeal and review proceedings are judicial proceedings whereas amnesty proceedings are administrative in nature. In the case of an appeal or review a conviction is set aside by reason of the fact that the accused should not have been convicted. . . . When amnesty is granted the conviction is deemed not to have taken place but that is not because the accused should not have been convicted. It is, as stated above, in order to achieve a future objective' (para [19]).

Thirdly, Du Toit argued that the letter from the National Commissioner was a contract to reinstate him. The Supreme Court of Appeal rejected this contention as the National Commissioner was merely expressing his opinion on the law, not offering re-employment. His interpretation of the law was wrong, so the letter had no effect.

The Constitutional Court largely confirmed Streicher JA's analysis (*Du Toit v Minister for Safety and Security & another* (CCT91/

08) [2009] ZACC 22 (18 August 2009)). The decision was not reported this year so we do not discuss it here. We merely note that the Constitutional Court placed more emphasis on striking an equilibrium between offering amnesty to entice offenders to tell their stories, and affording some justice to the victims. Allowing Du Toit's reinstatement would tip the balance too far in favour of the offender.

Review of decision to refuse amnesty

In *Simelane v Minister of Justice and Constitutional Development* 2009 (5) SA 485 (C), the Cape High Court considered an application for review of the Truth and Reconciliation Commission's (TRC) refusal to grant amnesty to Simelane. As the High Court put it, Simelane 'was an attorney by day and an [Azanian People's Liberation Army (APLA)] operative who directed military, political and intelligence operations against the apartheid government by night' (para [7]). Simelane established a dummy corporation to fund APLA activities. He received R50 000 as payment for a client's motor vehicle accident claim, which, instead of passing onto the client, he deposited in the account of the dummy corporation to fund APLA. His activities were later investigated by the Natal Law Society, which struck him off the attorney's roll for, amongst other infractions, the R50 000 fraud. A warrant for his arrest was also issued.

When the TRC was established, Simelane applied for amnesty for both a pending criminal prosecution and civil liability. The Amnesty Committee refused the application, in part as it did not fully understand the application, but also as it did not see any political component to the original application. Although it asked Simelane for further details, it did not wait for his response before rejecting his application. Simelane then brought an application to have the decision reviewed.

Ndita J held that, as there was an explicit statutory source for the court's review power, she was entitled to review the decision *de novo*. She then easily concluded that the Committee had not applied its mind to the application. The Committee had understood the political element as flowing from his membership of the ANC and the motivations of the investigating officers, not his intention to use the R50 000 to fund APLA. On her reading of the documents, Ndita J did not see this as a plausible reading and concluded that it was accordingly irrational and invalid. Even if the application was unclear or incomplete, the enabling statute

empowered the Committee to seek further information. They should have used that provision to fill in any gaps in the application, rather than dismissing it.

The failure to conduct further investigation rendered the decision invalid for an additional reason. Section 19(2) of the Promotion of National Unity and Reconciliation Act 34 of 1995 required that the committee 'shall investigate' applications for amnesty. The failure to wait for further information was a failure to fulfil a 'necessary substantive requirement for fair procedure in accordance with the principle of administrative justice' (para [30]). Simelane also argued that, as he had been granted indemnity from prosecution under the Indemnity Act 35 of 1990, he was entitled to amnesty under the Amnesty Act. Ndita J wisely rejected this submission: 'Had the legislature intended that persons who had been indemnified from prosecution in respect of any offences be automatically considered as having been granted amnesty, then it would have inserted a provision to that effect' (para [34]).

Lastly, the court considered whether, having set the decision aside, it should itself grant Simelane amnesty. While acknowledging that she had the power to do so, Ndita J stressed the general principle that courts should not replace invalid decisions with their own. This applies even where there is an explicit statutory power of review. In those cases, whether a court should impose its own decision depends primarily on the statute in question. In the present case, Ndita J held, the Amnesty Act required the grant of amnesty to lie in the hands of the specially created committee, and the 'legislature did not intend that questions of amnesty should lie exclusively in the hands of a judge' (para [43]).

Although there may be few, if any, other unconcluded amnesty applications, *Simelane* makes two important points for any that remain — it is an investigative process, and it should be left to the amnesty committees.

Political pardons outside the TRC process

While *Du Toit* concerned the effects of amnesty, and *Simelane* discussed the review of a decision to refuse amnesty, the next case considered ongoing applications for political pardons outside the TRC process (*Minister for Justice and Constitutional Development v Chonco & others* 2009 (6) SA 1 (SCA)). In 2003, Chonco and 383 other members of the Inkatha Freedom Party

(IFP) who had been imprisoned for what they alleged were political crimes applied to the President for pardons in terms of section 84(2)*(j)* of the Constitution. They had refused to take part in the TRC process because the IFP did not support it. Six years later, despite numerous requests, speeches by IFP officials in and out of Parliament, and a complaint to the South African Human Rights Commission, the President had not taken a decision. In 2005, the President stated that he had urged the Minister of Justice and Constitutional Development (the Minister) to speed up the processing of the applications. Believing that the problem lay with the Minster, Chonco and the other prisoners applied to the High Court for an order forcing the Minister to process the applications so that the President could take a decision.

This decision explicitly concerns the relationship between the President and the other members of Cabinet. We discuss it in full under the heading 'Executive Powers' below. Here we note that although the official amnesty process may be over, the question of how to deal with political criminals remains a live and contentious issue. Moreover, as appears from the judgment, the government has devised a specific procedure to deal with political pardon applications' (para [17]). The case also indicates the difficulty of dealing with what are effectively amnesty applications without the resources, influence and clear principles established in the TRC process. The delay is the clearest example of the deficiencies of an unstructured process. But even after the President began considering the issues, there was a further delay as he waited for the Constitutional Court to decide whether victims had a right to be heard in the pardon applications.

Victims' right to be heard in parole hearings

Derby-Lewis v Minister of Correctional Services 2009 (6) SA 205 (GNP) concerned the rights of victims to be heard before parole is granted. That is, in itself, a question that touches on reconciliation broadly understood. However, it also fits with our discussion of the reconciliation and amnesty process because the applicant was serving a life sentence for the murder of Chris Hani (his amnesty application had failed). The parole board had recommended that he be placed on parole after having served fifteen years of his sentence. Despite the recommendation, he was not placed on parole, primarily because the National Council for Correctional Services required the parole board to enquire

from the deceased's widow whether she wished to make representations regarding the applicant's placement on parole or whether she wished to attend a meeting of the board to give verbal inputs regarding his placement on parole. Derby-Lewis approached the High Court for orders declaring various sections of the Correctional Services Act 111 of 1998 to be unconstitutional and invalid, and for an order placing him on parole. Three issues arose in the application: *(a)* whether the court was statutorily empowered to place the applicant on parole; *(b)* whether the deceased's widow had a right to make recommendations to the parole board regarding the placement of the applicant on parole; and *(c)* whether the court should place the applicant on parole.

Van der Merwe J delivered the judgment of the North Gauteng High Court. The judge ultimately answered questions *(a)* and *(b)* in the negative, holding that the court was not statutorily empowered to place the applicant on parole, but that even if it was so authorised, it would not be appropriate to do so.

More interesting from a constitutional perspective, however, is the court's finding in relation to question *(b)* — the right of a victim to make representations before parole is granted.

Van der Merwe J held that section 42, read with section 75, of the Correctional Services Act 111 of 1998 requires the Parole Board to consider and make its decision to place a prisoner on parole based on a report compiled and 'in the light of any other information or argument', which must include information that may come from a relative (at 217–18). The court reasoned:

> 'Before a prisoner can be placed on parole, all possible relevant information should be considered. One cannot argue, as . . . [Derby-Lewis] now does, that [Mrs Hani's] representations will be of a political nature and nothing else. Any person, including [Derby Lewis], may put relevant information before a Board. It is the duty of that Board to weigh and consider all information placed before it and to exclude information that may be irrelevant' (at 218B–C).

The court accordingly upheld the argument that Chris Hani's widow had a right to make representations before Derby-Lewis' parole application could be granted. The finding that the views of victims must be heard in parole applications must be read with the Constitutional Court's recent decision that victims also have a right to be heard when the President is considering an application for pardon (*Albutt v Centre for the Study of Violence and Reconciliation & others* [2010] ZACC 4 (23 February 2010).

Executive Powers

The content and extent of the powers of the national executive were meaningfully expanded this year. *Kruger v President of the Republic of South Africa & others* 2009 (1) SA 417 (CC) fully sets out the mechanics of the President's power to bring statutes into force at a later date. The President's powers of pardon under section 84(2)*(j)* were discussed by the Supreme Court of Appeal in *Minister for Justice and Constitutional Development v Chonco* (supra). Last, we discuss an important case about reviewing decisions of the National Director of Public Prosecutions.

Presidential power to bring legislation into force

In *Kruger v President of the Republic of South Africa & others* 2009 (1) SA 417 (CC) the Constitutional Court was confronted with an unusual, perhaps unique, situation. Still, the case raises important issues about the nature of the President's powers to bring legislation into force, and the court's powers to review those decisions. Acting in terms of section 13 of the Road Accident Fund Amendment Act 19 of 2005 ('the Amendment Act'), the President issued a proclamation ('the First Proclamation') bringing into effect certain sections of the Amendment Act that altered the Road Accident Fund Act 56 of 1996 ('the Principal Act'). The sections would come into force on the 31 July 2006. Unfortunately, he mistakenly named the wrong sections. He meant to bring into force sections 1–5 of the Amendment Act, but instead listed sections 4, 6, 10, 11, and 12 of the Amendment Act (actually, the sections of the Principal Act that sections 1–5 would amend). On 29 July 2006, before the sections actually came into force, the President realised his error and attempted to remedy it through a new proclamation ('the Second Proclamation') which purported to amend the First Proclamation so that it referred to the correct sections. However, the Second Proclamation was published only on 31 July 2006.

An attorney involved in personal injury law challenged the constitutionality of the First Proclamation, on the ground that it was irrational. The High Court upheld the claim on the basis that the President could not have the power to amend a proclamation bringing an Act into force. Granting the President such a power would, the court concluded, permit him

> 'the power to revoke by proclamation any Act that he or his predecessors have previously brought into operation by publishing a proclamation to that effect in the *Gazette*. . . . Such a regime will simply be

> government by decree which is the antithesis of the Rule of Law which is one of the cornerstones of our Constitution.'

The case went to the Constitutional Court for confirmation.

By the time the Constitutional Court heard the matter, the validity of the Second Proclamation had also been raised through an application for direct access by the Road Accident Fund. Skweyiya J, writing for the majority, held, first, that the First Proclamation was irrational — it included a random selection of sections which, if enacted, would create serious practical problems (paras [50]–[54]).

Next, Skweyiya J considered whether the Second Proclamation, which enacted the correct sections, was valid. In his view, while the President's power to bring legislation into force must be construed narrowly, it necessarily implies the power to withdraw an erroneous proclamation, provided it is done before the original proclamation takes effect (para [61]). The President is *not* required to approach a court to declare an erroneous proclamation invalid. The dangers the High Court alluded to could arise only if the President can amend or withdraw proclamations after they come into force. However, the President cannot amend a proclamation that was invalid from its inception: 'The President cannot have the power to amend a nullity' (para [64]). The solution is to accompany a withdrawal with a new proclamation. The court recognised that this approach may put form above substance, but held that 'the principle that substance should take precedence over form . . . must yield in appropriate cases to the rule of law' (para [62]). (For more on the constitutional demand for clarity, see the discussion of *South African Liquor Traders' Association v Chairperson, Gauteng Liquor Board* (supra)). The court emphasised the importance of clarity in exercising public power:

> 'Two of the values on which our country is founded are the supremacy of the Constitution and the rule of law. It follows from this that when executive officials are required by law to publish in proclamations decisions taken by them in terms of legislation, and where such decisions will have legal consequences, they should be communicated in clear language so that those who are affected can know what it is that they should do in order to comply with the law. The public should not have to depend on lawyers to interpret the meaning and import of words in proclamations in order for them to know whether a particular piece of legislation passed by Parliament has taken effect' (paras [65]–[66], footnotes omitted).

Without strict adherence to form, it would be unclear which laws

are in force, which obviously violates the rule of law. In this case, the Second Proclamation was invalid because it purported merely to amend the First Proclamation, not withdraw and replace it. Also, it made sense only when read with the First Proclamation. So the Second Proclamation lacked sufficient clarity and was invalid. The court's innovative remedy to deal with the potential chaos caused by this decision is discussed under 'Remedies' below.

We generally agree with the court that, in the context of bringing legislation into force, clarity is the most important virtue and procedure must, when necessary, trump substance. In the spirit of technical nitpicking, we have one small addition to the court's reasoning. The court seems to be saying that a withdrawal is always possible, even if the original amendment was invalid. This cannot, technically, be true, as one cannot withdraw something that does not exist. However, in many cases it may be unclear to the President whether the proclamation was invalid or not and a withdrawal provides the certainty that, even if the proclamation was originally valid, it no longer is. If the proclamation was originally invalid, the withdrawal does nothing but remove doubt.

In dissent, Jafta AJ argued that, when read together, the two proclamations clearly reflected the President's intention to bring sections 1–5 of the Amendment Act into force.

In the first instance, he found that the First Proclamation was only partly invalid. It correctly brought section 4 into force and that rational action was severable from the irrational act of bringing sections 6, 10, 11, and 12 into effect. The majority's counter here was that it made no sense to bring section 4 into effect without also enacting sections 1, 2, 3, and 5. There are two overlapping concerns here. On the one hand, the question is whether the decision to bring section 4 into effect was rational. In our view, Jafta AJ is technically correct. The standard test for rationality is whether the action serves a legitimate government purpose. The reality that it could have been better achieved is irrelevant. It would have made far more sense to enact sections 1–5 together, but enacting section 4 alone still partially achieves the goal without any negative effects. However, the traditional rationality test must be understood in light of the important principles of certainty that the majority sets out. Just as the possibility of amendment without withdrawal violates the certainty principle, the idea that parts of a proclamation can be valid while

others are invalid violates the certainty principle. There will always be disagreement and doubt about whether part of the proclamation is irrational and, if so, whether it is severable. In the interest of avoiding any ambiguity about whether a law is in force, we would support the majority's finding on the First Proclamation.

Secondly, the dissent held that the error in *Kruger* was purely clerical: what the President intended to do was rational, but the proclamation was incorrectly drafted and did not properly reflect the President's rational intention. 'It cannot be argued', Jafta AJ wrote,

> 'that the President lacks the power to correct proclamations drafted in a manner that does not correctly reflect his decision. To hold otherwise would defeat the very purpose for which the power was conferred on the President' (para [110]).

The Second Proclamation was therefore a valid amendment of the First Proclamation.

While there is something alluring about Jafta AJ's approach, it cannot be supported, for the same reason that his conclusion on section 4 is wrong: however much sense it makes in theory to distinguish between actual intention and its expression, in the context of enacting legislation, the need for publicity and certainty require that courts always assume that proclamations actually reflect the President's intention. Only the withdrawal and re-proclamation process endorsed by the majority ensures the necessary level of certainty. Any problems that declarations of invalidity may cause can be (as they were in *Kruger*) fully dealt with at the remedial stage.

Presidential pardons

We gave the background to *Minister for Justice and Constitutional Development v Chonco* (supra) under the heading 'Reconciliation' above. We now discuss the details of the Supreme Court of Appeal's decision as it relates to the exercise of presidential powers.

To recapitulate, the applicants complained about the long delay in deciding their applications for pardon. The High Court granted their application. The primary question was whether Chonco and the other applicants were correct to sue the Minister, or whether they should have sought relief against the President. Both were parties in the High Court, but no relief was sought against the President. Seriti J acknowledged that the ultimate

power to grant the pardon rested with the President, not the Minister, but the practice was for the Minister to process the applications (*Chonco & others v Minister of Justice and Constitutional Development & another* 2008 (4) SA 478 (T)). That was a lawful arrangement and the applicant could accordingly force the Minister to do her part. The Minister was ordered to do everything necessary to allow the President to decide whether to grant pardons within three months. The Minister appealed to the Supreme Court of Appeal (the President was not a party). The court unanimously upheld the High Court's decision. Farlam JA held that it was permissible for the President to assign the preliminary investigation to the Minister and that the Minister could be forced to perform the tasks assigned to him:

> 'The fact that the President performs Head of State functions in terms of section 84(2) of the Constitution in pardoning offenders does not mean that executive functions are not performed beforehand. It is not implied in the Constitution that the President himself or through the office of the Presidency must perform all preparatory steps before the power to decide whether to grant a pardon or not is exercised. These steps (which may be called preliminary executive functions because they are steps required for laying the foundation for the ultimate decision to be made by the President) by clear implication fall within the ambit of the normal executive functions conferred by the Constitution on the executive and are therefore covered by section 85(2)*(e)* of the Constitution' (para [42]).

In a decision not reported in the year under review, the Constitutional Court reversed the Supreme Court of Appeal outcome (*Minister for Justice and Constitutional Development v Chonco & others* 2010 (1) SACR 325 (CC)). Without going into detail, the court held that while it was lawful for the President to co-opt the Minister to help him with the preliminary steps, the ultimate obligation to consider the pardons always lay solely with the President as Head of State. Chonco had to fail because the President had not been named in the litigation. Moreover, the complaint concerned a 'constitutional obligation of the President' in terms of section 167(4)*(e)* of the Constitution, and so could be heard only by the Constitutional Court. Although the prisoners made an application for direct access to the Constitutional Court to challenge the President's decision, the case was withdrawn at the hearing when the President revealed that he had considered 230 applications and the remaining 146 would be considered as soon as the Constitutional Court decided whether the victims were entitled to make representations (*Albutt v Centre for the*

Study of Violence and Reconciliation & others [2010] ZACC 4 (23 February 2010)). The Constitutional Court has since decided in *Albutt*: it held that victims do have a right to be heard.

Treaty-making powers

Two important questions about executive and legislative roles in treaty-making also arose this year: *(a)* the power of the national executive to enter into international agreements, and *(b)* how international agreements become domestic law. That decision (*President of the Republic of South Africa v Quagliani*, *and Two Similar Cases* 2009 (2) SA 466 (CC)) is discussed in the chapter on International Law.

Prosecutorial independence

In *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA), the Supreme Court of Appeal took issue with some of Nicholson J's findings on the nature of prosecutorial independence. The case, as we discuss more fully below (under the heading 'Judiciary') concerned an attempt to overturn the decision to prosecute Jacob Zuma. The Constitution includes both a demand for prosecutorial independence but also requires that the Minister of Justice exercise 'final responsibility' over the National Prosecuting Authority (NPA). Harms DP held that while these provisions may appear to be in conflict, they could be read together: 'although the Minister may not instruct the NPA to prosecute or to decline to prosecute or to terminate a pending prosecution, the Minister is entitled to be kept informed in respect of all prosecutions initiated or to be initiated which might arouse public interest or involve important aspects of legal or prosecutorial authority' (para [32]).

Nicholson J's holding that 'there should be no relationship [between the NPA and] the Minister of Justice' (which informed some of his 'conspiracy theories') was too strict. There could indeed be some relationship, but the 'NPA must not be led by political considerations and . . . ministerial responsibility over the NPA does not imply a right to interfere with a decision to prosecute' (para [37]).

In addition, the Supreme Court of Appeal repeated the obvious fact that, contrary to the High Court's finding, prosecutorial decisions are not administrative action subject to review. Moreover,

> 'the motive behind the prosecution is irrelevant because, as Schreiner JA said in connection with arrests, the best motive does not cure an

otherwise illegal arrest and the worst motive does not render an otherwise legal arrest illegal. The same applies to prosecutions' (para [37], footnotes omitted).

Section 179(5)*(d)* of the Constitution: *Zuma* is more than merely a tongue-lashing; it also considers the substance of the High Court decision. Section 179(5)*(d)* states that the National Director of Public Prosecutions (NDPP) may review a decision to prosecute or not to prosecute, after consulting the relevant Director of Public Prosecutions and after taking representations, within a period specified by the NDPP, from the following: the accused, the complainant, or 'any other person or party whom the National Director considers to be relevant'.

The High Court held that section 179(5)*(d)* required the NDPP to hear representations when reviewing his own decisions and/or the decision of the Director of Special Operations (DSO).

Harms DP rejected this interpretation. He held that the section is an 'apex' provision that does not require the NDPP to invite representations when re-considering his own decisions. Specifically, he rejected the argument that section 179(5)*(d)* is designed to ensure the equal treatment of all accused:

'The underlying purpose of the provision is not to protect the accused or the complainant: it is to define the procedure for the exercise of the power of control of the NDPP. It would be strange to find such an important right, which is not known in comparable jurisdictions or in our common law, in a chapter of the Constitution that deals basically with structures concerned with the administration of justice and not rights. The Bill of Rights deals in great detail with the rights of accused persons, and is silent about the right to be invited to make representations concerning prosecutorial decisions' (para [67]).

Harms DP also rejected the argument that section 179(5)*(d)* applied to the DSO. The DSO is not a Director of Public Prosecutions but a deputy National Director of Public Prosecutions. Moreover, the fact that the decision to prosecute Zuma was taken by the NDPP together with the DSO did not mean that the decision was not still the NDPP's. The Supreme Court of Appeal is correct to reverse the High Court's strained reading of section 179(5)*(d)*.

Legislative Powers

Challenges to procedural flaws in the legislative process

President of the Republic of South Africa v Quagliani, and Two Similar Cases 2009 (2) SA 466 (CC) concerned the validity of

South Africa's extradition agreement with the United States. One of the arguments raised by the applicants was that the delegates to the National Council of Provinces had not been properly mandated to vote on the ratification of the agreement.

The court did not determine the issue but dismissed it for three inter-related reasons.

In the first instance, the applicants had failed to join the representatives of the provinces who would have been able to explain what happened.

Secondly, the applicants had unduly delayed in bringing the application. In *Doctors for Life International v Speaker of the National Assembly & others* 2006 (6) SA 419 (CC), the Constitutional Court held that challenges to procedural deficiencies in the legislative process had to be brought timeously. Sachs J held that legislatures 'should be allowed a margin of appreciation in deciding on and implementing their procedures', and that, in order to ensure 'procedural finality', late challenges to the legislative process should only be allowed in 'very exceptional circumstances' (para [30]).

Thirdly, there was no evidence of a procedural irregularity, merely a 'bald allegation'. According to the court,

> '[t]he regular functioning of government would be unduly disrupted if courts could be called upon (on a purely speculative basis) to enquire at any stage into the regularity of completed legislative processes. Absent evidence to the contrary, a strong presumption must accordingly exist that the legislature followed constitutionally-mandated procedures in performing its functions' (para [31]).

The court held that '[e]ach of these preliminary factors on its own could have justified barring the applicants' from raising the argument (para [32]).

The court was, in our view, correct to refuse to consider the mandate argument. However, we are slightly uncomfortable with the second reason. We agree that there should be a general requirement that procedural challenges must be brought timeously. Still, it seems unreasonable to expect someone to challenge a law at the time it is enacted when they have no reason to believe the law will have an impact on their lives. The need to retain some certainty should be balanced against the need to ensure correct procedures are followed and that people are able to challenge the validity of laws that affect them. We would suggest that perhaps the ordinary rule on prescription should be followed: the stopwatch should only start running from the time a person should have been aware of the

procedural flaw. This will ordinarily occur when a person comes into conflict with a law. The potential consequences of declaring invalid laws that were long considered valid merely for a procedural flaw, can be dealt with by suspended orders of invalidity (to give the legislature a chance to re-enact the law) and orders limiting the retrospective effect of the declaration of invalidity (to ensure that acts taken in accordance with the law remain valid).

Legislative conflict; national and provincial legislative competence

Corrans v MEC for the Department of Sport, Recreation, Arts and Culture, Eastern Cape 2009 (5) SA 512 (ECG) concerned an application in terms of the PAJA for an order reviewing and setting aside the decision of the Provincial Heritage Resources Authority, Eastern Cape (PHRA), not to approve the applicant's application, in terms of section 34(1) of the National Heritage Resources Act 25 of 1999 ('the National Act'), for permission to demolish a building of historical interest. The PHRA had granted its permission for only a partial demolition, and only on certain conditions. The applicant advanced two main grounds of review — an attack based on legislative competence under the Constitution, and a rationality attack under PAJA. The first argument alone is of interest here.

The applicant argued that the PHRA was not authorised by the empowering legislation either to consider or to refuse her application because, from the date of commencement of the Eastern Cape Heritage Resources Act 9 of 2003 ('the Provincial Act'), which established a new authority to make such determinations (Amafa Ethu, the third respondent), the PHRA had lacked the competence to consider her application, and its decision could accordingly be reviewed in terms of section 6(2)*(a)*(i) of the PAJA (para [9]). Essentially, the applicant argued that the Provincial Act was in conflict with the National Act; that this was not a matter in respect of which the national legislation would prevail in terms of section 146(2)*(a)* or *(b)*; and that the Provincial Act accordingly prevailed in terms of section 146(5) of the Constitution (para [14]).

Part A of schedule 4 to the Constitution lists cultural matters as a functional area of concurrent national and provincial competence. Although this is not explicitly stated, the reasoning of the court assumes the following propositions: heritage resources fall within the functional area of 'culture' listed in part A of schedule 4 of the Constitution; the National Act and the Provincial Act are

accordingly both competent; and the National Act and the Provincial Act create different authorities (PHRAs and Amafa Ethu, respectively) with the power to perform exactly the same function. So the National Act and the Provincial Act conflict.

On the basis of these unarticulated premises, Chetty J proceeded to determine how this legislative conflict ought to be resolved. He examined the text of the National Act, including its long title, preamble, and operative provisions, and described the Act as 'provid[ing] a system for management of national heritage resources, which is of national application' (para [15]). Chetty J referred to section 146(2)*(b)* of the Constitution, in terms of which national legislation that provides uniformity by establishing norms, standards, frameworks, or national policies prevails over conflicting provincial legislation. Chetty J held that it was clear from not only the introduction to the National Act which, inter alia, vested a provincial heritage authority with limited powers in respect of certain categories of heritage resources, but from the entire structure of the National Act that it took precedence over the Provincial Act (para [15]).

Chetty J concluded that the ground of review premised on section 6(2)*(a)*(i) of the PAJA could not be sustained (para [17]). Ultimately, the judge held that judicial intervention in the decision reached by the PHRA's permit and appeal committee was not warranted and dismissed the application.

Chetty J's conclusion regarding the conflict between the National Act and the Provincial Act may, ultimately, be correct. However, apart from the bulleted silent propositions necessary for the conclusion that we mention above, Chetty J based his conclusion (that section 146(2)*(b)* applied) solely on an analysis of the provisions of the National Act. The Provincial Act ought also to have been closely considered, first, to confirm that the perceived legislative conflict is real, and, secondly, to decide which Act prevailed. Chetty J also failed to ask whether, in addition to establishing norms, standards, frameworks, or national policies — which the National Act clearly does do — heritage sites constitute a 'matter that, to be dealt with effectively, requires uniformity across the nation'. This is the second requirement of section 146(2)*(b)*. It is not self-evident that heritage matters may only be dealt with effectively if there is uniformity across the nation. Indeed, strong arguments could be made for allowing those closest — physically and culturally — to objects important to their heritage to determine their fate.

Judiciary

There were two important decisions about the role of the judiciary in society today, both of which revolve around the now-aborted prosecution of Jacob Zuma. The first concerns the furore created by the Constitutional Court's allegation that Hlophe JP interfered with the Constitutional Court's decision on the validity of the search warrants against Zuma. Secondly, we discuss the Supreme Court of Appeal's angry reversal of Nicholson J's decision to drop charges against Zuma, in part, because of political meddling. An important lesson to draw from these cases is how politics (in the dirty, power-grabbing sense) can infiltrate the judiciary. In both cases, the High Court made decisions seemingly favourable to political powers; and in both cases the Supreme Court of Appeal strongly rebuked the High Court for overstepping its role. We are not alleging that the High Court judges were acting with political considerations in mind, but that the intense attention that these high-profile cases generate can cloud the judgment of judges.

Judicial misconduct; complaints to Judicial Service Commission

Hlophe v Constitutional Court (WLD 25 September 2008 (case no 08/22932) unreported) arose out of a domestically unprecedented situation in which the judges of the Constitutional Court lodged a complaint with the Judicial Service Commission (JSC) against the Judge President of the Cape Provincial Division ('Hlophe'). The complaint alleged that Hlophe had attempted to influence judges of the Constitutional Court in the two matters involving Jacob Zuma and French arms company, Thint. In addition to lodging the JSC complaint, and shortly thereafter, the judges published a media statement alerting the public to their complaint. Hlophe subsequently lodged a counter-complaint, alleging that the Constitutional Court and/or the judges of that court had violated his constitutional rights when lodging their complaint. While these complaints were pending before the JSC, Hlophe launched an urgent application in the Johannesburg High Court for wide-ranging relief.

The High Court upheld parts of Hlophe's application, but its decision was resoundingly overturned on appeal by the Supreme Court of Appeal. We discuss both the High Court and appeal decisions here. We consider the High Court decision in some detail, not merely for posterity or because of its obvious political undercurrents, but because the appeal decision was narrowly

tailored and so avoided some of the interesting and novel issues that the High Court addressed.

Recognising the sensitivity of the matter, the High Court sat as a bench of five judges. Hlophe's initial application was in two parts. In Part A, he sought to interdict the JSC from proceeding with the complaint against him pending the determination of his High Court application. However, the JSC furnished an undertaking not to do so and accordingly Part A was not pursued at the hearing. In Part B, Hlophe sought a declarator that the Constitutional Court had itself violated its judicial authority. He further sought orders that the publication of a media statement by the judges of the Constitutional Court containing untested allegations of gross misconduct against him was unlawful and violated his rights to dignity, privacy, a fair hearing, equality, and access to courts. He further sought an order declaring that the decision to lodge a complaint against him with the JSC was unlawful and incompetent. In the alternative, in the event that the High Court was unable to deal with the relief sought, Hlophe prayed for an order referring the matter to the Constitutional Court on an urgent basis and on the basis of direct appeal.

Mojapelo DJP (Moshidi and Mathopo JJ concurring) delivered the majority judgment. He rejected the argument that the Constitutional Court had violated its judicial authority and also declined to make an order that the decision to lodge a complaint against Hlophe with the JSC had been unlawful and incompetent. However, Mojapelo DJP made declaratory orders that the publication of the allegations against Hlophe was unlawful, that the publication of those allegations in the media violated his right to dignity and his right to be heard prior to such publication, and that the decision of the Constitutional Court judges to lodge a complaint with the JSC on the basis of ex parte representations by some Constitutional Court judges violated Hlophe's right to equality (para [110]).

Gildenhuys J and Marais J filed separate dissenting judgments. Both would have dismissed the entire application.

Gildenhuys J gave two main reasons for his decision.

In the first instance, he held that Hlophe did not demonstrate a direct legal interest in the declaratory relief sought, as his only possible interests could be to foreshadow a damages claim or to interrupt the JSC complaints process, but Hlophe had not invoked either interest.

Secondly, Gildenhuys J held that, for a number of reasons, it would not be appropriate for the court to exercise its discretion to

grant declaratory relief. These included that public policy required Hlophe's counter-complaint to be adjudicated by the JSC (para [36]); Hlophe elected to lodge his counter-complaint with the JSC and had therefore chosen his forum (paras [42]–[44]); a declaratory order might usurp the functions of the JSC (paras [45]–[46]); declaratory orders should not be granted as a prelude to a damages claim (paras [47]–[49]); the orders sought did not fit the framework of the common law (paras [50]–[56]); and that unfair treatment by itself does not warrant any of the declaratory orders sought (paras [57]–[58]). As to the argument that the Constitutional Court had violated its judicial authority, Gildenhuys J held that the question whether the judges had acted as a court was a factual question that should properly be determined by the JSC after hearing evidence (paras [59]–[62]).

Marais J agreed with the reasons advanced by Gildenhuys J. In addition, however, Marais J wrote separately, in particular to emphasise the special constitutional role of the JSC and to state that granting the declaratory relief sought would inappropriately enter the terrain of the JSC.

The right to be heard before the decision to lodge a complaint of judicial misconduct is taken: Mojapelo DJP noted in his judgment that the complaint against Hlophe initially originated from only two judges of the Constitutional Court — Jaftha AJ and Nkabinde J. Mojapelo DJP found on the facts that it appeared that these two judges were initially unwilling to lodge a complaint or make a statement (para [35]). Mojapelo DJP found that on 29 May 2008, in conference, the judges of the Constitutional Court made the decision to lodge a complaint and issue a media statement (para [37]). Mojapelo DJP held that it made all the difference in this matter that the complaint and statement were issued by all the judges, and not merely Jaftha AJ and Nkabinde J, holding on this basis that 'therefore, the rest of the respondents were under an obligation to afford the applicant a hearing before acting on allegations of improper conduct against him' (para [42]). He held further that this obligation was even heavier in respect of the Chief Justice and Deputy Chief Justice, by virtue of their positions of authority (para [43]).

On the facts, Mojapelo DJP conceded that the sequence of events was that the Chief Justice informed Hlophe that a complaint was to be lodged against him and forwarded a copy of the complaint to him, then a complaint was faxed to the JSC and,

finally, a media statement with wording that was substantially identical to that of the complaint was issued. However, Mojapelo DJP held that the 'speed and lack of detail' in this process violated Hlophe's right to dignity (para [48]).

In our view, the construction adopted by Mojapelo DJP in terms of which two of the judges of the Constitutional Court placed facts before the other judges, who, according to Mojapelo DJP, were acting as decision-makers rather than complainants, appears artificial. It also fails to take into account that, although Hlophe's alleged approaches were made to only two judges, they were allegedly intended to influence the outcome of cases in which all the remaining judges were sitting. As such, in our view the judges were acting as complainants in lodging a complaint, and it does not seem appropriate ordinarily to require complainants to afford a hearing before laying a complaint. The situation may be different, however, if a member of the public approaches a Judge President, for example, to make allegations about a judge in that division. In that situation, a hearing may be appropriate before the Judge President takes a decision whether to lay a complaint with the JSC because the Judge President acts as something of an arbiter in relation to the complaint from the member of the public.

The publication of allegations of judicial misconduct: Mojapelo DJP held that the judges of the Constitutional Court 'possibly had a right to decide to go public about the complaint', but that in making this decision they 'had to act in a manner that ensured a delicate balance between the right of the public to know and the inevitable result that the publication itself may result in the corrosion of public confidence in the judiciary' (para [49]). He ultimately concluded that this 'balance was lost in the speed and haste with which the matter was handled and the lack of sufficient averment of factual details of what [Hlophe] allegedly did' (ibid).

In our view, this analysis by Mojapelo DJP fails to take into account a critical perspective on the alleged conduct of Hlophe. The judges of the Constitutional Court complained to the JSC, and issued a media statement alleging that Hlophe had attempted to influence two judges in pending cases before the court. Accordingly, in making its decision to publish the allegations, the Constitutional Court judges were not merely weighing the public's general 'right to know' against Hlophe's interests. A further set of interests was engaged — the interests of the litigants in the pending proceedings. Where events take place

behind closed doors which, if later discovered by the litigants in pending litigation and the public, would give rise to a perception of bias on the part of the court, there may often be a compelling interest in the affected court disclosing those events of its own accord.

In the Constitutional Court decision in *Thint (Pty) Ltd v National Director of Public Prosecutions & others; Zuma v National Director of Public Prosecutions & others* 2009 (1) SA 1 (CC), which was decided before the High Court decision in *Hlophe*, Langa CJ expressly addressed this concern. He recounted the background to the complaint lodged with the JSC by the judges of the Constitutional Court and indicated that the court in the *Thint/Zuma* matter invited the submissions of the parties in that matter regarding any concerns that they may have had arising out of the allegation that Hlophe had attempted to influence the decision in the matter (para [5]). None of the parties expressed any concerns in relation to the fairness of the proceedings. Langa CJ then confirmed that the alleged approaches by Hlophe had not inappropriately influenced the court in any way (para [6]).

In our view, it was necessary for the allegations against Hlophe to be published at the earliest opportunity — the public's confidence in the integrity of the judiciary, and the confidence of the litigants in the *Zuma* and *Thint* matters in the fairness of those proceedings, may have been severely compromised if the news of the alleged attempt had been leaked to the media before the court had an opportunity to allay fears that it had succeeded.

The impact of the court's order on the JSC process: Mojapelo DJP was at pains to distinguish the relief sought by Hlophe from the High Court from that sought in the JSC. In the High Court, Mojapelo DJP held, Hlophe was asking for a judicial declaration that his rights had been violated; in the JSC, he requested a finding of judicial misconduct against the judges of the Constitutional Court. Mojapelo DJP noted that the JSC had exclusive jurisdiction in relation to the latter (para [98]). He went on to state that it is theoretically possible for the JSC to consider whether misconduct was committed without having to consider whether the conduct violated constitutional rights (para [105]).

Significantly, however, Mojapelo DJP acknowledged that the JSC would be bound by the High Court's judgment unless it were to be overturned on appeal (ibid). In our view, it is hard to conceive of judicial conduct that violates a constitutional right but does not amount, at all, to misconduct. Whether the misconduct

is impeachable is a different question, of course, but the consequence of Mojapelo DJP's finding is to impose upon the JSC, even before the commencement of its complaints process, a set of binding conclusions that certain of Hlophe's rights were violated, based only on the limited affidavit evidence placed before the court on an urgent basis.

The main thrust of the dissenting judgment of Marais J is that the High Court ought not too readily intrude into the terrain of judicial ethics, an area for which the JSC bears the primary constitutional responsibility. In addition to the JSC's greater expertise in this area (para [35]), Marais J noted that the JSC is far better placed to resolve disputes of fact, as it is able to conduct a proper hearing, whereas the High Court is limited to the papers (para [33]). We agree.

The decision of the Supreme Court of Appeal: Rightly dissatisfied with the High Court decision, the Constitutional Court judges appealed to the Supreme Court of Appeal. A unanimous bench of the Supreme Court of Appeal, unusually constituted as a bench of nine judges, overturned that decision, concluding that Hlophe was not entitled to any relief (*Langa CJ & others v Hlophe* 2009 (4) SA 382 (SCA)). The court explained the unusual composition of the panel: 'As a rule this court sits as a panel of either three or five judges but in view of the importance of the matter, and taking into consideration the request of the appellants, in which the respondent acquiesced, it was directed that the matter be heard by a larger panel' (para [3]).

The Supreme Court of Appeal appears to have been at pains to decide the case as narrowly as possible, steering well clear of the political controversies that underlie the matter. We consider its conclusions on the two core issues in the case: whether Hlophe had a right to be heard by the Constitutional Court judges before they laid their complaint, and whether it was lawful to publicise the complaint.

The court characterised the argument of Hlophe on the audi alteram partem issue to assert that 'judges are obliged at all times, by the nature of the office that they hold, to act judicially when deciding matters that relate to that office, which includes an obligation to observe the rules of natural justice when making such decisions' (para [41]). The court rejected this argument for two main reasons. In the first instance, the court held that any such duties imposed on judges by the Constitution are 'not imposed upon a judge for the protection of the personal interests

of other judges but for the protection of the institution in the interests of the public at large', and that Hlophe was asserting his personal interests, not those of the public at large (para [43]). Secondly, the court held, the duties in question are ethical, not legally enforceable, obligations, which fall within the domain of the JSC, not the courts, to uphold (para [44]). The second reason is more persuasive than the first.

In argument before the Supreme Court of Appeal, counsel for Hlophe sought to locate a legally enforceable duty in the judicial oath of office and/or the general duty of judges to uphold the dignity of the courts. In our view, the Supreme Court of Appeal correctly rejected this argument. The audi alteram partem principle now finds its constitutional home primarily in certain provisions of the Bill of Rights, most notably the criminal fair trial right, in section 25, and the rights to just administrative action and access to courts, in sections 33 and 34, respectively. If these provisions do not confer a right to be heard on a judge in Hlophe's position, then, absent an explicit embodiment of such a right elsewhere in the Constitution in the context of judicial misconduct, it appears, in our view, to be interpretively implausible to assert the existence of such a right in the Constitution.

The SCA then turned to the question of the lawfulness of publishing the complaint. The High Court had concluded that, in the light of the failure to afford Hlophe a hearing before laying the complaint, the Constitutional Court judges had acted unlawfully in publishing the complaint. The Supreme Court of Appeal made short shrift of this argument, holding that once it was found that the appellants did not act unlawfully in laying the complaint, there could be no basis for finding that they were obliged to keep it secret (para [50]). Indeed, the court commented that there was much to be said for the contrary proposition — that the constitutional imperative of transparency *required* the publication of the complaint (ibid). After noting that it was not appropriate to attempt to ascertain the truth of the allegations against Hlophe on the papers, the court reasoned (para [54]):

> 'The fallacy of the finding [of the High Court] that the appellants had failed to strike a balance between the right of the public to know and the need to maintain public confidence in the judiciary is that the court would seem to have considered the truth or untruth of the defamatory allegation to be irrelevant. Disclosure of an allegation of gross misconduct against a judge may in certain circumstances not be for the public benefit but that could hardly be the case if the allegation is true. If the respondent in fact approached the two Justices in an

> attempt to influence their judgment it would have been to the public benefit that that fact be made known. The fact that the respondent is a judge does not give him special rights or special protection. Judges are ordinary citizens. What applies to others applies to them.'

The court concluded that the remedy available to a judge in Hlophe's position, should the allegations turn out not to be true, is to sue for defamation (para [55]).

Hlophe subsequently sought leave to appeal to the Constitutional Court, which created a unique dilemma because of the obvious interest of its judges in the matter. However, he withdrew the application before it could be heard.

Overstepping the judicial role

The Supreme Court of Appeal harshly rebuked Nicholson J for the way in which he decided Jacob Zuma's application to have the decision to prosecute him set aside (*National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA)).

Zuma argued that the decision was invalid because *(a)* the NDPP had not, as required by section 179(5)*(d)* of the Constitution, consulted him before deciding to charge him; and *(b)* he had a legitimate expectation that he would be consulted.

Nicholson J found in Zuma's favour, but also supported the idea that Zuma was the subject of a political conspiracy at the hands of Thabo Mbeki. As a direct consequence, Mbeki was recalled as President of the country by the African National Congress and replaced with Kgalema Mothlante. This was the context in which the Supreme Court of Appeal's decision was made.

Harms DP began by noting that the judgment had to take account of that context: 'It would be naïve to pretend that we are oblivious to the fact that Nicholson J's judgment has had far-reaching political consequences and that there may be an attempt to employ this judgment to score political points' (para [8]). Nicholson J, Harms DP's view,

> 'changed the rules of the game, took his eyes off the ball and red-carded not only players but also spectators. Lest his judgment be considered authoritative it will be necessary to deal with these matters' (para [13]).

The heart of the critique was that the High Court had considered political allegations that were not relevant to the causes of action pleaded by Zuma. Specifically, Harms DP criticised Nicholson J for, amongst others, the following findings: *(a)*

recommending a commission of inquiry into the arms deal as 'those personal sentiments concerning a political decision were, in the context of the judgment, unwarranted' (para [17]); *(b)* considering Mbeki's decision to dismiss Zuma and run for a third term as ANC president, stating that these were 'purely political questions and . . . whether or not one agrees with the learned judge's sentiments is of no consequence: the findings were gratuitous' (para [18]); *(c)* discussing whether the decision not to afford Zuma a hearing was politically motivated. This was irrelevant, because, 'as a matter of law, [Zuma was] either entitled to a hearing or he was not. If he was entitled to one, the reason for the failure to afford him one is completely immaterial' (para [23]). Also, Nicholson J did not apply the proper rules for motion proceedings; *(d)* alleging that the decision by Pikoli to prosecute Zuma was political was merely 'part of the judge's own conspiracy theory' and 'incomprehensible' (para [44]); and *(e)* at various points, Nicholson J relied on newspaper articles that were annexed to Zuma's paper as fact.

Harms DP summed up his dissatisfaction:

> 'It 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 [High 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'. . . . 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' (para [15], footnote omitted).

The Supreme Court of Appeal's criticism, though harsh, was warranted. Nicholson J's judgment clearly went beyond the permissible bounds of judicial investigation. However, the Supreme Court of Appeal's description of the judicial role as 'to adjudicate the issues between the parties to the litigation and not extraneous issues' (para [19]) could be misinterpreted. The idea of courts as purely neutral arbiters who, in Chief Justice John Roberts' (in)famous phrase, merely 'call balls and strikes' is, in the constitutional era, true but incomplete. The Constitutional

Court has made it clear that under certain circumstances, courts have a duty to consider constitutional issues not raised by the parties (*Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development* (supra)), to fashion new remedies not requested by the parties (*Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC)), to provide remedies when there is no constitutional violation (*Head of Department: Mpumalanga Department of Education & another v Hoërskool Ermelo & another* 2010 (2) SA 415 (CC)), and to decide moot cases (*AAA Investments (Proprietary) Limited v Micro Finance Regulatory Council & another* 2007 (1) SA 343 (CC)). These all go beyond the purely neutral judge who simply decides isolated disputes between parties. They demand a judiciary that is actively engaged in promoting the vision of the Constitution. So, while we agree with the Supreme Court of Appeal that courts must not decide 'extraneous issues' and should never engage in the kind of speculation Nicholson J conducted, this should not deter judges from considering the constitutional nature and implications of the cases before them, even when the parties do not.

Traditional Leaders

Shilubana v Nwamitwa 2009 (2) SA 66 (CC) is the latest milestone judgment in the constitutional life of customary law, building on the earlier decisions in *Alexkor Ltd v Richtersveld Community* 2004 (5) SA 460 (CC) and *Bhe v Magistrate, Khayelitsha (Commission for Gender Equality as amicus curiae); Shibi v Sithole; South African Human Rights Commission v President of the Republic of South Africa* 2005 (1) SA 580 (CC). In *Richtersveld*, the Constitutional Court recognised the place of customary law as 'an integral part of our law' and 'an independent source of norms within the legal system' (*Richtersveld* para [51]). In *Bhe*, the court struck down the customary law rule of male primogeniture in intestate succession, and replaced it with an interim constitutional concoction, which blended the Intestate Succession Act with the customary law rule permitting polygamy. Now, in *Shilubana*, the court considered the authority of a traditional community to develop its own customs and traditions to promote gender equality in the succession to traditional leadership positions. Van der Westhuizen J delivered the court's unanimous judgment.

The facts of the matter are somewhat unusual, involving the self-conscious invocation of constitutional norms by traditional

authorities in the development of customary law. In 1968 Ms Shilubana's father, Hosi Fofoza Nwamitwa ('Hosi Fofoza'), died without a male heir. At the time, customary law did not permit a woman to become chief or 'Hosi'. So Ms Shilubana did not succeed him as Hosi although she was his eldest child. Hosi Fofoza was instead succeeded by his brother, Richard Nwamitwa ('Hosi Richard'). During 1996 and 1997, the traditional authorities of the Valoyi community passed resolutions, supported by Hosi Richard, deciding that Ms Shilubana would succeed Hosi Richard, as in the new constitutional era women were equal to men (paras [4]–[5]). Her succession was approved by the provincial government.

However, following the death of Hosi Richard in 2001, Mr Nwamitwa (Hosi Richard's son) applied to the Pretoria High Court seeking a declarator that he, and not Ms Shilubana, was the heir to the Valoyi chieftainship, and seeking an order directing that the third to sixth applicants withdraw the letters of appointment issued to Ms Shilubana and instead issue such letters to him.

The High Court (per Swart J), had found that prior to the adoption of the interim Constitution, a woman could not be appointed Head of the Valoyi (*Nwamitwa v Phillia* 2005 (3) SA 536 (T)). Swart J found further that Hosi Richard had validly been appointed Hosi in 1968 (para [21]). There was no precedent in custom or tradition, Swart J held, for the chieftainship to be transferred from the line of a Hosi to another line, 'particularly by appointing a female' (para [22]). Swart J described the community's decision to appoint Ms Shilubana as 'a bout of constitutional fervour' (ibid). However, Swart J held that Ms Shilubana's appointment was not in accordance with the practice and custom of the Valoyi (para [23]). He emphasised that she was not ineligible because of her gender, but because of her lineage. Had Hosi Fofoza died after 1994, Ms Shilubana may have been entitled to succeed before Hosi Richard. However, Hosi Richard had lawfully succeeded Hosi Fofoza, and he had died with an eligible heir, Mr Nyamitwa. There was no basis to shift the chieftainship from one family line to another in those circumstances.

The Supreme Court of Appeal upheld the decision of the High Court for substantially the same reasons and dismissed Ms Shilubana's appeal (*Shilubana v Nyamitwa (Commission for Gender Equality as amicus curiae)* 2007 (2) SA 432 (SCA)). She accordingly sought leave to appeal to the Constitutional Court.

Van der Westhuizen J held that the proper approach to determining a particular customary law norm involves a three-stage approach: in the first instance, the court must consider the traditions of the community concerned; secondly, the court must respect the right of the community to develop its customary law; and, thirdly, the court must be cognisant of the value of legal certainty and the need to protect vested rights and weigh these in the balance with the importance of flexibility and development.

In applying the first factor, the traditions of the community, Van der Westhuizen J emphasised that the court must consider the community's past practice in its own setting, not in terms of a common law paradigm, and must be cautious of historical records (para [44]). As concerns the second factor, he noted that the right of communities under section 211(2) of the Constitution includes the right of traditional authorities to amend and repeal their customs, and that customary law is a 'constantly evolving' system: courts must establish the 'living customary law', though this may not be easy (paras [45]–[46]). The third factor involves a 'balancing act' in which '[t]he need for flexibility and the imperative to facilitate development must be balanced against the value of legal certainty, respect for vested rights, and the protection of constitutional rights' (para [47]).

Van der Westhuizen J added that, while the development of customary law by traditional authorities is distinct from its development by the courts, a court engaged in the adjudication of a customary law matter must remain mindful of its obligations to develop the customary law to promote the spirit, purport and objects of the Bill of Rights in terms of section 39(2) (para [48]).

Van der Westhuizen J noted that the traditional common-law test for the existence of custom as a source of law is set out in *Van Breda v Jacobs* 1921 AD 330 at 334, in which it was held that, to be recognised as law, a practice must be certain, uniformly observed over a long period of time, and reasonable. Van der Westhuizen J held, however, that the legal status of customary law norms cannot depend simply on their having been consistently applied in the past, as that test would by definition exclude any new development. Therefore, the *Van Breda* test cannot be applied to customary law (para [56]). While past practice is relevant, it is not decisive in the application of the three-factor test developed by Van der Westhuizen J (ibid).

Mr Nwamitwa had argued that, as the eldest son of the previous Hosi, he was entitled to succeed, and the traditional

authorities had no power to appoint someone other than the heir as Hosi.

Van der Westhuizen J considered the evidence of the past practice of the Valoyi. Ultimately, he could not conclude, on the facts, that the existing customary law of the Valoyi, without development, permitted the appointment of Ms Shilubana (para [66]).

He proceeded to consider whether the traditional authorities had the power to develop the law as they had purported to do. He noted that the traditional authorities' power is the 'high water mark' of any power within the traditional community on matters of succession (para [72]). Accordingly, if the High Court was correct that the traditional authorities did not have the power to develop the customary law of succession of the Valoyi to bring it into line with the Constitution, then nobody in the community would have such a power.

This consequence, according to Van der Westhuizen J, would be inconsistent with the Constitution. Section 211(2) of the Constitution provides for the right of traditional authorities to function according to their own system of customary law. A community must, therefore, have the power to bring its customs into line with the Constitution (para [73]). So if it were true that the traditional authorities had no power to develop their customary law to make it conform to the Constitution, the court must develop their power in terms of section 39(2) to confer such a power on them (para [75]).

Van der Westhuizen J proceeded to consider whether, applying the third factor — the 'balancing act' — of the test described above, the court should recognise the particular development as law. He found that the development would neither unduly undermine legal certainty nor impact on any vested rights of Mr Nwamitwa (paras [76]–[78]). While the development and Ms Shilubana's installation would leave unanswered some questions relating to future succession to the position of Hosi, he found that the customary law would inevitably be interpreted, applied and, if necessary, developed by the community or by the courts to answer these questions (para [81]). Accordingly, Van der Westhuizen J held that there was no consideration that precluded the court from giving effect to the development of the law by the Valoyi traditional authorities (para [83]).

Van der Westhuizen J thus concluded that the High Court and the Supreme Court of Appeal had erred in finding that the

traditional authorities lacked the power to develop their customary law of succession and appoint Ms Shilubana (para [85]). Accordingly, the High Court ought to have dismissed Mr Nyamitwa's application. Van der Westhuizen J made orders setting aside the orders of the High Court and the Supreme Court of Appeal, and dismissed the application for a declarator (para [94]).

Shilubana thus stands as a powerful affirmation of the authority of traditional authorities to develop their own customary law, in particular to bring it into line with constitutional norms. Its application by the courts to purported developments of customary law that might be regarded as inconsistent with other constitutional norms, in particular the right to equality, however, remains to be seen.

Remedies

Remedies are a vital concern, and there were some important decisions this year about the reach and limits of courts' remedial powers. Although many of these cases have been discussed in the chapter on Bill of Rights Jurisprudence, the remedial issues are not relevant only to Bill of Rights challenges but to all constitutional issues. There are two separate remedial provisions in the Constitution — section 38 and section 172. Section 38 only applies to Bill of Rights' challenges, whereas section 172 applies to all constitutional claims. However, the Constitutional Court has never drawn a real distinction between its powers under the two sections. Under both sections courts have wide discretion to define an 'appropriate' remedy (s 38) that is 'just and equitable' (s 172).

Limits of judicial remedial power

Three decisions this year consider the limits of what courts can and cannot do in mandating constitutional compliance.

In the first instance, in *Thint v National Director of Public Prosecutions* supra, the Constitutional Court made some important comments about preservation orders. A preservation order permits the court to hold documents seized under an unlawful warrant so that the trial judge can decide whether, under section 35(5) of the Constitution, they can nevertheless be admitted as evidence. As the *Zuma* court held that the warrants in question were all valid, these comments are obiter. The court addressed

the issue because of the disagreement in the Supreme Court of Appeal.

The Supreme Court of Appeal had split on this issue in *National Director of Public Prosecutions & another v Mahomed* [2008] 1 All SA 181 (SCA). Farlam and Cloete JJA approved preservation orders; Nugent and Mlambo JJA would permit only very limited orders; and Ponnan JA opposed any preservation orders. Those opposing the preservation order saw it as a deviation from the ordinary position (return of the seized items) and held that it would impermissibly deny a remedy for a violation of the right to privacy. In Ponnan JA's words:

> 'The Bill of Rights must not be reduced to a code that the State may abide in its discretion. The Constitution requires more; it demands a remedy for a violation. That remedy, one would have thought, is well-settled. But, says the State in this case, there now exists a constitutional injunction to reconsider existing remedies and to re-fashion them in accordance with the spirit of our new constitutional order. To my mind, there is a fallacy in that approach. It is this: Out of a remedy available to someone wronged by a rights violation, the wrongdoer seeks to fashion for itself a right that it otherwise would not have had. That can hardly be authorised by our Constitution' (para [39]).

Langa CJ, writing for the Constitutional Court majority (Ngcobo J did not address the issue (para [383])) held not only that preservation orders are permissible, but that the 'ordinary rule should be that when a court finds a . . . warrant to be unlawful, it will preserve the evidence so that the trial court can apply its section 35(5) discretion to the question of whether the evidence should be admitted or not' (para [223]). Preservation orders should not be granted only for serious violations of the right to privacy. The Chief Justice held that this finding was not in conflict with the general rule that 'a victim of a constitutional violation is entitled to effective relief' (para [224]). When exercising its discretion to devise a remedy, 'a court must also take into account other relevant circumstances, including the interests of others and the public interest, which in turn includes the public interest in the prosecution of serious crime' (para [224], footnotes omitted).

In our view, the court is correct on this specific issue, but its holding should be carefully construed. Section 35(5) clearly contemplates that some evidence that is gathered in violation of a person's rights may still be admitted. The preservation order is a temporary violation of privacy that properly reserves that

decision for the trial court. In addition, we agree with the court that it is proper to consider other factors in devising a remedy. However, the court must always provide a remedy. Other factors may influence what remedy the court provides, but they cannot override the requirement to afford some form of relief for a constitutional violation (see M Bishop 'Remedies' in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (2008) § 9.2 *(b)*).

Secondly, if *Zuma* seems to widen the powers of courts to fashion appropriate remedies while allowing some violations to go largely unanswered, *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development* (supra) sends almost the opposite message: it narrows some powers but encourages courts to act even where no violation has been proven. The Constitutional Court considered the wide-ranging order of a High Court that took it on itself to ensure the proper treatment of child witnesses in criminal cases. The High Court had made various declarations of invalidity which the Constitutional Court overturned because it found that the various provisions could be interpreted constitutionally. However, in addition to the orders of invalidity already discussed, the High Court issued various declaratory orders setting out the rights of child witnesses and complainants. The Constitutional Court set all these orders aside on the ground that there was no need for them once the declarations of invalidity had been made. This is a strange finding. While the primary responsibility of the High Court was certainly to issue the declarations of invalidity, sections 38 and 172(1) *(a)* of the Constitution clearly give it the power to issue additional orders to protect constitutional rights if it deemed it necessary. The declarations certainly went beyond the declarations of invalidity, at least by regulating the position until the invalidated provisions were fixed. It may well be that the specific orders the High Court granted were overly broad or unnecessary, but the suggestion in the Constitutional Court judgment that it had no business, in principle, issuing any declaratory orders should be reconsidered.

The High Court also made an order compelling the Minister of Justice and the National Police Commissioner to consider the declaratory orders in their policy-making functions. Ngcobo J held that this order went too far and violated the separation of powers by intruding into the executive's sphere of setting policy:

> '. . . judicial review under our constitutional democracy does not give courts the power to exercise executive or legislative functions. It permits courts to call upon the executive and legislature to observe the limits of their powers but does not permit courts to exercise those powers themselves. Courts therefore have the duty to patrol the constitutional borders defined by the Constitution. (para [183])

The High Court's orders clearly crossed that boundary.

However, while the Constitutional Court set aside the High Court's order, it replaced it with a more limited supervisory order of its own. It relied on evidence presented by the Director of Public Prosecutions and the various amici involved in the matter about the unavailability of intermediaries in many regional courts, the lack of training for intermediaries and prosecutors to deal with children, the absence of facilities, and the insufficient number of sexual offences' courts. The court held that every time an intermediary was unavailable, it violated the child's right and that the continued unavailability of intermediaries threatened the rights of all children. Ngcobo J accordingly decided to grant an order requiring the government to provide information about the needs and availability of intermediaries, after which it would issue further directions.

The willingness of the court to get involved in this dire situation should be welcomed. It is particularly encouraging that the court acted to prevent future violations of constitutional rights in a difficult and complicated area that is seriously affected by the availability of resources. The court also acted largely of its own accord, showing its willingness to craft remedies beyond those sought by the parties. Moreover, it acted without any constitutional violation. This seems to fit the growing trend, which one of the authors has noted elsewhere (Bishop op cit § 9.6(c)(iv)) that the court seems to be increasingly comfortable in making supervisory orders. More recent decisions confirm this trend (see *Head of Department: Mpumalanga Department of Education v Hoërskool Ermelo* (supra); *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes & others* (CCT 22/08) [2009] ZACC 16 (10 June 2009)).

Thirdly, in *Ekurhuleni Metropolitan Municipality v Dada* 2009 (4) SA 463 (SCA), the Supreme Court of Appeal reversed an order of the High Court forcing the Ekurhuleni Municipality to buy a piece of land in order to provide housing to desperately needy families. After heavy summer rains flooded the land they were living on, 76 families (the occupiers) moved to neighbouring land. The owner

of the land brought an application for eviction of the families. The occupiers resisted the application, arguing that the municipality had a duty under section 26(2) of the Constitution to take steps to provide them with adequate housing. The Municipality retorted that a wide range of legislation already enacted fulfilled, at this time at least, that duty.

At the hearing, Cassim AJ called for evidence about what the municipality had done to provide housing. The judge immediately suggested to the witnesses that were called that they should buy the property for R250 000. In the Supreme Court of Appeal's view, it was apparent 'from the tenor of the questions put by him to the two municipal employees, that the judge had, before hearing their evidence, resolved to order the municipality to buy the property for a price of R250 000' (para [8]). Discounting the municipality's objections that there were many statutory procedures to follow before it could buy the property as 'unnecessary bureaucracy', Cassim AJ endorsed the need for a 'robust approach' to implementing the Constitution and ordered the municipality to buy the property.

The Supreme Court of Appeal was less than enthusiastic about Cassim AJ's 'robustness'. 'This type of approach', it held, 'is probably the very antithesis of the approach which this court and the Constitutional Court have endorsed in a number of recent decisions' (para [10]). Hurt AJA referred to administrative decisions and writings stressing the need for judicial deference. He noted that no party had asked for the remedy and argued that it 'was not rationally related to the evidence which was adduced concerning the municipality's policies and plans and the extent of its immediate obligations to alleviate the plight of these particular occupiers' (para [13]). While the Supreme Court of Appeal accepted that Cassim AJ 'was perhaps right in coming to the conclusion that the municipality had not dealt with the problems of the informal settlement on the property with the measure of alacrity which could reasonably be expected of them[,] . . . that did not justify his adopting a solution which was well outside the limits of his powers' (para [14]). Particularly, the High Court would have required the state to ignore several legislative requirements. Furthermore, the order did not qualify as 'appropriate relief' as envisioned in section 38 of the Constitution.

In our view, the Supreme Court of Appeal was correct that, in the circumstances of the case, the court should not have ordered the state immediately to purchase the property. Perhaps a more

appropriate remedy would have been to order the state, in consultation with the owner and the occupiers, to devise a plan to address the situation — which may or may not have included purchasing the property — and then supervising the implementation of the solution to ensure it occurred within a reasonable time. The order to purchase the property is a blunt tool that does not reflect a concerted effort by the court to work with the government, the occupiers and the owner to find the best solution to a shared problem. Instead, it seems to symbolise a frustrated judiciary that wants to act immediately.

What is worrying about the Supreme Court of Appeal decision is that it might be read as discouraging courts from being 'robust' or innovative in finding remedies for serious violations. It should not be read in this way. The Constitutional Court has made it clear that section 38 and section 172(1)*(a)* provide courts with wide powers to craft remedies to cure violations of rights. The Supreme Court of Appeal decision should be read as criticising a particular order, not as placing a brake on courts' innovation in working with other branches of government to realise constitutional rights.

Alternatives to suspension

As discussed under 'Executive Powers' in *Kruger v President of the Republic of South Africa* (supra), the Constitutional Court invalidated two proclamations that attempted to bring into force various provisions of the Road Accident Fund Amendment Act 19 of 2005. The problem was that the Road Accident Fund (the Fund) had, since 31 July 2006, been operating on the assumption that the proclamations were valid. Uninhibited invalidity would 'wreak havoc with the control, management and administration of the Fund' (para [71]). The court affirmed that, under section 172(1)*(a)*, the proclamations had to be declared invalid, but that it was appropriate to devise a remedy to avoid chaos. Ordinarily, the remedy would be to suspend the declaration of invalidity, but since one of the proclamations had been invalidated for being unconstitutionally unclear, that was not possible. Instead, the court ordered that the Fund could, for a further 30 days, continue to Act as if the relevant sections had been brought into force. In addition, past actions taken under the sections would not be invalid as a result of the invalidity of the proclamations. This would afford the President 30 days to issue a new, valid proclamation and avoid any disruption.