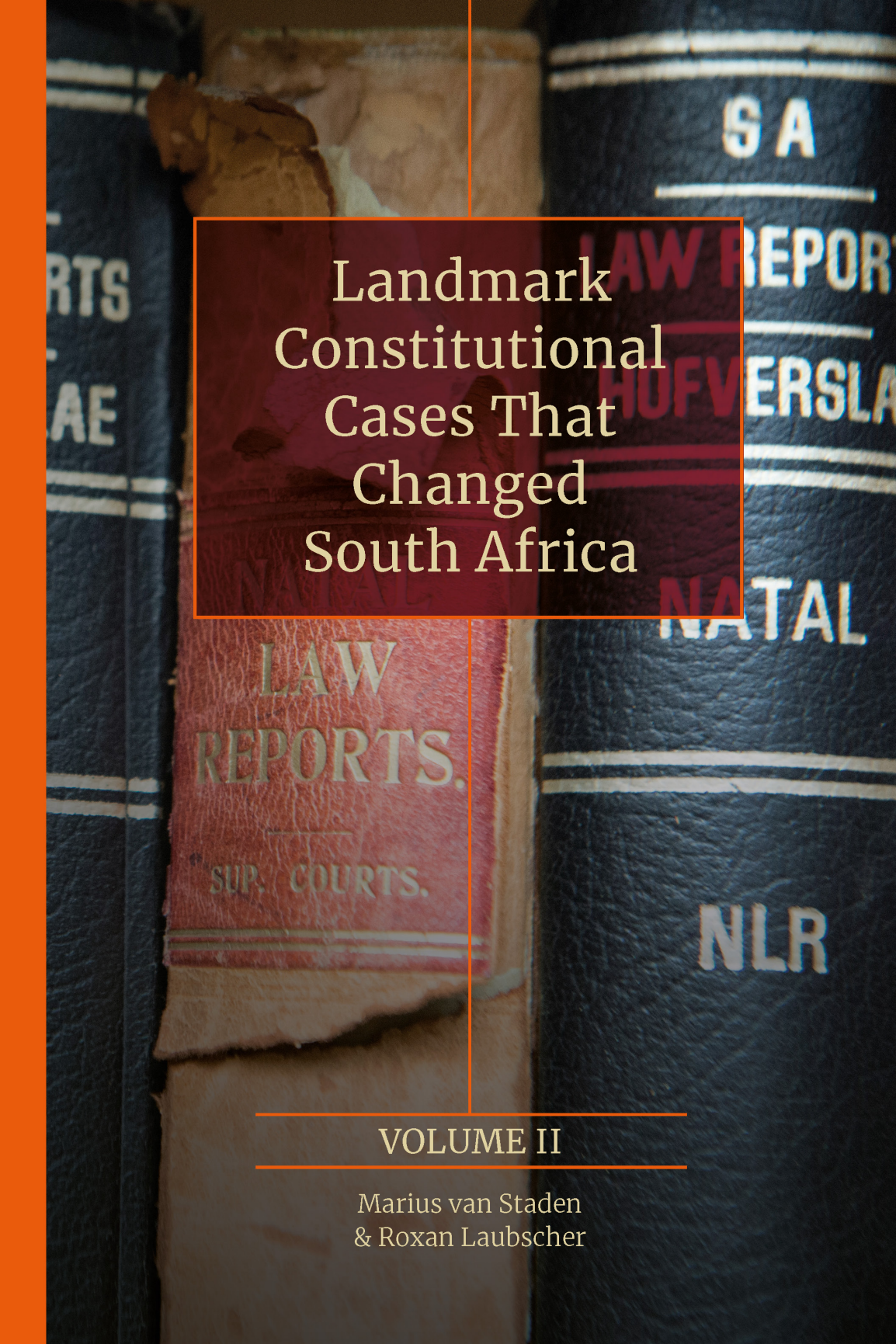

Landmark Constitutional Cases That Changed South Africa

VOLUME II

Marius van Staden
& Roxan Laubscher


UNIVERSITY
OF
JOHANNESBURG

Landmark Constitutional Cases that Changed South Africa

Volume 2

Edited by Marius van Staden & Roxan Laubscher

UJ Press

Landmark Constitutional Cases that Changed South Africa Volume 2

Published by UJ Press
University of Johannesburg
Library
Auckland Park Kingsway Campus
PO Box 524
Auckland Park
2006
https://ujpress.uj.ac.za/

First published 2025

https://doi.org/10.64449/9781997468912
978-1-997468-90-5 (Paperback)
978-1-997468-91-2 (PDF)
978-1-997468-92-9 (EPUB)
978-1-997468-93-6 (XML)

This publication had been submitted to a rigorous double-blind peer-review process prior to publication and all recommendations by the reviewers were considered and implemented before publication.

Proofreading: Mike Leisegang
Cover design: Hester Roets, UJ Graphic Design Studio
Typeset in 9/13pt Merriweather Light

Contents

Contributors

Marthinus van Staden is associate professor at the School of Law, University of the Witwatersrand. He obtained his LLD in labour law from the University of Pretoria, with a thesis examining teleological interpretation of employment statutes. He is a leading researcher in labour law, constitutional law and statutory interpretation. His scholarship focuses particularly on vulnerable workers, employment relationships in the digital age and the intersection of labour rights with constitutional principles. He holds an NRF rating and has published over 50 peer-reviewed articles in prestigious journals, including the *International Labour Review, Industrial Law Journal* (Oxford) and *South African Law Journal.* He is also a member of the Editorial Board of the *BRICS Law Journal*. He is co-editor of *Landmark Constitutional Cases that Changed South Africa* (2023), which examines pivotal decisions that shaped the nation's constitutional democracy. His research extends beyond traditional academic boundaries through regular contributions to leading publications such as Daily Maverick and Business Live, where he provides expert commentary on contemporary legal developments. Professor van Staden's work combines legal scholarship with practical application, examining how South African law addresses modern workplace challenges whilst remaining grounded in constitutional values. His research has been instrumental in advancing understanding of labour rights within South Africa's transformative constitutional framework.

Roxan Laubscher is an associate professor in the Faculty of Law at the University of Johannesburg. She holds a BCom Law degree, an LLB degree, as well as a master's and doctorate in Constitutional Law from the University of Johannesburg. She has lectured constitutional law and human rights law at the University of Johannesburg since 2011. She is a member of the editorial board of the *Journal of South African Law/Tydskrif vir die Suid-Afrikaanse Reg* and acts as a reviewer on various other local law journals, including the *Constitutional Court Review* and *De Jure*. She is also editor-in-chief of the newly launched *UJ Student*

Law Review (*UJSLR*). She has also presented papers at various local and international conferences and publishes widely on topics in constitutional and human rights law. In 2023, she co-authored, *Landmark Constitutional Cases that Changed South Africa* (Volume 1), with Prof Marius van Staden from the University of the Witwatersrand. She is a member of the International Association of Public Law (ICON-S) and is currently Acting Director of the South African Institute of Advanced Constitutional, Public, Human Rights and International Law, a research centre of the University of Johannesburg. In 2025 she received the VC's Top Researcher Award for the Faculty of Law, recognising her commitment to research excellence.

Amanda Boniface is an associate professor at the Faculty of Law, University of Johannesburg and an admitted Advocate of the High Court in South Africa. She is an accredited family mediator. She obtained her BLC, LLB, LLM (child law) *cum laude* and LLD degrees at the University of Pretoria. Her LLD thesis focused on the revolutionary changes to the parent-child relationship in South Africa, particularly with regards to care, contact and guardianship. She completed her post-doctoral fellowship at the Institute for Dispute Resolution in Africa, at Unisa, where her research focused on family dispute resolution in Africa and comparative research on western-style family mediation and African-style family mediation. She lectures the law of persons and the family and integrates her research on family law in her teaching. Her research focuses on legal issues affecting women and children, particularly human rights-related matters, as well as family dispute resolution in Africa. She has published both nationally and internationally in peer-reviewed journals such as the *Journal of Contemporary Roman-Dutch Law*, the *Journal of South African Law* and *Potchefstroom Electronic Law Journal*. She has written a number of articles in Japanese. Her research has been referred to numerous times by the South African Law Reform Commission. She has presented many papers at international and national conferences. Her current multi-country research project focuses on real-world cross-border solutions to issues affecting women worldwide.

Carika Keulder is a full professor in the School of Law at the University of the Witwatersrand. She holds an LLB, LLM, and LLD from the University of Pretoria, as well as a BCom in International Accounting from the University of Johannesburg. She is also an admitted attorney and notary public. Her doctoral thesis, *An Appraisal of Selected Tax-Enforcement Powers of the South African Revenue Service in the South African Constitutional Context*, examined the balance between effective tax collection and the constitutional protection of taxpayers' rights. This research has provided the foundation for her extensive and ongoing work in the field of tax administration and taxpayer rights, which remains her primary scholarly focus. Professor Keulder has presented her research at leading national and international conferences and has published widely in accredited peer-reviewed journals. Recognised as an authority in her field, she holds a C2 rating from the National Research Foundation and enjoys international recognition for her contributions to the advancement of taxpayer rights and tax law scholarship.

Franaaz Khan is an associate professor and head of Department of Private Law at the Faculty of Law at the University of Johannesburg. She is also an admitted attorney of the High Court of South Africa (non-practicing). She has over 14 years of experience in academia. Her legal career spans more than two decades, beginning with an LLB and LLM, followed by practice as an attorney before transitioning into academia. She pursued her PhD. Passionate about the evolution of delictual law, she explores its intersections with constitutional values, social justice, and emerging technologies, particularly artificial intelligence. She has presented at national and international conferences, published significantly, and supervised postgraduate students in diverse areas. She is committed to gender equity initiatives, actively supporting Black female students through mentorship programs. Her academic excellence and leadership have been recognized through prestigious awards, including the Harvard Institute for Global law and Policy and the Erasmus Scholarship, in which she will teach to international students at the University of Minho, Portugal. She is also the Vice President of the Southern African Chapter for Commonwealth Legal Education Association (CLEA).

She is also on the editorial board for an international law journal in India. These accolades have enriched her international research collaborations.

Whitney Rosenberg obtained her LLB in 2010, her Master's in Contract law in 2011 and her doctorate in Family Law in 2020 all from the University of Johannesburg. She is also an admitted attorney of the High Court of South Africa after completing her articles of clerkship and passing the attorneys admission examination. Currently Whitney Rosenberg is an Associate Professor at the University of Johannesburg where she lectures the Law of Persons and Family in the Department of Private Law. She is an emerging researcher and has over the years produced and published several publications, the majority of which have been published in well-known accredited and internationally recognised journals. She is the holder of the second runner-up WOZA Women in Law Award for social justice activist/pro bono lawyer in 2022. She has also established a non-profit organization called Baby Savers SA, which fights for the legalisation of safe relinquishment to prevent unsafe infant abandonment in South Africa. Her research interests are in Child law, Human Rights law, and international laws as it pertains to children, to name but a few. In her free time, she enjoys spending time with her family.

Nicole Deokiram is currently employed as a lecturer in the Faculty of Law and at the University of Johannesburg. She is completing her PhD in constitutional law. Ms Deokiram is also a research associate at the Centre for International and Comparative Labour and Social Security Law at the University of Johannesburg. Her areas of interest in research and teaching and learning includes labour law, constitutional law, jurisprudence and the drafting and interpretation of legislation. She is passionate about unfair discriminatory issues which includes, but are not limited to, racial, religious and gender based unfair discriminatory issues. It is this passion that led her to her current role at the office of the Minister of Employment and Labour as South Africa's Commission for Employment Equity Chairperson. She advises the Minister on, and amongst other things, the Employment Equity Act 55 of 1998 (EEA) and

the codes to the latter Act. She has been directly involved in drafting the two sets of the EEA Regulations which came into effect on 15 April 2025, and which regulates, amongst other things, general administrative matters regarding employment equity and sector numerical employment equity targets

Introduction

The cases presented in this second volume of *Landmark Constitutional Cases that Changed South Africa* represent watershed moments in the nation's constitutional jurisprudence, marking significant turning points in how fundamental rights are interpreted and applied within South Africa's democratic framework. Each case has profoundly shaped the legal landscape by establishing precedents that continue to reverberate through subsequent judgments, demonstrating the Constitutional Court's commitment to advancing substantive equality, human dignity and transformative constitutionalism. From the definitive pronouncements on corporal punishment in *S v Williams*, which recognised children's rights to dignity and freedom from violence, to the groundbreaking decision in *New Nation Movement* that transformed electoral participation by enabling independent candidates to stand for national elections, these judgments have systematically dismantled vestiges of discrimination and exclusion whilst establishing robust protections for vulnerable groups. Other key judgments like *Carmichele v Minister of Police*, which revolutionised state accountability for protecting citizens from foreseeable harm; *Hassam v Jacobs*, which advanced Muslim women's rights in polygynous marriages; and *South African Police Service v Solidarity obo Barnard*, which articulated nuanced principles for implementing affirmative action, collectively demonstrate the court's role in balancing competing constitutional imperatives whilst steadily advancing South Africa's democratic project.

These landmark cases illuminate the Constitutional Court's evolution over nearly three decades as it has navigated complex questions around language rights in education in *AfriForum v University of the Free State*, tax administration and access to courts in *Metcash Trading*, and unmarried fathers' rights in *Fraser v Children's Court*. What distinguishes these judgments is not merely their resolution of immediate legal questions but their articulation of broader constitutional principles that have subsequently been embraced, developed

and sometimes reconsidered by courts, the legislature and South African society. The judgments frequently demonstrate a remarkable judicial willingness to engage with indigenous values, South Africa's plural legal traditions and emerging international human rights standards whilst remaining grounded in the unique historical context of the nation's transition from apartheid to constitutional democracy. Through these cases, we witness the Constitutional Court's crucial role in reconciling tensions between individual rights and communal values, traditional practices and constitutional imperatives, and statutory provisions and constitutional guarantees – ultimately revealing a jurisprudence that is distinctively South African yet universally instructive in its approach to constitutional interpretation and its commitment to substantive justice.

Rather than merely identifying cases based on their popular recognition or frequency of citation, the selection process prioritised cases that sparked substantial shifts in legal principles, altered societal norms or expanded constitutional interpretations in novel ways. These cases were evaluated through multiple analytical lenses: their impact on broader society and individual rights, their novelty in breaking new legal ground, their clarity in providing guidance to lower courts, their persuasiveness in offering sound reasoning and lastly their longevity in remaining relevant despite the passage of time. We notably acknowledge that these criteria are not exhaustive and that determining landmark status ultimately involves a measure of subjective judgment, leaving space for disagreement about which cases might be considered most foundational to South African constitutional development.

It is worth emphasising that the cases explored throughout this volume are not necessarily the most prominent in public consciousness nor universally accepted as the most important constitutional cases. Rather, they represent judgments that have particular significance for legal science in South Africa, offering rich analytical material for understanding how constitutional principles have evolved and been applied in various contexts. The selection reflects a deliberate focus on cases that illuminate specific aspects of constitutional rights

interpretation, demonstrate the practical implementation of constitutional values or illustrate the tension between competing constitutional principles. By examining these cases in depth, the volume aims to provide insight into not only the substantive content of constitutional rights but also the methodological approaches employed by the courts in navigating complex constitutional questions, thereby contributing to the broader scholarly understanding of South African constitutional jurisprudence rather than simply reiterating the most commonly discussed cases.

Chapter 1 examines *S v Williams*, a watershed moment in South African constitutional jurisprudence regarding corporal punishment. This landmark case fundamentally transformed South Africa's approach to physical punishment by declaring juvenile whipping under section 294 of the Criminal Procedure Act unconstitutional, constituting cruel, inhuman and degrading treatment prohibited by the Interim Constitution. The judgment's significance lies in its meticulous exploration of the tension between punitive measures and human dignity which established crucial precedents regarding the interpretation of constitutional rights concerning children. By rejecting arguments that corporal punishment served as an effective deterrent or alternative to imprisonment, the court emphasised that a culture of authority legitimising violence contradicted the constitutional values that South Africa aspired to uphold. This judgment catalysed the "constitutionalisation of children's rights" in South Africa, leading to subsequent legislative developments including the abolition of corporal punishment in schools through the South African Schools Act and ultimately the invalidation of the common law defence of 'reasonable chastisement' for parents in *Freedom of Religion South Africa v Minister of Justice*. Beyond its immediate impact on corporal punishment, the case has influenced judicial considerations of children's best interests across various contexts including adoption, sentencing of caregivers, education rights and juvenile justice. By establishing that constitutional imperatives require more than mere abstention from coercion but also demand fairness and even-handedness in relation to diverse groups, *S v Williams* represented a decisive break with South Africa's

authoritarian past and established an enduring framework for protecting the dignity, equality and security of the nation's most vulnerable citizens.

Carmichele v Minister of fundamentally redefined the relationship between state accountability and citizen protection, establishing that state organs have a positive duty to prevent foreseeable harm to individuals, particularly in cases of gender-based violence. What makes *Carmichele* exceptional is how it revolutionised the development of the common law through the lens of constitutional values, requiring courts to infuse private law remedies with constitutional imperatives of dignity, equality and freedom. The judgment broke new ground by recognising that failing to protect women from gender-based violence constitutes a constitutional violation, describing it as "the single greatest threat to the self-determination of South African women." By holding state officials accountable for their negligent omissions rather than just their actions, the court expanded delictual liability in a manner that was shared with South Africa's transformative constitutional project. The case's impact has been far-reaching, catalysing substantial reforms in the criminal justice system including enhanced bail procedures, strengthened victim-centric approaches and improved inter-departmental coordination. Perhaps most significantly, *Carmichele* exemplifies transformative constitutionalism in action by bridging the traditional divide between public and private law, ensuring that constitutional values permeate all aspects of legal reasoning. Its recognition that gender-based violence demands special protection from the state has influenced numerous subsequent cases, demonstrating how constitutional adjudication can respond to the lived realities of vulnerable groups while simultaneously advancing broader systemic change. Consequently, *Carmichele* stands as a cornerstone of South Africa's post-apartheid jurisprudence, reflecting the Constitution's commitment to substantive equality and human dignity.

The *Metcash Trading Ltd v Commissioner for South African Revenue Service* case stands as a key moment in South African fiscal jurisprudence, marking the first time that the

Constitutional Court addressed the constitutional validity of the "pay now, argue later" principle in tax administration. This landmark case fundamentally shaped the balance between efficient tax collection and taxpayer rights, establishing that while the South African Revenue Service must be empowered to fulfil its constitutional mandate of securing state revenue, such powers must operate within the framework of constitutional rights and values. The court's careful contextual approach to interpreting fiscal legislation established important precedent for how tax provisions must be understood within their broader statutory ecosystem. Although critics have noted the court's arguably narrow interpretation that privileged tax collection over taxpayer rights and its failure to adequately consider international comparisons or relevant legislation like the Use of Official Languages Act, the judgment's enduring significance lies in its establishment of crucial principles regarding the Tax Court's status as a specialist tribunal rather than a court of law, the High Court's inherent jurisdiction to hear tax matters involving legal questions and the rescindability of filed tax statements. The *Metcash* judgment catalysed significant legislative developments, ultimately influencing the drafting of the Tax Administration Act which codified criteria for suspending payment obligations. This judicial–legislative dialogue exemplifies how constitutional scrutiny, even when upholding contested provisions, can lead to the refinement of administrative powers to better protect individual rights while preserving essential state functions. The case thus stands as a cornerstone in South African tax administration, demonstrating how constitutional principles can shape even technical areas of law to reflect a balance between state necessity and individual protection.

NUMSA v Marley Pipe Systems concerned the complex intersection of strike action, violence and collective liability. This key case addresses the controversial application of the common purpose doctrine in employment contexts, particularly during industrial action. The Constitutional Court's ruling significantly altered the legal landscape by establishing that mere presence during violent strike incidents is insufficient for culpability; instead, individual complicity must be conclusively

established. This principle, emerging in the aftermath of the Marikana tragedy that fundamentally reshaped South Africa's approach to strike violence, provides critical protection for workers' constitutional rights to strike and assemble while simultaneously condemning violence in industrial actions. The court's nuanced approach recognises the delicate balance required between employers' legitimate concerns about violent conduct and workers' rights to collective action, establishing a higher evidentiary threshold for dismissals during strikes. The subsequent *Solidarity* case further extended this principle to all designated groups, demonstrating its far-reaching implications across all demographic categories. By establishing a framework that balances transformation with individual rights, the case provides crucial guidance for navigating one of the most challenging aspects of South Africa's constitutional democracy: addressing historical injustices while building a non-racial, non-sexist society founded on human dignity, equality and freedom. The judgment's significance lies in its recognition that while collective action is constitutionally protected, it cannot serve as a shield for individual accountability, thus reflecting a mature approach to labour relations that respects both workplace discipline and legitimate protest – a cornerstone of South Africa's evolving democratic landscape.

In the cases of *S v Lawrence; S v Negal; S v Solberg* the foundational question of whether legislation that endorses the majority religion constitutes an infringement of religious freedom. This case was the first time that the Constitutional Court examined the right to freedom of religion under section 14 of the Interim Constitution, setting a crucial precedent for interpreting religious freedom in a religiously diverse society. While the majority judgment found no infringement of religious freedom in the Sunday trading provisions, the dissenting judgments by O'Regan J and Sachs J laid down more progressive principles regarding the state's obligation to remain neutral in religious matters and not favour one religion over others. These minority judgments proved influential in subsequent jurisprudence, as evidenced in *Gold Circle (Pty) Ltd v Premier, Province of KZN*, where similar Christian-favouring provisions were declared unconstitutional and in legislative developments

like the repeal of the contested provisions in the new Liquor Act. The case articulated the essential principle that freedom of religion requires the legislature to act with fairness and even-handedness towards diverse religions, recognising that even subtle legislative preferences for a majority religion may constitute an infringement of constitutional rights. The legacy of *Lawrence* extends far beyond its immediate context, forming part of the bedrock of South Africa's approach to religious freedom and equality in a diverse society, thus making it a landmark case worthy of inclusion in this volume documenting the transformative impact of constitutional jurisprudence on South African law and society.

Fraser v Children's Court, Pretoria North profoundly transformed the recognition of parental responsibilities and rights of unmarried fathers in South African law. Prior to this groundbreaking judgment, unmarried fathers were systematically excluded from having any meaningful say in the adoption of their children, reflecting deeply entrenched gender inequalities in family law. The Constitutional Court's declaration that section 18(4)(*d*) of the Child Care Act was unconstitutional marked a watershed moment in addressing discrimination on multiple grounds: between fathers in different types of unions, gender discrimination between mothers and fathers and discrimination based on marital status. The court's nuanced approach balanced the unique relationship between mother and child with the evolving societal context where more fathers sought active involvement in their children's lives. This judgment catalysed significant legislative reforms, first through the Natural Fathers of Children Born Out of Wedlock Act and ultimately section 21 of the Children's Act, which established criteria for unmarried fathers to automatically acquire parental responsibilities and rights. Beyond its immediate impact on family law, the case influenced broader constitutional jurisprudence regarding religious marriages, as evidenced by its citation in subsequent landmark judgments like *Women's Legal Centre Trust v President of the Republic of South Africa*. The court's forward-thinking approach anticipated developments in South African law nearly three decades ahead, demonstrating its enduring significance in advancing equality, challenging

gender stereotypes and recognising different family formations within a constitutional framework that prioritises dignity and equal treatment. Despite shortcomings in subsequent legislation regarding children's best interests, the judgment remains foundational in South Africa's progressive realisation of substantive equality in family law.

Hassam v Jacobs concerns equality, dignity and religious freedom. This judgment fundamentally transformed the legal landscape for Muslim women in polygynous marriages by addressing discriminatory exclusions from intestate succession benefits. The Constitutional Court's decisive rejection of historical prejudices against Muslim marriages, previously dismissed as "retrograde" and "immoral", marked a key shift in legal attitudes towards religious diversity. By declaring that discrimination based on religion, gender and marital status reinforced patriarchal practices and violated constitutional guarantees of equality, the court established crucial precedent for the protection of vulnerable groups within South African society. The judgment's significance extends beyond its immediate impact on intestate succession rights to represent a critical step in South Africa's evolution towards legal pluralism and the recognition of diverse family forms. Though focused specifically on intestate succession rather than fully recognising polygynous Muslim marriages, *Hassam* established an important foundation that contributed to subsequent judicial and legislative developments, including the *Women's Legal Centre Trust* case and ultimately the Divorce Amendment Act of 2024. This incremental judicial recognition, while criticised for its piecemeal approach, demonstrates the court's commitment to transformative constitutionalism and reflects South Africa's societal values of human dignity, equality and social justice. The *Hassam* judgment thus stands as a cornerstone in South Africa's progressive accommodation of religious and cultural diversity within a constitutional democracy, making it an essential landmark case that significantly changed South Africa's legal landscape.

AfriForum v University of the Free State stands as the first Constitutional Court case to address the complex

tension between official language recognition and practical implementation in South African higher education. This judgment profoundly impacted language policies across universities by establishing that while section 29(2) of the Constitution guarantees the right to education in an official language of choice where "reasonably practicable", this right must be balanced against considerations of equity, practicability and historical redress. The court's ruling that language policies entrenching racial segregation, even unintentionally, could not be sustained set a precedent that influenced subsequent decisions including *Gelyke Kanse v Chairperson of the Senate of the University of Stellenbosch* and *Chairperson of the Council of UNISA v AfriForum NPC*. Justice Froneman's dissenting opinion, which questioned whether exercising a constitutionally protected language right could constitute unfair racial discrimination and emphasised implications for all official languages beyond Afrikaans, proved particularly significant as it ultimately shaped the more nuanced approach taken in the *UNISA* case. The chapter critically evaluates the majority judgment's narrow interpretation of language diversity and failure to consider relevant legislation such as the Use of Official Languages Act, which requires national entities to use at least three official languages. This case thus represents a key moment in South Africa's ongoing negotiation between constitutional commitments to multilingualism and the practical challenges of implementation in a post-apartheid society still grappling with historical inequities, making it essential to understanding the evolution of language rights jurisprudence in South African constitutional law.

South African Police Service v Solidarity obo Barnard fundamentally shaped South Africa's jurisprudence on affirmative action. The Constitutional Court grappled with the tension between individual rights and broader societal transformation, establishing what became known as the "*Barnard* principle" which permits employers to deny appointments that would negatively impact representivity even to candidates scoring highest in selection processes. The judgment's significance lies in its articulation of a nuanced approach to evaluating affirmative action measures, establishing

that while such measures are integral to achieving substantive equality, their implementation must be rationally connected to their purpose. The considerable judicial disagreement evident in the various judgments – with some justices advocating for fairness or proportionality tests rather than mere rationality – reflects broader societal debates about balancing competing constitutional imperatives. The subsequent *Solidarity* case extended the "*Barnard* principle" to all designated groups, demonstrating its far-reaching implications for employment equity implementation across all demographic categories. Beyond its immediate impact on labour law, the *Barnard* judgment's significance lies in its recognition that restitutionary measures are not exceptions to equality but form part of substantive equality itself, while simultaneously acknowledging the importance of human dignity and reasoned decision-making in their implementation. By establishing a framework for evaluating affirmative action measures that balances transformation with individual rights, the case provides crucial guidance for navigating one of the most challenging aspects of South Africa's constitutional democracy: redressing historical injustices while building a non-racial, non-sexist society founded on human dignity, equality and freedom.

The *New Nation Movement NPC v President of the Republic of South Africa* case represents a watershed moment in South African constitutional jurisprudence for its profound impact on the country's electoral system and democratic landscape. This landmark ruling compelled Parliament to amend the Electoral Act to accommodate independent candidates in national and provincial elections, marking a significant departure from the party-centric system that had characterised South African democracy since 1994. At its core, the judgment hinged on a novel interpretation of section 19(3)(*b*) of the Constitution, which guarantees every adult citizen the right to stand for public office, reading this in harmony with section 18's protection of freedom of association. The court's finding that forcing citizens to join political parties to contest elections infringed on these fundamental rights has reverberated throughout South African society, establishing a more inclusive democratic framework that accommodates diverse forms of political participation.

While rejecting arguments that constitutional provisions such as those referring to a "multi-party system" necessitated a party-only electoral system, the court's balanced approach acknowledged both the importance of political parties and individuals' rights to disassociate from them. The subsequent implementation of electoral reforms and the emergence of case law addressing challenges in this new electoral landscape demonstrate the judgment's lasting significance. Though the practical impact of independent candidates in the 2024 elections was relatively modest, the case's constitutional importance extends beyond immediate electoral outcomes, representing a profound reinterpretation of political rights that may reshape South Africa's democratic landscape for generations to come by expanding political representation beyond traditional party structures.

The second volume of *Landmark Constitutional Cases that Changed South Africa* builds upon the foundation established by its predecessor, expanding the analytical framework whilst exploring new dimensions of constitutional jurisprudence that complement the groundbreaking cases examined in the first volume. Where the first volume addressed fundamental issues such as the death penalty, constitutional damages, legality review, customary law inheritance and contractual fairness, the second volume delves into equally significant but different constitutional territories including children's rights, state accountability, tax administration, religious freedom and electoral reform. Together, these volumes offer a comprehensive portrait of how the Constitutional Court has methodically constructed a constitutional edifice that addresses virtually every aspect of South African life, creating an intricate tapestry of judgments that collectively advance the Constitution's transformative aims whilst preserving its core values of human dignity, equality and freedom.

The progression from the first to second volume reflects the natural evolution of constitutional jurisprudence, moving from the court's initial task of establishing fundamental principles towards the more nuanced work of applying these principles to increasingly specific and complex factual matrices.

This progression mirrors the development of South African democracy itself, from the urgent dismantling of apartheid's most egregious legal structures to the more gradual refinement of constitutional norms in areas like religious accommodation, affirmative action implementation and language rights in educational settings. By examining these later judgments in detail, the second volume illuminates how the foundational concepts articulated in early cases have been tested, expanded and occasionally reformulated as the Constitutional Court has confronted new challenges. Furthermore, the analytical approach adopted throughout both volumes – examining not only the judgments themselves but also their subsequent impact and development – provides readers with a dynamic understanding of constitutional law as a living system rather than a static collection of precedents, revealing how landmark cases continue to shape South African law long after they are decided.

Marius van Staden & Roxan Laubscher

August 2025

Chapter 1

Striking a Balance: The Constitutional Court's Stand on Corporal Punishment of Minors and the Right to Personal Freedom and Security

S v Williams[1]

Roxan Laubscher
Faculty of Law;
University of Johannesburg
Johannesburg, South Africa

> "If the State, as role model *par excellence*, treats the weakest and the most vulnerable among us in a manner which diminishes rather than enhances their self-esteem and human dignity, the danger increases that their regard for a culture of decency and respect for the rights of others will be diminished" (*S v Williams* par 47).

Abstract

S v Williams stands as a landmark constitutional case that fundamentally transformed South Africa's approach to corporal punishment and children's rights. The case challenged the constitutionality of juvenile whipping under section 294 of the

Criminal Procedure Act within the framework of the Interim Constitution. The Constitutional Court's deliberation centred on whether this form of punishment constituted "cruel, inhuman or degrading treatment" prohibited by section 11 of the Interim Constitution. In its groundbreaking judgment, the court ruled that juvenile whipping violated the constitutional rights to human dignity and freedom and security of the person, rejecting arguments that corporal punishment served as an effective deterrent or alternative to imprisonment. The court emphasised that a culture of authority legitimising violence contradicted the constitutional values that South Africa aspired to uphold following its painful history of institutionalised violence. This judgment catalysed what scholars term the "constitutionalisation of children's rights" in South Africa, leading to subsequent legal developments including the abolition of corporal punishment in schools through the South African Schools Act and, eventually, the invalidation of the common law defence of 'reasonable chastisement' for parents in *Freedom of Religion South Africa v Minister of Justice*. The *Williams* judgment established crucial precedents regarding the interpretation and application of constitutional rights concerning children, recognising them as rights-bearers deserving equal protection from all forms of violence – whether from public or private sources. Beyond corporal punishment, the case has influenced judicial considerations of children's best interests across various contexts, including adoption, sentencing of caregivers, education rights and juvenile justice. By emphasising the state's obligations to respect, protect and fulfil children's constitutional rights, *S v Williams* represented a decisive break with South Africa's authoritarian past and established an enduring framework for protecting the dignity, equality and security of the nation's most vulnerable citizens.

1.1 Introduction

The right to human dignity, along with the right to freedom and security of the person, forms part of the central rights and values underlying the South African Bill of Rights. Guaranteeing these rights allowed the South African constitutional order to move

forward, transitioning from a system of arbitrary authoritarian rule to a system premised on justified democratic rule. The Constitutional Court's ruling in *S v Williams* highlighted the prominence of the right to freedom and security of the person, together with the right to human dignity, in our constitutional order. The *Williams* ruling has had a lasting effect on our courts' interpretation and application of rights, especially regarding the rights of children and their personal freedom and security in subsequent judgments. This chapter highlights the most significant aspects of the judgment and shows the ripple effect that these aspects have had on the jurisprudence of the South African courts in the years that followed.

The issue in the *Williams* case was whether a sentence of juvenile whipping, in terms of section 294 of the Criminal Procedure Act 51 of 1977, was consistent with the provisions of the Constitution of the Republic of South Africa, 1993 (the Interim Constitution). First, the court highlighted the function and role of the courts in upholding our new constitutional order as well as making sure that the rights of "the weakest and the most vulnerable, are defended and not ignored".[2] Second, the court pointed out that the issue in this case was not the differences between adult and juvenile whipping, but the constitutionality of juvenile whipping.[3] It was argued that the impugned provisions infringed sections 8, 10, 11, and 30 of the Interim Constitution (the rights to equality, dignity, personal freedom and security and the rights of children respectively), although the court chose to focus mainly on the rights to personal freedom and security and human dignity.[4] The court proceeded to consider the matter in terms of the right to personal freedom and security; more specifically, whether juvenile whipping (corporal punishment for juveniles) represented a "cruel, inhuman, or degrading treatment or punishment" within the meaning of section 11 of the Interim Constitution, various international law provisions and foreign case law.[5] The court pointed out that

> "[t]he process of political negotiations which resulted in the Constitution were a rejection of violence… The Government has a particular responsibility to sustain

> and promote the values of the Constitution. If it is not exacting in its acknowledgement of those values, the Constitution will be weakened. A culture of authority which legitimates the use of violence is inconsistent with the values for which the Constitution stands."[6]

The court extensively considered the limitation of the right in terms of the previous limitation clause (section 33) of the Interim Constitution and, therefore, concluded that this form of punishment was indeed an infringement of sections 10 and 11 of the Interim Constitution.[7] This chapter explores the significant aspects of the *Williams* judgment and tracks the impact and development of these aspects in various selected subsequent cases.

1.2 Significant aspects of the judgment

1.2.1 Interpretation, application and limitation of the right to freedom and security of the person as it applies to children

One of the reasons why the *Williams* judgment remains so prominent in South African law is the court's thorough consideration of the interpretation, application and limitation of the fundamental constitutional right to personal freedom, and security, particularly when applied to vulnerable individuals, particularly children. Obviously, this right is extremely important when considering the past discriminating practices of the previous apartheid government and the gross violations of the right to freedom of the person which occurred during this era. From the outset, the court emphasised the role of the judiciary in creating a "new culture 'founded on the recognition of human rights'".[8] The court further stated that this duty meant that courts should be particularly careful when considering the impact that the exercise of their functions had on the individuals before it, in particular the interests of the vulnerable and the weak, which must be protected and not ignored.[9] One of the implications of this new role of the courts, the court argued, was that "old rules and practices can no longer be taken for

granted; they must be subjected to constant re-assessment to bring them into line with the provisions of the Constitution".[10] Regarding the matter of adult whipping, the court stated that it was common cause between the parties that adult whipping was not consistent with the Constitution,[11] notwithstanding that it was still permissible for males between 21 and 30 years of age amidst growing criticism and condemnation of the practice, both here and abroad.[12] The state, however, stressed the importance of the differences between adult and juvenile whipping, particularly regarding the manner in which the punishment was executed and restricted only to male youths.[13] The court was, however, correct in asserting that it is not tasked to assess the differences between adult and juvenile whipping, but to ascertain the constitutionality of juvenile whipping on its own merits.[14]

Regarding the provisions related to juvenile whipping,[15] the age limit was set at a minimum of nine years of age, while a sentence of whipping was not allowed in the case of "the existence of some psychoneurotic or psychopathic condition contributed towards the commission of the offence",[16] the maximum number of strokes that may be imposed on a juvenile is seven on one specific instance,[17] the whipping must be inflicted over the buttocks, which must be covered with regular clothing,[18] a parent or guardian may be present during the whipping.[19] Furthermore, no whipping may be inflicted unless a district surgeon or an assistant district surgeon has certified that the juvenile "is in a fit state of health to undergo the whipping",[20] while juveniles over the age of 17 years may be sentenced to a whipping in addition to another sentence, provided that where the juvenile has been given a prison sentence, such prison sentence must be suspended in its entirety.[21]

The court briefly considered various rights applicable to the issues raised in this matter,[22] but for purposes of this discussion, this chapter only focuses on the right to freedom and security of the person in section 11 of the Interim Constitution. Section 11 of the Interim Constitution reads as follows:

> "(1) Every person shall have the right to freedom and security of the person, which shall include the right not to be detained without trial. (2) No person shall be subject to torture of any kind, whether physical, mental or emotional, nor shall any person be subject to cruel, inhuman or degrading treatment or punishment."

The court pointed out that this provision explicitly refers to seven types of prohibited treatment, namely: "torture; cruel treatment; inhuman treatment; degrading treatment; cruel punishment; inhuman punishment and degrading punishment".[23] These prohibitions, the court held, are similar to those found in various international instruments, and are usually expressed in absolute terms – leaving no room for justification.[24] Regarding the definitions of the terms, the court referred to the meanings indicated in the Oxford English Dictionary, which defines "cruel" as "causing or inflicting pain without pity", "inhuman" as "destitute of natural kindness or pity, brutal, unfeeling, savage, barbarous" and "degrading" as "lowering in character or quality, moral or intellectual debasement".[25] In South African case law, the court held, there are not many references to the word "cruel"; it is mostly used in cases pertaining to animal cruelty.[26] The court pointed out that we could, therefore, learn much from the approaches of international law and foreign jurisdictions when giving meaning and content to provisions similar to our section 11.[27]

In terms of international law, the terms have not usually been interpreted on their own, but rather as phrases. For example, when the United Nations Human Rights Committee (UNHRC) had to interpret a similar section in the International Covenant on Civil and Political Rights (ICCPR), it held that it was not "necessary to draw up a list of prohibited acts or to establish sharp distinctions between the different kinds of punishment or treatment; the distinctions depend on the nature, purpose and severity of the treatment applied".[28] Accordingly, the UNHRC found that when assessing what actions constitute inhuman or degrading treatment, such a determination would depend on all relevant circumstances of the facts at hand; for

example, the type of treatment and its duration, the physical or mental effects of the treatment, as well as the sex, age and state of health of the individual involved.[29] In the European context, Article 3 of the European Convention makes a distinction between inhuman and humiliating treatment, according to the severity of the pain caused.[30] Severe mental or bodily anguish, therefore, results from inhumane treatment, while torture is an intensified version of this.[31] The European Court of Human Rights also draws a distinction between degrading and inhuman punishment, holding that a punishment cannot be deemed inhumane unless a specific degree of suffering is experienced.[32]

Both the Constitution of the United States (Eighth Amendment) and the Canadian Charter of Rights and Freedoms (Article 12) prohibit "cruel and unusual punishment".[33] In the case, *Furman v Georgia*, although with reference to capital punishment, the nature of "cruel and inhuman punishment" was said to be located in the fact that it objectified the individual, and not so much in the severity of the pain that is inflicted – thus nullifying an individual's human dignity.[34] This view was later confirmed in *Gregg v Georgia*.[35] In the Canadian context, in *Smith v The Queen*, it was held that "cruel and unusual punishment" was as a "compendious expression of a norm" and the applicable test, therefore, was "whether the punishment prescribed is so excessive as to outrage the standards of decency".[36] The court in *Williams*, however, remarked that since our Constitution is much different from the American Constitution, it does not seem necessary to adopt the same approach in considering evolving societal "standards of decency", as these would be akin to considerations of public opinion, which the Constitutional Court has previously found to be inconclusive.[37] The *Williams* court, therefore, rightly remarked that "[i]n determining whether punishment is cruel, inhuman or degrading within the meaning of our Constitution, the punishment in question must be assessed in the light of the values which underlie the Constitution" and can, therefore, not be assessed according to the standards followed in other systems which are very different from our own Constitution and constitutional history.[38]

The court remarked that the decisions of our neighbouring countries, with similar legal systems and history, could also be helpful in assessing the meaning and content of the constitutional rights to personal freedom and security.[39] In the Namibian context, even though the Namibian Constitution does not have a general limitation clause, the Namibian Supreme Court held in *Ex Parte Attorney-General, Namibia*, that corporal punishment (for juveniles and adults) amounted to "cruel or degrading punishment" and was, therefore, inconsistent with the Namibian Constitution.[40] The same conclusion was reached in the Zimbabwean cases of *S v Ncube; S v Tshuma and S v Ndhlovu*,[41] *S v F*[42] and *S v Juvenile*[43] – characterising corporal punishment as an "inhuman and degrading" punishment.

Finally, the court further held that there was a growing consensus in the international community on the impermissibility of the use of corporal punishment within the criminal justice system – various jurisdictions having already abolished the practice, including the "United Kingdom, Australia (except in the State of Western Australia), the United States of America, Canada, Europe and Mozambique".[44] Consequently, it seems that there was already strong international condemnation of the practice. The court, however, noted that when interpreting section 11(2) of the Constitution, regard should not only be had to other jurisdictions, but to the purposive approach to the interpretation of the rights enshrined in Chapter 3 of the Constitution and the need to seek the purpose of the particular rights within the context of our South African society.[45]

Regarding the state's argument related to the differences between adult and juvenile whipping as a justification for retaining juvenile whipping as a form of punishment, the court in *Williams* held that, in the court's view, the similarities between these forms of punishment far outweighed the differences:

> "There is a small difference in the dimensions of the instrument used; the adult is stripped naked and trussed, the strokes being delivered on bare flesh while the juvenile's strokes are inflicted on normal attire, without

> him being tied; there is no limit to the number of times a juvenile may be sentenced to receive strokes while the adult may only be so sentenced twice, and never within a period of three years of the previous sentence of strokes. Both occur in a state institution; the maximum number of strokes that may be imposed is seven in respect of both. Both involve a physical beating with a cane wielded by a State employee, a virtual stranger to the person being punished. The severity of the pain inflicted is arbitrary, depending as it does almost entirely on the person administering the whipping. Although the juvenile is not trussed, he is as helpless. He has to submit to the beating, his terror and sensitivity to pain notwithstanding. Nor is there any solace to be derived from the fact that there is a prior examination by the district surgeon. The fact that the adult is stripped naked merely accentuates the degradation and humiliation. The whipping of both is, in itself, a severe affront to their dignity as human beings."[46]

There are, therefore, very few differences between adult and juvenile whipping; it seriously affects their human dignity and personal freedom in a similar way.

Regarding other justifications for corporal punishment for juveniles proffered by the state, it was contended that the character of adults was already fixed, while those of children was still in the process of formation and, therefore, susceptible to correction and reform, which could entail that corporal punishment may still have an effect on children, while this is not the case for most adults.[47] The *Williams* Court, however, did not agree; the court argued that children, as a vulnerable group, should be protected from trauma and "experiences which may cause [them] to be coarsened and hardened", particularly because of their impressionable and sensitive natures.[48] Although the court briefly considered the similarities of judicial corporal punishment and corporal punishment practiced in schools, it found that the latter issue was not before it and that it could, therefore, not pronounce on that issue in this case.[49]

The court then moved on to contextualising the interpretation of the section 11 right within South Africa's constitutional history. The court remarked that, because of our history of apartheid, South Africa has already "lagged behind" the rest of the word with respect to recognition of rights, and moving away from punishments that emphasise "retribution and vengeance" rather than "correction, prevention and the recognition of human rights".[50] Since the 1980s, the court continued, our country has endured widespread private and public violence, including violent crimes, such as murder and armed robbery.[51] The negotiations that led to our new constitutional order, however, was founded on an agreement rejecting violence and retribution – it can, therefore, be said that "the institutionalised use of violence by the State on juvenile offenders as authorised by section 294 of the Act is a cruel, inhuman and degrading punishment".[52] The state has a duty to uphold the values on which our democracy is founded; it would undermine the Constitution if the state is allowed to disregard these values by inflicting violence on its subjects.[53]

Next, the court considered the second stage in the two-stage inquiry into the justifiability of the limitation of the right in question. In the first stage, which was discussed above, the court established that the right in section 11 of the Interim Constitution has been infringed.[54] In the second stage, a court must establish whether such limitation is reasonable and justifiable within the framework of the limitation clause in section 33 of the Interim Constitution.[55] According to the court, the test for justifiability in section 33 comes down to three questions:

> "(a) whether the means used are reasonable; (b) whether they are justifiable in the context of the civilised society we hope we are or which we, through this Constitution, are aspiring to be; and (c) whether they are necessary to attain the objective."[56]

Essentially, this amounts to a proportionality test – "a process of weighing up the individual's right which the State wishes to limit against the objective which the State seeks to achieve

by such limitation", which test must ultimately occur against the backdrop of the values underlying the Constitution and our constitutional history.[57] Referring to the application of the proportionality test by the court in *S v Makwanyane* and the way in which the German Constitutional Court applied their proportionality test, the court remarked that a court should consider the purpose of the limitation, whether the limitation achieves the purpose and whether there is a balance between the purpose of the limitation and the right in question.[58] Notably, these factors very closely resemble the factors in the current Constitution's limitation clause in section 36.

There were two purposes proffered by the state for the implementation of juvenile whipping, first that it "constitutes a better alternative to imprisonment" for juveniles, and second, that juvenile whipping acts as a deterrent.[59] With reference to the first purpose, the court remarked that it seemed that juvenile whipping was only an option because there is a distinct lack of alternative mechanisms to deal with juvenile offenders and that "the price to be paid for this state of unreadiness is to subject juveniles to punishment that is cruel, inhuman or degrading", which state of affairs, the court rightly remarked, is "untenable".[60] Pointing to the shift in emphasis regarding the aims of punishment, the court held that although the "traditional objectives of punishment, namely, prevention, retribution, deterrence and rehabilitation, are no doubt still applicable", there has been "a gradual shift of emphasis away from the idea of sentencing being predominantly the arena where society wreaks its vengeance on wrongdoers", rather focusing on rehabilitation and "humanising" the criminal justice system.[61] Approaches to sentencing in the juvenile justice system, the court held, are also changing, focusing more on alternative correctional supervision, community service, victim–offender mediation and juvenile offender schools.[62] The (Interim) Constitution, the court held, has created an important framework that allows for the implementation of major reforms to our criminal justice system. "Every person" is eligible for the rights outlined in its Bill of Rights, encompassing both adults and children, women and men, as well as convicts and detainees – human dignity and the prohibition against harsh,

inhuman, or degrading penalties are plainly highly valued in the Constitution; the State must meet extremely strict standards before these rights can be restricted.[63] Regarding the second purpose of juvenile whipping, namely deterrence, the state stressed that juvenile whipping makes crime unappealing is, therefore, a justifiable goal. However, the court pointed out, the methods must be appropriate and justified, and there is not any solid proof that corporal punishment is more effective than other forms of punishment in deterring crime.[64] Furthermore, the court argued that the marginal deterrence value of juvenile whipping, which involves physical pain, does not justify its existence. The court pointed out that, while retribution is a legitimate element of punishment, it should not be the sole reason for punishment and should not be the overriding factor.[65] The supposed benefits of juvenile whipping, the court stressed, must be balanced against the rights that it infringes upon.[66] Corporal punishment, the court held, unlike other forms of punishment, involves the deliberate infliction of physical pain by one person onto another, sanctioned by the state.[67] The level of pain inflicted can be unpredictable, as it depends on the individual administering the punishment, with the court only specifying the number of strokes.[68] There is no dignity in this process, either for the recipient or the person delivering the punishment, as it degrades all involved.[69] For these reasons, the court concluded that there are no interests that justify retaining the practice – "[i]t has not been shown that there are no other punishments which are adequate to achieve the purposes for which it is imposed. Nor has it been shown to be a significantly effective deterrent".[70] On the contrary, the court held, the imposition of corporal punishment is more likely to coarsen and degrade children, rather than rehabilitate them.[71] The court, therefore, concluded that the imposition of corporal punishment on children is, therefore, an unconstitutional infringement of sections 10 and 11 of the (Interim) Constitution.[72]

1.3 Impact of the judgment

1.3.1 Impact on the interpretation and application of the right to freedom and security of the person and other rights of children

Building on the legacy of the *Makwanyane* case, the *Williams* case's recognition of the rights to dignity and personal freedom and security, particularly considering the egregious human rights violations that occurred during the apartheid era, paved the way for developments regarding the interpretation and application of these rights relating to children in years to come. This part of the chapter considers the approach followed in several cases that dealt with the right to freedom and security of the person after the judgment in *Williams*, particularly regarding the children. In addition, some other cases are also highlighted which emphasise the movement towards "constitutionalisation of children's rights" following the *Williams* decision.

Following the judgment in *Williams*, administering corporal punishment in schools was abolished by the legislature in terms of section 10 of the South African Schools Act 84 of 1996. In *Christian Education South Africa v Minister for Education*[73] the Constitutional Court was called upon to decide the constitutionality of section 10 of the South African Schools Act, which banned the use of corporal punishment in schools. It is important to note that, by the time that *Christian Education* was decided, the 1996 Constitution had come into effect and that the wording of the constitutional provision on personal freedom and security was slightly different than when *Williams* was decided in terms of the Interim Constitution – now the right provided that everyone had the right to be free from violence from public *or* private sources.[74] The appellant, Christian Education of South Africa, an association representing 196 independent Christian schools, contended that this prohibition violated the right of parents to religious freedom and, furthermore, interferes with the right to establish independent schools, the right to participate in the cultural life of their choice, the right to enjoy their culture and to practise their religion.[75] The appellant argued that corporal punishment was part of their religious

beliefs and interfered with their right to religious freedom.[76] In support of their claims, Christian Education cited Bible verses which instructed Christian parents to use corporal punishment in raising and disciplining their children.[77] They argued that parents delegated their parental authority to teachers, and that the corporal punishment was, therefore, administered in terms of biblical prescription.[78]

The Minister of Education opposed the appeal, arguing that corporal punishment violates children's rights to human dignity, equality, protection from maltreatment, neglect, abuse, violence, torture, and cruel treatment.[79] The Minister argued that the Bible verses do not empower or prescribe corporal punishment by teachers, and that parliament has a duty to respect, protect, promote, and fulfil the rights in the Bill of Rights, which rights would be violated by administering corporal punishment.[80] Referring to the judgment in *S v Williams*, the court highlighted that the violence which was sanctioned by judicially imposed corporal punishment was contrary to the values underlying the Constitution and infringed on the rights to dignity and personal freedom and security of the young people concerned.[81] The court looked to a Namibian case similar to the *Christian Education* case, wherein the Namibian Supreme Court found corporal punishment in schools to be inconsistent with the Namibian Constitution and, therefore, unconstitutional.[82] From these cases, the *Christian Education* Court concluded that there was a trend in the southern African case law that considers corporal punishment to be a violation of the dignity and personal security of children.[83] The court further noted that the requirement in section 12 that prohibits violence from public and private sources does not substitute, but is in addition to "the right not to be punished in a cruel, inhuman or degrading way".[84] In terms of section 7(2), the court further argued, that the state has a duty to "respect, protect, promote and fulfill" all rights in the Bill of Rights, and must, therefore, take steps to limit public and private violence.[85] Finally, the court pointed out that "coupled with [the state's] special duty towards children, this obligation represents a powerful requirement on the state to act".[86] The court proceeded to compare the administration of judicially imposed corporal

punishment with corporal punishment in schools, finding that the two settings, although slightly different, shared some significant characteristics, namely both being "detached" and "institutional" environments.[87]

In addition, the court argued that it is important to note our painful history of meeting protesting youth with violence, as well as the extent of the child abuse and neglect prevalent in South African society – these "considerations taken from past and present are highly relevant to the degree of legitimate concern that the state may have in an area loaded with social pain".[88] The court noted that the purpose of the Schools Act was to make a decisive break with our "authoritarian past" by introducing new principles of learning in terms of which problems were solved by reason, rather than by force.[89] Accordingly, the court argued, that banning physical punishment in schools was more than just a practical attempt to address behavioural issues in a different way.[90] Abolition of corporal punishment served a moral and symbolic purpose that was obviously meant to uphold the inherent dignity and emotional and physical integrity of every child.[91] Supervising the use of physical punishment in schools is another significant challenge, as it is inevitable that it will be administered by different teachers or institutions with varying degrees of force and may be excessive.[92] The court, therefore, concluded that the entire symbolic, moral, and educational purpose of abolishing corporal punishment would be compromised if some schools were exempted from this prohibition. It would also call into question the state's ability to uphold its obligation to protect all individuals from violence.[93] The court, however, chose not to decide the issue of corporal punishment by parents in their own home.[94]

Almost a decade later, the courts had another opportunity to consider the constitutionality of corporal punishment, this time in the context of parents regarding their own children. In *YG v S*[95] the High Court found that the common law defence of "reasonable chastisement" on a charge of assault for parents regarding the physical punishment of children, was unconstitutional as it infringed on the human dignity, equality,

the right to be free from all forms of violence from public or private sources, the rights of children and the right not to be treated in an inhuman or degrading way.[96] Referring to both the *Williams* and *Christian Education* judgments, the High Court held that the arbitrary nature of physical chastisement is a very relevant consideration when ascertaining the justifiability of the infringement of children's rights in the case of physical punishment.[97] Consequently, the High Court found the arbitrary nature of physical punishment to be "out of line" with "the child-centred model of rights demanded by our Constitution".[98] In addition, the High Court highlighted that the reference in section 12 of the Constitution to the prohibition of violence from public *and* private sources, entails that victims of violence in the home should have the same protections as those who are the victims of assault from the public domain.[99] Put differently, a child who endures violence from a parent in the home should have the same legal protections as in the case of abuse of children originating from a third party.[100] According to the High Court, the defence of "reasonable chastisement" against a charge of assault infringes on children's right to dignity in the following way:

> "the defence of reasonable chastisement permits (and obliges) the State to treat him or her with a lesser level of concern and gives the State less power to protect her or his rights. This is inherently degrading for children who are effectively treated as second-class citizens by the law in this regard."[101]

In this sense, the High Court argued, the defence of "reasonable chastisement", therefore, not only undermines the human dignity of children, but also infringes on the equality of children by treating them differently from adults who endure similar incidences of assault.[102] Furthermore, the High Court held that the defence infringes on the physical integrity of children and is "antithetical to the constitutional right prioritising the best interests of the child"; undermining the special duty of the state towards children to protect their best interests in all matters.[103] Consequently, the High Court found

the common law defence unconstitutional.[104] One of the parties in the matter, Freedom of Religion South Africa, however, appealed against the High Court's ruling to the Constitutional Court.

Regarding the appeal, the Constitutional Court in *Freedom of Religion South Africa v Minister of Justice and Constitutional Development*,[105] Freedom of Religion South Africa sought to challenge the declaration of unconstitutionality of physical punishment of children by their parents issued by the High Court. The Constitutional Court, basing its argument on the right to personal freedom and security in section 12 of the Constitution, the court held that because of our "painful and shameful history of widespread and institutionalised violence", the government had a duty to protect everyone against "all forms" of violence, from public, as well as private sources.[106] Within the context of the corporal punishment of children, the court once more referred to the *Williams* judgment, stating that a society that legitimises violence goes against the founding values of the Constitution.[107] The court reiterated that "all forms of violence" in terms of section 12 includes all types of violence, regardless whether such violence is categorised as "moderate, reasonable or extreme",[108] therefore, the court held that

> "parental chastisement of a child, however moderate or reasonable does, in my view, meet the threshold requirement of violence proscribed by this constitutional provision and, therefore, limits the right in section 12(1)(*c*)."[109]

Referring to *Williams* and *Christian Education*, the court further emphasised the importance of children's right to human dignity[110] and the paramountcy of the best interests of children in terms of section 28 of the Constitution.[111] The court stressed that the best interests of children is of paramount importance in *every matter* concerning a child, "regardless of the belief behind the practice".[112] The court concluded that, as there were other less restrictive means available to discipline children, for instance the positive parenting approach, as well as "the right to be free from all forms of violence or to be treated with dignity,

coupled with what chastisement does in reality entail… speak quite forcefully against the preservation of the common law defence of reasonable and moderate parental chastisement".[113] Consequently, the court declared parents' common law defence of reasonable chastisement against a charge of assault, unconstitutional and invalid.[114] Although this conclusion should be welcomed as a triumph for constitutional values, some uncertainty remains. Bekink rightly points out that the prosecuting authority may experience difficulties in applying the decision in practice, while the broad public may also not support the judgment and continue to use physical punishment at home.[115] Greeff also indicates that, regardless of the *Freedom of Religion SA* judgment, the practice of corporal punishment in South Africa continues both at home and at school:

> "As recently as October 2016, the Committee on the Rights of the Child stated in their concluding comments on the second periodic report that corporal punishment is still practiced extensively throughout South Africa in homes and schools. In the General Household Survey of 2011, ninety-two per cent of the child respondents indicated that they experienced corporal punishment at school. Fortunately, this number dropped to 5.7 per cent nationally in 2018104 but jumped again in 2019 to 6.8 per cent of respondents."[116]

Considering the unconstitutionality of physical punishment of children, the provision of government sponsored parental education programmes on positive disciplinary methods will, therefore, be key in educating parents on alternatives to corporal punishment.[117]

Perhaps one of the most important effects of the *Williams* case is the trend it initiated to emphasise the importance of the protection of the constitutionally enshrined rights of children and upholding their best interests in various contexts, also referred to by Binford as the "constitutionalisation of children's rights".[118] So, for example, in *Fraser v Children's Court Pretoria North*,[119] the court held that the best interests of the child must be considered and balanced in disputed adoption cases, while

in *Fraser v Naude*, the Constitutional Court denied any further appeal and confirmed an order stating that the best interests of children must be considered in adoption.[120] Furthermore, the Constitutional Court in *Du Toit v Minister for Welfare and Population Development*, held that it was in the best interests of a child to be adopted by both partners of a same-sex couple, and (amongst other things) invalidated certain legislative prohibitions on the adoption of children by same-sex couples.[121] In addition, regarding sentencing, in *S v Howells*[122] a sentence of imprisonment was upheld regarding a mother, provided her children would be cared for during her imprisonment, while in *S v M* the court considered the best interests of the child when sentencing the mother, converting her sentence to a non-custodial one in order for her to continue taking care of her children.[123]

In *AB v Pridwin Preparatory School* the Constitutional Court was called upon to pronounce on the constitutional permissibility of depriving children of their right to education by a private school expelling them because of the behaviour of their parents.[124] The court held that the school failed to indicate how it considered the best interests of the children in making the decision to expel them, and, therefore, infringed on the best interest of the children.[125] In the context of the registration of births, the Constitutional Court in *Centre for Child Law v Director General: Department of Home Affairs* held that the Births and Deaths Registration Act 51 of 1992 treated the registration of the births of legitimate and illegitimate children differently was consistent with the principle of paramountcy of the interests of children and stigmatised children based on the circumstances of their birth.[126] In *Centre for Child Law v Director of Public Prosecutions, Johannesburg,* the court held that certain provisions criminalising the possession or usage of cannabis by children should be declared unconstitutional as the criminalisation of such conduct does not achieve the intended purpose of protecting children and that there are better and less limiting measures to deal with children who engage in such conduct.[127] These are just some of the cases that have focused on the importance of the protection of children and upholding their best interests in matters that affect them following the decision in *Williams*.

1.4 Conclusion

From this discussion it has become clear that the *Williams* case has had a profound and lasting impact on the South African legal system, especially regarding safeguarding the rights and best interests of children. The *Williams* case, although decided in terms of the Interim Constitution, highlighted the importance of protecting the human dignity and personal freedom and security of children – both of which were severely limited by the imposition of corporal punishment by the state. In addition, it was found that the imposition of judicially sanctioned corporal punishment was contrary to the values underlying our constitutional order and could also be regarded as a cruel, inhuman and degrading punishment.

Building on the *Williams* decision, the court in *Christian Education* invalidated the imposition of corporal punishment in schools. Again, the court stressed that the imposition of corporal punishment in the institutionalised setting of schools had a very similar effect on children than that of state-sanctioned corporal punishment, severely infringing children's human dignity and personal freedom and security.

Protecting children from all forms of violence, both from public and private sources, was a further welcome and necessary development in our law. In *YG v S* and *Freedom of Religion SA* the courts invalidated the common law defence of reasonable and moderate chastisement regarding the physical punishment of children by their parents. Recognising that children are not mere extensions or possessions of their caregivers, but individual persons worthy of the same protection against all forms of violence as any adult person, is arguably an even more important development in recognising the equality of children.

In addition, the decision in *Williams*, as well as the subsequent cases highlighted above, set in motion a judicial trend of considering the rights and best interests of children in all matters that concern them. Here one may think of cases like: *Fraser v Children's Court Pretoria North*, *Fraser v Naude* and *Du Toit v Minister for Welfare and Population Development* (in the context of adoptions), *S v Howell* and *S v M* (in the context of sentencing a care giver), *AB v Pridwin Preparatory School* (concerning limitation

of the right to education), *Centre for Child Law v Director General: Department of Home Affairs* (regarding legitimacy of one's birth), and *Centre for Child Law v Director of Public Prosecutions* (regarding criminal prosecution of children for cannabis use or possession). This trend is to be welcomed, and it is hoped that this trend will continue to be developed by our courts in the years to come. Children are indeed vulnerable and inexperienced, which is why it is imperative that we hold their best interest in the highest regard in all matters that affect them.

Endnotes

1 1995 3 SA 632 (CC); also see Sarkin "Problems and challenges facing South Africa's Constitutional Court: An evaluation of its decisions on capital and corporal punishment" 1996 *SALJ* 71 80–84.
2 *Williams* (n 1) par 8.
3 *Williams* (n 1) par 13.
4 *Williams* (n 1) par 15–19.
5 *Williams* (n 1) par 19–53.
6 *Williams* (n 1) par 52.
7 *Williams* (n 1) par 54–92.
8 *Williams* (n 1) par 8.
9 *Williams* (n 1) par 8.
10 *Williams* (n 1) par 8.
11 *Williams* (n 1) par 10.
12 *Williams* (n 1) par 10–11.
13 *Williams* (n 1) par 13.
14 *Williams* (n 1) par 13.
15 *Williams* (n 1) par 14; also see *S v Du Preez* 1975 4 SA 606 (C).
16 s 295(2) of the Criminal Procedure Act; *Williams* (n 1) par 14.
17 s 294(1)(*a*) of the Criminal Procedure Act.
18 s 294(2) of the Criminal Procedure Act.
19 s 294(3) of the Criminal Procedure Act.
20 s 294(5) of the Criminal Procedure Act.
21 s 294(1)(*b*) of the Criminal Procedure Act.
22 These are: the right to equality (s 8), the right to dignity (s 10) and the rights of children (s 30) of the Interim Constitution; see *Williams* (n 1) par 16–18.
23 *Williams* (n 1) par 20.
24 *Williams* (n 1) par 20–21.
25 *Williams* (n 1) par 24.
26 *Williams* (n 1) par 24; see *R v Mountain* 1928 TPD 86 88; and *Hellberg v R* 1933 NPD 507 510.
27 *Williams* (n 1) par 23.
28 *Williams* (n 1) par 26; General Comment 20.4 of the Human Rights Committee 1992 Report.
29 *Williams* (n 1) par 26; also see *Vuolanne v Finland* 96 ILR 649 657.
30 *Williams* (n 1) par 27; also see Van Dijk and Van Hoof *Theory and Practice of the European Convention on Human Rights* (1990) 226–227.
31 *Williams* (n 1) par 27; *Denmark et al v Greece*: Report of 5 November 1969 *Yearbook of the European Convention on Human Rights* XII (1969) 186; also see *The Republic of Ireland v The United Kingdom* (1979–80) 2 EHRR 25 80 par 167.
32 *Williams* (n 1) par 27; see *Tyrer v United Kingdom* (1979–80) 2 EHRR 1 9 par 29.
33 *Williams* (n 1) par 28.
34 *Williams* (n 1) par 28; 408 US 238 (1972) 273.
35 *Williams* (n 1) par 29; 408 US 153 (1976).
36 *Williams* (n 1) par 30; (1988) 31 CRR 193 213–214.
37 *Williams* (n 1) par 37; also see *S v Makwanyane* 1995 3 SA 391 (CC) par 88; also see Laubscher "The death penalty decision: A triumph for human rights and the value of *ubuntu*" in Laubscher and Van

Staden *Landmark Constitutional Cases that Changed South Africa (Vol 1)* (2023) 16–17.

38 *Williams* (n 1) par 37.
39 *Williams* (n 1) par 31.
40 *Williams* (n 1) par 31; 1991 3 SA 76 (NmSC).
41 *Williams* (n 1) par 32; 1988 2 SA 702 (ZSC).
42 *Williams* (n 1) par 32; 1989 1 SA 460 (ZHC).
43 *Williams* (n 1) par 32; 1990 4 SA 151 (ZSC).
44 *Williams* (n 1) par 39–40.
45 *Williams* (n 1) par 51.
46 *Williams* (n 1) par 44–45.
47 *Williams* (n 1) par 46.
48 *Williams* (n 1) par 47.
49 *Williams* (n 1) par 48–49.
50 *Williams* (n 1) par 50.
51 *Williams* (n 1) par 51.
52 *Williams* (n 1) par 52.
53 *Williams* (n 1) par 52.
54 *Williams* (n 1) par 54.
55 *Williams* (n 1) par 54; s 33 of the Interim Constitution reads as follows: "The rights entrenched in this Chapter may be limited by law of general application, provided that such limitation (a) shall be permissible only to the extent that it is (i) reasonable; and (ii) justifiable in an open and democratic society based on freedom and equality; and (b) shall not negate the essential content of the right in question, and provided further that any limitation to (aa) a right entrenched in section 10, 11… shall, in addition to being reasonable as required in paragraph (a)(i), also be necessary."
56 *Williams* (n 1) par 58.
57 *Williams* (n 1) par 58–59.
58 *Williams* (n 1) par 60.
59 *Williams* (n 1) par 61.
60 *Williams* (n 1) par 63.
61 *Williams* (n 1) par 64–67.
62 *Williams* (n 1) par 73–75.
63 *Williams* (n 1) par 76.
64 *Williams* (n 1) par 80.
65 *Williams* (n 1) par 86.
66 *Williams* (n 1) par 89.
67 *Williams* (n 1) par 89.
68 *Williams* (n 1) par 89.
69 *Williams* (n 1) par 89.
70 *Williams* (n 1) par 91.
71 *Williams* (n 1) par 91.
72 *Williams* (n 1) par 92.
73 2000 4 SA 757 (CC); also see the discussion by Bekink "Suid-Afrika se hoogste hof gee die gemeenregtelike verweer van ouerlike bevoegdheid tot redelike en matige tugtiging 'n doodskoot: Nabetragting oor die saak van *Freedom of Religion SA v Minister of Justice and Others* 2020 (1) SA 1 (KH)" 2021 *Tydskrif vir Geesteswetenskappe* 39–56.

74 See Sloth-Nielsen "Southern African perspectives on banning corporal punishment – A comparison of Namibia, Botswana, South Africa and Zimbabwe" in Leviner and Naylor (eds) *Corporal Punishment of Children: Comparative Legal and Social Developments towards Prohibition and Beyond* (2019) 245 256; and Skelton "*S v Williams*: a springboard for further debate about corporal punishment" 2015 *Acta Juridica* 336-359.
75 *Christian Education* (n 73) par 2.
76 *Christian Education* (n 73) par 2 4.
77 *Christian Education* (n 73) par 4.
78 *Christian Education* (n 73) par 5.
79 *Christian Education* (n 73) par 8.
80 *Christian Education* (n 73) par 8.
81 *Christian Education* (n 73) par 44.
82 *Christian Education* (n 73) par 46; *Ex parte Attorney-General, Namibia: In re Corporal Punishment by Organs of State* 1991 3 SA 76 (NmSC).
83 *Christian Education* (n 73) par 47.
84 *Christian Education* (n 73) par 47.
85 *Christian Education* (n 73) par 47.
86 *Christian Education* (n 73) par 47.
87 *Christian Education* (n 73) par 49.
88 *Christian Education* (n 73) par 49.
89 *Christian Education* (n 73) par 50.
90 *Christian Education* (n 73) par 50.
91 *Christian Education* (n 73) par 50.
92 *Christian Education* (n 73) par 50.
93 *Christian Education* (n 73) par 50.
94 *Christian Education* (n 73) par 48.
95 2018 1 SACR 64 (GJ); also see Sloth-Nielsen (n 74) 259-262.
96 *YG v S* (n 95) par 36.
97 *YG v S* (n 95) par 68.
98 *YG v S* (n 95) par 68.
99 *YG v S* (n 95) par 69.
100 *YG v S* (n 95) par 69.
101 *YG v S* (n 95) par 72.
102 *YG v S* (n 95) par 74-76.
103 *YG v S* (n 95) par 76.
104 *YG v S* (n 95) par 85.
105 2020 1 SA 1 (CC); also see Bekink (n 73) 47-55; and Greeff "Corporal punishment: Law reform lessons for Australia from South Africa and New Zealand" 2021 *Comparative and International Law Journal of Southern Africa* 1 10-13.
106 *Freedom of Religion SA* (n 105) par 42.
107 *Freedom of Religion SA* (n 105) par 43; see *Williams* (n 1) par 52.
108 *Freedom of Religion SA* (n 105) par 43.
109 *Freedom of Religion SA* (n 105) par 44.
110 *Freedom of Religion SA* (n 105) par 45-48.
111 *Freedom of Religion SA* (n 105) par 55-56.
112 *Freedom of Religion SA* (n 105) par 57-60; also see *S v M* 2008 3 SA 232 (CC) par 26; and *Christian Education* (n 73) par 41.
113 *Freedom of Religion SA* (n 105) par 69-71.
114 *Freedom of Religion SA* (n 105) par 73.

115 Bekink (n 73) 54–55.
116 Greeff (n 105) 14.
117 Bekink (n 73) 55.
118 Binford "The constitutionalization of children's rights in South Africa" 2016 *New York Law School Law Review* 333.
119 1997 2 SA 218 (CC).
120 1999 1 SA 1 (CC).
121 2003 2 SA 198 (CC).
122 1999 2 All SA 233 (C).
123 *S v M* (n 112); see Binford (n 118) 351.
124 2020 5 SA 327 (CC); also see Laubscher "Overview of the Constitutional Court judgments on the bill of rights – 2020" 2021 *TSAR* 311 321–323.
125 *AB v Pridwin* (n 124) par 152; Laubscher (n 124) 322.
126 2022 2 SA 131 (CC); also see Laubscher "Overview of the Constitutional Court judgments on the bill of rights – 2021" 2022 *TSAR* 356 367.
127 2022 2 SACR 629 (CC); also see Laubscher "Overview of the Constitutional Court judgments on the bill of rights – 2022" 2023 *TSAR* 316 327–328.

Chapter 2

Shaping State Accountability in South African Law

Carmichele v Minister of Police[1]

Franaaz Khan
Faculty of Law,
University of Johannesburg
Johannesburg, South Africa

> "Few things can be more important to women than freedom from the threat of sexual violence … It is the single greatest threat to the self-determination of South African women" (*Carmichele* par 62).

Abstract

Carmichele v Minister of Police represents a watershed moment in South African constitutional jurisprudence, fundamentally altering the relationship between the state and its citizens regarding protection from harm. The case's landmark status stems from its profound impact on several interconnected areas of law. First, it established a constitutional imperative for courts to develop the common law in accordance with the spirit, purport and objects of the Bill of Rights, particularly when existing legal frameworks fail to adequately protect constitutional values. Second, it revolutionised state accountability by recognising that the state bears positive duties to protect

citizens from foreseeable harm, especially in cases of gender-based violence (GBV). This recognition significantly expanded the scope of delictual liability to encompass state omissions where officials fail to take reasonable steps despite having knowledge of specific threats. Third, the judgment explicitly acknowledged the constitutional dimensions of gender-based violence, recognising it as "the single greatest threat to the self-determination of South African women" and highlighting the state's special responsibility in addressing this societal ill. Fourth, it exemplified transformative constitutionalism by infusing private law remedies with constitutional values, thereby bridging the traditional divide between public and private law. The case's lasting significance is evident in subsequent legal developments, including reformed bail procedures, enhanced state official training and improved inter-departmental coordination within the criminal justice system. By mandating that courts interpret legal duties through a constitutional lens that emphasises dignity, equality and freedom, *Carmichele* established a precedent that continues to shape South African jurisprudence, forcing state institutions to take their protective obligations seriously while providing victims with legal recourse when those obligations are neglected.

2.1 Introduction

Carmichele v Minister of Police was a landmark decision in South African law. It has immense implications for the recognition and protection of gender-based violence survivors' rights. It also paved the way for establishing state liability principles in negligence cases. This chapter explores the important aspects of the case, delving into its background, its significance in South African legal history, and its far-reaching implications for gender justice and state accountability.

The case was heard in the Constitutional Court in 2001, and it involved an appeal by the applicant, Ms Carmichele, against a decision by the Supreme Court of Appeal. Ms Carmichele was a victim of a heinous rape and assault by a known criminal. This criminal had, on a previous occasion, harassed and threatened her. Despite her numerous attempts

to report to the police regarding the criminal behaviour of the accused, the police failed to take the necessary steps to protect her from harm. Subsequently, she sued the Minister of Safety and Security (now the Minister of Police) for damages. Ms Carmichele alleged negligence on the part of the police where they had failed in preventing the assault, as they were aware of the imminent danger.

The case stands as a turning point in South African legal history, especially in the law of delict. It demonstrated a significant departure from traditional approaches to the law of delict, especially in cases that resulted from gender-based violence. The case highlighted the state's responsibility to safeguard persons from harm. The responsibility was amplified in circumstances where the police had prior knowledge of the danger.[2] Moreover, this case signified the changing role of the judiciary in addressing failures of law officials. The judiciary vaguely holds these officials responsible for their negligence and/or omissions. In holding these officials accountable, one is promoting the principles of constitutionalism and the rule of law in post-apartheid South Africa.[3] The case set key precedents in the sphere of gender-based violence and state liability. In addition, it placed emphasis on the intersectional nature of gender violence, whereby it was acknowledged that women, especially those from disadvantaged communities, are affected by such types of violence.

The decision to hold the state responsible for its failure to protect Ms Carmichele cemented the foundation for subsequent legal developments which focused on strengthening mechanisms for preventing and addressing gender-based violence. These mechanisms include legislative changes, policy initiatives, and judicial involvement.[4] This chapter begins by providing an overview of the background of the *Carmichele* case. It then proceeds to examine the proceedings in the lower courts, before offering a detailed analysis of the judgment delivered by the Constitutional Court. The chapter concludes with a discussion of the significance and broader implications of the *Carmichele* case, focusing on its influence on subsequent legal cases, its contribution to state accountability, its impact

on the law of delict, and its role in advancing the principles of transformative constitutionalism.

2.2 Background

On 6 August 1995, Ms Carmichele (the applicant or victim) was heinously attacked by Francois Coetzee (accused) at the residence of her friend, namely Julie Gosling. The accused had a disturbing history of raging sexual offences that commenced in his youth. At the time that he attacked the victim, he had already been convicted of several serious crimes and this included an attempt to murder another young female.[5] Ms Carmichele often stayed at her friend's (Ms Gosling's) house. In 1995, towards the latter of June, the accused was seen loitering around Gosling's home, attempting to peep through windows and open them. The victim approached the accused and indicated that he was looking for her friend. Ms Carmichele was uncomfortable and sensed that the accused was not being truthful. She proceeded to call her friend. Julie confirmed that the accused was making an excuse, as he had probably seen her exiting her home earlier in the day.[6] Nonetheless, Julie reported the matter to the police, raising the fact that the accused's conduct was suspicious. The police indicated that they could not assist as no crime was being committed.

On 6 August 1995, Ms Carmichele visited Julie at her residence, unaware that Julie was not home. She entered the house and was attacked by the accused, who had already broken in. The accused viciously assaulted the victim with a pick handle. Thereafter, he stabbed Ms Carmichele. As the accused proceeded with the attack, the victim managed to defend herself by kicking him, which caused him to lose his balance. At this point, Ms Carmichele escaped through an open door and sought the assistance of a passerby.[7] The accused was later arrested and charged with multiple offences, including attempted murder.

This case demonstrates one of the failures of the criminal justice system in South Africa, whereby the police failed to respond timeously to the pleas of victims. In this case, it resulted in the accused being able to walk around freely and committing the heinous offences. It can be argued that the

attack on Ms Carmichele could have been prevented had the police heeded the concerns that she raised.

2.3 Proceedings in the lower courts

The applicant sought to rely on the common law duty of wrongfulness in terms of the law of delict. On this basis, the applicant instituted action against the two Ministers in the high court for the injuries that she had sustained from the attack.[8] The applicant relied on the argument that the police officer's conduct and that of the public prosecutors took the form of an omission, in which they had a legal duty to act in order to prevent the accused from causing her harm.[9] The applicant alleged a further omission by the prosecutors and police when they released the accused without bail. She relied on the duties imposed on the police by the Constitution; for example, in terms of section 205(3) and the State in terms of the Bill of Rights, chapter 2, which included various rights, such as the right to life and freedom and security of the person.[10] The High Court did not agree and dismissed the applicant's claim. The court held that the applicant could not establish a legal duty of care that rested upon the police and prosecutor.[11] The applicant was met with the same fate when she appealed to the Supreme Court of Appeal.[12] The Supreme Court of Appeal endorsed the High Court's finding that the police and prosecution had no legal duty of care towards the applicant, hence no claim for damages to her. The applicant then sought a special appeal against the order of the Supreme Court of Appeal in the Constitutional Court.[13]

2.4 Constitutional court judgment

2.4.1 Overview

The Constitutional Court was tasked with considering two significant issues, amongst others, one of which being the development of the common law that promotes the spirit, purport and objects of the fundamental rights and the other being the duty of care owed and the liability of the state.[14]

2.4.2 Development of the common law

The Constitutional Court agreed that when it came to the reform of the law, the legislature was the main actor in effecting change. However, the court pointed out that the judiciary was also under a general duty to evolve the common law where it moved away from the spirit, purport and objects of the fundamental rights provisions. The court held that:

> "In exercising their powers to develop the common law, judges should be mindful of the fact that the major engine for law reform should be the legislature and not the judiciary. In this regard it is worth repeating the dictum of Iacobucci J in *R v Salituro*, which was cited by Kentridge AJ in *Du Plessis v De Klerk*: 'Judges can and should adapt the common law to reflect the changing social, moral and economic fabric of the country. Judges should not be quick to perpetuate rules whose social foundation has long since disappeared. Nonetheless there are significant constraints on the power of the judiciary to change the law . . . in a constitutional democracy such as ours it is the legislature and not the courts which has the major responsibility for law reform . . . The judiciary should confine itself to those incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society'."[15]

These constitutional issues had not been dealt with at the High Court or the Supreme Court of Appeal. This did not detract from the courts' responsibility to develop the common law if the need arose in a particular case. The court emphasised and instructed that the common law be developed in circumstances that impose a duty of care on the state where it has knowledge of a specific threat and omits reasonable measures to prevent harm.[16] Section 39(2) of the Constitution imposes a duty on courts to promote the spirit, purport, and objects of the Bill of Rights when developing the common law. The provision demonstrates the evolving nature of the Constitution, requesting courts to not

just apply existing law but also enhance it to reflect the values of the Constitution.[17]

Justice Ackermann illustrated that the Constitution is the supreme law, and all law, including the common law, must be developed in accordance with it.[18] This included reassessing common law rules that were inconsistent with constitutional values from time to time. The court took a guarded yet strong stance when dealing with this issue.[19] The Court did this by not forcefully imposing liability on the state in this instance but rather referred the case back to the High Court for it to reassess the matter, taking cognisance of the constitutional imperative to develop the common law.[20]

The Constitutional Court held that the common law should be developed gradually, in accordance with the facts of each case that is presented to it. The aim is to advance common law by having regard to the values of the Constitution, particularly the rights to dignity, life, and security of the person.[21] This required the lower courts to assess whether the common law adequately provided protection to those who were victims of heinous crimes. If the law did not provide this protection, it must be developed in this regard.

The court also evaluated the existing common law doctrine of wrongfulness. The court held that this doctrine assisted in determining whether a legal duty existed in cases of alleged negligence and it required reassessment.[22] While appreciating the necessity for the common law to develop, the court also acknowledged the significance of legal certainty and continuity.[23] While developing the common law, one must be wary of not affecting abrupt or radical changes that could undermine the stability of the legal system.[24] Rather, the court requested a careful balance to be made between honouring established legal principles and making necessary changes to guarantee that the law remains fair and lawful in light of constitutional values.[25]

Another significant aspect of the Constitutional Court decision was that it requested that our courts be amenable to considering developments in comparative and international law when advancing the common law. This is of importance

in instances when the common law of other jurisdictions provides insights into how similar issues have been dealt with in different legal contexts.[26] The court highlighted that such comparative insights can be monumental in the development of the common law in South Africa, especially in matters that involve human rights.[27]

The court acknowledged that some judges may be conservative in their approach to developing common law. However, judicial innovation is required by the Constitution at times.[28] Such a type of innovation must be guided by constitutional values. This will guarantee that the law advances in a way that protects human rights and demonstrates the change in South African society.[29] However, the court acknowledged that with innovation comes respect for the broader legal framework.[30]

2.4.3 Duty of care and state's liability

As discussed earlier in this chapter, the applicant alleged that the state, through its organs, the police and the prosecution, owed a duty of care to her to protect her from harm inflicted by the accused, who had a history of being violent.[31] The court was tasked with determining whether such a duty of care existed under the common law and would result in the state being liable for the harm which she suffered. The court began by examining the common law concept of "duty of care". It involved establishing whether the law should acknowledge that a person (or entity) has a legal responsibility to prevent causing harm to another. With respect to state liability, this involved determining whether the state has an obligation to take reasonable steps to prevent foreseeable harm to individuals.[32]

The court made note of the importance of the state's duty extending beyond refraining from causing harm. The duty must include reasonable steps that need to be taken to protect persons from harm by others.[33] The court also emphasised that the state is tasked by the Constitution and international law to prevent gender-based violence and ensure that women's right to dignity and freedom of security is protected. The court held that the police duties "is one of the primary agencies of

the State responsible for the protection of the public in general and women and children in particular against the invasion of their fundamental rights by perpetrators of violent crime".[34] The court noted various important factors in establishing the duty of care. These are discussed in the paragraphs below.

2.4.3.1 Foreseeability of harm

The court acknowledged that the harm which the applicant experienced was foreseeable. This was evident as the police and prosecutors were aware of the accused's history of violence and the multiple charges against him.[35] This knowledge on the part of the state was foundational in the anticipation that the accused was a threat to society and the victim.

24.3.2 Proximity and knowledge

The court examined the relationship between the state and the applicant and concluded that the state and its necessary organs were aware of the danger posed by the accused.[36] Given the fact that the proximity and knowledge were close, it increased the expectation that the state should take steps to protect potential victims from harm.

2.4.3.3 Public policy and legal convictions

Traditionally, the determination of whether a duty of care exists in South African law involves considering public policy and the legal convictions of the community. The Constitutional Court emphasised that these considerations must be informed by constitutional values, particularly the protection of human rights. The court held that public policy, rooted in constitutional imperatives, supported the imposition of a duty of care on the state in this case.[37]

In addition, the Constitutional Court took cognisance of the concept of wrongfulness as being a critical element in establishing liability. It refers to the breach of a legal duty not to cause harm.[38] The court needed to decide whether the failure of the police and prosecutors to take steps to prevent the accused's release and, thus, the harm to the applicant could be considered wrongful.

The court reaffirmed that the common-law concept of wrongfulness is influenced by considerations of public policy, which are now shaped by constitutional values. Given the state's constitutional duty to protect the rights to life, dignity, and security of the person, the court concluded that the state's failure to act in this case was indeed wrongful.[39] The court linked the concept of wrongfulness directly to the state's obligations under the Constitution, particularly sections 10, 11, and 12, which guarantee the rights to dignity, life, and freedom and security of the person. The court stated that these rights impose positive duties on the state to protect individuals from harm, particularly when such harm is foreseeable.[40]

The specific wrongful act identified by the court was the failure of the police and prosecutors to oppose the accused's bail. The court noted that the decision to release the accused on bail, despite the known risk, represented a failure by the state to fulfil its constitutional duties.[41]

The court held that where state officials, such as the police and prosecutors, fail to perform their duties in a manner that respects and protects these constitutional rights, their conduct can be considered wrongful under the law of delict. This wrongfulness forms the basis for holding the state liable for the harm caused by their omissions.[42]

After establishing that the state's conduct was wrongful, the court turned to the issue of negligence.[43] In delict, negligence occurs when a party fails to take reasonable care to avoid causing harm to another. The court needed to decide whether the state, through the police and prosecutors, was negligent in its duty to protect the applicant.[44] The court examined whether the police and prosecutors had acted reasonably in their handling of the accused's case. Given the accused's violent history and the serious nature of the charges which he was facing, The court found that it would have been reasonable for the state to oppose his release on bail or to implement other protective measures.[45] The court concluded that the failure to take such reasonable steps constituted negligence.[46] The state's inaction in the face of a clear and present danger to the applicant was seen as a breach of the standard of care expected of the police and prosecutors.

Moreover, for delictual liability to be established, it must also be shown that negligent conduct caused the harm. The court considered whether the harm to the applicant would have occurred if the state had taken reasonable steps to prevent the accused's release.[47] The court found that the state's failure to act was a direct cause of the harm, establishing the necessary link between the state's negligence and the applicant's injuries.[48]

An important observation by the court was the need to balance various interests when imposing liability on the state. There was a need to protect individuals' right to dignity and security on one end and on the other end of the spectrum. One needed to be cognisant of the practical challenges facing criminal justice, whereby these claims against the state would open up floodgates for similar matters.[49] However, the court concluded that the public interest in holding the state responsible for safeguarding individuals from foreseeable harm outweighed the concerns about possible burdens on the criminal justice system.[50] The court emphasised that the state's duty to uphold constitutional rights cannot be blurred by concerns about administrative efficiency or resource setbacks.[51] The court reinforced that the Constitution mandates an elevated standard of care from state officials, especially in protecting individuals from harm. This standard must be adhered to despite the additional responsibilities of the state.[52]

2.4.4 Remittal to the High Court

Having laid down the principles for determining state liability, the Constitutional Court referred the matter back to the high court. It requested and instructed the high court to apply these principles to the facts of the case and reconsider whether the state could be held liable in the circumstances, having regard for constitutional values.[53] The referral set a fresh understanding and start for the high court and allowed it to re-examine the facts, bearing in mind constitutional mandates. This also paved the way for the common law to evolve in a way that was consistent with the Constitution. This approach strengthened the Constitutional Court's function in directing the advancement of the common law, having regard for constitutional principles.

This decision set the benchmark for future cases involving state liability and infringements of constitutional rights.

2.5 The significance and impact of the Carmichele case

As discussed earlier in the chapter, the *Carmichele* judgment strengthened the principle that the state must be held accountable in cases where they failed to protect individuals from harm. This accountability extended to instances where the state and its organs had specific knowledge of specific threats as well. The decision also aligned with the law of delict and social values that ensure that victims of state negligence have recourse in law and that the state is incentivised to fulfil its protective obligations.[54] The judgment also paved the way for increased state liability in cases where the state fails to protect individuals from foreseeable harm. This decision has consequences for the state's approach to risk assessment and the distribution of resources. The implication of liability has resulted in a more cautious and proactive stance taken by state and law enforcement officials, particularly in cases where there is a known risk to public security.[55]

The decision has also encouraged persons to apply for legal redress when their rights have been violated because of state negligence.[56] This has positively impacted the development of a culture of accountability, in which we see the state being held accountable to a higher standard of care in its engagements with people.[57]

Moreover, the judgment has had a significant impact on subsequent cases coming before our courts. The case has provided guidance to our courts in cases involving state liability and the development of the common law regarding constitutional values. Our courts have seen cases that followed Carmichele, such as *K v Minister of Safety and Security*[58] and *Van Eeden v Minister of Safety and Security*,[59] reinforced and built on the foundations laid by *Carmichele*. These subsequent cases further confirmed the state's duty to protect individuals and expand the scope of delictual liability.

As a result of the judgment and subsequent decisions mentioned, there were changes made within the criminal justice system. There was an emphasis placed on scrutinising bail and arrest conditions and assessing risk to public safety. The Domestic Violence Act[60] and the Criminal Procedure Act[61] mandate stricter bail and arrest conditions.[62] The Criminal Procedure Act further regulates the granting and cancellation of bail, emphasising the need to protect victims of GBV.[63] Guidelines were devised to improve communication and coordination between the different state officials. The National Prosecuting Authority (NPA) introduced measures to assist prosecutors in recognising and replying to potential risks presented by accused persons, with greater emphasis on cases involving gender-based violence.[64]

The drive for coordinated training, focuses mainly on enhancing the collaboration between police, prosecutors, and the Department of Justice. This emphasised the importance of joint responsibility and communication in dealing with cases where individuals' safety was at risk. By advancing collaboration, it would guarantee that all relevant state organs could effectively work together to protect public security. The NPA focuses on a victim-centric approach in GBV cases. This ensures that the rights and safety of victims are of utmost priority in the criminal justice process.[65] Victims are consulted during bail proceedings and their concerns are addressed.[66] The *Carmichele* decision has also had an impact regarding the training that state officials receive in respect of their constitutional obligations.

Another area of focus is the training of police officers and their duty to protect individuals in instances where public safety was in danger.[67] GBV has become a significant reform area. The South African Police Service (SAPS) began organising community outreach programmes which sought to create awareness about GBV. This initiative encouraged reporting of GBV crimes.[68] These initiatives also assisted officers in responding to cases involving violence against women and children, an important issue emphasised by the court in *Carmichele*.

It can be stated that *Carmichele* has had an immense effect on the development of the law of delict. It emphasised that the

common law must be interpreted in a manner that promotes constitutional values. By establishing delictual liability in principles such as dignity, equality, and freedom, the judgment has set a benchmark for broadening the scope of state liability. Courts, as mentioned, have since applied this reasoning to hold state actors accountable in contexts that extend beyond traditional delictual frameworks. This has resulted in private law addressing not only civil wrongs but also the broader social justice goals enshrined in the Constitution.

2.6 Conclusion

The *Carmichele* judgment is one of the most significant landmark cases in South Africa's legal history. It encompasses the transformative ambitions of the Constitution. Its practical consequences are wide, especially in emphasising state accountability, modelling procedural reforms and steering the interpretation of common law, all of which should align with the constitutional values. By explicitly asserting that public policy considerations must be grounded in constitutional values, the judgment defined the important relationship between private law and the broader social justice goals contained in the Constitution.[69]

The judgment's focus on the duty of state officials to act carefully in protecting the rights to life, dignity, and security resulted in a profound effect on the criminal justice system. It has triggered reforms in bail procedures, and improved collaboration between state officials and agencies. The introduction of training initiatives to ensure compliance with constitutional obligations demonstrates the case's continuing significance regarding ongoing challenges such as GBV and systemic inadequacies within state bodies.[70] The judgment continues to influence legal debates and embraces the potential to mould future law. It has provided a strong framework for integrating constitutional principles into the common law. It guarantees that the law adapts to meet the demands of a just and equitable society.

As depicted, its principles influenced cases that followed involving state liability, where courts increasingly struggle

with balancing individual rights, public safety, and the state's obligations under the Constitution. *Carmichele* remains a cornerstone for arguments promoting for the alliance of private law principles with constitutional obligations.[71] However, there are challenges in fully implementing the principles established in *Carmichele*. Some of these challenges include inconsistent application by courts, resource constraints, and systemic ineffectiveness within law enforcement agencies. These challenges continue to weaken its transformative ability.

To address these challenges, it requires persistent efforts to advance institutional competence, advance accountability procedures, and ensure that the judiciary and state officials are sufficiently prepared to maintain constitutional principles.[72] From a holistic perspective, *Carmichele* personifies the importance of transformative constitutionalism in South Africa. It demonstrates how the Constitution can serve as a mechanism for creating legal frameworks that promote equality, dignity, and freedom.[73] The judgment underlines the significance of going beyond a merely remedial approach to one that is preventive. This would address structural wrongs and foster a legal system that is alert to the lived realities of vulnerable members of society.[74] As South Africa continues to traverse intricate legal and social challenges, *Carmichele* is an important reminder of the judiciary's role in guaranteeing that the law functions not only as a tool for redress but as a mechanism for significant change. Its heritage lies in its firm dedication to connecting the gap between legal principles and social justice, which solidifies its standing as a basis of South Africa's constitutional democracy.

Endnotes

1 *Carmichele v Minister of Safety and Security* 2001 10 BCLR 995 (CC).
2 Combrinck "Access to housing for women who are victims of gender-based violence" 2020 *SAJHR* 123-145.
3 Fagan "Reconsidering *Carmichele*" 2008 *SALJ* 659-673.
4 Deane "Judicial responses to gender-based violence and femicide" in Deane *Gender-Based Violence and Femicide in South Africa* (2024) 167-194.
5 *Carmichele* (n 1) par 5.
6 *Carmichele* (n 1) par 21.
7 *Carmichele* (n 1) par 23.
8 *Carmichele* (n 1) par 21.
9 *Carmichele* (n 1) par 21.
10 *Carmichele* (n 1) par 23.
11 *Carmichele* (n 1) par 21.
12 *Carmichele* (n 1) par 21.
13 *Carmichele* (n 1) par 23.
14 *Carmichele* (n 1) par 27 and 33.
15 *Carmichele* (n 1) par 36.
16 *Carmichele* (n 1) par 34 and 39; McQuoid-Mason "Invasion of privacy: Common law v constitutional delict – Does it make a difference?" 2000 *Acta Juridica* 227 259-261.
17 *Carmichele* (n 1) par 33; McQuoid-Mason (n 16) 259-261.
18 *Carmichele* (n 1) par 33.
19 *Carmichele* (n 1) par 50.
20 *Carmichele* (n 1) par 82 and 83; McQuoid-Mason (n 16) 259-261.
21 *Carmichele* (n 1) par 29 and 44.
22 *Carmichele* (n 1) par 58.
23 *Carmichele* (n 1) par 36, 39 and 40; McQuoid-Mason (n 16) 259-261.
24 *Carmichele* (n 1) par 36, 39 and 40.
25 *Carmichele* (n 1) par 36, 39 and 40.
26 *Carmichele* (n 1) par 54 and 55.
27 *Carmichele* (n 1) par 54 and 55.
28 *Carmichele* (n 1) par 36, 39 and 40.
29 *Carmichele* (n 1) par 36, 39 and 40; McQuoid-Mason (n 16) 259-261.
30 *Carmichele* (n 1) par 36, 39 and 40; Du Bois "State liability in South Africa: A constitutional remix" 2010 *Tulane European & Civil Law Forum* 139 139-145.
31 *Carmichele* (n 1) par 43, 44 and 49; Du Bois (n 30) 139-145.
32 *Carmichele* (n 1) par 43, 44 and 49; Fagan (n 3) 659-663.
33 *Carmichele* (n 1) par 43, 44 and 49; Du Bois (n 30) 139-143.
34 *Carmichele* (n 1) par 62.
35 *Carmichele* (n 1) par 62-67; Fagan (n 3) 659-663.
36 *Carmichele* (n 1) par 68-73.
37 *Carmichele* (n 1) par 56-57; Fagan (n 3) 659-673.
38 *Carmichele* (n 1) par 36-44.
39 *Carmichele* (n 1) par 40.
40 *Carmichele* (n 1) par 36-44.
41 *Carmichele* (n 1) par 72-74.
42 *Carmichele* (n 1) par 72-74; Du Bois (n 30) 139-143.

43 *Carmichele* (n 1) par 45-49; Du Bois (n 30) 139-145.
44 *Carmichele* (n 1) par 45-49; see Chirwa "The doctrine of state responsibility as a potential means of making private actors accountable for human rights" 2004 *Melbourne Journal of International Law* 1.
45 *Carmichele* (n 1) par 62-66; 72-74; Chirwa (n 44) 1.
46 *Carmichele* (n 1) par 62-66; 72-74; Chirwa (n 44) 44-46.
47 *Carmichele* (n 1) par 62-66; 72-74; Chirwa (n 44) 44-46.
48 *Carmichele* (n 1) par 76-77; Chirwa (n 44) 22.
49 *Carmichele* (n 1) par 53-58; Chirwa (n 44) 22.
50 *Carmichele* (n 1) par 59- 63; Chirwa (n 44) 44-46.
51 *Carmichele* (n 1) par 59-63; Chirwa (n 44) 22.
52 *Carmichele* (n 1) par 59-63.
53 *Carmichele* (n 1) par 78-80; Fagan (n 3) 659-663.
54 *Carmichele* (n 1) par 65-77; Fagan (n 3) 659-663.
55 *Carmichele* (n 1) par 65-77.
56 *Carmichele* (n 1) par 65-77.
57 *Carmichele* (n 1) par 65-77; Deane (n 4) 167-177.
58 2005 6 SA 419 (CC).
59 2003 1 SA 389 (SCA).
60 Domestic Violence Act 116 of 1998.
61 Criminal Procedure Act 51 of 1977.
62 s 8 and 18 of the Criminal Procedure Act.
63 Currie-Gamwo "The NPA's Sexual Offences and Community Affairs Unit welcomes the three pieces of legislation that seeks to amend crucial provisions in the fight against gender-based violence" at https://www.npa.gov.za/index.php/media/npas-sexual-offences-and-community-affairs-unit-welcomes-three-pieces-legislation-seeks-amend (28-11-2024).
64 Currie-Gamwo (n 63).
65 Currie-Gamwo (n 63).
66 Currie-Gamwo (n 63).
67 Currie-Gamwo (n 63).
68 Securitywomen "South African women's group trains police to respond to gender-based violence" at https://www.securitywomen.org/post/south-african-womens-group-trains-police-to-respond-to-gender-based-violence (24-11-2024).
69 Liebenberg "The value of human dignity in interpreting socio-economic rights" 2005 *South African Journal on Human Rights* 1 5-15.
70 South African Law Reform Commission (SALRC) (2015). Project 94: Crime – The Role of the Police and Justice in Gender-Based Violence Cases; Parliament of South Africa. (2020). Gender-Based Violence: Progress Report on Legislative and Policy Interventions.
71 The South African Law Reform Commission "Removing barriers to accessing the criminal justice system" *Domestic Violence: The Criminal Law Response* Paper 161, Project 100 (2023) 89-126.
72 Van der Walt "Transformative constitutionalism and the development of South African property law" 2005 *Tydskrif vir die Suid-Afrikaanse Reg* 655 666.
73 Van der Walt (n 72) 666.
74 Liebenberg (n 69) 5-15.

Chapter 3

Access to Courts and the South African Revenue Service's Obligation to Collect Taxes

Metcash Trading Ltd v Commissioner for South African Revenue Service[1]

Carika Keulder
School of Law;
University of the Witwatersrand
Johannesburg, South Africa

"The scheme of the Act is that sections 33, 33A and 34 provide an aggrieved vendor ample opportunity for fair judicial determination in due course of any dispute with the Commissioner arising out of the exercise of the latter's power to impose tax liability by assessment or associated impost. The Act can therefore not be said to constitute a complete bar to access to courts; at most it obliges the taxpayer to pay the disputed amount(s) subject to appropriate restitution, with interest, once the judicial dispute resolution process has run its course" (*Metcash Trading* par 58).

Abstract

The case of *Metcash Trading Ltd v Commissioner for South African Revenue Service* stands as a landmark constitutional case that examined the tension between the South African Revenue Service's imperative to collect taxes efficiently and taxpayers' constitutional right of access to courts. The Constitutional Court was tasked with determining whether provisions in the Value Added Tax (VAT) Act that allowed SARS to employ the "pay now, argue later" rule and statement procedure were constitutional. At the heart of the case was section 36(1) of the VAT Act, which provided that a taxpayer's obligation to pay assessed tax was not suspended pending an objection or appeal, alongside sections 40(2)(*a*) and 40(5), which permitted SARS to file a statement at court having the effect of a civil judgment while precluding challenges to its correctness. The Constitutional Court departed from the High Court's finding of unconstitutionality by adopting a contextual approach, emphasising that these provisions must be understood within the VAT system where vendors effectively act as tax collectors. The court determined that the provisions did not violate the right to access courts because multiple opportunities for judicial intervention existed, including appeals to the Tax Court and the High Court's inherent jurisdiction to hear legal matters. The court held that even if there were an infringement of rights, it would be reasonable and justifiable given the discretion afforded to SARS to suspend payment obligations. This judgment fundamentally shaped South African tax administration by endorsing the "pay now, argue later" approach and has had far-reaching implications for subsequent legislation and jurisprudence. Despite criticism that the court conflated general access to courts with access at the specific moment of dispute, the judgment established enduring principles regarding the Tax Court's status, the High Court's inherent jurisdiction in tax matters and the rescindability of filed statements. The case remains significant as it established the constitutional parameters within which tax collection powers must operate, influencing the subsequent Tax Administration Act, which codified criteria for suspending

payment obligations, demonstrating how constitutional scrutiny can lead to the refinement of administrative powers.

3.1 Introduction

With the advent of constitutional democracy in South Africa, fiscal legislation had to be scrutinised and amended to ensure that they aligned with the (interim) Constitution of the Republic of South Africa Act[2] and the subsequent (final) Constitution of the Republic of South Africa, 1996.[3] This is because

> "even fiscal statutory provisions, no matter how indispensable they may be for the economic well-being of the country – a legitimate governmental objective of undisputed high priority – are not immune to the discipline of the Constitution and must conform to its normative standards."[4]

Although the South African Revenue Service (SARS) must ensure the effective and efficient collection of taxes,[5] SARS' powers must be balanced with the protection of taxpayers' rights. At the core of the tension between tax collection and taxpayers' rights is the approach that a revenue authority takes in relation to disputed tax claims. In the matter of *Metcash Trading* the Constitutional Court had to consider whether the provisions allowing SARS to use a summary collection procedure to collect tax, despite the taxpayer disputing their tax liability, are constitutional. This chapter highlights the most significant aspects of the judgment and the impact that this judgment has had on subsequent cases and legislative developments.

In this matter the Constitutional Court was tasked with confirming the High Court's decision that declared sections 36(1), 40(2)(*a*) and 40(5) of the Value Added Tax Act[6] (VAT Act) contrary to the Constitution.[7] Section 36(1) of the VAT Act provided that a person's value-added tax (VAT) liability is not suspended pending an objection or appeal, unless the commissioner of SARS decided otherwise. Consequently, SARS could proceed with enforcement actions even though the taxpayer disagreed with the assessment. One such an

enforcement action was the filing of a statement at court in terms of section 40(2)(*a*) of the VAT Act, which had the effect of an exigible civil judgment. In terms of section 40(5) of the VAT Act, the correctness of this statement could not be challenged.

The constitutional attack was initially based on the taxpayer's right not to be arbitrarily deprived of property (section 25(1) of the Constitution) and the right to access to courts (section 34 of the Constitution).[8] The basis for the High Court declaring the provisions invalid was that the VAT provisions infringe on the right to access to courts because SARS acts as a substitute for the court by determining every aspect of the vendor's liability and the enforcement thereof; any interlocutory relief by the court was precluded; and a possible successful appeal does not sufficiently address the infringement that a taxpayer has to tolerate until then.[9] Turning to whether the infringement is reasonable and justifiable in terms of section 36 of the Constitution, the High Court held that a delay in paying taxes in the current matter would not have a substantial impact when considering the greater scheme of national tax. Moreover, the court held that the effect of these provisions could be detrimental to the taxpayer even though it is only temporary in nature.[10]

As the taxpayer did not pursue its argument pertaining to section 25(1) in the High Court,[11] the Constitutional Court only had to consider whether the relevant provisions in the VAT Act were indeed unconstitutional considering the right to access to courts.

3.2 Significant aspects of the judgment

3.2.1 The importance of context

The Constitutional Court stipulated that before the constitutional challenge to access to courts could be explored, a basic understanding of the VAT system and where the challenged provisions fit in are essential. VAT is concerned with calculating the value added for each stage of the production and distribution chain and levying VAT at 14% (as was the prescribed rate then).[12] As VAT is calculated on the value added at each

stage and not on the full price of the commodity, a VAT vendor needs to set off the VAT paid when acquiring the commodity against the VAT it levied for the value added when making a further supply. For practicality reasons vendors are not required to pay over the relevant VAT for each supply as it takes place. Instead, the vendor needs to calculate the output tax (the VAT for the onward supply) and the input tax (VAT that was included in acquiring the commodity) and submit returns and pay over the VAT in line with the vendor's allocated tax period.[13] Thus, VAT requires continuous self-assessment and the VAT liability, unlike income tax, not only arises when an assessment is issued.[14] VAT vendors, unlike taxpayers for income tax, in essence become involuntary tax collectors that some exploit.[15] Section 31 of the VAT Act provides "a valuable weapon in the hands of the Commissioner" in that the commissioner is empowered to assess the vendor's VAT liability in the absence of a return from the vendor, when a return is unsatisfactory or if the VAT due has not been paid.[16] A vendor could then object, which requires the commissioner to reconsider the assessment, and thereafter appeal where an independent forum, the Tax Court, can consider the matter anew.[17] It is at this stage where the "pay now, argue later" approach and filing of a certificate at court come into play.

The court's emphasis on the textual context within which these provisions function in the VAT Act points to classical contextualism where provisions must be "understood as part of the more encompassing legislative instrument in which it has been included".[18] Although this approach was endorsed by the Constitutional Court in various cases before the *Metcash Trading* judgment,[19] the *Metcash Trading* judgment has emphasised how this approach should be used for fiscal legislation. This emphasis is important, as provisions dealing with tax administration are not used in isolation and, therefore, the context within which provisions function must be understood.

However, in outlining the relevant context, the Constitutional Court made a point of distinguishing the VAT context from that of income tax. Does this mean that the court may have reached a different conclusion if *Metcash*

Trading involved income tax? Croome and Van Zyl do not think so.[20] Croome reasons that the Income Tax Act,[21] like the VAT Act, is a law of general application that applies to everyone. Furthermore, Croome indicated that as the collection of income tax by way of the "pay now, argue later" approach, together with filing a certificate ensures that government has revenue to realise socio-economic objectives, it is a reasonable and justifiable limitation of a taxpayer's right.[22]

Williams asserts that it is not necessarily that the court would have reached the same conclusion.[23] Based on the emphasis that the court placed on VAT and how it functions to determine the constitutionality of the "pay now, argue later" approach and filing a certificate, one would need to carefully consider the operation of these provisions in context of the specific types of tax. If the VAT context was not relevant, the court would not have deemed it important to point out how VAT differs from income tax.[24]

Nonetheless, the distinctions that the court drew in *Metcash Trading* is flawed and do not show how the context within which VAT functions is different from that of income tax as it pertains to the right to access to courts. When dealing with a tax debt there are three stages: A taxable event that creates an obligation, the determination of tax liability and then when the tax liability becomes payable.[25] The first stage requires a specific activity or scenario that falls within the levying provisions of the specific tax Act. For VAT, this is when a vendor[26] supplies goods or services in the course or furtherance of any enterprise,[27] when a person imports goods into South Africa[28] or when a person imports services.[29] In turn, this event for income tax purposes is when a receipt or accrual that is revenue in nature occurs in a period of assessment.[30]

The second stage requires an assessment, which determines the amount of the liability.[31] For VAT, a taxpayer must submit a tax return that includes "a determination of a tax liability," which then constitutes a self-assessment by the taxpayer.[32] If a taxpayer fails to make such a determination, SARS should then issue an assessment.[33] Only after the amount of the tax liability is determined by way of an assessment can

the third stage commence, in terms of which the taxpayer is obliged to pay the assessed amount of tax on the date indicated in the assessment, being "by the day and at the place notified by SARS, the commissioner by public notice, or as specified in a tax Act".[34] When the date specified has arrived, the taxpayer is in *mora ex lege* and an enforceable tax liability is established.[35]

Contrary to the court's view in *Metcash Trading* in relation to income tax, the recent Supreme Court of Appeal case of *Wiese v C: SARS* confirms that an income tax debt also arises when it becomes chargeable in terms of the relevant provisions[36] Another recent Supreme Court of Appeal case, *Henque 3935 CC t/a PQ Clothing Outlet v C:SARS* (*Henque*), further clarifies this point by indicating that, since income tax is concerned with taxable income received by or accrued to a taxpayer during a year of assessment, an income tax liability becomes due "immediately after the end of the year, or shorter period".[37] In a similar vein, the Constitutional Court in *United Manganese of Kalahari (Pty) Limited v Commissioner of the South African Revenue Service and four other cases* held that an assessment does not create a tax liability; it already exists beforehand.[38]

Whilst these cases depart from *Metcash Trading's* dictum on when an income tax liability is established, *Henque* confirmed, in line with *Metcash Trading*, that the VAT liability is created "at the time of a relevant supply".[39] It appears that the court in *Henque* drew the distinction between when a tax liability arises for VAT and income tax respectively, based on the wording of the relevant charging provisions. In this respect, section 5 of the Income Tax Act specifically provides for tax to be levied per year of assessment, whereas section 7 of the VAT Act, the charging provision for VAT, identifies only the event that triggers liability. When considering the context within which both these taxes function, such a basis of distinction makes little sense, as both taxes involve triggering events that are aggregated within a tax period.

From this discussion of the recent court cases on when a tax debt is established, it becomes evident that drawing a distinction between VAT and income tax in relation to the establishment of a tax debt liability is tenuous. Even if one

were to accept such a distinction, it remains unclear how this distinction would influence the impact that the "pay now, argue later" approach has on the right of access to courts.

The court's view that, with VAT, the vendor becomes an involuntary tax collector must also be considered further. The incidence of VAT is not on the vendor, but on the ultimate consumer. Consequently, the VAT that the vendor must pay over is not the vendor's money; they merely act as a collection agent. Contrariwise, with income tax, the taxpayer is the person on whom the tax is levied and who is assessed. However, because of the set off that takes place when determining a VAT liability, the output tax that is received by the vendor does not necessarily constitute the entire VAT liability. In this respect it was found in *Director of Public Prosecutions, Western Cape v Parker* that the relationship between SARS and a vendor is not a relationship of trust.[40] Therefore, the nature of the relationship between the taxpayer and SARS, as with income tax, is one of debtor and creditor.

Returning to the discussion of the Constitutional Court's approach of considering context, the court did not follow the same approach when it referred to other jurisdictions. Although the court held that the "pay now, argue later" approach and a form of immediate execution are found in many other open and democratic societies,[41] the Constitutional Court failed to discuss any of the comparable sections in other jurisdictions on which it based its claim. The court merely listed the United States of America, Canada and Australia as examples.[42]

If one reads sections 36 and 39 of the Constitution together it is prudent to consider the approaches in other open and democratic societies. Firstly, section 36 provides that "[t]he rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in *an open and democratic society*" (own emphasis). Secondly, section 39(1) of the Constitution provides that when interpreting the Bill of Rights, which includes the right to access to courts, foreign law may be considered. Consequently, one could consider the positions in other open

and democratic societies when determining whether a limitation on a right in the Bill of Rights is reasonable and justifiable.

The criticism is not that the Constitutional Court relied on other jurisdictions to reach its decision, rather that the court did not adequately consider the position in the other jurisdictions. An adequate consideration is essential as an earlier Constitutional Court judgment held that "the use of foreign precedent requires circumspection"[43] and one cannot rely on other jurisdictions without due consideration of the appropriate context.[44]

The Canadian position serves as an example of the importance of adequately considering the context of provisions in *Metcash Trading*. In Canada, when an assessment is made, the Canadian Revenue Authority is not allowed to proceed with enforcement of this tax debt within a period of ninety days since the notice of assessment had been sent.[45] Likewise, if the taxpayer objects to the assessment or if the matter is subsequently taken on appeal to the Tax Court of Canada, the enforcement of the tax debt is prohibited until the taxpayer has been informed of the outcome or have withdrawn their case.[46] It is only when the matter proceeds on further appeal to the Supreme Court of Canada that the outstanding disputed tax debt is payable and the Canadian Revenue Authority can proceed with enforcement thereof. Fritz indicates that the payment obligation may possibly not be suspended at this phase of the dispute as the matter had then already been adjudicated by an impartial forum, the Tax Court of Canada, as envisaged in article 7 of the Taxpayer Bill of Rights.[47]

There are some exceptions in terms whereof the "pay now, argue later" approach is invoked before the matter has been adjudicated by any impartial forum. These exceptions are when it relates to a withholding tax,[48] if the taxpayer is a large corporation[49] or when a court has made an order to the effect because there are reasonable grounds that the delay in collecting the disputed amount could place collection in jeopardy.[50] In terms of the latter, when a court order has been granted, the order must generally be served on the taxpayer within 72

hours.[51] The taxpayer may then apply for a review,[52] which affords the taxpayer the opportunity to make representations.[53]

From this brief discussion of the Canadian position, it is apparent that the Constitutional Court erred in using Canada as an example to justify South Africa's approach to payment obligations pending dispute resolution for two reasons. One, in Canada the rule is generally only invoked once an impartial forum has adjudicated the matter. Two, most of the exceptions can be objectively determined; for example, does it meet the large corporation threshold or is it a withholding tax? Regarding the subjective exception, reasonable grounds of jeopardy when collection is delayed, it is determined by an impartial person, a judge.[54] This is distinguishable from the provisions considered in *Metcash Trading* where the commissioner has the discretion to suspend a payment obligation without clear criteria.

A thorough analysis of other jurisdictions could have also pointed the court to less invasive means available to achieve the purpose envisaged by the provisions, which is one of the factors that needs to be considered when determining whether an infringement is reasonable and justifiable in terms of section 36 of the Constitution. Again, if Canada's context was adequately considered instead of just listing it as an example, the court would have established that in Canada, most taxpayers tend to pay their disputed taxes because of the fact that interest continues to accrue, even though the payment obligation is initially suspended.[55] Additionally, the Tax Court of Canada may impose a penalty on the taxpayer (not exceeding 10 per cent of the disputed amount) if it dismisses a taxpayer's appeal regarding an assessment, or if the appeal was withdrawn, and there were no reasonable grounds for the appeal or if the purpose of appealing was to defer the payment obligation.[56]

3.2.2 Opportunity for judicial intervention

Perhaps the most significant aspect of the *Metcash Trading* judgment at the time of the *Metcash Trading* judgment, was that the court interpreted the right to access to courts to mean the right to an opportunity of judicial intervention. The court highlighted various opportunities for judicial intervention in the

dispute resolution process to reach the conclusion that the right to access to courts was not infringed.

(a) Tax Court – specialist tribunal

The Constitutional Court held that sections 33 and 33A of the VAT Act created "its own special procedure" in term whereof a taxpayer can "appeal" SARS' rejection of an objection to the Tax Court.[57] As the commissioner who issued the assessment is not a judicial officer, the subsequent disputing thereof in the Tax Court is not an appeal in the forensic sense of the word.[58] Despite the fact that the Tax Court functions "outside the normal forensic hierarchy", an appeal before the Tax Court complies with the right to access to courts.[59] This is because the Tax Court is an independent and impartial specialist tribunal,[60] which "operates to all intents like an ordinary court".[61] Furthermore, there is no ouster provision prohibiting a taxpayer from relying on other relief.[62]

(b) High Court's inherent jurisdiction in tax matters

The Constitutional Court held that a taxpayer may rely on the High Court's inherent jurisdiction to grant appropriate or ancillary relief in tax matters turning on legal issues, even when the dispute has not yet been adjudicated by the Tax Court.[63] Olivier questions the relevance of this statement as the taxpayer argument was that the provisions excluded the jurisdiction of the court *when* the rule was invoked, not that the court's jurisdiction was completely excluded.[64] Drawing from this criticism of Olivier, Keulder states that the focus should have been on the fact that access to courts strives to prevent self-help.[65] The question should have been whether these provisions, at the time it was invoked, unreasonably allowed SARS to help itself by becoming the judge in its own case.[66] Consequently, the mere fact that there are opportunities for judicial intervention later is insufficient to effectively uphold the right of access to courts. When the "pay now, argue later" approach applies, a taxpayer may be unable to pursue any dispute resolution caused by being out of pocket because of paying before arguing.[67]

(c) Statement procedure

In relation to the statement procedure, the Constitutional Court held that the High Court erred in equating the VAT provisions under consideration with section 38(2) of the North West Agricultural Bank Act,[68] which was declared unconstitutional in *Lesapo v North West Agricultural Bank and Another*.[69] The provision in *Lesapo* was declared unconstitutional as it authorised the bank to seize and sell property of a debtor whilst the debtor was in lawful and undisturbed possession thereof. This occurred without any court judgment or any statutory safeguards. Consequently, the Constitutional Court in the *Lesapo* judgment held that section 38(2) of the North West Agricultural Bank Act constituted self-help by ousting the jurisdiction of the courts.[70]

The Constitutional Court in *Metcash Trading* distinguished the current provisions from that in *Lesapo* on the basis that section 40(2) of the VAT Act "specifically goes via the ordinary judicial institutions".[71] This is because once the statement has been filed at court, it constitutes a civil judgment. Thus, so the court held, the ordinary court rules and procedures pertaining to execution would apply to ensure access to courts.[72] Furthermore, section 40(5) only barred proceedings that question the correctness of the certificate filed. This bar was temporary as the tax system provides "ample opportunity for fair judicial determination in due course of any dispute".[73] One such opportunity is the fact that the judgment obtained in terms of section 40(2) could be rescinded.[74]

The court's assertion that a taxpayer had access to the courts, based on the requirements that the statement is filed at court and that the execution of the statement procedure must comply with prescribed court rules, is questionable.[75] Surely, access to courts requires more than a registrar receiving and stamping a document and for the execution of a judgment to occur in terms of prescribed court rules. Although a default judgment in civil proceedings takes place along similar lines, a default judgment can only be obtained when there has been a procedural default from the debtor.[76] When a tax statement is filed in court, it does not relate to the taxpayer failing to adhere to any procedure. In fact, at the time of the *Metcash Trading*, the

commissioner was not even required to inform the taxpayer of the intended filing.[77]

2.3 The commissioner's discretion

Although the Constitutional Court held that the right to access to courts was not infringed when the relevant provisions were invoked, it indicated that even if these sections infringed on the right to access to courts, it would be reasonable and justifiable in terms of section 36 of the Constitution. The court held that the impact of the "pay now, argue later" approach is ameliorated as the commissioner may suspend the taxpayer's payment obligation pending dispute resolution.[78] This is relevant because section 36(1)(*c*) of the Constitution stipulates that one of the factors to consider when determining the reasonability and justifiability of a limitation is the nature and extent of the limitation.

As section 36(1) of the VAT Act provided the commissioner with a discretion to suspend the payment obligation, the decision made when exercising this discretion would be subject to review in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA).[79] Despite the fact that the discretion afforded to the commissioner to suspend payment can lessen the impact on taxpayers' right to access to courts, the review of the decision regarding suspension has drawn criticism. The grounds for reviewing the commissioner's decision not to suspend the payment obligation, as provided for in section 6 of the PAJA, are narrow.[80] As it was also unclear when the commissioner would exercise this discretion in favour of the taxpayer and when not, it would have been nearly impossible for the taxpayer to rely on the review ground that irrelevant considerations were taken into account or that relevant considerations were not considered.[81] Olivier remarked that clearly defined grounds would better protect a taxpayer's rights.[82] Inserting grounds would curb SARS' broad discretion to align with the rule of law.[83]

Even when one of the review grounds is met, in terms of section 8 of the PAJA, the court can grant an order directing the commissioner to provide reasons or reconsider the decision. As an ordinary course, the court does not have the power to

overturn the commissioner's decision.[84] Thus, a review of the commissioner's discretion does not constitute a strong remedy for the taxpayer.

Moreover,

> "the exercise of a discretionary power may subsequently be successfully challenged on administrative grounds, for example, that it was not reasonable, does not relieve the legislature of its constitutional obligation to promote, protect and fulfil the rights entrenched in the Bill of Rights."[85]

Therefore, Olivier remarks that the fact that the commissioner's conduct can be taken on review does not absolve the legislature from ensuring that provisions are constitutional.[86]

3.3 Impact of the judgment

In the more than two decades since *Metcash Trading* was decided, there have been numerous court cases that have relied on aspects contained in the *Metcash Trading* judgment. There have also been significant legislative amendments. Most importantly, the Tax Administration Act[87] (TAA) was enacted on 1 October 2012, and in terms thereof the provisions considered under *Metcash Trading* was repealed and replaced by provisions in Chapters 10 and 11 of the TAA. Despite this repeal, the judgment of *Metcash Trading* remains relevant as the new provisions are almost identical to the repealed provisions.

3.3.1 The importance of context

The Constitutional Court's approach to consider the context within which provisions functions can be seen in the 2017 matter of *Nondabula v Commissioner: SARS and Another*.[88] In this matter, the court had to consider whether SARS could issue a third-party appointment to collect taxes when it did not furnish a notice of assessment to the taxpayer. In addition to considering the textual context of notice of assessments and third-party appointments, the court held that these provisions must be considered in the context of SARS being

part of public administration. This is important, as section 195 of the Constitution places constitutional obligations on the public administration. These include acting in an accountable manner,[89] and being transparent.[90] the court held that failure to comply with the constitutional obligations contained in section 195 means that the rule of law is contravened.[91] Hence, in *Nondabula*, the court not only considered the internal context of the provision, following the Constitutional Court's approach in *Metcash Trading*, but also the external constitutional context.[92] The value of placing the provisions and SARS conduct within a constitutional context in this specific case emphasises that although it is important for SARS to collect taxes, this must be done within the parameters of the Constitution.[93]

While the contextual approach to interpreting fiscal provisions, as embodied in *Metcash Trading*, can be detected in subsequent tax case law, the confusion regarding the distinction between VAT and income tax regarding the "pay now, argue later" approach continues. *Capstone 556 (Pty) Ltd v Commissioner, South African Revenue Services, Kluh Investments (Pty) Ltd v Commissioner, South African Revenue Services*[94] endorsed the court's approach in *Metcash Trading* to consider the "pay now, argue later" approach and certificate statement within the context of the VAT system.[95] Even though the constitutionality of the equivalent income tax provisions were not attacked in this matter, the court confirmed that the context for income tax might be different.[96] Hence, one would need to consider these provisions in the income tax context. The court stated that:

> "There are material differences distinguishing the position of self-regulating vendors under the value-added tax system and taxpayers under the entirely revenue authority-regulated income tax dispensation. … In this respect I have the effect of the pay first, argue later' provisions pending the determination of the Commissioner of *an objection* (as distinct from pending the determination by the Tax Court of an appeal) to an income tax assessment particularly in mind as an aspect that might well receive a different treatment if

> challenged, particularly in the context of the fundamental *right to administrative justice.*"[97]

Unfortunately, the court did not expand on this any further and one can only guess how the difference between income tax and VAT in relation to the "pay now, argue later" approach impacts the right to administrative justice. Fritz remarks that perhaps the court meant that the right to administrative justice could be more susceptible to infringement for income tax purposes, as taxpayers would not have the same opportunity to state their case as they would when determining their own VAT liability. She remarked, at that stage, that such an argument would be illogical as the taxpayer generally provided the information in a tax return on which SARS would then determine the taxpayer's income tax liability by way of an original assessment.[98] Thus, it was only the actual determination that was performed by SARS but based on the taxpayer provided information. Yet, given that SARS is now employing automatic assessments for income tax based on third-party data, and not on information provided by taxpayers, this line of argument might be more accurate today.

To date, the courts have not provided, in my opinion, convincing reasons why the *Metcash Trading* judgment dealing with VAT would not also apply to income tax. If an income tax attack matter is ever heard by the Constitutional Court, it would be prudent for the court to consider the context within which income tax functions.

3.3.2 Opportunities for judicial intervention

(a) Tax Court – specialist tribunal

In a recent High Court matter, *Poulter v the Commissioner for SARS,* the court had to determine whether a layperson may represent a taxpayer in the Tax Court.[99] Determining this required the court to establish whether or not the Tax Court is a court of law, as section 15 of the Legal Practice Act[100] provides that only a legal practitioner, either as an attorney or an advocate, can represent another person in a court of law.

In terms of section 166 of the Constitution, courts of law are the Constitutional Court, the Supreme Court of Appeal, the High Court, the Magistrates' Courts and a "court established or recognised in terms of an Act of Parliament, including any court of a status similar to either the High Court of South Africa or the Magistrates' Courts". In this regard, section 116(2) of the TAA recognises the Tax Court only as a court of record.

In *Poulter*, the court held that the function of the Tax Court should be considered to determine whether the Tax Court is a court of law or rather an administrative tribunal.[101] Here, the Constitutional Court's ruling in *Metcash Trading* pertaining to the Tax Court as a specialist tribunal was "especially instructive".[102] The High Court quoted from *Metcash Trading* that the "appeal" heard by the Tax Court is not an appeal in the forensic sense,[103] and that the appeal at the Tax Court falls "outside the normal forensic hierarchy" of the High Court and Supreme Court of Appeal.[104] Consequently, the court in *Poulter* held that the Tax Court is not a court of law.[105] Therefore, the *Metcash Trading* judgment was used to reach the conclusion that a layperson may represent another person in the Tax Court, as it is not a court of law.

Although the *Poulter* matter has confirmed that the Tax Court is not a court of law, as indicated in the *Metcash Trading* judgment, the Tax Court "meets the criteria of section 34 of the Constitution".[106] This means that although the Tax Court is not a court of law, it does not affect a taxpayer's right to access to courts.

(b) High Court's inherent jurisdiction in tax matters

With the enactment of the TAA, the inherent jurisdiction of the High Court in tax matters is limited. Section 104 of the TAA stipulates that a dispute regarding an assessment, a decision not to extend the period for lodging an objection, or any other decision that is subject to objection or appeal must follow the dispute resolution process, whereby the Tax Court serves as the court of first instance. However, section 105 of the TAA provides an exception in terms whereof the High Court has the discretion to adjudicate a dispute as a court of first instance.

Caroll remarks that section 105 "treads the line" between the High Court's inherent jurisdiction, as referred to in *Metcash Trading*, and the tax dispute process regulated in terms of the Rules promulgated under section 103 of the Tax Administration Act, 2011.[107]

There have been several cases which considered when exactly the High Court would be able to adjudicate a tax matter directly as envisaged in terms of section 105 of the TAA. As Choate points out, this question is not merely an academic exercise. She observes that following the Tax Court route could take 18 to 24 months given the timeframes imposed by the TAA for objection and appeal to the Tax Court.[108]

In the *Commissioner for SARS v Rappa Resources (Pty) Ltd*[109] the Supreme Court of Appeal held that the High Court will only be allowed to adjudicate a tax matter as a court of first instance, and thus deviate from the procedure set out in the TAA, when there are exceptional circumstances present.[110] In *United Manganese of Kalahari (Proprietary) Limited v The Commissioner for SARS*, the Supreme Court of Appeal[111] held that these exceptional circumstances, relying explicitly on *Metcash Trading's* ruling regarding the inherent jurisdiction of the High Court in tax matters, would be when the tax case deals with a legal issue.[112]

This approach, and, consequently, *Metcash Trading's* ruling pertaining to the High Court's inherent jurisdiction with legal issues, was confirmed in the recent Supreme Court of Appeal matter *Commissioner SARS v Absa Bank Ltd and Another* when the court held that:

> "It was common cause that such appropriate circumstances should be labelled 'exceptional circumstances'. The court would require a justification to depart from the usual procedure and, this, by definition, would be 'exceptional'. However, the quality of exceptionality need not be exotic or rare or bizarre; rather it needs simply be, properly construed, circumstances which sensibly justify an alternative route. When a dispute is entirely a dispute about a *point of law*, that attribute. in my view, would satisfy exceptionably."[113]

However, the subsequent consolidated Constitutional Court judgment, *United Manganese of Kalahari (Pty) Limited v Commissioner of the South African Revenue Service*, held that a High Court would be able to provide a direction to deviate from the procedure set out in the TAA when it is "appropriate or whether there is good cause to approach the High Court rather than the Tax Court".[114] Whilst a dispute about *a point of law* could potentially be sufficient if it is appropriate or if it constitutes good cause for the deviation from the Tax Court, such a dispute would not necessarily confer jurisdiction on the High Court to hear the matter. This is because, under section 105 of the TAA, the inherent jurisdiction of the High Court is conditionally suspended until the High Court grants the required direction.[115] Consequently, section 105 of the TAA does substantially limit the inherent jurisdiction on which *Metcash Trading* relied as a basis for concluding that a taxpayer's right to access to courts is not infringed by the "pay now, argue later" approach.

(c) Statement procedure

In the *First National Bank* case the Constitutional Court had to consider the constitutionality of the former section 114 of the Customs and Excise Act.[116] This section permitted the commissioner of SARS to collect customs debts by selling goods owned by a debtor or a third party, which were located on the debtor's premises, without requiring a prior judgment or court authorisation. In this Constitutional Court case it was held that there was an insufficient connection between the customs debt and the person deprived of property (potentially a third party), as well as between the property and the customs debt.[117] Consequently, section 114 was declared unconstitutional to the extent that it applied to property owned by third parties.[118] Because of this declaration, the court held it unnecessary to pronounce on the constitutionality thereof regarding the right to access to courts as there would be no additional substantive relief granted.[119]

Nonetheless, the court indicated that the constitutionality in terms of section 34 is questionable as, similar to the *Lesapo* judgment, the debtor had no recourse to court and had "none of the statutory or other safeguards applicable to the attachment

and sale in execution of a judgment debt".[120] Consequently, the court held that "[a]ny doubt as to the validity of section 114 on the grounds of its inconsistency with section 34 of the Constitution would be removed by an amendment of the present Act to incorporate a provision corresponding to that of section 40(2)(*a*) of the VAT Act".[121] The court further held that such an amendment would be constitutionally sound for the reasons advanced in *Metcash Trading* being that the court officials will be involved in the process and the execution of the judgment would form part of the ordinary execution process.[122] This obiter endorsement of *Metcash*, without considering the correctness and Olivier's criticism of this aspect in *Metcash Trading*, led to an amendment of section 114 of the Customs and Excise Act to provide for a statement procedure similar to the sections 40(2)(*a*) and 40(5) of the VAT Act.

With the enactment of the TAA, sections 172 and 174 of the TAA replaced section 40(2)(*a*) of the VAT Act. This means that SARS still retains the power to file a statement in court, which then holds the effect of a civil judgment for a liquidated debt in the amount specified in the statement. However, the certificate process in terms of the TAA now requires that SARS first needs to provide the taxpayer with at least 10 business days' notice, before filing such a statement.[123]

Although the TAA does not include a provision like section 40(5) in terms whereof the correctness of the statement cannot be questioned, the views expressed in *Metcash Trading* regarding section 40(5) not being an absolute bar to court access remain relevant today. In *Barnard Labuschagne Incorporated v SARS*,[124] the Constitutional Court had to consider whether a statement filed at court is rescindable like an ordinary judgment.[125] In this matter, the court affirmed the importance of *Metcash Trading* in this respect by stating that:

> "The reasoning in *Metcash* on rescindability was not 'merely . . . an observation', it was an integral part of this Court's reasoning. … Observance of the rules of precedent is not a display of politeness to courts of higher authority;

> it is a component of the rule of law, which is a founding value of the Constitution."[126]

3.3.3 The commissioner's discretion

After the *Metcash Trading* judgment, SARS issued Media Release 27,[127] indicating that when the commissioner exercises its discretion as to whether to suspend the payment obligation, the commissioner must consider whether paying the tax amount pending dispute resolution would lead to irreversible damage for the taxpayer and other appropriate circumstances, such as assurance that the disputed amount will be paid if the appeal fails.

After this media release, section 88 of the ITA and section 36 of the VAT Act were amended to contain the factors that the commissioner could take into consideration when exercising its discretion to suspend a payment pending dispute resolution.[128] These factors are:

1. the amount involved;
2. the taxpayer's compliance history;
3. whether the taxpayer might alienate his assets during the postponement of payment;
4. whether the taxpayer is able to provide adequate security for the payment of the assessed amount;
5. if payment of the amount would cause the taxpayer irreparable financial hardship;
6. whether sequestration or liquidation proceedings are impending;
7. whether the taxpayer had failed to furnish requested information; and
8. whether fraud was involved in the origin of the dispute.[129]

With the implementation of the TAA, section 164 thereof retains the "pay now, argue later" approach,[130] as previously contained in section 36(1) of the VAT Act, which can now be deviated from when a taxpayer requests a suspension.[131] It is now within the discretion of a senior SARS official, and not simply the commissioner, to grant such a suspension based on a

non-exclusive list of factors listed in section 164(3) of the TAA. These factors initially mirrored those contained in the amended section 36 of the VAT Act but were later amended as follows:

> "(*a*) whether the recovery of the disputed tax will be in jeopardy or there will be a risk of dissipation of assets;
>
> (*b*) the compliance history of the taxpayer with SARS;
>
> (*c*) whether fraud is *prima facie* involved in the origin of the dispute;
>
> (*d*) whether payment will result in irreparable hardship to the taxpayer not justified by the prejudice to SARS or the *fiscus* if the disputed tax is not paid or recovered; or
>
> (*e*) whether the taxpayer has tendered adequate security for the payment of the disputed tax and accepting it is in the interest of SARS or the *fiscus*."

As the absence of explicit factors were criticised under 1.2.3, the inclusion of factors in legislation is welcomed. Although these factors are susceptible to criticism,[132] it is appropriate for the current discussion to focus on the fact that the legislature deemed it necessary to provide factors. In *Metcash Trading* the Constitutional Court presented the review process as an opportunity for taxpayers to access the courts concerning the "pay now, argue later" approach. Still, only with clear criteria of what should be considered when exercising this discretion can a taxpayer effectively use the review proceedings. Thus, until clear criteria were provided, the "pay now, argue later" approach could not effectively ameliorate the impact of this approach.

Another interesting legislative development in respect of the "pay now, argue later" approach is that section 164(6) establishes a so-called grace period during which SARS is prohibited from enforcing a tax debt from the time it receives a suspension request from the taxpayer until 10 days after it has denied this request. Generally, this new provision is a positive development for taxpayers, who now have legal certainty that

SARS cannot proceed with collections during this grace period. Yet, somewhat pessimistically, this provision may encourage SARS to reach decisions quickly to resume collection efforts. If these decisions are made without carefully considering the specifics of each case, taxpayers would then need to seek a review of those decisions.[133]

3.4 Conclusion

Whilst the Constitutional Court in *Metcash Trading* did acknowledge the importance of interpreting fiscal provisions within the context in which it functions, the Constitutional Court erred in various aspects. Most significantly, it equated a taxpayer's right to access to courts when disputing the tax obligation and subsequent enforcement thereof with a taxpayer's right to access courts in general. Just because a taxpayer in general has various options to have a matter heard by an impartial forum, by way of appeal or review, does not mean that taxpayers had a right to access to courts in this specific instance. Therefore, I opine that the right to access to courts was indeed infringed on and the court should have examined much more closely whether the relevant provisions is a reasonable and justifiable limitation in terms of 36. In relation to section 36, the court simply stated that the challenged provisions are like those in other open and democratic societies. However, a brief discussion of Canada, which the court held to be one of these jurisdictions, show that the approach in Canada is not comparable.

There have been legislative amendments made to the "pay now, argue later" approach and the statement procedure. These include providing clear legislative criteria regarding the discretion to suspend the payment obligation, allowing a grace period before collection actions commence to enable SARS to consider a taxpayer's suspension request, and giving a taxpayer notice of the imminent filing of a statement at court. Considering these amendments, it is clear that over time the legislature has incorporated several built-in protections for the taxpayer. Reflecting on the provisions as it were at the time of

Metcash Trading, it is difficult to understand the court's finding that the right to access to courts was not even infringed.

Is there much to fault the Constitutional Court judgment on? Yes. Yet, there are also numerous precedent-setting principles that apply and provided clarity in matters that do not deal with the constitutionality of the "pay now, argue later" approach and the statement procedure. These are that the Tax Court is not a court of law; the High Court has an inherent jurisdiction to hear tax matters dealing with issues in law and a filed statement is rescindable.

Endnotes

1 2001 1 SA 1109 (CC).
2 200 of 1993.
3 Interim Report of the Commission of Inquiry into certain aspects of the Tax Structure of South Africa, ch 6, 67, 18 November 1994.
4 *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services* 2002 4 SA 768 par 31.
5 s 3(*a*) of the South African Revenue Service Act 34 of 1997.
6 89 of 1991.
7 In terms of section 167(5) of the Constitution, the Constitutional Court "must confirm any order of invalidity made by the Supreme Court of Appeal, the High Court of South Africa, or a court of similar status, before that order has any force".
8 *Metcash Trading Ltd v Commissioner for the SA Revenue Service* 2000 3 BCLR 318 (W) 322.
9 *Metcash Trading* (HC) (n 8) 242.
10 *Metcash Trading* (HC) (n 8) 244.
11 *Metcash Trading* (HC) (n 8) 244. The Davis Tax Committee "Report on Tax Administration" (2017) 74 remarked that the "pay now argue later" approach does infringe on the right not to be arbitrarily deprived of property. See Fritz and Brits "Does the 'pay now, argue later' approach in the Tax Administration Act 28 of 2011 infringe on a taxpayer's right not to be deprived of property arbitrarily?" 2020 *SAJHR* 200–220 where the authors found that the "pay now, argue later" approach is neither procedurally nor substantively arbitrary.
12 In terms of the Rates and Monetary Amounts and Amendment of Revenue Laws Act 21 of 2018, the VAT rate has been amended to 15% effective 1 March 2018.
13 *Metcash Trading* (CC) (n 1) par 12–15.
14 *Metcash Trading* (CC) (n 1) par 16.
15 *Metcash Trading* (CC) (n 1) par 17–18.
16 *Metcash Trading* (CC) (n 1) par 21–22.
17 *Metcash Trading* (CC) (n 1) par 22.
18 Du Plessis *Re-interpretation of Statutes* (2002) 112.
19 See for instance *S v Makwanyane* 1995 6 BCLR 665 (CC) par 115; 278; *Executive Council of the Western Cape Legislature v President of the RSA* 1995 10 BCLR 1348 (CC) par 204; and *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 12 BCLR 1517 (CC) par 87.
20 Croome *Taxpayers' Rights in South Africa* (2010) 40; and Van Zyl "The time is ripe to reconsider the pay-now-argue-later principle" 2018 *THRHR* 172.
21 58 of 1962.
22 Croome (n 20) 40.
23 Williams "Unresolved aspects of the 'pay now, argue later' rule" 2012 *Synopsis* 4.
24 See *Metcash Trading* (CC) (n 1) par 16, 17 and 22.
25 Fritz *An Appraisal of Selected Tax-Enforcement Powers of the South African Revenue Service in the South African Constitutional Context* (2017 thesis SA) 153.

26 s 1 of the VAT Act defines "vendor" as "any person who is or is required to be registered under this Act".
27 s 7(1)(*a*) of the VAT Act.
28 s 7(1)(*b*) of the VAT Act.
29 s 7(1)(*c*) of the VAT Act.
30 s 5(1) of the Income Tax Act.
31 s 96(1)(*d*) of the Tax Administration Act 28 of 2011 (TAA).
32 s 28(1) of the VAT Act read with s 91(2) of the TAA.
33 At the time of the *Metcash Trading* matter this was in terms of s 31 of the VAT Act. Now, after the enactment of the TAA, this is provided for in s 91(2) of the TAA.
34 s 1 read with s 162(1) of the TAA.
35 Van Zyl and Fritz "The law of obligations, tax debts, insolvency, and the dissipation of assets to the prejudice of the fiscus" 2024 *THRHR* 23 29.
36 2025 1 SA 127 (SCA) par 29.
37 2025 ZASCA 56 (12 May 2025) par 32. See s 5 of the Income Tax Act.
38 2025 5 BCLR 530 (CC) par 85.
39 *Henque* (n 37) par 36.
40 2015 4 SA 28 (SCA) par 9.
41 *Metcash Trading* (CC) (n 1) par 61.
42 Olivier "Tax collection and the bill of rights" 2001 *TSAR* 192 199.
43 *Sanderson v Attorney-General, Eastern Cape* 1997 12 BCLR 1675 (CC) par 26.
44 1995 6 BCLR 665 (CC) par 109.
45 s 225.1 of the Income Tax Act RSC 1985, c 1 (5th Supp).
46 s 225.1(2) and 225.1(3) of the Income Tax Act.
47 Fritz "Reconsidering the 'pay now, argue later' approach of South Africa in relation to disputed taxes – lessons from Canada and Australia" 2019 *JJS* 20 31.
48 s 225.1(6) of the Income Tax Act.
49 s 225.1(7) of the Income Tax Act. In terms of s 225.1(8) a large corporation is a corporation that has a total of taxable capital employed in Canada exceeding $10 million. Large corporations are required to pay 50 per cent of the disputed tax pending dispute resolution.
50 s 225.2(2) of the Income Tax Act.
51 s 225.2(5) of the Income Tax Act. See *Canada v Cormier-Imbeault* (2009) 6 CTC 45 where the court identified factors that may justify the granting of such a court order.
52 s 225.2(8) of the Income Tax Act.
53 Alpert Law Firm "Defending jeopardy assessments" 2012 *Legal Business Report* 3 available at http://bit.ly/1UudsFD (18-04-2024).
54 Fritz (n 47) 34.
55 Simard "How to object to assessment in Canada", available at http://bit.ly/1PMSl05 (19-04-2024).
56 s 179.1 of the Income Tax Act.
57 *First National Bank* (n 4) par 32-33. The court confirmed in par 32 that because of the fact the commissioner who issued the assessment is not a judicial officer, the subsequent disputing

thereof in the Tax Cout is not an appeal in the forensic sense of the word.
58 *Metcash Trading* (CC) (n 1) par 32.
59 *Metcash Trading* (CC) (n 1) par 47.
60 *Metcash Trading* (CC) (n 1) par 34, 47.
61 *Metcash Trading* (CC) (n 1) par 47.
62 *Metcash Trading* (CC) (n 1) par 33.
63 *Metcash Trading* (CC) (n 1) par 43–45. The court relied on the matters of *Contract Support Services (Pty) Ltd and Others v C: SARS* 1999 3 SA 1133 (W); and *Shell's Annandale Farm (Pty) Ltd v CSARS* 2000 3 SA 564 (C) in this respect.
64 Olivier (n 42) 196.
65 Keulder "'Pay now, argue later' rule – Before and after the Tax Administration Act" 2013 *PELJ* 140 140.
66 Keulder (n 65) 140.
67 Fritz (n 47) 40.
68 14 of 1981.
69 1999 12 BCLR 1420 (CC).
70 *Lesapo* case (n 69) 1421.
71 *Metcash Trading* (CC) (n 1) par 51.
72 *Metcash Trading* (CC) (n 1) par 51.
73 *Metcash Trading* (CC) (n 1) par 58.
74 *Metcash Trading* (CC) (n 1) par 66.
75 Olivier (n 42) 198.
76 Olivier (n 42) 198. See also Keulder *Does the Constitution Protect Taxpayers Against the Mighty SARS? – An Inquiry into the Constitutionality of Selected Tax Practices and Procedures* (2011 dissertation SA) 47 in this regard.
77 Olivier (n 42) 198. However, see the discussion under 1.3.3 where SARS is now required to give a taxpayer notice in terms of s 172(1) of the TAA.
78 *Metcash Trading* (CC) (n 1) par 62.
79 *Metcash Trading* (CC) (n 1) par 38–39.
80 Olivier (n 42) 197.
81 s 6(2)(*e*))(iii) of PAJA.
82 Olivier (n 42) 199.
83 *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs* 2000 8 BCLR 837 (CC) 842.
84 Only in exceptional circumstances does s 8(1)(*c*) of PAJA empower the court to substitute the commissioner's decision.
85 *Dawood* (n 83) par 48.
86 Olivier (n 42) 198.
87 28 of 2011.
88 2018 3 SA 541 (ECM).
89 s 195(1)(*f*) of the Constitution.
90 s 195(1)(*g*) of the Constitution.
91 *Nondabula* (n 88) par 24.
92 Mdumbe "Has the literal/intentional/textual approach to statutory interpretation been dealt the coup de grace at last?" 2004 *SA Public Law* 472 475 indicates that "internal" context refers to read the legislation holistically and "external" context refers to "all factors outside the statutory text which could assist in determining its

purpose". These factors include commission reports, other legislation, common law principles and most importantly the Constitution.

93 Fritz "'Victory' for taxpayer after SARS fails to fulfil its duties" 2019 *De Jure Law Journal* 181 185.
94 2011 6 SA 65 (WCC).
95 *Capstone* (n 94) par 2 and 9.
96 *Capstone* (n 94) par 9.
97 *Capstone* (n 94) par 9. Own emphasis added.
98 Fritz "Payment obligations of taxpayers pending dispute resolution: Approaches of South Africa and Nigeria" 2018 *African Human Rights Law Journal* 171 185.
99 (A88/2023) 2024 ZAWCHC 97 (2 April 2024).
100 28 of 2014.
101 *Poulter* (n 99) par 27 referring to *President of the Republic of South Africa and Others v South African Rugby Football Union and others* 2000 1 SA 1 (CC).
102 *Poulter* (n 99) par 49.
103 *Poulter* (n 99) par 49 quoting *Metcash Trading* (CC) (n 1) par 47.
104 *Poulter* (n 99) par 50 quoting *Metcash Trading* (CC) (n 1) par 47.
105 *Poulter* (n 99) par 53.
106 *Poulter* (n 99) par 50; *Metcash Trading* (CC) (n 1) par 47.
107 Caroll "Don't go banking on review" (2 November 2023) *CDH Tax and Exchange Control Alert*, available at https://www.cliffedekkerhofmeyr.com/en/news/publications/2023/Practice/Tax/tax-and-exchange-control-alert-2-november-dont-go-banking-on-review (accessed 27 Apr 2024).
108 Choate "Trends in judicial cases in Tax Administration" 2023 *TAXTalk* 39.
109 2023 4 SA 488 (SCA) par 16.
110 *Rappa Resources* (n 109) par 17.
111 2018 2 SA 275 (SCA).
112 *United Manganese of Kalahari (Pty) Limited v Commissioner of the South African Revenue Service and Four other Cases* 2025 5 BCLR 530 (CC).
113 2023 ZASCA 125 par 25. Own emphasis added.
114 *United Manganese of Kalahari (Pty) Limited* (n 112) par 75. For a critique of the High Court judgment of *ABSA Bank*, see Keulder and Legwaila "A review muddle on an inappropriate application of general anti-avoidance rules" 2025 *Journal of South African Law* 133-144.
115 *United Manganese of Kalahari (Pty) Limited* (n 112) par 53.
116 91 of 1964.
117 *First National Bank* (n 4) par 108-109.
118 *First National Bank* (n 4) par 133.
119 *First National Bank* (n 4) par 115.
120 *First National Bank* (n 4) par 117.
121 *First National Bank* (n 4) par 119.
122 *First National Bank* (n 4) par 118 quoting with approval from *Metcash Trading* (CC) (n 1) par 51.
123 s 172(1) of the TAA.
124 2022 ZACC 8 (11 March 2022).

125 *Barnard Labuschagne Incorporated* (n 124) par 3.
126 *Barnard Labuschagne Incorporated* (n 124) par 30.
127 *Barnard Labuschagne Incorporated* (n 124) SARS *Media Release* 27 of 2000 (24 Nov 2000).
128 Taxation Laws Second Amendment Act 18 of 2009.
129 For a critique of some of these factors, see Williams (n 23) 4; Rood "Pay now, argue later" 13 Aug 2009 *Finweek* 44.
130 s 164(1) of the TAA.
131 s 164(2) of the TAA.
132 See Fritz (n 25) 171–174 for a discussion of these factors.
133 Keulder (n 76) 149–150.

Chapter 4

Strike Violence and Labour Law Liability

National Union of Metalworkers of South Africa obo Aubrey Dhludhlu and 147 Others v Marley Pipe Systems (SA) (Pty)[1]

Marthinus van Staden
School of Law,
University of the Witwatersrand
Johannesburg, South Africa

"Sympathetic though I am to the difficulties facing employers, individual complicity in the commission of acts of violence must be established. That is what the principles on common purpose have always required. If it were to be otherwise, the law would be a cruel instrument that attaches guilt and imposes sanction on the innocent. Association in complicity for purposes of common purpose must include having 'the necessary intention' in relation to the complicity" (*Marley Pipe Systems* par 36).

Abstract

This judgment marks a significant evolution in South African labour law, particularly regarding the interpretation of collective guilt and application of the doctrine of common purpose in industrial action contexts. The Constitutional Court's ruling in *National Union of Metalworkers of South Africa obo Aubrey Dhludhlu and Others v Marley Pipe Systems* addresses the dismissal of 148 employees following a violent unprotected strike where a company executive was assaulted. While upholding the dismissals of those directly implicated in the violence, the court overturned the dismissals of 41 employees whose participation was not adequately established, emphasising that "individual complicity in the commission of acts of violence must be established" rather than applying blanket collective guilt. This landmark ruling departs from previous approaches by affirming that mere presence at the scene of violence is insufficient for establishing liability under the common purpose doctrine. The court clarified that for liability to attach, there must be proof of an employee's association with the acts through direct or circumstantial evidence of complicity, not simply being present. The judgment is particularly significant as it emerges in the shadow of the Marikana tragedy, which fundamentally altered South Africa's approach to strike violence. By rejecting the notion that workers can be dismissed based on proximity to violence without evidence of participation, the Constitutional Court established a crucial safeguard for workers' constitutional rights to strike and assemble, while simultaneously condemning violence in industrial action. The court's nuanced approach balances employers' legitimate concerns about violent conduct with workers' rights to collective action, establishing a higher evidentiary threshold for dismissals during strikes. This judgment ultimately constrains the application of common purpose in the employment context, preserving individual accountability principles whilst recognising the complex dynamics of strikes and protest actions in South Africa's post-apartheid labour relations landscape.

4.1 Introduction

Strikes and protest actions in South Africa have often become violent. None of these instances has scared the South African psyche as much as the Marikana events of 2012. Although the *Marley Pipe Systems* case discussed herein was not related to these events, it is very much within the context thereof and strike violence in general that the case should be understood. On 16 August 2012, the South African Police Service (SAPS) attempted to disperse striking mineworkers at the Lonmin platinum mine in Marikana, resulting in the deaths of 34 miners.[2] This was the culmination of an unprotected strike that began on 9 August, when rock drill operators (RDOs) at Lonmin demanded a wage increase to R12,500 per month.[3] The strike was characterised by violence and intimidation from the outset. On 11 August, strikers marched to the NUM (National Union of Mineworkers) office and clashed with union officials, resulting in injuries.[4] On 12 August, two Lonmin security guards were killed by strikers.[5] On 13 August, two police officers and three strikers were killed in confrontations.[6] By 16 August, police implemented a plan to disarm and disperse the strikers gathered on a *koppie* (hill) near the mine[7]. At around 15:40, police began unrolling barbed wire, which agitated the strikers.[8] A group of armed strikers then advanced towards a police line. At 15:53, police opened fire with live ammunition, killing 16 strikers.[9] After this initial shooting, some strikers fled to a smaller *koppie* nearby. Police pursued them to this area, where a further 18 strikers were killed over the next 15 minutes in more chaotic circumstances.[10]

The Marikana incident brought unprecedented attention to the issue of strike violence in South Africa. The shocking death toll and intense media coverage made strike violence a national concern, influencing public opinion, policy discussions, and legal deliberations. After Marikana, the legislature introduced several amendments to attempt to prohibit instances of violence, such as those in the Marikana case. This indicates a shift in the legal landscape towards stricter control and management of strike actions aimed at preventing violent escalations. The court in the *Marley Pipe Systems* case would have been acutely aware of the Marikana incident and its aftermath when considering cases

involving strike action and violence. Marikana sparked intense debate about the use of force both by protesters and authorities during strikes. This debate likely influenced how violent actions during strikes were perceived and judged in subsequent cases. The trauma of Marikana lingers in the collective memory of South African society, influencing perceptions and reactions to strike actions in the years that followed. In this context, the *Marley Pipe Systems* case would have been adjudicated in an environment where the potential for strike violence was taken very seriously and where there was heightened sensitivity to the need to balance workers' rights with the maintenance of public order and safety.

In this context, the *Marley Pipe Systems* case represents a significant milestone in South African labour law, particularly concerning the interpretation of collective guilt and the application of the doctrine of common purpose in the context of strike action. The *Marley Pipe Systems* case centres on the dismissal of 148 employees following an unprotected strike that turned violent, resulting in the assault of a company executive. The case's journey through the labour courts and ultimately to the Constitutional Court highlights the complex interplay between workers' rights to strike, employers' rights to maintain workplace discipline and the legal principles governing collective action and individual culpability.

At its core, this case grapples with fundamental questions about the nature of collective action, the limits of solidarity and the balance between protecting workers' rights and maintaining order in industrial relations. The Constitutional Court's judgment provides crucial insights into the application of the doctrine of common purpose in labour disputes and sets an important precedent for how courts should approach cases involving group misconduct during strikes.

This discussion will examine the facts of the case, the legal framework governing strikes and protest action in South Africa and the reasoning behind the courts' decisions at various levels. It will also consider the broader implications of this judgment for labour relations, the right to strike and the principles of fairness and individual accountability in employment law. By

analysing this landmark case, the discussion aims to shed light on the evolving landscape of South African labour law and its attempts to navigate the often-turbulent waters of industrial action in a post-apartheid context. The *Marley Pipe Systems* case serves as a critical touchstone for understanding how the legal system seeks to balance competing rights and interests in the realm of collective labour disputes.

4.2 Facts of the case

This case concerns the dismissal of employees by Marley Pipe Systems (SA) (Pty) Ltd, the employer, following an unprotected strike at the company's premises in 2017. The National Union of Metalworkers of South Africa (NUMSA) represents 41 of the dismissed employees in this appeal.[11] The events leading to the dismissals began earlier in the year when a wage increase agreement affecting the plastics industry was reached. The employer communicated this increase to NUMSA shop stewards, who then informed the employer's employees.[12] Dissatisfied with the increase, NUMSA members working the morning shift initiated an unprotected strike.[13]

The striking employees initially gathered in the canteen, awaiting an address from the employer's head of human resources. When he did not arrive, they moved towards the administrative offices, carrying placards demanding the removal of the head of human resources.[14] Upon the head of human resources' emergence, the striking employees surrounded and severely assaulted him. He was punched, kicked and had rocks thrown at him while on the ground. The head of human resources was also pushed through a glass window and only managed to leave the premises and seek medical help after two non-striking employees came to his rescue.[15]

Following the incident, the employer called the police to quell the unrest and secured a Labour Court order interdicting employees from committing acts of violence, intimidation and harassment, as well as engaging in the unprotected strike.[16] After a disciplinary process, the employer dismissed 148 employees.[17] Of these, 136 were convicted of assault based on the doctrine of common purpose, while 12 were found to have been

directly involved in the physical assault of the human resource manager.[18] The doctrine of common purpose is a legal principle that allows individuals to be held liable for criminal acts or misconduct committed by others, even if they did not physically participate in the act itself. This doctrine is particularly relevant in cases involving group activities where it may be difficult to establish individual culpability.[19]

The dismissed employees, represented by NUMSA, referred an unfair dismissal dispute to the Metal and Engineering Industries Bargaining Council. When conciliation failed, the matter was referred to the Labour Court.[20] In their plea before the Labour Court, the employees denied that any assault or unprotected strike had taken place.[21] The employer opposed the claim and filed a counterclaim seeking compensation for losses incurred because of the unprotected strike.[22]

The Labour Court upheld the dismissals and awarded damages to the company.[23] The court's findings were based on several key pieces of evidence and considerations. First, the Labour Court identified 12 employees who were positively linked to the actual physical assault of the head of human resources. These individuals were directly implicated in the violent act that took place during the unprotected strike. For the remaining employees, the Labour Court relied on various forms of evidence to place them at the scene of the assault. This evidence included clock cards used for the company's payroll system, which established that all the employees, except for Mr Mokoena, had arrived at work for the morning shift. Additionally, job cards used at workstations helped to identify employees who were part of the morning shift. The court also considered photographic and video material that depicted the events of the day. Oral testimony indicated that a large group of employees had first gathered in the canteen and then moved as a group towards the offices. The fact that the employees were not at their workstations was interpreted to mean that they must have been part of the group that converged at the canteen and then proceeded to the scene of the assault. Furthermore, the Labour Court considered that the employees had been given an opportunity to indicate through Dropbox or

WhatsApp Messenger that they had not participated in the acts of misconduct.

Only a handful of employees took advantage of this opportunity and were, consequently, not charged.[24] The testimony of the sole witness, who testified on behalf of all the employees, was also considered by the Labour Court. The witness stated that all the employees regarded themselves as leaders with respect to the events of the day in question. However, his denial that Mr Steffens was assaulted was found to be untruthful. He also initially denied that the employees participated in an unprotected strike but later retracted this under cross-examination.[25] Based on this evidence, the Labour Court found 95 employees, in addition to the 12 directly involved in the assault, to have been present at the scene. The remaining 41 employees, including Mr Mokoena (who was not on the morning shift), were found guilty of assault based on the doctrine of common purpose.[26] The court thus upheld the dismissals of all 148 employees, finding them guilty both of assault and participation in an unprotected strike.[27]

NUMSA then appealed to the Labour Appeal Court on behalf of 41 employees, arguing that their dismissals were substantively unfair.[28] The appeal was unsuccessful, leading to the current application for leave to appeal to the Constitutional Court.[29] The Labour Appeal Court upheld the decision of the Labour Court, dismissing NUMSA's appeal on behalf of the 41 employees whose direct involvement in the assault had not been established.[30] In its judgment, the Labour Appeal Court made several key findings regarding the application of the doctrine of common purpose. Firstly, the Labour Appeal Court sought to place all the appellant employees at the scene of the assault. It noted that there was no evidence suggesting that only the 107 employees (for whom the appeal was no longer pursued) were present at the scene. The court emphasised that the undisputed evidence showed that all the appellant employees had left their workstations and participated in the strike.[31] The Labour Appeal Court then held that common purpose had been established for all the employees. It based this conclusion on several factors. Notably, the court stated that none of the 148 employees had

distanced themselves from the actions of the group and there was clear evidence that the assault on the head of human resources was perpetrated by members of the group of striking employees.[32] Furthermore, the court found it significant that none of the employees intervened to stop the assault or assist the head of human resources. It also noted that the employees did not disassociate themselves from the assault before, during, or after it occurred. The court highlighted the undisputed evidence that the striking employees celebrated the assault after the fact.[33]

The Labour Appeal Court extended this reasoning to include Mr Mokoena, who arrived on the scene after the assault. The court concluded that through his conduct, Mr Mokoena had directly associated with the actions of the group.[34] In its judgment, the Labour Appeal Court also addressed the employees described by a witness as "bystanders". The court held that these employees were present at the scene and associated with the events of the day. It emphasised that they took no steps to distance themselves from the misconduct either at the time of, during, or after the assault.[35] Finally, the Labour Appeal Court considered it significant that the employees persisted in denying that any assault had occurred, both in their pleaded case and in the evidence of Mr Ledwaba. The court also noted that the employees refused the opportunity to explain their own conduct in relation to the assault.[36] Based on these findings, the Labour Appeal Court concluded that the inference drawn – that all employees were involved in or associated themselves with the assault – was the most probable and plausible conclusion.[37] As a result, it upheld the Labour Court's decision and dismissed the appeal.

4.3 Findings of the Constitutional Court

The Constitutional Court's judgment, delivered by Madlanga J, critically examined the application of the doctrine of common purpose in this case and ultimately overturned the decisions of the lower courts. The court's findings were based on a careful analysis of established legal principles and the specific circumstances of the case. First, the court emphasised that

while it understands the evidentiary difficulties faced by employers in proving individual employee complicity in acts of violence during strikes, this cannot result in the sacrifice of innocent employees.[38] The court acknowledged the possibility that employees might be mere spectators when other employees were committing acts of violence and stressed that it would be a travesty to charge, find guilty and dismiss an employee who never took part in or associated with such acts.[39]

The court reiterated the established principles of common purpose as set out in the *Mgedezi* case.[40] These include the requirements that the person must have been present at the scene, aware of the assault, intended to make common cause with the perpetrators, manifested their sharing of a common purpose through some act of association and had the requisite criminal intent.[41] However, the court also noted, referencing the *Dunlop* case,[42] that presence at the scene is not always necessary if there is evidence of association with the misconduct before or after the event.[43] Crucially, the court held that for liability to attach under the doctrine of common purpose, there must be proof of an employee's complicity in the acts of violence. This proof can be direct or circumstantial but must demonstrate that the individual in some form associated themselves with the violence.[44] The court emphasised that mere presence at the scene and watching does not satisfy these requirements.[45]

Applying these principles to the case at hand, the court found that the high watermark of the case against the 41 employees was that they were part of the group that waited for the head of human resources, marched and chanted songs within the premises and carried placards.[46] The court concluded that this evidence was insufficient to demonstrate an act of association with the assault.[47] The court took issue with the Labour Appeal Court's conclusion that the employees did not dissociate from the assault and were rejoicing. It pointed out that there was no evidence that they had ever associated with the assault in the first place and that the marching, singing and dancing were already taking place when the group left the canteen.[48]

Regarding Mr Mokoena, who was not even at the premises when the assault took place, the court found the evidence of his complicity even weaker.[49] The court also distinguished this case from the *Oak Valley Estates* case,[50] which dealt with interdicts rather than termination of employment. In *Oak Valley Estates*, the issue at hand was whether an employer facing unlawful conduct during a protected strike could obtain an interdict against employees participating in that strike without linking each employee to the unlawful conduct.[51] The court, in that case, established that in certain circumstances, a "link" may consist of merely being within a cohesive group committing acts of violence at the workplace without the individual being actually linked to the violence.[52]

However, the court in the present case stressed that the principles applied in *Oak Valley Estates* are not directly applicable to cases involving termination of employment. The key differences highlighted by the court are as follows: First, interdicts, as were dealt with in *Oak Valley Estates*, are often concerned with future conduct. An interdict may not be necessary against an employee who has readily undertaken not to participate in any future unlawful action. In contrast, disciplinary action leading to dismissal is based on past conduct.[53] Secondly, the court emphasised that it would be inappropriate to suggest that an employee could be dismissed based on common purpose without being linked to acts of violence. The court firmly stated that a verdict of guilt cannot be appropriately returned for merely being present where acts of violence took place.[54] The court further explained that an employee could simply have been a spectator, or the acts could have happened so spontaneously or suddenly that the employee could not avoid being there. It reiterated the principle from the *Polyoak* case[55] that "our law knows no concept of collective guilt".[56] This distinction emphasises the higher standard of proof required for dismissal compared to obtaining an interdict. While an interdict may be granted based on a reasonable apprehension of harm, dismissal requires concrete evidence of individual misconduct or complicity.

In summary, the Constitutional Court's analysis of the common purpose doctrine outlined the essential criteria for convicting an individual on this basis. For a conviction to be justified, the court emphasised that the person must have been physically present when the violence occurred and aware of the assault taking place. Additionally, they must have intentionally aligned themselves with the assailants, performed some action to associate with them and intended for the victim to be harmed. The court noted that to hold bystanders or spectators liable under this doctrine, it was crucial to prove their complicity in the violent act rather than mere presence or observation. The court's reasoning here reinforces the principle that in labour disputes resulting in dismissal, individual culpability must be established. It serves as a caution against applying principles from one legal context (interdicts) to another (termination of employment) without careful consideration of the differing standards and implications.[57]

The Constitutional Court held that the principles applicable to common purpose had not been satisfied in this case. There was no basis for holding the 41 employees guilty of assault, and thus, their dismissals on this basis were substantively unfair.[58] However, the court noted that the conviction for participating in an unprotected strike still stands. Consequently, it remitted the matter to the Labour Court to consider the appropriate sanction for this charge now that the aggravating fact of a severe assault is no longer applicable.[59] This judgment, therefore, emphasises the importance of individual culpability in labour disputes and sets a significant precedent for the application of the doctrine of common purpose in such cases.

4.4 The legislative framework

Section 23 of the Constitution of the Republic of South Africa, 1996 (the Constitution) protects the right to strike as a fundamental labour right. Specifically, section 23(2)(*c*) states that "[e]very worker has the right to strike". In addition, section 23(2)(*b*) states that "[e]very worker has the right to participate in the activities and programmes of a trade union". This constitutional protection emphasises the importance of the

right to strike in South African labour relations and provides a strong legal foundation for workers to engage in collective action. However, it is important to note that the right to strike, like other constitutional rights, is not absolute. It is subject to limitation under section 36 of the Constitution, which allows for the restriction of rights under certain circumstances. This means that while the right to strike is protected, its exercise can be regulated to balance it against other rights and societal interests. While section 23 of the Constitution protects the right to strike, it does not explicitly protect violent actions. Any argument for allowing some degree of violence during strikes must be weighed carefully against the potential harm to individuals, property and the broader society, as well as the legal consequences outlined in labour laws.

The right to freedom of assembly plays a crucial role in democratic societies, particularly in the context of labour disputes and strike action. However, when strikes turn violent, complex questions arise regarding the limits of this fundamental right. The South African Constitution protects the right to assemble peacefully and unarmed under section 17. The section reads as follows: "Everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions". This provision recognises assembly as an essential form of political participation and expression, especially for marginalised groups who may lack other avenues to make their voices heard.[60] In the labour context specifically, the right to picket is explicitly included within the scope of section 17, highlighting its importance for workers engaged in collective action.[61] However, as in the case of the right to strike, the right to assembly is not absolute and contains inherent limitations. Most notably, only "peaceful" assemblies receive constitutional protection.[62] When strikes descend into violence, they fall outside this protected sphere. As Woolman notes, German jurisprudence considers an assembly non-peaceful only when acts of physical violence against persons or property are committed or threatened.[63] This suggests that minor disruptions or symbolic acts would not necessarily strip an assembly of protection, but overt violence would.

The challenge lies in determining at what point a strike crosses the line from protected assembly to unprotected violent action. There is a risk that overzealous authorities may exploit the "peaceful" requirement to suppress legitimate protest. As Hoffmann-Riem argues,[64] a generous interpretation is necessary to prevent the state from using this proviso to silence unpopular views.[65] Courts must be wary of blanket bans on assemblies based on vague assertions of potential violence. At the same time, the rights of non-participants and the broader public interest in order and safety must be considered. The Regulation of Gatherings Act[66] in South Africa allows authorities to prohibit gatherings that pose a credible threat to public safety, though such prohibitions must be based on tangible evidence rather than mere speculation.[67] A careful balance must be struck between allowing space for protest and protecting society from harm.

When violence does erupt during a strike, a key consideration is whether it represents the actions of a small minority or reflects the intentions of the assembly as a whole. It has also been argued that if some participants resort to violence while the majority remain peaceful, the assembly should retain its protected status.[68] This principle aims to prevent provocateurs from hijacking an otherwise lawful gathering. Police are expected to target violent individuals rather than dispersing the entire assembly. However, if violence becomes widespread or is clearly sanctioned by organisers, the assembly may lose constitutional protection. In such cases, authorities have greater latitude in restricting or prohibiting the gathering. But even then, any restrictions should be proportional and narrowly tailored to address the specific threat.[69] The issue of liability for damage caused during violent strikes is particularly contentious. South Africa's Regulation of Gatherings Act imposes joint and several liability on participants for riot damage.[70] This provision has been criticised as potentially chilling the right to assembly by exposing participants to significant financial risk.[71] There are valid concerns that such blanket liability may deter people from exercising their constitutional rights.

Ultimately, while peaceful assembly is a cornerstone of democracy, this right must be balanced against other societal interests when strikes turn violent. Courts and authorities face the difficult task of protecting legitimate protest while maintaining public order. A nuanced, context-sensitive approach is needed – one that safeguards the essence of the right to assembly while setting appropriate boundaries on destructive behaviour. Clear guidelines and robust judicial oversight are essential to prevent abuse of discretion by officials in restricting assemblies. As South Africa continues to grapple with labour unrest and protest action, finding this balance remains an ongoing challenge. The constitutional promise of freedom of assembly must be upheld, but not at the expense of descending into lawlessness. Careful, principled application of time, place and manner restrictions, rather than outright prohibitions, may offer a path forward in many cases.[72] Above all, the fundamental importance of assembly as a form of democratic participation must remain at the forefront of any legal analysis in this domain.

The Labour Relations Act (LRA)[73] does not allow any employee to be dismissed for participating in a protected strike. Section 197(1)(*a*) of the LRA provides that "if the reason for the dismissal is – that the employee participated in or supported, or indicated an intention to participate in or support, a strike or protest action" that such a dismissal would be automatically unfair. So too, section 67(4) of the LRA provides that "[a] n employer may not dismiss an employee for participating in a protected strike or for any conduct in contemplation or in furtherance of a protected strike". Nevertheless, section 67(5) of the LRA makes it clear that the Act "does not preclude an employer from fairly dismissing an employee in compliance with the provisions of [the Act] for a reason related to the employee's conduct during the strike". The test to determine if the reason related to the employee's conduct during the strike is whether participation in the strike was the "main", "dominant" or "legal" cause of the dismissal. The onus will be on the employer to prove that the dismissals were based on the employee's conduct and that the requirements of the Act were followed.[74]

The Labour Appeal Court in *CEPPWAWU v Metrofile (Pty) Ltd*[75] has reaffirmed that employers retain the right to dismiss employees for misconduct committed during a strike, regardless of whether the strike is protected (lawful) or not. This means that an employer is not precluded from initiating disciplinary proceedings, which may potentially result in dismissal, whilst the strike is ongoing. Should the striking employees opt not to participate in the disciplinary hearing, the employer is within their rights to continue the proceedings without the employees present.[76] This ruling emphasises the principle that whilst workers have the right to engage in protected strike action, this right does not provide immunity from disciplinary measures for misconduct. The court's position balances the employees' right to strike with the employer's need to maintain workplace order and discipline, even during periods of industrial action.[77]

Two cases illustrate this principle. These cases deal with the limits of protection afforded to workers and union representatives during strikes. In the first case, *NUM v Black Mountain Mining (Pty) Ltd*,[78] two union representatives (shop stewards) were dismissed for misconduct during a protected strike. Their actions included accusing managers of racism and engaging in intimidation. The court ruled that while shop stewards generally enjoy some immunity for their actions during strikes, this protection only applies to actions taken in good faith. The key test is whether their conduct falls within reasonable and acceptable bargaining behaviour and is related to their duties as shop stewards.[79] In this case, the court determined that the shop stewards' actions went beyond reasonable limits and were not directly related to their responsibilities. Consequently, their dismissal was deemed fair. In coming to this conclusion, the court held that a "balance must be struck between the employer's right to maintain discipline and the shop stewards' right to discharge their duties" and that "[t]he right to strike is not a licence for misconduct".[80]

The second case, *NDCAWU v Cummins Emission Solutions (Pty) Ltd*,[81] involved employees who were dismissed for intimidating non-strikers during a protected strike. These employees argued that their dismissal was automatically unfair

because of their participation in a protected strike. However, the Labour Court disagreed and found the dismissals to be fair. The Labour Court found that the dismissals of the employees were not automatically unfair but were, in fact, fair dismissals for misconduct. In the matter, the employees failed to prove that they were dismissed merely for participating in the protected strike.[82] The evidence showed that they were dismissed for intimidation, which is misconduct, rather than for strike participation.[83] The court again clarified that participation in a protected strike does not shield employees from disciplinary action for misconduct committed during the strike.[84]

The employees were specifically charged with and dismissed for intimidation, not for their general strike participation.[85] Only 15 out of many striking employees were charged, with only nine ultimately dismissed, indicating that the employer was not targeting strikers generally.[86] The employer had also not discouraged strike participation but had raised concerns about intimidation.[87] Importantly, the court noted that threats of violence in the workplace constitute serious misconduct warranting dismissal, especially when employees had been assured that they could choose whether to strike.[88] The court, therefore, concluded that the dismissals were substantively and procedurally fair.[89] The court emphasised that while employees have the right to strike, this right is not absolute and does not protect them from consequences for misconduct committed during a strike.[90] This case demonstrates that employers can fairly dismiss employees for intimidation during a protected strike, provided the dismissal is for the misconduct itself and not for participation in the strike.

These cases illustrate an important principle that while workers have the right to strike and union representatives have certain protections when performing their duties, these rights are not absolute. Actions that go beyond reasonable advocacy or bargaining, particularly those involving intimidation or other forms of misconduct, can still result in fair dismissal, even during a protected strike. The courts aim to balance the rights of workers to engage in collective action with the need to maintain order and protect others from intimidation or harm.

Following Marikana, several amendments have been introduced to strengthen the regulation of picketing, with the primary aim of mitigating "picket line violence". However, these changes largely serve to reinforce existing practices rather than significantly alter the status quo.[91] The modifications to sections 69(4), 69(5) and 69(6)(c) establish a new framework for the picketing process. This framework mandates that agreements on picketing must be secured before the conciliation period expires. In cases where an agreement cannot be reached, the commissioner is tasked with determining the picketing rules, which must then be issued alongside the certificate of outcome. Crucially, picketing is only permitted when rules are in place, whether through a collective agreement, a separate agreement,[92] or as determined by the commissioner. In essence, this means that picketing rules must be established prior to the commencement of any protected strike action.[93]

The rules set forth by the commissioner are subject to applicable codes, which now include the Code of Good Practice: Collective Bargaining, Industrial Action and Picketing.[94] This code provides more detailed guidance on how unions should adhere to the requirements outlined in section 69. These changes aim to create a more structured and regulated environment for picketing, potentially reducing the likelihood of violence or uncontrolled demonstrations. The Code addresses picketing violence in several instances. The Code aims to prevent violence during protest action and strikes through several key measures:

1. The Code emphasises peaceful conduct. The Code strongly condemns violence, intimidation and damage to property during industrial action.[95] It stresses that strikes and pickets must be conducted peacefully and unarmed.[96]
2. The Code promotes good faith bargaining. The Code encourages parties to engage in good-faith negotiations and adhere to principles of mutual respect.[97] This aims to resolve disputes before they escalate to strikes.
3. The Code establishes clear rules for picketing. The Code provides detailed guidelines on the conduct of pickets, including designating locations, limiting numbers of

picketers and prohibiting dangerous weapons.[98] This helps to maintain order and prevent confrontations.

4. The Code defines the roles and responsibilities of the parties involved in strikes and protest action. The Code outlines specific roles for union officials, employers, police and private security in managing industrial action.[99] This clarity helps to prevent misunderstandings that could lead to violence.
5. The Code encourages communication between the bargaining parties. The Code recommends establishing clear lines of communication between all parties involved in industrial action.[100] This facilitates quick resolution of issues before they escalate.
6. The Code restricts the use of dangerous weapons. The Code explicitly prohibits the possession or display of dangerous weapons during pickets and provides a clear definition of what constitutes a dangerous weapon.[101]
7. The Code promotes training. The Code emphasises the importance of training negotiators, picket marshals and security personnel in conflict management and the provisions of the Code itself.[102]
8. The Code establishes peace committees. The Code suggests forming peace and stability committees during industrial action to monitor and address potential conflicts.[103]
9. The Code limits provocative behaviour. The Code prohibits both picketers and employers from engaging in provocative or threatening behaviour that could incite violence.[104]
10. The Code encourages continued negotiations. The Code emphasises that parties should remain open to negotiations even after a dispute has been declared, which can help to prevent prolonged and potentially violent strikes.[105]

By implementing these measures, the Code aims to create an environment where industrial action can be conducted peacefully, and disputes can be resolved without resorting to violence.

A more controversial aspect of these amendments is the expansion of the Labour Court's powers concerning picketing. Notably, the court now has the authority to suspend a picket at

one or more locations. However, the legislation does not specify the grounds on which such a suspension may be enacted.[106] This expansion grants the Labour Court a more interventionist role in managing picketing activities. Critics of this change argue that "a strong case would need to be made out to justify the limitation of a constitutional right".[107] This concern stems from the potential for these expanded powers to infringe upon workers' rights to protest and engage in collective action, which are often protected under constitutional law.

The LRA extends protection to pickets, but only under the condition that they remain peaceful. This fundamental principle emphasises the delicate balance between the right to protest and the maintenance of public order. Any instances of violence or intimidation during a picket will result in the forfeiture of this legal protection, potentially exposing those involved to both civil and criminal liabilities. This stipulation serves as a crucial deterrent against the escalation of pickets into more aggressive or harmful demonstrations. The legal landscape surrounding picketing and protests encompasses a delicate balance between the right to demonstrate and the need to maintain public order and protect property. This balance is exemplified in the case of *SATAWU v Garvas*, which was heard by both the Supreme Court of Appeal and the Constitutional Court. The case arose from a protest march organised by the South African Transport and Allied Workers Union (SATAWU) under the Regulation of Gatherings Act.[108] During this march, significant damage was inflicted upon vehicles and shops along the route. As a result, small business owners who bore the brunt of this damage sought compensation from SATAWU under section 11(2)(*b*) of the Regulation of Gatherings Act. Section 11(1) and (2) are set out immediately below to facilitate an understanding of the issues. Section 11(1) provides:

> "If any riot damage occurs as a result of—
>
> (*a*) a gathering, every organization on behalf of or under the auspices of which that gathering was held, or, if not so held, the convener;

> (*b*) a demonstration, every person participating in such demonstration, shall, subject to subsection (2), be jointly and severally liable for that riot damage as a joint wrongdoer contemplated in Chapter II of the Apportionment of Damages Act, 1956 (Act No. 34 of 1956), together with any other person who unlawfully caused or contributed to such riot damage and any other organization or person who is liable therefor in terms of this subsection."

Section 11(2) provides:

> "It shall be a defence to a claim against a person or organization contemplated in subsection (1) if such a person or organization proves—
>
> (*a*) that he or it did not permit or connive at the act or omission which caused the damage in question; and
>
> (*b*) that the act or omission in question did not fall within the scope of the objectives of the gathering or demonstration in question and was not reasonably foreseeable; and
>
> (*c*) that he or it took all reasonable steps within his or its power to prevent the act or omission in question: Provided that proof that he or it forbade an act of the kind in question shall not by itself be regarded as sufficient proof that he or it took all reasonable steps to prevent the act in question."

SATAWU's defence centred on the argument that section 11(2)(*b*) of the LRA infringed upon the constitutional right to assemble, demonstrate and picket. However, the Supreme Court of Appeal rejected this argument, emphasising that the constitutional right to protest is specifically qualified by the requirement that such demonstrations be "peaceful and unarmed". The court drew a clear distinction between legitimate protest and rioting, stating that participation in riots contradicts constitutional values. Conversely, the court held that attaching liability to

the organisers of events that result in damage aligns with these constitutional principles.[109] This ruling was subsequently upheld by the Constitutional Court,[110] which found that section 11(2) of the LRA strikes an appropriate balance between limiting the right to assemble and demonstrate and protecting the public from reasonably foreseeable damage arising from such demonstrations. This decision emphasises the principle that while the right to protest is fundamental, it is not absolute and must be exercised responsibly.

The court's rulings in this case establish several important principles. Firstly, they reinforce the notion that peaceful protest is a protected right, but this protection does not extend to violent or destructive behaviour. Secondly, they affirm that organisers of protests can be held liable for damages resulting from demonstrations that they arrange, even if they did not directly cause the damage themselves. This principle of organisational responsibility serves as a deterrent against poorly planned or controlled protests.

Furthermore, these judgments highlight the legal system's approach to balancing competing rights and interests in society. On the one hand, there is the fundamental right to freedom of assembly and expression, which is crucial for a functioning democracy. On the other hand, there is the need to protect public safety and private property. The courts' decisions suggest that when these interests conflict, a careful balancing act must be performed, with the ultimate goal of maintaining social order while preserving essential freedoms.

In practical terms, these rulings serve as a cautionary tale for unions and other organisations planning protests or demonstrations. They emphasise the importance of thorough planning, effective crowd control measures and clear communication with participants about the boundaries of acceptable behaviour during protests. The threat of civil liability provides a strong incentive for organisers to take all reasonable steps to ensure that their events remain peaceful and do not infringe upon the rights of others.

However, the distinction between legitimate persuasion and unlawful intimidation is not always clear-cut. Picketing, by

its very nature, tends to be a robust and emotionally charged activity. Certain behaviours that are commonplace in pickets worldwide, such as name-calling, gesturing and glowering, are generally not considered unlawful in themselves. These actions are often seen as part of the standard tactics employed by picketers to express their discontent and apply pressure. The key factor in determining whether conduct crosses the line into intimidation is whether it induces a reasonable apprehension of harm in the person targeted. This criterion introduces an element of objectivity to the assessment, focusing on the impact of the behaviour rather than just its nature.

It is worth noting that employees who hold positions as shop stewards are not exempt from their responsibilities to adhere to their employer's rules, policies and instructions. This principle applies as long as these directives are reasonable and lawful.[111] This clarification is important as it emphasises that leadership roles within union structures do not grant immunity from workplace regulations or override the need for professional conduct.

These principles reflect the complex interplay between workers' rights to collective action and the need for social order and workplace discipline. They aim to create a framework where legitimate protests can occur without descending into harmful or disruptive behaviour. The challenge lies in the practical application of these principles, particularly in high-tension situations where emotions can run high. Employers, unions and legal authorities must navigate these nuanced distinctions carefully to ensure that the right to picket is preserved while also maintaining a safe and orderly environment for all parties involved.

These amendments reflect a delicate balance between maintaining public order and preserving workers' rights. While the changes aim to create a more structured environment for picketing, they also introduce new challenges in terms of interpretation and application, particularly regarding the expanded powers of the Labour Court. The effectiveness and fairness of these amendments will likely be tested in practice as stakeholders navigate this updated regulatory landscape.

4.5 The importance of violence

Woolman presents a compelling argument for allowing a limited degree of violence as part of democratic processes, including strike action. This perspective challenges the conventional notion that all assemblies and demonstrations must be entirely peaceful to be considered legitimate. The author contends that the overregulation and pacification of the right to assembly through its concretisation as a constitutional right has, in many ways, displaced the democratic politics that animate the freedom to assemble and act collectively as equal citizens.[112] This shift towards strictly peaceful protests often fails to acknowledge the realities of deeply entrenched inequalities and the struggles of second-class citizens to have their voices heard.

Woolman draws on the insights of influential thinkers such as Martin Luther King Jr,[113] Hannah Arendt[114] and Judith Butler[115] to support his argument about the occasional necessity of limited force in democratic processes. Martin Luther King Jr, while primarily known for his advocacy of non-violent resistance, recognised that under certain circumstances, urban riots could serve as a form of social protest. King described riots as "durable social phenomena" that, while not insurrections, were "mainly intended to shock the white community".[116] He viewed these actions not as normatively desirable but as a necessary means of drawing attention to systemic injustices when other forms of protest had been ineffective. Hannah Arendt, although generally opposed to violence in political action, acknowledged that force might be justified under specific conditions. Woolman interprets Arendt's work to suggest that the use of force could be deemed justified if it represents and results in a genuine transition from authoritarian politics to civic republicanism.[117] Arendt saw the potential legitimacy in "successful revolutions" that create space for triumphant forms of collective action, such as the drafting of the US Constitution.[118] Judith Butler's perspective, as presented by Woolman, recognises the potential necessity of forceful collective action in challenging entrenched power structures. While Butler is concerned with the precarious nature of bodily integrity, Woolman argues that her work allows for a gap where

some form of force, not intentionally directed at the precarious individual, can be justified. This interpretation suggests that Butler's theory accommodates contestations of power that may occasionally escalate into force designed to "prick the conscience of the king".[119]

All three thinkers, while primarily advocating for non-violent methods, reluctantly acknowledge that in cases of persistent oppression or exclusion from meaningful political participation, limited use of force by marginalised groups might be necessary to effect change. However, they all emphasise that such force should not be an end in itself and should ultimately lead to more inclusive and equitable political participation.[120] While these theorists generally condemn the use of force to bring about political change, their work acknowledges that in certain circumstances, the occasional use of force by marginalised groups may be necessary to challenge systemic oppression.[121] This recognition stems from the understanding that when groups are effectively excluded from a state's most important decision-making forums, they may need to resort to more forceful means to secure their participation in self-governance.

Woolman argues that the modifier "peaceful" in constitutional provisions regarding the right to assembly should primarily protect the bodily integrity of non-participants rather than be used to prevent minimal damage to private property or to silence the voices of marginalised groups.[122] He contends that property rights often serve to maintain the status quo and act as a brake on the assembly's democratic and egalitarian aims.[123] Woolman cites King's observation that urban riots must be recognised as durable social phenomena that, while not insurrections, are intended to shock the privileged community and serve as a form of social protest.[124] This perspective acknowledges that certain disruptive actions, while not ideal, may be necessary to draw attention to systemic injustices and catalyse change. Woolman criticises court decisions, such as those in South Africa, that impose strict liability on protest organisers for any damage that occurs during demonstrations, even when such damage was unforeseeable and unpreventable.[125]

He argues that this approach has a chilling effect on assembly rights and unduly restricts the space for collective action.

In conclusion, Woolman's argument suggests that allowing for a limited degree of forceful action within democratic processes, including strikes, may be necessary to ensure that marginalised voices are heard and that genuine social and political change can occur. While maintaining a general commitment to non-violence, this perspective recognises that the occasional use of force may be legitimate when it leads to the subsequent inclusion of previously excluded groups in the self-governance of the polity.[126] This nuanced approach to assembly rights seeks to balance the need for public order with the imperative of fostering genuine democratic participation and addressing entrenched inequalities.

Manamela and Budeli, however, argue against violence during protected and unprotected strike action.[127] The authors contend that violence during strikes has become a serious concern in South Africa. The authors cite examples from various sectors, including security, mining, transport and agriculture, where strikes turned violent, resulting in deaths, injuries and significant property damage.[128] They argue that the right to strike does not offer striking employees a license to engage in unruly or criminal conduct. Violence during a strike is considered an abuse of the right to strike.[129] The authors argue that a violent strike is not functional to collective bargaining and is not conducive to bargaining in good faith.[130] Protected and unprotected strikes can turn violent. However, the legal consequences differ depending on whether the strike is protected or unprotected.[131] Violent conduct during strikes can lead to civil liability, interdicts and dismissal of employees, even if the strike itself is protected.[132]

Violent conduct during strikes can lead to serious consequences for employees and trade unions, even if the strike itself is protected. While section 67(2) of the LRA provides immunity from civil liability for participation in a protected strike, this immunity does not cover unlawful acts by strikers. Employees who engage in unlawful violent conduct resulting in employer losses can be held liable for damages and trade unions

can also be held vicariously liable for the acts of their members if certain conditions are met. Although an employer may not interdict a protected strike itself, they can apply for an interdict against employees who engage in unlawful conduct during a protected strike. The employer may apply to the Labour Court or High Court for an order restraining any person from committing violent acts of misconduct and a mandatory order may also be issued directing the union to intervene and take all reasonable steps to stop unlawful acts.

Regarding dismissal, section 67(5) of the LRA allows for the fair dismissal of an employee for reasons related to their conduct during a protected strike. Employees who engage in unlawful violent conduct during a protected strike may be fairly dismissed, provided that all the requirements set by the LRA have been met. The dismissal must be both substantively and procedurally fair, as provided for in the Code of Good Practice: Dismissal and the employer must prove, on a balance of probabilities, that the employee was guilty of misconduct. The authors emphasise that while the right to strike is protected, this protection does not extend to violent or unlawful conduct. They argue that improper behaviour and unlawful conduct, such as assault, intimidation and damage to property (vandalism), will attract both civil and criminal liability. This stance emphasises the importance of maintaining peaceful and lawful conduct during strikes, even when they are protected under labour law.

Trade unions have a duty to take all reasonable steps to stop and prevent violence, damage to property and other acts of misconduct during a strike.[133] Trade unions can be held vicariously liable for the violent acts of their members during strikes under certain circumstances.[134] The authors note that South Africa has recently been confronted with a high level of violent strikes, which negatively impacts the country's international image and economy.[135] The authors argue that violence during both protected and unprotected strike action is unacceptable, not functional to collective bargaining and is discouraged in terms of both international and national labour laws. The authors conclude that lawlessness should not be allowed to infiltrate and pollute the right to strike and that it

is up to trade unions to ensure that their members conduct themselves properly during strikes.[136] These points collectively emphasise the authors' stance that while the right to strike is important and protected, violence during strikes is a serious issue that undermines the legitimacy of strike action and has significant legal and economic consequences.

The argument for allowing some degree of violence during strike action is complex and controversial. As a point of departure, it should be acknowledged that strikes are inherently disruptive and often involve heightened tensions. As Grunfeld notes, strikes are "essential parts of the collective bargaining process" and represent "the final stage when a negotiation agreement cannot be reached".[137] This suggests that strikes often occur in situations of extreme frustration and desperation. In labour law, the balance of power in industrial relations favours employers over employees.[138] In this context, some might argue that a degree of forceful action is necessary for workers to effectively challenge this power imbalance. In South Africa's history, strikes have played a crucial role in challenging systemic injustices and have played a central role in the liberation politics of the country.

4.6 The Constitutional Court's approach

The *Marley Pipe Systems* case, when examined through the lens of Woolman's argument, presents a compelling illustration of the complex interplay between workers' rights, democratic processes and the occasional necessity for forceful action in labour disputes. Woolman's perspective, which advocates for allowing a limited degree of force in democratic processes, including strike action, offers a nuanced framework for understanding the events and judicial decisions in this case. Firstly, it is crucial to consider the context of the *Marley Pipe Systems* strike. The workers, dissatisfied with a wage increase agreement, initiated an unprotected strike. This action itself can be seen as a manifestation of Woolman's argument that marginalised groups sometimes need to resort to more forceful means to secure their participation in self-governance. The workers, feeling that their voices were not adequately heard

through conventional channels, took collective action to draw attention to their grievances.

The violence that ensued during the strike, particularly the assault on the head of human resources, while regrettable, can be viewed through Woolman's lens as a form of social protest. The workers' actions, though extreme, were arguably aimed at drawing urgent attention to their plight and the perceived injustices in their workplace. Woolman's critique of the overregulation and pacification of the right to assembly is particularly relevant in this case. The courts' initial decisions to uphold the dismissals of all 148 employees, including those not directly involved in the assault, exemplify the kind of strict liability that Woolman argues has a chilling effect on assembly rights. This approach, he contends, unduly restricts the space for collective action and fails to acknowledge the realities of deeply entrenched inequalities.

However, the Constitutional Court's final judgment in the *Marley Pipe Systems* case aligns more closely with Woolman's perspective. By overturning the dismissals of the 41 employees who were not directly linked to the violent acts, the court demonstrated a more nuanced understanding of the complexities of strike action. This decision reflects Woolman's argument that the modifier "peaceful" in constitutional provisions should primarily protect the bodily integrity of non-participants rather than be used to silence the voices of marginalised groups. The court's emphasis on the need for individual culpability rather than collective punishment agrees with Woolman's critique of approaches that impose blanket liability on protest organisers. By requiring proof of an employee's complicity in the acts of violence, the court's decision allows for a more balanced consideration of the right to assembly and the need for accountability.

Furthermore, the court's recognition that mere presence at the scene and watching does not satisfy the requirements for liability under the doctrine of common purpose aligns with Woolman's argument for a more nuanced approach to assembly rights. This decision acknowledges that not all participants in a strike or protest necessarily endorse or participate in violent

actions, preserving space for legitimate collective action. The *Marley Pipe Systems* case also illustrates Woolman's point about the tension between property rights and assembly rights. While the violence against the head of human resources clearly crossed a line, the court's decision to remit the matter to the Labour Court for reconsideration of appropriate sanctions for participation in an unprotected strike (without the aggravating factor of assault) reflects a more balanced approach.

While the *Marley Pipe Systems* case involved regrettable acts of violence, its final resolution by the Constitutional Court aligns closely with Woolman's advocacy for a more nuanced understanding of assembly rights and the occasional necessity of forceful action in democratic processes. The court's decision acknowledges the complexities of labour disputes and strikes, recognising that while violence cannot be condoned, the right to collective action and the voices of marginalised workers must be protected. This approach, in line with Woolman's arguments, seeks to balance the need for public order with the imperative of fostering genuine democratic participation and addressing entrenched inequalities in the workplace.

4.7 Conclusion

The *Marley Pipe Systems* case, while distinct in its specifics, cannot be fully understood without reference to the shadow cast by the Marikana tragedy. Both incidents emphasise the volatile nature of labour disputes in South Africa and the potential for industrial action to escalate into violence. However, the Constitutional Court's measured approach in the *Marley Pipe Systems* case suggests a significant evolution in legal thinking since Marikana. Where the aftermath of Marikana was characterised by broad-brush approaches and collective accountability, this ruling demonstrates a more nuanced understanding of the complexities inherent in strike actions. It reflects a judicial recognition that while violence must be unequivocally condemned, the response must be proportionate and individualised. This shift may be seen as part of the ongoing societal and legal reckoning with the lessons of Marikana, striving to balance workers' rights to protest with the

imperative to maintain public order and safety. Consequently, the *Marley Pipe Systems* case represents not just a legal milestone but a step in South Africa's journey towards more equitable and less violent labour relations.

In conclusion, the *Marley Pipe Systems* case represents a watershed moment in South African labour law, offering a nuanced interpretation of the doctrine of common purpose and collective guilt within the context of strike action. The Constitutional Court's judgment, in overturning the dismissals of 41 employees not directly linked to the violent acts, marks a significant shift away from blanket applications of liability towards a more individualised approach to culpability. The ruling emphasises the delicate balance that must be struck between protecting workers' rights to collective action and maintaining workplace order and safety. By emphasising the need for concrete evidence of individual misconduct or complicity, the court has set a higher standard for employers seeking to dismiss employees for strike-related violence. This approach aligns more closely with constitutional principles of fairness and justice whilst still acknowledging the serious nature of violent conduct during industrial action.

The case also highlights the ongoing challenges faced by South African society in managing labour disputes. The spectre of the Marikana tragedy looms large over such cases, serving as a stark reminder of the potential consequences when industrial action spirals into violence. The court's decision reflects an awareness of this context, seeking to provide a framework that allows for legitimate protest whilst firmly discouraging violent behaviour.

Moreover, the judgment touches upon deeper philosophical questions about the nature of collective action and the limits of solidarity. By rejecting the notion of collective guilt, the court has affirmed the importance of individual agency and responsibility, even within the context of group activities like strikes. This stance may have far-reaching implications for how trade unions and employers approach industrial action in the future. The case also serves as a cautionary tale both for employers and unions. For employers, it highlights the

importance of thorough investigation and evidence-gathering before implementing dismissals in the wake of violent strikes. For unions, it reiterates the need to maintain discipline and control during industrial action to prevent the escalation of violence that could jeopardise the legitimacy of their cause.

Looking forward, this judgment is likely to shape the landscape of labour relations in South Africa for years to come. It may encourage a more measured approach to strike action on both sides of the bargaining table, fostering an environment where grievances can be addressed without resorting to violence. However, it also raises questions about how employers can effectively manage the risks associated with violent strikes whilst respecting the rights of individual workers. In the broader context of South African democracy, the *Marley Pipe Systems* case reflects the ongoing process of refining and interpreting constitutional rights in the post-apartheid era. It demonstrates the judiciary's crucial role in navigating the complex intersections of labour law, constitutional rights and societal expectations. As South Africa continues to grapple with issues of economic inequality and labour unrest, cases like this will undoubtedly play a vital role in shaping the country's path towards a more just and equitable society.

Ultimately, the Constitutional Court's decision in the *Marley Pipe Systems* case represents a significant step towards a more nuanced and fair approach to labour disputes. By rejecting simplistic notions of collective guilt and emphasising the importance of individual culpability, the court has provided a framework that better balances the rights of workers, the needs of employers and the broader interests of society. As South Africa continues to evolve its labour laws and practices, this case will stand as a landmark in the ongoing effort to create a more just and equitable industrial relations landscape.

Endnotes

1 2023 1 SA 338 (CC).
2 Marikana Commission of Inquiry: "Report on matters of public, national and international concern arising out of tragic incidents at Lonmin Mine in Marikana, North West Province" GNR 699, *GG 38978*, 10-07-2015 par 1.
3 Marikana Commission of Inquiry (n 2) par 4.5.
4 Marikana Commission of Inquiry (n 2) par 11-17.
5 Marikana Commission of Inquiry (n 2) par 15-23.
6 Marikana Commission of Inquiry (n 2) par 24-50.
7 Marikana Commission of Inquiry (n 2) par 2-8.
8 Marikana Commission of Inquiry (n 2) par 5-6.
9 Marikana Commission of Inquiry (n 2) par 29-26.
10 Marikana Commission of Inquiry (n 2) par 11.
11 *NUMSA* (n 1) par 2.
12 *NUMSA* (n 1) par 3.
13 *NUMSA* (n 1) par 3.
14 *NUMSA* (n 1) par 3.
15 *NUMSA* (n 1) par 4.
16 *NUMSA* (n 1) par 4.
17 *NUMSA* (n 1) par 5.
18 *NUMSA* (n 1) par 5.
19 *NUMSA* (n 1) par 17-20.
20 *NUMSA* (n 1) par 5.
21 *NUMSA* (n 1) par 6.
22 *NUMSA* (n 1) par 6.
23 *NUMSA* (n 1) par 7.
24 *NUMSA* (n 1) par 7.
25 *NUMSA* (n 1) par 8.
26 *NUMSA* (n 1) par 9.
27 *NUMSA* (n 1) par 7 and 9.
28 *NUMSA* (n 1) par 9 and 10.
29 *NUMSA* (n 1) par 12 and 13.
30 *NUMSA* (n 1) par 10.
31 *NUMSA* (n 1) par 10.
32 *NUMSA* (n 1) par 11.
33 *NUMSA* (n 1) par 11.
34 *NUMSA* (n 1) par 12.
35 *NUMSA* (n 1) par 12.
36 *NUMSA* (n 1) par 12.
37 *NUMSA* (n 1) par 11.
38 *NUMSA* (n 1) par 21.
39 *NUMSA* (n 1) par 21.
40 *S v Mgedezi* 1989 1 SA 687 (A) 705I-706B.
41 *NUMSA* (n 1) par 17.
42 *National Union of Metalworkers of South Africa obo Khanyile Nganezi v Dunlop Mixing and Technical Services (Pty) Limited* 2019 5 SA 354 (CC) par 46.
43 *NUMSA* (n 1) par 18.
44 *NUMSA* (n 1) par 22-25.
45 *NUMSA* (n 1) par 25.
46 *NUMSA* (n 1) par 25.

47 *NUMSA* (n 1) par 26–27.
48 *NUMSA* (n 1) par 30.
49 *NUMSA* (n 1) par 31.
50 *Commercial Stevedoring Agricultural and Allied Workers Union v Oak Valley Estates (Pty) Ltd* 2022 43 ILJ 1241 (CC) par 45.
51 *NUMSA* (n 1) par 33.
52 *NUMSA* (n 1) par 33.
53 *NUMSA* (n 1) par 33.
54 *NUMSA* (n 1) par 34.
55 *Polyoak (Pty) Ltd v Chemical Workers Industrial Union* 1999 20 ILJ 392 (LC) 393C.
56 *NUMSA* (n 1) par 34.
57 *NUMSA* (n 1) par 33–35.
58 *NUMSA* (n 1) par 37.
59 *NUMSA* (n 1) par 38.
60 Woolman "Freedom of assembly" in Woolman, Roux and Bishop (eds) *Constitutional Law of South Africa* 2–3.
61 Woolman (n 60) 24–5.
62 Woolman (n 60) 19.
63 Woolman (n 60) 19–20.
64 Hoffmann-Riem *Reihe Alternativkommentare Kommentar zum Grundgesetz für die Bundesrepublik Deutschland* (1984) 753.
65 Woolman (n 60) 19–20.
66 205 of 1993.
67 s 5 of the Regulation of Gatherings Act.
68 Woolman (n 60) 20.
69 Woolman (n 60) 28–29.
70 Woolman (n 60) 21.
71 Woolman (n 60) 15.
72 Woolman (n 60) 35–37.
73 66 of 1995.
74 *SACWU v Afrox Ltd* 1999 10 BLLR 1005 (LAC) par 32.
75 2004 2 BLLR 103 (LAC).
76 *Metrofile* (n 75) par 53–55.
77 *Metrofile* (n 75) par 53–56.
78 2010 3 BLLR 281 (LC).
79 *Black Mountain Mining* (n 78) 282C–D.
80 *Black Mountain Mining* (n 78) 282A–B, 282B–C.
81 2014 6 BLLR 600 (LC).
82 *NDCAWU* (n 81) par 39.
83 *NDCAWU* (n 81) par 35.
84 *NDCAWU* (n 81) par 35.
85 *NDCAWU* (n 81) par 22–23.
86 *NDCAWU* (n 81) par 21–22.
87 *NDCAWU* (n 81) par 23–24.
88 *NDCAWU* (n 81) par 76–77.
89 *NDCAWU* (n 81) par 80.
90 *NDCAWU* (n 81) par 36.
91 Godfrey *et al* "The new labour bills: An overview and analysis" 2018 39 *ILJ* 2161 2170.
92 s 69(4) of the LRA.
93 Godfrey (n 91) 2170–2171.

94 GNR 1396, *GG* 42121, 19-12-2018.
95 item 1(3)(f) of the Code.
96 item 16(1).
97 item 7.
98 items 28-32.
99 items 32-34.
100 item 23(2).
101 item 5(2)-(3).
102 items 8, 32(2), 34(5)(c).
103 item 23(1).
104 items 32(4), 8(1).
105 item 7(16).
106 s 69(12)(*c*) of the LRA.
107 Godfrey (n 91) 2171.
108 205 of 1993
109 *SATAWU v Garvas* 2011 12 BCLR 1249 (SCA).
110 *SATAWU v Garvas* 2012 8 BCLR 840 (CC).
111 *South African Municipal Workers' Union Ethekwini Municipality* 2016 12 BLLR 1208 (LAC) par 27.
112 Woolman "The overregulation of the democratic politics of freedom of assembly" in Abu El-Haj et al (eds) *The Oxford Handbook of Peaceful Assembly* (online edn, Oxford Academic, 23 Jan. 2024), https://doi.org/10.1093/oxfordhb/9780197674871.013.24 (2-9-2024) 1.
113 King *Where Do We Go from Here: Chaos or Community* (1967).
114 Arendt *On Violence* (1970).
115 Butler *Notes Toward a Performative Theory of Assembly* (2015).
116 Woolman (n 112) 10.
117 Woolman (n 112) 5.
118 Woolman (n 112) 6.
119 Woolman (n 112) 7.
120 Woolman (n 112) 8.
121 Woolman (n 112) 2.
122 Woolman (n 112) 17.
123 Woolman (n 112) 1.
124 Woolman (n 112) 10.
125 Woolman (n 112) 13-14.
126 Woolman (n 112) 2.
127 "Employees' right to strike and violence in South Africa" *XLVI CILSA* 2013.
128 Manamela and Budeli (n 127) 322-323.
129 Manamela and Budeli (n 127) 324.
130 Manamela and Budeli (n 127) 323.
131 Manamela and Budeli (n 127) 324-325.
132 Manamela and Budeli (n 127) 324-326.
133 Manamela and Budeli (n 127) 333.
134 Manamela and Budeli (n 127) 333-334.
135 Manamela and Budeli (n 127) 335.
136 Manamela and Budeli (n 127) 336.
137 Grunfeld quoted by Pitt *Employment law* (1992) 251.
138 Davies and Freedland *Kahn-Freund's Labour and the Law* (1983) 11.

Chapter 5

The Endorsement of the Majority Religion Through Legislation – A Constitutional Analysis

S v Lawrence, S v Negal and S v Solberg[1]

Nicole Deokiram

Faculty of Law,
University of Johannesburg
Johannesburg, South Africa

"The constraints on the exercise of freedom of religion can be imposed in subtle ways and that the choice of Christian holy days for particular legislative purposes may be perceived to elevate Christian beliefs above others; and that as a result adherents of other religions may be made to feel that the state accords less value to their beliefs than it does to Christianity. . . [T]he requirements of the Constitution require more of the legislature than that it refrain from coercion. It requires in addition that the legislature refrain from favouring one religion over others. Fairness and even-handedness in relation to diverse religions is a necessary component of freedom of religion" (*Lawrence* par 93, 128).

Abstract

This chapter explores the constitutional implications of legislatively endorsing a majority religion through the lens of the landmark case *S v Lawrence, S v Negal and S v Solberg*. The case represents the first time that South Africa's Constitutional Court examined the right to freedom of religion under section 14 of the Interim Constitution, establishing a crucial precedent regarding the state's relationship with religion in a pluralistic society. The dispute centred on whether the prohibition of alcohol sales on "closed days" (Sundays, Good Friday and Christmas Day) under the Liquor Act 27 of 1989 unconstitutionally favoured Christianity over minority religions. While the majority judgment delivered by Chaskalson P concluded that there was no infringement on religious freedom, the minority judgments by O'Regan J and Sachs J articulated a more nuanced understanding of religious freedom and equality, reasoning that the legislation impermissibly endorsed Christianity and failed to maintain state neutrality. The chapter demonstrates how these minority judgments, despite not prevailing in *Lawrence*, substantially influenced subsequent jurisprudence and legislation. The minority position was later vindicated in *Gold Circle (Pty) Ltd v Premier, Province of KZN*, where similar Christian-favouring provisions prohibiting horse racing on specific religious days were declared unconstitutional. Furthermore, the legislature effectively endorsed the minority approach by repealing the contested provisions in the new Liquor Act 59 of 2003 and implementing the KwaZulu-Natal Horse Racing and Betting Control Regulations, which removed restrictions tied to Christian holidays. *Lawrence* thus serves as a landmark case not merely for being the first to address religious freedom under the Constitution but for establishing foundational principles regarding state neutrality in religious matters. The case articulated that freedom of religion requires the legislature to act even-handedly towards diverse religions, to refrain from endorsing one religion over others and to acknowledge that even subtle legislative preferences for a majority religion may constitute an infringement of constitutional rights. The impact of these principles extends beyond the immediate case, forming

the bedrock of South Africa's constitutional approach to religious freedom and equality in a diverse, post-apartheid society.

5.1 Introduction

This chapter considers legislation that endorsed the Christian religion and that has also been brought before the courts to determine the constitutionality of such legislation. The main focus of this chapter is the *Lawrence* case, as it was the first case to be brought before the Constitutional Court to determine the constitutionality of the legislation which portrayed a Christian character and solely favoured the Christian religion. The chapter then considers the endorsement of the principles that arose from the *Lawrence* case, as discussed below, with specific reference to the judgment in the case of *Gold Circle (Pty) Ltd v Premier, Province of KZN*,[2] and *Gold Circle (Pty) Ltd v Premier, Province of KZN*.[3]

In *Lawrence*, the three appellants were convicted in the Magistrates' Court for failure to comply with certain provisions of the Liquor Act (hereafter the Old Liquor Act)[4] that prohibited the sale of certain alcohol, or prohibited the sale of alcohol on certain days and times.[5] The appellants then unsuccessfully appealed to the previously named Cape of Good Hope Provincial Division of the Supreme Court, now the Western Cape High Court of South Africa, against its decision on the basis that the applicable provisions of the Old Liquor Act infringed the constitutionally guaranteed rights to economic activity guaranteed by section 26 of the Interim Constitution[6] and the right to freedom of religion, belief and opinion guaranteed by section 14 of the Interim Constitution.[7] The matter then came before the Constitutional Court to determine whether the applicable provisions of the Old Liquor Act infringed the appellant's rights guaranteed under sections 14 and 26 of the Interim Constitution.

For purposes of this chapter, the infringement on the right to economic activity guaranteed by section 26 of the Interim Constitution will not be discussed and, therefore, the matters involving the two appellants, namely Ms Lawrence and Mr Negal, will be excluded from this chapter, as their matters were exclusively based on the Interim Constitution's section 26

right. Rather, this chapter focuses on the right to freedom of religion guaranteed by section 14 of the Interim Constitution and, therefore, the focus will be on the matter involving Ms Solberg, although Ms Solberg had also claimed infringement of her right to economic activity guaranteed by section 26 of the Interim Constitution. The *Lawrence* case is also the first case that considered section 14 of the Interim Constitution.

Section 14 of the Interim Constitution provided as follows:

> "(1) Every person shall have the right to freedom of conscience, religion, thought, belief and opinion, which shall include academic freedom in institutions of higher learning.
>
> (2) Without derogating from the generality of subsection (1), religious observances may be conducted at state or state-aided institutions under rules established by an appropriate authority for that purpose, provided that such religious observances are conducted on an equitable basis and attendance at them is free and voluntary.
>
> (3) Nothing in this Chapter shall preclude legislation recognising-
>
> (*a*) a system of personal and family law adhered to by persons professing a particular religion; and
>
> (*b*) the validity of marriages concluded under a system of religious law subject to specified procedures."

Ms Solberg was convicted, amongst others, for not complying with section 90(1) of the Old Liquor Act. Section 90(1) of the Old Liquor Act read as follows:

> "The holder of a grocer's wine licence may, notwithstanding any law to the contrary—
>
> (*a*) on any day, excluding a closed day and Saturday, sell or deliver his or her liquor between 08:00 and 20:00;

> (*b*) on any Saturday, excluding a closed day, sell or deliver his or her liquor between 08:00 and 17:00."

When the *Lawrence* case was brought before the Constitutional Court, Christmas Day, Good Friday and Sunday were considered "closed days" under the Old Liquor Act.[8] All of the mentioned closed days relate to the Christian religion and are also considered Christian holy days. The Christian religion is the majority religion in South Africa. Section 90(1) of the Old Liquor Act applied to all persons in South Africa, whether they adhered to the precepts of Christianity or not. Furthermore, it is evident that the definition of closed days in section 90(1) of the Old Liquor Act has a Christian character.

Section 90(1) of the Old Liquor Act, therefore, prohibited the sale of alcohol on closed days and Ms Solberg sold wine at a 7-*Eleven* store on a Sunday.[9] In the Constitutional Court, Ms Solberg alleged that section 90(1) of the Old Liquor Act infringed on her right to economic activity guaranteed by section 26 of the Interim Constitution and on her right to freedom of religion guaranteed by section 14 of the Interim Constitution.[10] As mentioned above, this chapter focuses on the infringement of section 14 of the Interim Constitution.

Ms Solberg alleged that the right to freedom of religion of persons observing minority religions in South Africa, guaranteed by section 14 of the Interim Constitution, had been infringed by the prohibition of the sale of alcohol on closed days. This is because a belief or observance from the majority religion was forced on persons observing a minority religion. Ms Solberg specifically alleged that:

> "the purpose of prohibiting wine selling by grocers on 'closed day[s]' was 'to induce submission to a sectarian Christian conception of the proper observance of the Christian sabbath and Christian holidays or, perhaps, to compel the observance of the Christian sabbath and Christian holidays'. This, so the argument went, 'coerced individuals to affirm or acquiesce in a specific practice solely for a sectarian Christian purpose' and was

> inconsistent with the freedom of religion of those persons who do not hold such beliefs and do not wish to adhere to them. In support of this contention it was argued that the history of the legislation showed that closed days were introduced into the Liquor Act for a religious purpose. Sunday, Good Friday and Christmas Day, which are the only days presently covered by the definition of 'closed day' in section 2 of the Act, are all of particular significance to the Christian religion."[11]

This chapter, therefore, considers whether legislation that applies to all persons of South Africa, irrespective of their personal religious beliefs has the potential to infringe the right to freedom of religion of persons who observe one of the minority religions in South Africa, rather than the Christian religion.

Chaskalson P, for the majority, held that section 90(1) of the Old Liquor Act did not infringe the right to freedom of religion, guaranteed by section 14 of the Interim Constitution, as Ms Solberg failed to prove that section 90(1) of the Old Liquor Act did indeed infringe on her right, or any other person's right, and that the prohibition against the sale of alcohol on closed days as provided by section 90(1) of the Old Liquor Act did not "serve any other religious" purpose.[12] Chaskalson P further indicated that Sunday is regarded as the most "convenient" day of rest and for purposes of the definition of closed days under section 90(1) of the Old Liquor Act, there is no religious significance.[13]

O'Regan J disagreed with the majority judgment in the *Lawrence* case and held that there had in fact been an unconstitutional infringement of Ms Solberg's section 14 right to freedom of religion.[14] Sachs J concurred with O'Regan J that Ms Solberg's right to freedom of religion had been infringed. However, Sachs J concluded that such infringement was not unconstitutional, concurring with the decision of Chaskalson P.[15] The judgment of O'Regan J and Sachs J is discussed in more detail below. Despite the judgment and the conclusion of the majority of the Constitutional Court in the *Lawrence*

case, a majority of the Constitutional Court judges concurred that section 90(1) of the Old Liquor Act in fact had a Christian character and favoured the Christian religion; thereby infringing the right to freedom of religion of persons observing minority religions in South Africa.

5.2 Significant aspects

5.2.1 Judgment by O'Regan J

O'Regan J held that section 90(1) of the Old Liquor Act has a Christian character. She disagreed with Chaskalson P, who held that Sunday is regarded as the most "convenient" day of rest, irrespective of the definition of closed days under section 90(1) of the Old Liquor Act. O'Regan J, provided an analysis of the definition of closed days under section 90(1) of the Old Liquor Act, holding that:

> "many Christian denominations consider, as a central tenet of their religion, that Sundays should be observed as a day of rest and religious observance. It is true that both Good Friday and Christmas Day are days which have been declared as public holidays. However they are only two of twelve statutorily recognised public holidays. And they are the two days of the twelve which have a direct foundation in the practice and observance of Christianity. It seems an unavoidable conclusion, that these two days together with Sundays were selected to comprise the definition of closed day because of their religious significance for Christians. If the purpose had been to provide for days of rest, the days selected would have been all days recognised as public holidays. It is true that both Good Friday and Christmas Day are days which have been declared as public holidays. However they are only two of twelve statutorily recognised public holidays. And they are the two days of the twelve which have a direct foundation in the practice and observance of Christianity. It seems an unavoidable conclusion, that these two days together with Sundays were selected to comprise

> the definition of closed day because of their religious significance for Christians."[16]

O'Regan J disagreed with the judgment of the majority of the Court in the *Lawrence* case. When the legislature chose Good Friday, Christmas Day and Sunday as closed days under the Old Liquor Act, the legislature provided for legislated preference for Christianity over the minority religions in South Africa.[17] O'Regan further stated that the definition of closed days under section 90(1) of the Old Liquor Act resulted in legislation affirming the Christian religion over the minority religions of South Africa, specifically stating that: "[t]he inevitable effect of choosing these days was to give a legislative endorsement to Christianity, but not to other religions."[18]

O'Regan J, however, agreed with Chaskalson P that the right to freedom of religion guaranteed under section 14 of the Interim Constitution can be limited if the infringement is not substantial.[19] She also acknowledged that all persons in the country are protected by the religious freedom guaranteed in section 14 of the Interim Constitution and that religion plays an important role amongst South Africans.[20] O'Regan was confident that the legislature, through section 90(1) of the Old Liquor Act, had intended to favour the Christian religion over the minority religions of South Africa and that the legislature, therefore, did not promote section 14 of the Interim Constitution as the latter section requires the legislature to act "even-handedly in relation to religion and not prefer one to the exclusion of others".[21] O'Regan J stresses that the freedom of religion clause requires the legislature to understand the importance of not forcing "religious beliefs", not "favouring" one religion over another and to act with "[f]airness and even-handedness in relation to diverse religions".[22] This was clearly not the case in the matter of Ms Solberg, in the *Lawrence* case, when read with section 90(1) of the Old Liquor Act. O'Regan J ultimately held that section 90(1) of the Old Liquor Act infringed on Ms Solberg's right to freedom of religion guaranteed under the Interim Constitution.[23]

O'Regan J then looked at the limitations clause, found in section 33 of the Interim Constitution, to determine whether the infringement on the right to freedom of religion was reasonable and justifiable. Section 33 of the Interim Constitution provided as follows:

> "(1) The rights entrenched in this Chapter may be limited by law of general application, provided that such limitation–
>
> (*a*) shall be permissible only to the extent that it is–
>
> (i) reasonable; and
>
> (ii) justifiable in an open and democratic society based on freedom and equality; and
>
> (*b*) shall not negate the essential content of the right in question, and provided further that any limitation to–
>
> (aa) a right entrenched in section 10, 11, 12, 14 (1), 21, 25 or 30 (1) (d) or (e) or (2); or
>
> (bb) a right entrenched in sections 15, 16, 17, 18, 23 or 24, in so far as such right relates to free and fair political activity, shall, in addition to being reasonable as required in paragraph (a) (i), also be necessary.
>
> (2) Save as provided for in subsection (1) or any other provision of this Constitution, no law, whether a rule of the common law, customary law or legislation, shall limit any right entrenched in this Chapter.
>
> (3) The entrenchment of the rights in terms of this Chapter shall not be construed as denying the existence of any other rights or freedoms recognised or conferred by common law, customary law or legislation to the extent that they are not inconsistent with this Chapter.

> (4) This Chapter shall not preclude measures designed to prohibit unfair discrimination by bodies and persons other than those bound in terms of section 7 (1).
>
> (5)(*a*) The provisions of a law in force at the commencement of this Constitution promoting fair employment practices, orderly and equitable collective bargaining and the regulation of industrial action shall remain of full force and effect until repealed or amended by the legislature.
>
> (*b*) If a proposed enactment amending or repealing a law referred to in paragraph (a) deals with a matter in respect of which the National Manpower Commission, referred to in section 2A of the Labour Relations Act, 1956 (Act 28 of 1956), or any other similar body which may replace the Commission, is competent in terms of a law then in force to consider and make recommendations, such proposed enactment shall not be introduced in Parliament unless the said Commission or such other body has been given an opportunity to consider the proposed enactment and to make recommendations with regard thereto."

O'Regan J referred to *S v Makwanyane*[24] and stipulated that, in order to determine the infringement in the matter regarding Ms Solberg, the Constitutional Court had to consider the "purpose and effect" of the Old Liquor Act and whether that purpose and effect was more important than the "infringement caused".[25] With minimal evidence put forward by the state regarding the purpose and effect of section 90(1) of the Old Liquor Act, O'Regan held that she could not grasp what the purpose of the latter section was and, therefore, concluded that one of the purposes, although it could not be the main purpose, of section 90(1) of the Old Liquor Act was to reduce the "consumption" of alcohol by prohibiting the sale of alcohol on closed days or public holidays with a Christian character.[26] There was no prohibition of the sale of alcohol on other public holidays

and, therefore, the purpose of section 90(1) of the Old Liquor Act, could not be accepted by O'Regan J.[27] O'Regan J concluded that although the infringement of section 14 of the Interim Constitution in the matter of Ms Solberg is not significant or "egregious", the purpose of section 90(1) of the Old Liquor Act is not more important than the infringement that arises.[28]

For these reasons, O'Regan J, for the minority in *Lawrence*, ultimately held that section 90(1) of the Old Liquor Act, as far as it prohibits the sale of alcohol on closed days, was unconstitutional.[29] O'Regan J further held that the legislature is seen to "endorse" the Christian religion through the definition of closed days in section 90(1) of the Old Liquor Act. O'Regan J, therefore, found that the right to freedom of religion was infringed by section 90(1) of the Old Liquor Act regarding persons observing minority religions in South Africa, and that such limitation was not reasonable and justifiable under the limitations clause of the Interim Constitution.[30]

5.2.2 Judgment by Sachs J

Sachs J concurred with O'Regan J that the prohibition of the sale of alcohol on closed days in terms of the Old Liquor Act infringed the right to freedom of religion of persons observing minority religions in South Africa. He further held that the legislature thereby favours the Christian religion through the definition of closed days in terms of the Old Liquor Act. In this regard, he specifically provided that

> "the identification of Sundays, Good Friday and Christmas Day as closed days for purposes of selling liquor, does involve an endorsement by the state of the Christian religion in a manner that is problematic in terms of section 14 and that the objective of section 14 is to keep the state away from favouring or disfavouring any particular world-view, so that even if politicians as politicians need not be neutral on these questions, legislators as legislative drafters must. . . I come to the following conclusion: the inescapable message sent out by the particular choice of these closed days is that

> despite the enactment of section 14, the state still shows special solicitude to Christian opinion or, to put it more accurately, to the views of certain Christians, and thereby infringes section 14. As I have stated above, it is the conjunction of Good Friday and Christmas Day with Sunday that manifests a state endorsement of Christianity as a religion requiring special observance and meriting more respect than other religions. Implicit in this is the assumption that Christians occupy central positions in the political kingdom, while non-Christians live on the periphery."[31]

Although Sachs J concurred with O'Regan J that the right to freedom of religion of persons observing minority religions in South Africa had been infringed by the Old Liquor Act, such infringement, in Sachs J's judgment, was not unconstitutional. Therefore, Sachs J concurred with Chaskalson P's majority judgment. In this regard, Sachs J held that:

> "[t]he result is that I agree with O'Regan J that the provisions relating to closed days involve a breach of section 14. Since, however, I am of the opinion that such infringement is sanctioned by section 33, I concur with Chaskalson P in his conclusion that the provisions in question are not unconstitutional."[32]

5.3 Impact of the case

5.3.1 New Liquor Act

The majority judgment in the *Lawrence* case, prima facie, appears to be discriminatory and, therefore, remains problematic. Apart from the infringement of the religious freedom of persons observing minority religions, other unfavourable consequences arise. In this regard, Sachs J pointed out that "any endorsement by the state today of Christianity as a privileged religion not only disturbs the general principle of impartiality in relation to matters of belief and opinion, but also serves to activate

memories of painful past discrimination and disadvantage based on religious affiliation".[33] Although Chaskalson P's majority judgment held that section 90(1) of the Old Liquor Act did not bear a religious character and did not infringe the right to freedom of religion guaranteed by the Interim Constitution, the legislature through the Liquor Act (hereafter the New Liquor Act)[34] seems to adopt the approach favoured by O'Regan J and Sachs J in their judgments in the *Lawrence* case.

The New Liquor Act, therefore, resolved the conflict of the decisions put forward by the minority and the majority of the Constitutional Court in the *Lawrence* case. The New Liquor Act, in this regard, repealed the Old Liquor Act in its entirety. The New Liquor Act does not prohibit the sale of alcohol by liquor licence holders on what was considered closed days under the Old Liquor Act and, therefore, the New Liquor Act promotes the right to freedom of religion of all those persons in South Africa irrespective of their religious beliefs. The New Liquor Act does not unfairly promote the interests of persons observing the majority religion against those persons observing minority religions.

5.3.2 Gold Circle

Gold Circle was initially brought before the Durban High Court in the form of a *rule nisi*. Jappie J decided the matter regarding the interim order[35] and Southwood AJ decided the matter regarding the final order in the *Gold Circle* case.[36] The facts of the *Gold Circle* case were similar to the facts of the *Lawrence* case, as both cases dealt with legislation that was based on a Christian character and that favoured the Christian religion. In this regard, the legislation applied to all persons irrespective of their religious beliefs and the legislation defined "closed days" in accordance with Christian holy days, which had resulted in the infringement on the rights of persons observing minority religions in South Africa. The only difference is that the *Lawrence* case dealt with legislation prohibiting the sale of alcohol on closed days, whereas the *Gold circle* case dealt with legislation prohibiting horse racing on certain days .[37] Southwood AJ also extensively considered the *Lawrence* case,

including the minority and the majority judgments. Southwood AJ applied the judgment of the minority in the *Lawrence* case, specifically the reasoning of O'Regan and Sachs J in respect of the infringement of section 14 of the Interim Constitution. Section 14 of the Interim Constitution was reiterated under section 15 of the Constitution of the Republic of South Africa, 1996 (hereafter the Constitution).

Regulation 4(3) of the Horse Racing and Betting Control Consolidation Ordinance (hereafter the KZN Horse Racing and Betting Ordinance)[38] provided that "[n]o races shall be held on any Sunday, Good Friday, Ascension Day or Christmas Day, provided that the Minister may, from time to time determine that races be held on a specific Sunday".

Just as Christmas Day, Good Friday and Sunday were considered "closed days" under the Old Liquor Act, so too was Sunday, Good Friday, Ascension Day and Christmas Day were considered "race days" under the KZN Horse Racing and Betting Ordinance.[39] The applicants in the *Gold Circle* case sought a *rule nisi* declaring regulation 4(3) of the KZN Horse Racing and Betting Ordinance unconstitutional as it infringed on the right to freedom of religion and the right to equality of those persons observing minority religions. Section 9 of the Constitution prohibits discrimination on the ground of, amongst others, religion and section 15(1) of the Constitution provides that: "[e]veryone has the right to freedom of conscience, religion, thought, belief and opinion."[40]

Jappie J agreed with the applicants' allegations in the *Gold Circle* case that regulation 4(3) of the KZN Horse Racing and Betting Ordinance placed a mandatory obligation and a forceful religious restraint on those persons who do not observe Christianity.[41] The applicants further alleged that the prohibition contained in regulation 4(3) of the KZN Horse Racing and Betting Ordinance may be seen as "observance by the horseracing industry in KwaZulu-Natal of the Christian religious holidays only.".[42] Jappie J held that regulation 4(3) of the KZN Horse Racing and Betting Ordinance was in conflict with section 9 of the Constitution. Jappie J ordered that regulation 4(3) of the KZN Horse Racing and Betting Ordinance was unconstitutional

and "invalid" or alternatively that "the words 'Good Friday, Ascension Day or Christmas Day'" be removed from regulation 4(3) of the KZN Horse Racing and Betting Ordinance as it was unconstitutional and "invalid".[43]

The matter was then brought before Southwood AJ. Southwood AJ considered regulation 4(3) of the KZN Horse Racing and Betting Ordinance and provided a more detailed meaning of "closed days":

> "Christians observe the closed days, Sundays, to rest from secular pursuits and to worship; the others to commemorate various events of special significance in their religion, and to worship. People in other religions, agnostics and atheists do not recognise the days as having any special significance."[44]

It can, therefore, be argued that regulation 4(3) of the KZN Horse Racing and Betting Ordinance portrays a Christian character in terms of the more detailed meaning of closed days under the latter regulation as held by Southwood AJ.

The judgment of Southwood AJ highlights that persons observing the Christian religion are favoured status by the definition of closed days provided under regulation 4(3) of the KZN Horse Racing and Betting Ordinance.[45] In this regard, Southwood AJ clarified the purpose of the latter regulation as follows:

> "It seems to me that the purpose of prohibiting horse racing on the closed days is to promote the precepts of Christianity. It is sought to promote them by recognising these Christian days of worship as worthy of being given special treatment and by eliminating, on the closed days, the secular attractions of horse race meetings so that those attractions do not compete with the behaviour and worship expected of Christians on those days. While s 4(3) seeks to promote these precepts, it does not seek to do so by compulsion, but by removing competing attractions. Although s 4(3)'s purpose is aimed at Christians, its

> effects are visited on Christians and non Christians alike: Section 4(3) of the ordinance protects Christians from the effect of the attractions of horse racing meetings only, not from the attractions of gambling in general. It does not seek to protect non Christians. It prevents non Christians from enjoying the attractions and benefits of race meetings on days which have no significance for them. It compels the respondent to refuse requests for permission by the first and second applicants to hold race days on Sundays, Good Fridays, Ascension Days or Christmas Days and in so doing it discriminates against non Christians. It gives State support for one religion and not others. . . There are benefits for Christians in s 4(3), who have their religion recognised and fostered on closed days, but there are disbenefits in it for non Christians, who are deprived of race horse meetings and all that goes with them, on closed days."[46]

Southwood AJ emphasised the importance of the reasoning of O'Regan J and Sachs J in respect of the infringement caused by legislation, that is section 90(1) of the Old Liquor Act, to persons observing minority religions in South Africa regarding the right to freedom of religion guaranteed by the Interim Constitution. Such legislation has a Christian character, favours the Christian religion and promotes the precepts of Christianity. In this regard, Southwood AJ specifically stated that:

> "[t]here is no material difference between the s 14(1) of the interim Constitution and s 15(1) of the Constitution. Section 4(3) is a far clearer case of an infringement of s 15(1) of the Constitution than the infringement of s 14(1) of the interim Constitution considered in *S v Lawrence; S v Negal; S v Solberg*. In my view, the reasoning of O'Regan and Sachs JJ for the majority of the Judges in that case, supporting their conclusion that s 90(1) of the Liquor Act infringed against s 14(1) of the Constitution, applies with more force in this case. I respectfully agree with that reasoning."[47]

Southwood AJ held that the right to freedom of religion of persons observing minority religions in South Africa is infringed by regulation 4(3) of the KZN Horse Racing and Betting Ordinance and the limitation of the latter right is unreasonable and unjustifiable. Southwood AJ, however, did not consider the limitations clause provided for under section 36 of the Constitution.[48] Southwood AJ further held that persons observing minority religions in South Africa were being discriminated against, regarding the right to equality, based on the ground of religion in terms of section 9(3) read together with section 9(1) of the Constitution. Southwood AJ held that the discriminatory provision in regulation 4(3) of the KZN Horse Racing and Betting Ordinance could not be considered as fair, as provided under section 9(5) of the Constitution, and was therefore not justifiable.[49] Ultimately, Southwood AJ held that regulation 4(3) of the KZN Horse Racing and Betting Ordinance was unconstitutional and invalid.[50]

5.3.3 KwaZulu-Natal Horse Racing and Betting Control Regulations

Because of the minority judgment in the *Lawrence* case there has also been positive legislative amendments in enforcing the right to freedom of religion of persons observing minority religions in South Africa. For example, through the abolishment of legislation that has a Christiam character and promotes the precepts of Christianity. Following the decision in the *Gold Circle* case, the premier of the KwaZulu-Natal province changed the KZN Horse Racing and Betting Ordinance that prohibited horse races on the Christian holy days of Sunday, Good Friday, Ascension Day and Christmas Day, as provided for by regulation 4(3) of the KZN Horse Racing and Betting Ordinance, by implementing the KwaZulu-Natal Horse Racing and Betting Control Regulations. The latter regulations came into effect on 16 July 2010, and it does not provide for the closure of horse racing on Christian religious holidays or what was previously considered to be "closed days" under regulation 4(3) of the KZN Horse Racing and Betting Ordinance.

5.4 Conclusion

This chapter discussed the case law dealing with the constitutionality of legislation that endorsed the Christian religion. In this regard, this chapter discussed the *Lawrence* case, which dealt with the constitutionality of section 90(1) of the Old Liquor Act. This section provided a blanket prohibition of the sale of alcohol on closed days, which was based on Christian holy days. The majority of the Constitutional Court in *Lawrence* held that there was no infringement caused by section 90(1) of the Old Liquor Act regarding the right to religious freedom of persons observing minority religions guaranteed under the Interim Constitution. The minority judgment of the Constitutional Court in *Lawrence* took a different approach, finding that there was indeed infringement of the right to freedom of religion of persons observing minority religions by section 90(1) of the Old Liquor Act and that such infringement was not reasonable and justifiable under the limitations clause of the Interim Constitution. Therefore, the minority in the *Lawrence* case would have found section 90(1) of the Old Liquor Act unconstitutional. Although there was significant disagreement between the majority and the minority of the Constitutional Court in *Lawrence*, it was the judgment of the minority in the latter case which was ultimately followed in the *Gold Circle* case and endorsed the legislature.

Endnotes

1 1997 4 SA 1176 (CC) (*Lawrence*). This chapter is based on the author's doctoral thesis titled: *Religious Holidays and the Rights to Religious Freedom and Equality* (currently in progress, UJ).
2 2006 JOL 16397 (D). This is the citation of the judgment for the interim order.
3 2005 4 SA 402 (D). This is the citation of the judgment for the final order.
4 27 of 1989.
5 *Lawrence* (n 1) par 3.
6 200 of 1993.
7 *Lawrence* (n 1) par 4.
8 s 2(*v*) of the Old Liquor Act.
9 *Lawrence* (n 1) par 2.
10 *Lawrence* (n 1) par 4, 7.
11 *Lawrence* (n 1) par 4, 85, 86.
12 *Lawrence* (n 1) par 97.
13 *Lawrence* (n 1) par 97.
14 *Lawrence* (n 1) par 133.
15 *Lawrence* (n 1) par 178.
16 *Lawrence* (n 1) par 97, 125.
17 *Lawrence* (n 1) par 125.
18 *Lawrence* (n 1) par 125.
19 *Lawrence* (n 1) par 125.
20 *Lawrence* (n 1) par 116.
21 *Lawrence* (n 1) par 116.
22 *Lawrence* (n 1) par 128, 129.
23 *Lawrence* (n 1) par 128, 129.
24 1995 3 SA 391 (CC) par 104.
25 *Lawrence* (n 1) par 128, 130.
26 *Lawrence* (n 1) par 130, 132.
27 *Lawrence* (n 1) par 132.
28 *Lawrence* (n 1) par 132.
29 *Lawrence* (n 1) par 133.
30 *Lawrence* (n 1) par 133.
31 *Lawrence* (n 1) par 160, 163, 164.
32 *Lawrence* (n 1) par 178.
33 *Lawrence* (n 1) par 152.
34 59 of 2003.
35 *Gold Circle* (n 2).
36 *Gold Circle* (n 3).
37 The term "race days" was used by Jappie J in his judgment and the term "closed days" was used by Southwood AJ in his judgment.
38 28 of 1957.
39 See reg 2 – definitions section of the KZN Horse Racing and Betting Ordinance (n 38).
40 s 9 of the Constitution reads as follows: "(1) Everyone is equal before the law and has the right to equal protection and benefit of the law. (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair

discrimination may be taken. (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination. (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."

41 *Gold Circle* (n 2) 1–2.

42 *Gold Circle* (n 2) 2.

43 *Gold Circle* (n 2) 3–5 and see reg 4(3) of the KZN Horse Racing and Betting Ordinance (n 38).

44 *Gold Circle* (n 3) 408.

45 *Gold Circle* (n 3) 412–414.

46 *Gold Circle* (n 3) 412–414.

47 *Gold Circle* (n 3) 414–415.

48 The limitations clause provided under s 33 of the Interim Constitution is reiterated under the limitations clause provided under s 36 of the Constitution. S 36 of the Constitution reads as follows: "(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including: (*a*) the nature of the right; (*b*) the importance of the purpose of the limitation; (*c*) the nature and extent of the limitation; (*d*) the relation between the limitation and its purpose; and (*e*) less restrictive means to achieve the purpose. (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights."

49 *Gold Circle* (n 3) 414.

50 *Gold Circle* (n 3) 414.

Chapter 6

Gender Equality: Recognising the Parental Responsibilities and Rights of Unmarried Fathers

Fraser v Children's Court, Pretoria North[1]

Whitney Rosenberg
Faculty of Law,
University of Johannesburg
Johannesburg, South Africa

> "The question of parental rights in relation to adoption bears directly on the question of gender equality. In considering appropriate legislative alternatives, parliament should be acutely sensitive to the deep disadvantage experienced by the single mothers in our society. Any legislative initiative should not exacerbate that disadvantage" (*Fraser* par 44).

ABSTRACT

Fraser v Children's Court, Pretoria North stands as a watershed constitutional case in South African law for its key role in recognising the parental responsibilities and rights of unmarried fathers. The judgment declared section 18(4)(*d*)

of the Child Care Act 74 of 1983 invalid and inconsistent with the Interim Constitution for dispensing with an unmarried father's consent for adoption in all circumstances whilst requiring consent from both parents of "legitimate" children. The Constitutional Court's analysis identified three significant grounds of discrimination: between fathers in different types of unions, gender discrimination between mothers and fathers and discrimination based on marital status. The court applied substantive equality principles, rejecting blanket provisions whilst acknowledging the unique relationship between mother and child, especially after birth. This nuanced approach balanced competing rights and recognised changing societal contexts where more fathers sought active involvement in their children's lives. The judgment catalysed legislative change, first through the Natural Fathers of Children Born Out of Wedlock Act 86 of 1997 and ultimately section 21 of the Children's Act 38 of 2005, which established criteria for unmarried fathers to automatically acquire parental responsibilities and rights. Beyond its immediate impact on family law, the case influenced broader constitutional jurisprudence regarding religious marriages, as evidenced by its citation in subsequent landmark judgments like *Women's Legal Centre Trust v President of the Republic of South Africa*. The court's forward-thinking approach in *Fraser* anticipated developments in South African law nearly three decades ahead, demonstrating its enduring significance in advancing equality, challenging gender stereotypes and recognising different family formations within a constitutional framework that prioritises dignity and equal treatment. Despite certain shortcomings in subsequent legislation regarding children's best interests, the judgment remains foundational in the progressive realisation of substantive equality in South African family law.

6.1 Introduction

Fraser v Children's Court, Pretoria North remains one of the most significant judgments in opening the way for the rights of unmarried fathers to be recognised[2] in South Africa by declaring section 18(4)(*d*) of the Child Care Act 74 of 1983 invalid and

inconsistent with the Interim Constitution as far as it dispensed with the father's consent for the adoption of an "illegitimate child" in all circumstances. This section required the Children's Court to obtain the consent of both parents with the adoption of a "legitimate child" and only the consent of the mother with the adoption of an "illegitimate child".[3] It created an inequality between biological mothers and biological fathers and between married fathers and unmarried fathers. Parliament was required to correct this defect within two years and the order of invalidity of this section was suspended for two years.[4] This chapter highlights the most significant aspects of the judgment and shows the ripple effect of these aspects on the promulgation of relevant legislation and the court's approach to the rights of unmarried fathers in the subsequent years.

Fraser (the applicant) is the biological father of the child born out of wedlock and Naude (the second respondent) is the mother of the child. The applicant and the second respondent were involved in an intimate relationship between 1994 and 1995, and the second respondent gave birth to a boy on 12 December 1995. No marriage was solemnised between the parties.[5] Shortly after the second respondent discovered that she was pregnant, she decided that it would be in the best interests of the child to give him up for adoption.[6] The applicant applied to the Supreme Court for an urgent interdict just before the child was born to prevent the second respondent from handing the child over to anyone except him and this was dismissed by Coetzee J on the basis that the applicant had established no *prima facie* right.[7] The applicant resisted the placing of the child up for adoption on the grounds that he wished to be considered as a prospective adoptive parent and he also sought a stay of adoption proceedings pending the application to the Constitutional Court to challenge the constitutionality of section 18(4)(*d*) of the Child Care Act insofar as it dispenses with the father's consent for the adoption of an illegitimate child.[8] The subsection read as follows:

> "A children's court to which application for an order of adoption is made… shall not grant the application unless it is satisfied–

> (d) that consent to the adoption has been given by both parents of the child, or, if the child is illegitimate, by the mother of the child, whether or not such mother is a minor or married woman and whether or not she is assisted by her parent, guardian, or husband, as the case may be."

The Children's Court (first respondent) sanctioned the adoption of the child on 23 February 1996, after which the applicant launched another application in the Supreme Court in which he wanted the identities of the prospective adoptive parents to be disclosed so as to enable him to interdict them from leaving South Africa with his child and this application was also dismissed.[9] On 11 March 1996 the applicant brought proceedings in the then Transvaal Provincial Division for review of the adoption granted by the Children's Court (first respondent) on an urgent basis. Preiss J decided on 24 May 1996 that the issue concerning the constitutionality of section 18(4)(*d*) of the Child Care Act must be referred to the Constitutional Court for consideration[10] and decided that the order given by the first respondent (granting the adoption of the child) must be set aside. Despite this victory, Naude (the mother) appealed this decision causing it to be set aside by the Supreme Court of Appeal.[11] Fraser, being intent on not giving up, further appealed to the Constitutional Court, where Chaskalson P put an end to the matter by deciding that it was almost three years since the adoption order was made and the continued uncertainty would not be in the interests of the child.[12] The matter then continued in the Constitutional Court for a decision on the validity of section 18(4)(*d*).

Although the outcome was not favourable to Fraser, the matter was one that sparked much debate around the parental responsibilities and rights of unmarried fathers and left an indelible mark on our current legal framework. The main attack made on section 18(4)(*d*) of the Child Care Act by the applicant was that it violated the right to equality in terms of section 8(1) of the interim Constitution and the right of every person not to be unfairly discriminated against in terms of section

8(2) of the Constitution.[13] Mahomed DP held that there can be no doubt that the guarantee of equality lies at the very heart of the Constitution.[14] The court held that, consistent with this repeated commitment to equality, are the conditions set out to justify the limitation of fundamental rights in section 33 of the interim Constitution – the limitation clause.[15] That, according to the limitation clause, the limitation must be "justifiable in an open and democratic society based on freedom and equality".[16]

The court held that the impugned provision does offend section 8 of the interim Constitution and highlighted three grounds for such discrimination, firstly because it impermissibly discriminates between the rights of a father in certain unions and those in other unions. Secondly, it discriminates on the grounds of gender and lastly on the grounds of marital status.[17] The first ground, as highlighted by the court, dealt with the fact that certain unions may be purely religious and because they permit polygamy, they may not be recognised in our law as they are deemed to be against public policy.[18] The result of this would be that a father to a child born as a result of such a union would have no say in the adoption of the child, as the child would be regarded as illegitimate.[19] Mahomed DP further pointed out that a purely religious marriage is not recognised because of its potential for polygamy; however, a customary union, despite being polygamous, is recognised in terms of section 27 of the Child Care Act, which means that it is included in the definition of marriage and that the consent of both the mother and the father is required when the child is placed for adoption in terms of section 18(4)(*d*).[20] Mahomed DP held that there is no basis for such discrimination and that such discrimination is not reasonable and justifiable in an open and democratic society.[21]

The second ground that the court found was invalid and inconsistent with the interim Constitution was based on gender.[22] Mahomed DP correctly recognised that a unique relationship between mother and child does exist, especially immediately after giving birth, which relationship is different to that of the father with the child. It was on that basis that the kind of discrimination that section 18(4)(*d*) authorises against a natural father might be justifiable initially after

birth.[23] The issue that the court had was that a mother has the automatic right to withhold her consent to the adoption of the child, subject to section 19, but that right is denied to every unmarried father regardless of the age of the child.[24] The court held that this may lead to unfair results and on this basis too, the court found the impugned provision to be unreasonable and unjustifiable.[25]

The third and final ground of discrimination dealt with by the court was between married and unmarried fathers. The court found that the impugned provision would lead to unfair anomalies because a father who concluded a formal marriage but who did not show any interest in the well-being of his child would be required to give his consent before such a child may be adopted. Conversely, a father who has not concluded a formal marriage but who has shown a real vested interest in his child would not have a say in the adoption of his child. This would be so despite the fact that the mother may be the reason why the marriage was not solemnised.[26] Mahomed DP emphasised that a simple striking out of all the words after the word "child" in section 18(4)(*d*) would not be justified because it would require the consent of every parent regardless of the circumstances and that could even lead to consent being required for the adoption of a child conceived as a result of rape or incest.[27] The court reiterated that blanket rules in this instance fail to take into account cases of a more complex nature.[28] A balanced approach accommodates both the interests of the child as well as the parental right to develop and enjoy close relationships with a child.[29]

The court highlighted various factors that need to be taken into account regarding the approach in foreign jurisdictions and listed some as the duration of the relationship between the parents of the children born out of wedlock, the age of the child, stability of the relationship between parents, intensity of the bond between the father and the child, the legitimate needs of the parents, the reasons why the relationship has not been formalised through marriage and what the best interests of the child are.[30] The court held that the Act may be open to attack because it shows no sensitivity to these nuances[31] and ordered

that section 18(4)(*d*) be declared invalid and inconsistent with the Constitution but that such order of invalidity be suspended for two years pending Parliament's correction of the defect.[32]

6.2 Significant aspects of the judgment

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

6.2.1.1 Right to equality – different marriages, gender, and marital status

One of the main reasons that this decision remains so important is the court's consideration of the right to equality in an area of law that was largely unequal in its approach for reasons that were unjustifiable. Mahomed DP considered section 18(4)(d) in view of the right to equality concerning different marriages, gender and marital status. His approach was not limited to dealing with the impugned provision from the vantage point of a violation of the right to equality in respect of marital status but delved deeper into other aspects listed in section 8 of the Interim Constitution, some observations proving ahead of their time. In this regard, Mahomed DP's findings that section 18(4)(d) impermissibly discriminates between the rights of fathers in certain unions and those in other unions, specifically referring to those solemnised in terms of religion such as Islamic marriages.[33] The result is that the father of a child born of such a union will not have the same rights as the mother, and would have the untenable effect of a child in such union being regarded as illegitimate.

Mahomed DP also highlighted why this is the case, pointing to the fact that religious marriages are potentially polygamous and, therefore, against public policy.[34] This finding by Mahomed DP was also referred to in *Women's Legal Centre Trust v President of the Republic of South Africa*[35] referring to it as "a benefit to prove the injurious effects of non-recognition".[36] This pronouncement and others[37] eventually culminated in an order by the Constitutional Court that the Marriage Act[38] and the Divorce Act[39] were inconsistent with various provisions of

the Constitution including the equality clause and Parliament was given 24 months to remedy the defect.[40] The *Women's Legal Centre Trust* decision came 25 years after the pronouncement was made in the current matter indicating its burgeoning effect throughout the years. Not only did the court in *Fraser* deal directly with the issue of discrimination between different types of unions and the effect that this had on children born as a result of such unions but the court went further by providing an example of one such instance where the different treatment made no sense at all and that was by the law's recognition of customary unions despite it also being polygamous in nature and, therefore, allowing fathers of children born of those unions the right to consent to the adoption of their children but denying this same right to fathers of children born of a purely religious union.[41] In this respect, the court highlighted section 27 of the Child Care Act which provided that a "customary union" as defined in section 25 of the Black Administration Act[42] is deemed to be a marriage between the parties thereto for the purposes of chapter 4 of the Child Care Act which includes section 18(4)(*d*)[43] and for such distinction there can be no justification.[44]

The court further dealt with another ground of discrimination, namely, gender. In dealing with this aspect, it avoided casting the net too wide by ignoring the inherent differences in the function of mothers versus those of fathers, especially shortly after the birth of their child.[45] Mahomed DP held that this kind of discrimination may be justifiable in the initial period after the birth of the child but not beyond that.[46] Mosikatsana[47] mentioned that denying the father of an illegitimate child the right to consent to or veto the child's adoption is not aimed at empowering women but rather at creating a chasm between the roles assigned to men (as being productive) and women (as being reproductive).[48]

Mosikatsana emphasised that section 18(4)(*d*) of the Child Care Act reinforced the traditional notion of fatherhood, making his role the same as that of a third party, and this is reinforced by regulation 4(2) of the Child Care Act 1983, which provided that any person who has a substantial interest in proceedings of the children's court may intervene, a father could qualify as

any person.[49] Section 18(4)(*d*) proved consistent with the rule *een moeder maakt geen bastaardt* which gives the mother of an illegitimate child sole parental responsibility and gives her the right to consent to the adoption of the child without providing the same right to the father. This reinforces traditional sex roles by assigning the mother as the primary care-giver and absolving the father from parental responsibilities.[50] The effect of this gender discrimination was far-reaching as it not only impacted on the rights of the father but also on those of the mother, placing a burden solely on her to care for the child and additionally such gender discrimination disregarded the rights of the child not to be punished for the acts of his or her parents by denying the child a relationship with his or her father.[51] The impugned provision did not take into account the existing relationship between the father and the child or the father's wish to develop a relationship with the child and his accompanying actions, which according to the court could lead to "strange, anomalous and unfair results".[52] The court thus found the discrimination on the basis of gender to be unreasonable and without justification in an open and democratic society based on freedom and equality.[53]

The final ground of discrimination highlighted by Mahomed DP is that of marital status.[54] The impugned provision impermissibly discriminated between married and unmarried fathers. The court held that the right to veto an adoption based on the marital status of a parent could lead to unfair anomalies,[55] bearing in mind that a married father may show no to little interest in the child while the opposite may be true for an unmarried father. Mosikatsana points out that equal treatment would not eliminate gender inequalities, it would only give unwed fathers the choice or option of being involved.[56] This comes with the important realisation, according to Mosikatsana, that gender-neutral rules that are applied in situations of social and economic inequality perpetuate existing gender inequalities.[57] Formal equality is said to ignore the social and economic circumstances of individuals and often exacerbates inequality as opposed to achieving true equality.[58] Substantive equality is said to pay attention to the context of individuals in society. Such context includes the way in which marriage and

child-rearing duties are structured that could result in further disadvantage or subordination.[59]

The Constitutional Court in *Minister of Finance and Others v Van Heerden* stated that:

> "This substantive notion of equality recognises that besides uneven race, class and gender attributes of our society, there are other levels and forms of social differentiation and systematic under-privilege, which still persist. The Constitution enjoins us to dismantle them and to prevent the creation of new patterns of disadvantage. It is therefore incumbent on courts to scrutinise in each equality claim the situation of the complainants in society; their history and vulnerability; the history, nature and purpose of the discriminatory practice and whether it ameliorates or adds to group disadvantage in real life context, in order to determine its fairness or otherwise in the light of the values of our Constitution. In the assessment of fairness or otherwise a flexible but "situation-sensitive" approach is indispensable because of shifting patterns of hurtful discrimination and stereotypical response in our evolving democratic society. The unfair discrimination enquiry requires several stages."[60]

However, according to Mosikatsana section 18(4)(*d*) a rule of substantive equality, reinforced the already existing gender stereotypes of women as primary caregivers.[61] A blanket rule allowing all fathers to consent to the adoption of their children was found not to be the solution in this instance as its result may have been that such consent proves necessary even in instances of rape and incest.[62] Therefore, a better approach would be to consider the various factors such as "biological connection, assumption of responsibility and provision of childcare".[63] The impugned provision served as an indication of the old context in which this provision was drafted. It demonstrated the approach that was relevant for that day, which was one where fathers were not involved in child-rearing. But as society changes, so too do laws and this matter of *Fraser*

served as an example of the emergence of a new era of "child-rearing fathers", who demanded equal rights and opportunity in respect of their children.

What amounted to substantive equality at the time of the drafting of the impugned provision was no longer substantively equal with the emergence of *Fraser*. With the change in the societal context, more women became involved in the workplace, causing a shift in the distribution of child-rearing responsibilities. Was the impugned provision always discriminatory or did it become a source of discrimination with the emergence of a generation of child-rearing fathers? In any context, placing a blanket provision or rule over any group of people, i.e. a general assumption that all unwed fathers would not be interested in assuming parental responsibilities and rights over their children, is discriminatory and cannot be justified. Therefore, the contextual analysis of laws or specific provisions must refer to the context of the individual in conjunction with the societal context of the day. Thus section 18(4)(*d*) always discriminated against unwed fathers because it failed to consider matters where fathers were interested in assuming parental responsibilities. The extent of this discrimination also exceeded the bounds of reasonableness in that it harmed the child's right to parental care as well as the mother's right to equality.

6.2.1.2 Right to procedurally fair administrative action[64]

Section 18(4)(*d*) violated the unwed father's right to procedural fairness in terms of section 33(1) of the Interim Constitution. The unwed father was denied the right to participate in his child's life and was excluded from having a say in the adoption of the child regardless of circumstances. This had the result of adversely affecting the father's right to due process.

6.2.1.3 The child's right to parental care

Section 18(4)(I) resulted from the previous distinction in our law between legitimate and illegitimate children, which was a distinction imputed on children based on parents' actions, i.e. not being married. This severely curtailed the rights of children who were considered illegitimate and denied these children

the right to equality in respect of receiving parental care from their unwed fathers. In the societal context of the time, the need for parental care from both parents was disregarded. The definition of parental care in terms of section 1 of the current Children's Act[65] includes aspects that require the involvement of both parents:[66]

> "'care', in relation to a child, includes, where appropriate–
>
> (*a*) within available means, providing the child with–
>
> (i) a suitable place to live;
>
> (ii) living conditions that are conducive to the child's health, well-being and development; and
>
> (iii) the necessary financial support;
>
> (*b*) safeguarding and promoting the well-being of the child;
>
> (*c*) protecting the child from maltreatment, abuse, neglect, degradation, discrimination, exploitation and any other physical, emotional or moral harm or hazards;
>
> (*d*) respecting, protecting, promoting and securing the fulfilment of, and guarding against any infringement of, the child's rights set out in the Bill of Rights and the principles set out in Chapter 2 of this Act;
>
> (*e*) guiding, directing and securing the child's education and upbringing, including religious and cultural education and upbringing, in a manner appropriate to the child's age, maturity and stage of development;
>
> (*f*) guiding, advising and assisting the child in decisions to be taken by the child in a manner appropriate to the child's age, maturity and stage of development;
>
> (g) guiding the behaviour of the child in a humane manner;

(h) maintaining a sound relationship with the child;

(i) accommodating any special needs that the child may have; and

(*j*) generally, ensuring that the best interests of the child is the paramount concern in all matters affecting the child."

The above definition includes aspects such as financial support and even protection, all of which a child will be deprived of if denied a relationship with the unwed father in terms of section 18(4)(*d*).

6.3 Impact of the *Fraser* case on the Children's Act

After Fraser's victory in the Constitutional Court, which declared section 18(4)(*d*) invalid and inconsistent with the right to equality, the legislature passed a new law called the Natural Fathers of Children Born Out of Wedlock Act.[67] This act allowed the unwed father to approach the court for access rights, custody, or guardianship over the child and the court would grant such an application if in the best interests of the child and if a family advocate was appointed then once the report of the family advocate was considered.[68] The act further provided for factors that the court must take into account when considering whether rights of access, custody or guardianship should be granted, the section read as follows:

"(*a*) The relationship between the applicant and the natural mother, and, in particular, whether either party has a history of violence against or abusing each other or the child;

(*b*) the relationship of the child with the applicant and the natural mother or either of them or with proposed adoptive parents (if any) or any other person;

(*c*) the effect that separating the child from the applicant or the natural mother or proposed adoptive parents (if any) or any other person is likely to have on the child;

> (*d*) the attitude of the child in relation to the granting of the application;
>
> (*e*) the degree of commitment that the applicant has shown towards the child, and, in particular, the extent to which the applicant contributed to the lying-in expenses incurred by the natural mother in connection with the birth of the child and to expenditure incurred by her in connection with the maintenance of the child from his or her birth to the date on which an order (if any) in respect of the payment of maintenance by the applicant for the child has been made and the extent to which the applicant complies with such order;
>
> (*f*) whether the child was born of a customary union concluded according to indigenous law or custom or of a marriage concluded under a system of any religious law; and
>
> (*g*) any other fact that, in the opinion of the court, should be taken into account."[69]

The Natural Fathers of Children Born Out of Wedlock Act did not place unmarried fathers on equal footing with unmarried mothers or with married fathers; the unmarried father had to apply to the High Court for rights and did not automatically acquire them. If the child is not yet born or is a newborn, it is challenging to establish a relationship between the unmarried father and the child. Because of a lack of time to bond in the early stages of life, the effect of separation of the child from the unmarried father would also not serve as a telling sign of whether the father should be granted any rights and the attitude of the child in paragraph (*d*) would be irrelevant in this regard too. The only applicable subsection in this regard was paragraph (*e*) which outlined the unmarried father's contribution towards lying-in expenses and maintenance. Paragraph (*g*) saved this section of the Act by allowing other relevant considerations to be considered. The Natural Fathers of Children Born Out of Wedlock Act remained applicable for a decade until 1 July 2007 when it was repealed by the Children's Act 38 of 2005. Section

21 of the Children's Act explains how unmarried fathers can automatically qualify for parental responsibilities and rights and reads as follows:

> "Parental responsibilities and rights of unmarried fathers
>
> (1) The biological father of a child who does not have parental responsibilities and rights in respect of the child in terms of section 20, acquires full parental responsibilities and rights in respect of the child—
>
> (*a*) if at the time of the child's birth he is living with the mother in a permanent life-partnership; or
>
> (*b*) if he, regardless of whether he has lived or is living with the mother—
>
> (i) consents to be identified or successfully applies in terms of section 26 to be identified as the child's father or pays damages in terms of customary law;
>
> (ii) contributes or has attempted in good faith to contribute to the child's upbringing for a reasonable period; and
>
> (iii) contributes or has attempted in good faith to contribute towards expenses in connection with the maintenance of the child for a reasonable period.
>
> (2) This section does not affect the duty of a father to contribute towards the maintenance of the child.
>
> (3) (*a*) If there is a dispute between the biological father referred to in subsection (1) and the biological mother of a child with regard to the fulfilment by that father of the conditions set out in subsection (1)(*a*) or (*b*), the matter must be referred for mediation to a family advocate, social worker, social service professional or other suitably qualified person.

> (*b*) Any party to the mediation may have the outcome of the mediation reviewed by a court.
>
> (4) This section applies regardless of whether the child was born before or after the commencement of this Act."[70]

This section improved the rights of unmarried fathers although it did not place these fathers on equal footing with unmarried mothers or married fathers. The result is that an unmarried father may now acquire full parental responsibilities and rights without approaching the court and only if he has met the requirements laid out in the section.[71] What this section failed to consider is the best interests of children, as pointed out by Bonthuys.[72] The section also fails to consider domestic violence situations and how awarding equal parental responsibilities and rights to fathers may exacerbate the problem of domestic violence as a perpetrator may demand contact or care of his children in order to locate the mother and commit further abuse.[73] Bonthuys opines that awarding equal parental responsibilities and rights to fathers who actually take care of their children is just and fair but doing so to most unmarried or divorced fathers may increase the burden borne by mothers.[74] These challenges will be examined here below.

6.4 Impact of the judgment

Following Fraser's victory in the Constitutional Court the Natural Fathers of Children Born out of Wedlock Act was promulgated, which was a small step in the right direction by empowering fathers to approach the High Court for access, custody or guardianship. This eventually led to section 21 of the Children's Act 38 of 2005, which grants all unmarried fathers automatic parental responsibilities and rights. The judgment significantly impacted how unmarried fathers are treated. It was the first victory of its kind to start changing the societal narrative of the "deadbeat dads," which narrative was supported by the law in not granting unmarried men parental

responsibilities and rights despite some being very involved and dedicated to their children.

Some key aspects of this judgment were how the court used the right to equality to analyse the treatment of unmarried fathers in respect of different marriages, gender, and marital status. The court applied substantive equality by advising against the implementation of a blanket provision that will place unmarried fathers, married fathers and unmarried mothers on equal footing, acknowledging that such blanket provision may cause more harm than good to single mothers. The court examined the societal context within which section 18(4)(*d*) existed and the change in society that demanded a change in the laws. According to Jagwanth, the application of substantive equality which is impact- and context-based yields maximum benefit for the most disadvantaged and vulnerable groups, single mothers forming part of this vulnerable group.[75] Jagwanth goes on to state that there is an asymmetry inherent in substantive equality which determines that the non-identical treatment of different groups is necessary to address differences between them.[76]

This asymmetry is confirmed in section 21 which does not place unmarried fathers on an equal footing with married fathers or unmarried mothers, but if certain conditions are met, allows the unmarried father to acquire full parental responsibilities and rights, thus leaving it up to the unmarried father to determine the extent of his rights, although Louw views the failure of a father to show a sufficient degree of commitment spares him the burden of responsibilities that are automatically bestowed on mothers.[77] This approach prevents the situation where an unmarried father who is not involved at all from claiming any rights to decision-making involving the child and does demonstrate a balanced approach.

Louw disagrees that this presents a balanced approach, stating that the different treatment between mothers and fathers can be attacked on the grounds that it unfairly discriminates against mothers on the grounds of sex, gender and marital status and it unfairly discriminates against biological fathers in relation to biological mothers in respect of sex and gender and

in relation to mothers and married fathers or fathers who have committed themselves to the mother and in relation to mothers and unmarried fathers who have adhered to section 21(1)(*b*) of the Children's Act.[78] Further, Louw states that the different treatment of mothers and fathers in terms of the acquisition of parental responsibilities and rights also infringes on the constitutional rights of children, namely, the child's right not to be discriminated against on the basis of social origin and birth and the right to dignity as well as the child's right to parental care in terms of section 28(1)(*b*) and best interests in terms of section 28(2) of the Constitution.[79]

Currie and De Waal make an important point regarding the unequal treatment of mothers and unmarried fathers,[80] they provide that, on the one hand, awarding fathers of children born out of wedlock automatic parental rights "may advance gender equality by encouraging them to take a more active role in the care of their children" and awarding mothers a greater share of parental rights solely on the basis of gender may perpetuate harmful stereotypes which see women as bearing the main burden of childcare.[81] According to Currie and De Waal, the reality is that awarding fathers equal rights may not result in more active participation by fathers but may cause undue hardship for the mother because the father has a legal right to interfere with the mother's childcare arrangements.[82] The authors suggest basing the awarding of parental responsibilities and rights on actual childcare work, which is what section 21 does, if section 21(1)(*a*) is ignored.[83] Section 21 awards the unmarried father parental responsibilities and rights based on his fulfilling certain conditions which may be likened to his childcare work or his participation in caring for the child.

6.4.1 Shortcomings of section 21 of the Children's Act: Best interests of children

In *S v M*[84] Sachs J emphasised that children are not merely miniature adults, a mere extension of his or her parents destined to either sink or swim with them and that in the new constitutional dispensation the sins and traumas of fathers and mothers should not be visited on their children. According to

Skelton, the majority court in *S v M* carefully considered the best interests of the child and did not confuse this with the rights of the primary caregiver.[85] Skelton states "[t]he discourse centres on children's rights to family and parental care, and their right to have their best interests given appropriate weight. … The purpose of emphasising the duty of the sentencing court to consider the best interests of the child is not to allow errant parents to escape punishment, but rather to protect innocent children from avoidable harm".[86]

The comments made by the court in *S v M* and deductions made by Skelton indicate the importance of giving the best interests of the child appropriate weight. Excluding an unmarried father's consent for adoption by not granting him parental responsibilities and rights such as what section 18(4)(*d*) did, ultimately prejudiced children by depriving them of their right to family and parental care, in other words punishing them for the "sins" of their parents in the form of their parents' refusal to marry. Section 18(4)(*d*) amounted to a punishment bestowed on children for the actions of their parents. What section 21 of the Children's Act tried to do was to rectify the injustice to fathers, but sadly yet again, no mention of the best interests of children. Louw states that it could be argued that the societal goal of the Children's Act is to protect mothers and thus makes the act parent-centred as opposed to based on the best interests of children.[87] She states

> "[t]he purpose sought to be achieved by limiting a father's right to automatic parental responsibilities and rights seems to have more to do with protecting the mother's vested interests than putting the interests of children first."[88]

As pointed out by Bonthuys, section 21 fails to consider the best interests of children as guaranteed in section 28 of the Constitution. Section 21 should have included some form of consideration for the best interests of the child and would have thus allowed for an exception should it be proved that according parental responsibilities and rights to the unmarried father will not be in the child's best interests. Its failure to do so is

a lacuna that cannot be justified considering section 28 and its importance.

6.5 Conclusion

The trail-blazing decision of *Fraser* culminated in the promulgation of section 21. The court in *Fraser* realised the need for a nuanced approach when adopting new laws which would ensure the achievement of substantive equality. The court warned against a blanket rule that may worsen the situation of mothers. Whether intended or not, the court in its forward-thinking approach also managed to highlight the unfair discrimination inherent in the differentiation between religious marriages and customary marriages; the decision of the court in *Fraser* being mentioned in the well-known judgment of *Women's Legal Centre Trust* where the non-recognition of Muslim marriages was brought to the fore. That decision has culminated in the single Marriage Bill that will bring all types of marriages which are currently governed by various acts under one umbrella, whether monogamous or polygamous in nature; however, we are yet to see whether it will adequately provide for religious marriages as especially highlighted by the court in *Fraser*.

This decision also paved the way for the recognition of the parental responsibilities and rights of unmarried fathers and improved the laws to protect these fathers' rights in a manner that is balanced, focusing the unmarried father's responsibilities and rights on whether he has fulfilled the requirements in section 21 and, therefore, avoiding the arbitrary awarding of rights which would place an undue burden on mothers. Unfortunately, this balancing of rights does not stretch to the best interests of children. A major shortcoming of section 21 is its failure to consider the best interests of children, which demonstrates the focus on the rights of parents as opposed to the rights of children.

Despite an unmarried father meeting all the criteria listed in section 21, his acquisition of parental responsibilities and rights may not be in the child's best interests. It is proposed that a provision be introduced in section 21 that makes all the

considerations subject to the child's best interests in terms of section 28 of the constitution. If there is *prima facie* evidence that awarding an unmarried father parental responsibilities and rights would not be in the child's best interests, then a relevant court would have to be approached to determine the child's best interests. Such an approach would serve as an additional safeguard and would strengthen the relevant section towards achieving more substantive equality for the sake of the children involved. The success of the *Fraser* judgment may be found in how the court pre-empted the developments in our law that we are experiencing today, almost three decades after the decision was made.

Endnotes

1 1997 2 SA 261 (CC).
2 Boniface "Revolutionary changes to the parent-child Relationship in South Africa: End of the revolution for the 'unmarried' father" 2009 *Speculum Juris* 1 8.
3 Beyl *A Critical Analysis of Section 21 of the Children's Act 38 of 2005 with Specific Reference to the Parental Responsibilities and Rights of Unmarried Fathers* (2013 dissertation UP) 40. The terminology used is the same as referred to in the Child Care Act 74 of 1983 as this case refers to that Act.
4 *Fraser* (n 1) par 52.
5 *Fraser* (n 1) par 1.
6 *Fraser* (n 1) par 2.
7 *Fraser* (n 1) par 3.
8 *Fraser* (n 1) par 4.
9 *Fraser* (n 1) par 6.
10 *Fraser v Children's Court, Pretoria* North 1997 2 SA 218 (T) 240.
11 *Naude and Another v Fraser* 1998 8 BCLR 945 (SCA).
12 *Fraser v Naude* 1999 1 SA 1 (CC) par 8-10.
13 *Fraser* (n 1) par 19; s 8 of the Interim Constitution provided: "(1) Every person shall have the right to equality before the law and to equal protection of the law; (2) No person shall be unfairly discriminated against, directly or indirectly, and, without derogating from the generality of this provision, on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language. (3)(*a*) This section shall not preclude measures designed to achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination, in order to enable their full and equal enjoyment of all rights and freedoms. (*b*) Every person or community dispossessed of rights in land before the commencement of this Constitution under any law which would have been inconsistent with subsection (2) had that subsection been in operation at the time of the dispossession, shall be entitled to claim restitution of such rights subject to and in accordance with sections 121, 122 and 123. (4) Prima facie proof of discrimination on any of the grounds specified in subsection (2) shall be presumed to be sufficient proof of unfair discrimination as contemplated in that subsection, until the contrary is established."
14 *Fraser* (n 1) par 20.
15 *Fraser* (n 1) par 20.
16 *Fraser* (n 1) par 20.
17 *Fraser* (n 1) par 21.
18 *Fraser* (n 1) par 21; *Seedat's Executors v The Master (Natal)* 1917 AD 302; *Ismail v Ismail* 1983 1 SA 1006 (A).
19 *Fraser* (n 1) par 21.
20 *Fraser* (n 1) par 22.
21 *Fraser* (n 1) par 23.
22 *Fraser* (n 1) par 24.
23 *Fraser* (n 1) par 25.
24 *Fraser* (n 1) par 25.

25 *Fraser* (n 1) par 25.
26 *Fraser* (n 1) par 26.
27 *Fraser* (n 1) par 27.
28 *Fraser* (n 1) par 29.
29 *Fraser* (n 1) par 29.
30 *Fraser* (n 1) par 43; *Bethell v Bland* 1996 2 SA 194 (W); *B v S* 1995 3 SA 571 (A).
31 *Fraser* (n 1) par 43.
32 *Fraser* (n 1) par 52.
33 *Fraser* (n 1) par 21.
34 *Fraser* (n 1) par 21.
35 2009 6 SA 94 (CC).
36 *Women's Legal Centre Trust* (n 35) par 26.
37 *Daniels v Campbell* 2004 5 SA 331 (CC) par 74–75.
38 25 of 1961.
39 70 of 1979.
40 *Women's Legal Centre Trust* (n 35) par 48.
41 *Fraser* (n 1) par 22.
42 38 of 1927.
43 *Fraser* (n 1) par 22–23.
44 *Fraser* (n 1) par 23.
45 Smart "Losing the struggle for another voice: The case of family law" 1995 *Dalhousie Law Journal* 173 177 as quoted in Mosikatsana "Is papa a rolling stone? – The unwed father and child in South African law: A comment on *Fraser v Naude*" 1996 *Comparative and International Law Journal of South Africa* 152 164.
46 *Fraser* (n 1) par 25.
47 See Mosikatsana (n 45) 164.
48 Mosikatsana (n 45) 157–158.
49 Mosikatsana (n 45) 159.
50 Mosikatsana (n 45) 159.
51 Mosikatsana (n 45) 159–160.
52 *Fraser* (n 1) par 25.
53 *Fraser* (n 1) par 25.
54 *Fraser* (n 1) par 26.
55 *Fraser* (n 1) par 26.
56 Mosikatsana (n 45) 164.
57 Mosikatsana (n 45) 165.
58 De Vos and Freedman *et al South African Constitutional Law in Context* (2021) 519.
59 De Vos and Freedman *et al* (n 58) 520.
60 *Minister of Finance v Van Heerden* 2004 6 SA 121 (CC) par 27.
61 Mosikatsana (n 45) 165.
62 *Fraser* (n 1) par 28 and 29.
63 Shanley "Unwed fathers' rights, adoption, and sex equality: Gender-neutrality and the perpetuation of patriarchy" 1995 *Columbia Law Review* 64–5 as cited in Mosikatsana (n 45) 165.
64 As postulated by Mosikatsana (n 45) 165.
65 38 of 2005.
66 "The idea is that parents should co-exercise these PRR. Both parents have a responsibility to ensure that the child has a suitable place to live in conditions that are conducive to the child's health,

well-being and development. Whereas the parent with whom the child lives will usually choose the home in which the child lives, both parents should contribute financially to ensure that the child has a suitable place to live. Both parents should maintain a sound relationship with the child, no matter with whom the child lives." Skelton and Hansungule "Parental responsibilities and rights" in Van Heerden, Skelton and Du Toit *et al Family Law in South Africa* (2023) 291.

67 86 of 1997.
68 s 2(1) and 2(2)(*a*) and (*b*).
69 s 5(*a*)-(*g*).
70 Louw views this section as a screening test that fathers must pass by showing the necessary commitment to either the mother or the child. Louw "The constitutionality of a biological father's recognition as a parent" 2010 *PER/PELJ* 3 165; see also *Republic of South Africa v Hugo* 1997 4 SA 1 (CC) par 38.
71 Skelton and Hansungule (n 66) 296.
72 Bonthuys "Parental rights and responsibilities in the Children's Bill 70D of 2003" 2006 *Stellenbosch Law Review* 482 487.
73 Bonthuys (n 72) 487.
74 Bonthuys (n 72) 488.
75 Jagwanth "Expanding equality" 2005 *Acta Juridica* 131 134.
76 Jagwanth (n 75) 133.
77 Louw (n 70) 165.
78 Louw (n 70) 162.
79 Louw (n 70) 162.
80 Currie and De Waal *Bill of Rights Handbook* (2005) par 27.2(b)(ii) 607-608.
81 Currie and De Waal (n 80) par 27.2(b)(ii) 607-608.
82 Currie and De Waal (n 80) par 27.2(b)(ii) 607-608.
83 Currie and De Waal (n 80) par 27.2(b)(ii) 607-608.
84 2007 12 BCLR 1312 (CC) par 18.
85 Skelton "Severing the umbilical cord: A subtle jurisprudential shift regarding children and their primary caregivers" 2008 *Constitutional Court Review* 351 363.
86 Skelton (n 85) 363.
87 Louw (n 70) 179.
88 Louw (n 70) 180.

Chapter 7

The Protection of Spouses in Muslim Marriages in South Africa

Hassam v Jacobs[1]

Amanda Boniface
Faculty of Law,
University of Johannesburg
Johannesburg, South Africa

> "The effect of the failure to afford the benefits… to widows of polygynous Muslim marriages will generally cause widows significant and material disadvantage of the sort which it is the express purpose of our equality provision to avoid" (*Hassam* par 34).

ABSTRACT

The case of *Hassam v Jacobs* represents a watershed moment in South African constitutional jurisprudence concerning equality, dignity and religious freedom in post-apartheid South Africa. This landmark judgment, decided by the Constitutional Court in 2009, significantly advanced the protection of Muslim women in polygynous marriages by declaring that section 1 of the Intestate Succession Act constituted an unjustifiable infringement of section 9(3) of the Constitution. The court's decision remedied the discriminatory exclusion of widows in polygynous Muslim marriages from intestate succession

benefits, a protection previously denied through the restrictive interpretation of the word "spouse" in the Act. The judgment's constitutional significance lies in its decisive rejection of historical prejudices against Muslim marriages, which had been dismissed as "retrograde" and "immoral" in previous cases like *Ismail v Ismail*. By ordering the addition of "or spouses" after each use of "spouse" in the Act, the court affirmed that discrimination based on religion, gender and marital status reinforced patriarchal practices and violated the constitutional guarantee of equality. The court emphasised that such discrimination caused "significant and material disadvantage" to Muslim women, particularly detrimental because it affected women, not men, thereby adding a gendered dimension to the discrimination. This judgment represents a critical step in South Africa's evolution towards legal pluralism and the recognition of diverse family forms, advancing the constitutional values supporting South Africa's democratic transition. While *Hassam* focused specifically on intestate succession rather than fully recognising polygynous Muslim marriages, it established an important precedent that contributed to subsequent judicial and legislative developments, including the *Women's Legal Centre Trust* case and ultimately the Divorce Amendment Act of 2024, which finally provided statutory recognition of Muslim marriages. This incremental judicial recognition, though criticised for its piecemeal approach, demonstrates the court's commitment to transformative constitutionalism and reflects South Africa's societal values of human dignity, equality and social justice. The judgment thus stands as a cornerstone in the protection of vulnerable groups in South African society and the accommodation of religious and cultural diversity within a constitutional democracy.

7.1 Introduction

The case of *Hassam v Jacobs* was heard on 19 February 2009 and decided on 15 July 2009. In this case, the court decided that marriage is important to everyone in South African society, no matter their skin colour or religion.[2] The court declared that section 1 of the Intestate Succession Act[3] is an "unjustifiable

infringement of section 9(3) of the Constitution".[4] The reasons given for this conclusion by the Constitutional Court were that the defect is present because the word "spouse", as found in the Intestate Succession Act excludes widows who were married in polygynous Muslim marriages, and, therefore, such women are denied the protection that vulnerable women in our society are entitled to.[5] The court ordered that the words "or spouses" should be added after each use of the word "spouse" in the Intestate Succession Act.[6] Additionally, the court provided provisions applicable when applying sections 1(1)(*c*)(i) and 1(4)(*f*) of the Intestate Succession Act where the deceased person was married in a polygynous marriage.[7]

The matter came before the Constitutional Court as an application to confirm the declaration of invalidity of section (1)(4)(*f*) of the Intestate Succession Act that was made by Van Reenen J in the Western Cape High Court.[8] Van Reenen J had found that the exclusion of widows of Muslim polygynous marriages from the provisions of the Intestate Succession Act were discriminatory.[9] The facts[10] were that the applicant was married to the deceased, Mr Hassam, according to Muslim rites and that the deceased married a second wife without the knowledge of the applicant, such marriage also being according to Muslim rites.[11] On the deceased's death certificate it was stated that the deceased was "never married". The first respondent, the executor of the deceased's estate, did not regard the applicant as a spouse for purposes of the Intestate Succession Act.

The applicant had originally approached the High Court in Cape Town and wanted an order that recognised her as a spouse and as a surviving spouse for the purposes of the Intestate Succession Act as well as the Maintenance of Surviving Spouses Act[12] and to order the executor of the estate to recognise her as such. The executor had questioned the validity of the applicant's marriage although none of the respondents, including the second wife, had disputed the validity of such marriage. The court *a quo* declared the marriage to be valid.[13] The applicant stated that the word "spouse", as found in section 1(4) of the Intestate Succession Act, should include a husband or wife

married in terms of Muslim rites, and that it should not matter whether the marriage was monogamous or polygynous, and that by excluding her from the definition of "spouse", the Act limited her right to equality and religious freedom.

The High Court had considered whether widows of polygynous Muslim marriages, not having the benefits provided for by the Act, was unconstitutional and the High Court concluded that this resulted in such spouses being discriminated against, as their rights to equality and dignity were infringed.[14] The consideration of these rights by the Constitutional Court are discussed below.

7.2 Significant aspects of the judgment

7.2.1 The interpretation, content and limitation of the rights to equality and dignity

7.2.1.1 The interpretation and contents of the rights to equality and dignity in relation to intestate succession of spouses in polygynous Muslim marriages

The argument that was brought before the Constitutional Court was predominantly based on the equality provision in the South African Constitution and the submissions made to the court were that it would clearly amount to unfair discrimination if the widows of polygynous Muslim marriages were not included in the provisions of the Act.[15] The applicant argued that widows in polygynous Muslim marriages are unfairly discriminated against on the grounds of gender, religion and marital status.[16] The applicant referred to *S v Jordan*[17] when submitting that women in polygynous marriages are discriminated against and contended that women are a "particularly vulnerable segment of the population" and the Act predominantly benefits widows rather than widowers and that the Act thus is detrimental towards Muslim women.[18] The case of *Daniels v Campbell*[19] was used to illustrate that discrimination can occur based on marital status in instances where there is not legislative protection for some types of relationships and that withholding such protection amounts to discrimination on the ground of marital status.[20]

The submission was also made that excluding spouses in polygynous Muslim marriages from the Act was infringing sections 15, 30 as well as 31 of the Constitution and that the ability to conclude a polygynous Muslim marriage forms part of the right and freedoms related to religious and cultural choices, and not recognising such marriages discriminates on the ground of religion.[21] The argument before the Constitutional Court was that there was no relationship between a legitimate governmental purpose and the differentiation in question and that widows who were married in polygynous Muslim marriages thus have their rights to freedom of religion, conscience, belief and opinion as well as culture infringed.[22]

The court made it clear here that this matter did not deal with the constitutional validity of polygynous Muslim marriages but with whether the Act discriminated against widows of such marriages and thus the judgment did not deal with incorporating any aspects of Sharia law into South African law.[23] The court also reminded us that the *Daniels* case did not deal with polygynous Muslim marriages but with monogamous Muslim marriages.[24] The court then dealt with the issue of whether excluding spouses in polygynous Muslim marriages from the ambits from the Act was in violation of section 9(3) of the Constitution, and in particular, whether the exclusion was discriminatory; if so, whether the discrimination was unfair or not, and lastly, if it was unfair, then whether the unfair discrimination was justifiable under section 36 of the Constitution.[25] The court also considered if the word "spouse" as found in the Act can be seen as including spouse in polygynous marriage, and that if such an interpretation cannot be made, then what relief should be granted instead.[26] In order to answer these questions, the court explored equality jurisprudence.

Nkabinde J referred to the principles developed by the Constitutional Court that are used when dealing with the question of equality and referred firstly to section 9 of the Constitution that stipulates that everyone is equal before the law and has the right to equal protection and benefit of the law and cited the entire section.[27] Thereafter, the court referred to the case of *Harksen v Lane*[28] where the equality analysis

was summarised, thus setting out the questions that must be asked by the court in order to determine whether a provision is discriminatory.[29]

Nkabinde J further made it clear that section 39(2) of the Constitution prompts the court to promote the spirit, purport and objects of the Bill of Rights when interpreting legislation and that, referring to the *Daniels* case, discriminatory interpretation that previously negatively affected people are not sustainable anymore, thanks to our Constitution.[30] When exploring the approach that was taken in the *Daniels* matter, Nkabinde J referred to the case of *Ismail v Ismail*[31] where the court's decision was prejudicial against the Muslim community as the "[r]ecognition of polygynous unions was seen as a retrograde step and entirely immoral" by the court at that time.[32]

The court made it clear that the belief demonstrated in the *Ismail* case "displays ignorance and total disregard for the lived realities prevailing in Muslim communities is consonant with the inimical attitude of one group in our pluralistic society imposing its views on another".[33] The court further made it clear that it cannot be regarded as a retrograde step to afford protection to spouses in Muslim polygynous marriages, as the previous approach taken by the court in the *Ismail* case discriminated against such spouses on the grounds of human dignity and equality and were based on beliefs held by a very limited part of society at that time.[34] The Constitutional Court made it clear that, when determining whether a provision is constitutionally valid or not, the court must look at the diversity of South African society as this is also made clear in the Promotion of Equality and Prevention of Unfair Discrimination Act[35] and must ensure the "achievement of the progressive realisation of our 'transformative constitutionalism'".[36]

In order to achieve transformation, the court then determined the issues that must be dealt with and specified that they were whether the word "spouse" in the Act can be read in such a way that it includes spouses in polygynous Muslim marriages[37] and whether the excluding of spouses who are in polygynous Muslim marriages from intestate succession as provided for by the Act is in contradiction to section 9(3) of the

South African Constitution.[38] The court's consideration of these aspects is discussed below.

7.2.1.2 Application of the rights to equality and dignity to intestate succession in polygynous Muslim marriages

The Constitutional Court agreed with the view of the High Court that not allowing spouses of Muslim polygynous marriages to benefit from intestate succession does not pass constitutional scrutiny.[39] Nkabinde J made it clear that the foundations of our law include the right to equal protection before the law as well as the right to equality and that our Constitutional Court case law shows clearly that equality is breached by discrimination and that equality is not simply "a matter of difference".[40] The differentiation was clear in the facts as hand, as there was a difference in the application of intestate succession in instances of women who were married in terms of the Marriage Act, widows who were in Muslim monogamous marriages, and women who were in Muslim polygynous marriages, and that additionally, the Act discriminated against Muslim women, not men.[41]

The court then considered the application of the question whether the differentiation between these groups of women actually is discrimination and concluded that it was as the discrimination must not be examined in isolation but also in light of South Africa's history as well as contextually.[42] Nkabinde J, furthermore, explored the result of the Act failing to provide for widows in Muslim polygynous marriages and concluded that, in practice, this causes widows "significant and material disadvantage of the sort which it is the express purpose of our equality provision to avoid".[43] The court additionally reiterated that the discrimination only affects women and not men so it has a gendered aspect[44] to be considered as well as the grounds of religion.[45] Nkabinde J made it clear that the questions asked in this matter were not to determine whether polygynous marriages were consistent with the South African Constitution but rather to determine whether women in Muslim polygynous marriages were adequately protected and to enforce the provisos of the Constitution that every person is of equal worth and should be treated accordingly.[46] The court additionally made

it clear that the discrimination based on religion, gender and marital status was reinforcing the practices of patriarchy and relegating women in Muslim polygynous marriages to be seen as not being worthy of protection and that the Act thus conflicted with gender equality as laid out in the Constitution.[47]

The court concluded that discrimination had been proven but that the question of whether such discrimination could be justified under section 36 of the Constitution now had to be answered,[48] and that in order to answer the question the court needs to consider "the nature of the rights infringed, the nature of the discriminatory conduct, the provisions themselves as well as the impact of the discrimination on those who are adversely affected".[49] The court here determined that Muslim women in polygynous marriages were severely prejudiced by not being included in the provisions of the Act[50] and that this exclusion limits their rights and is unjustifiable.[51]

7.2.2 The role of society

Throughout this judgment the Constitutional Court made it clear that we cannot discriminate against women in Muslim polygynous marriages, and not provide them adequate protection upon the death of their husbands, in a society that has as its foundation fundamental human rights, democratic values and social justice.[52] South Africa is a heterogenous society and diversity must be accommodated within it and the "lived reality" of women in Muslim polygynous marriages need to be taken into account.[53] The court additionally made it clear that we cannot turn back time to when the Act was enacted in 1987 or even to when the cases of *Ismail* or *Seedat* were decided as the only marriages that the legislature was aiming to protect at the time of the enactment of the legislation were civil marriages that had been concluded in terms of the Marriage Act, but that we do now have to look at the "current place and effect in South Africa" of not recognising such polygynous Muslim marriages.[54]

This ties in with the equality provision of the Constitution and the right to dignity, as was discussed above. The court went so far as to stipulate that the assumptions made in the Ismail case displayed ignorance and were not acceptable as they were

demonstrative of one group within the pluralistic society of South Africa imposing their views onto another group within that same society.[55] Importantly, the court also referred to the transition of South Africa into a "democratic society" and that we need to be guided by principles of justice human dignity, equality and fairness and "human relations that are caring and compassionate" and that "the diversity of our society… provides a blue print for our constitutional order".[56] The *boni mores* of South African society offers the protection of persons excluded by the provisions of the Act. Families are found in many forms in South Africa, and we can no longer only recognise one form of family, and this judgment supports this view.[57]

In order to remedy the defect in the Act, the Constitutional Court concluded that we cannot read the word "spouse" as meaning more than one spouse and, therefore, the court held that words have to be read in order to cure such defect[58] and held that the words "or spouses" must be seen as being included in Section 1 of the Intestate Succession Act.[59]

7.3 Impact of the judgment

7.3.1 Impact on the interpretation of the rights to equality and dignity

Although the *Hassam* case did demonstrate that women married in Muslim polygynous marriages were entitled to the rights of equality and dignity at the death of their spouses, in that they were entitled to be protected in terms of intestate succession, it did not go far enough and missed the opportunity to give full recognition to Muslim polygynous marriages. Instead, the court opted to recognise the consequences of such marriage without deciding about the validity of the marriage itself,[60] although the court was aware that, despite the decision in the *Daniel*'s case – since it was only applicable to monogamous Muslim marriages – women were suffering in Muslim polygynous marriages.[61]

The court even refers[62] to Cachalia,[63] who made it clear that the consequences of non-recognition of Muslim marriages are grave for the women in such marriages, as they are not married in community of property and have no claim to a

joint estate, and that even if they entered into an antenuptial agreement, such agreement is seen as being void and that there is no claim allowed for loss of support or maintenance upon the death of the women's husband, and that if such women's husband die intestate they have no claim to inheritance. Despite being aware of the extremely prejudicial consequences of the non-recognition of Muslim marriages on the women in such marriages, the court here still chose to lessen one of the consequences, by allowing for legislation change for intestate succession for such spouses yet did not use the opportunity to recognise the cause of such discrimination and ameliorate it by fully recognising Muslim polygynous marriages. Nkabinde J also specified that as marriage is a social institution it is of importance to all members of society, no matter their religious background or the colour of their skin and thus the significance that is attached to Muslim polygynous marriages should not be less than that attached to marriages concluded in terms of the Marriage Act or African customary marriages.[64] The court also reiterated that the dignity of parties who are in Muslim marriages must be respected just as much as the dignity of parties in African customary marriages.[65]

Although *Women's Legal Centre Trust v President of the Republic of South African*[66] did not deal with intestate succession like the *Hassam* case did, it was particularly important as it also explored the protection of rights to dignity and equality of spouses in Muslim marriages.[67] This judgment is discussed further below.

6.3.2 Impact on judicial development

In the *Hassam* case, the court stipulated that legislative policy has already shifted, as was evident in the decision made in the case of *Daniels* and that Muslim marriages could not be excluded from the protection provided by the Act and the Maintenance Act, since this would be against the spirit, purport and objects of the Constitution. Despite this acknowledgment, the Constitutional Court in the *Hassam* case restricted its judgment to the inclusion of spouses, in Muslim polygynous marriages, in the Act in order to protect them in cases of intestate succession but did not go

as far as to fully recognise Muslim marriages.[68] The *Hassam* case, however, did open the door a bit further for the future full recognition of Muslim marriages, taking the recognition a step further than what the case of *Daniels* had but women in Muslim polygynous marriages were still left in a vulnerable position. This was evident in the case of *Faro v Bingham*,[69] where the surviving wife of a Muslim marriage brought an action against the deceased estate to claim maintenance and the court was requested to regard Muslim marriages as valid marriages. However, the court did not provide full recognition of Muslim marriages but did give relief to the widow.

In the matter of *Benjamin v FNB Trust Services (Pty) (Ltd)*,[70] it was held that the applicant, who was the widow of the deceased with whom she had been in a Muslim marriage, was a spouse in accordance with section 1 of the Maintenance of Surviving Spouses Act.[71] Abduroaf and Moosa[72] submit that in terms of Islamic law, a Muslim widow would not be entitled to such maintenance but would be able to inherit because of her being a beneficiary of her deceased husband's estate. The authors also refer to the *Hassam* case[73]and conclude that it is better that assets be distributed according to Islamic law in such instances and that a valid will could obtain this outcome.[74] The authors also make it clear that a maintenance claim against deceased estates are "foreign to Islamic law" and that widows from Muslim marriages should be able to use the claim to maintenance to claim their inheritance in terms of Islamic law.[75] Of course, not all persons married in Muslim marriages make wills, so it remains important that in order to safeguard their rights that legislative provisions protect them both for the claim of maintenance and intestate succession claims.

The Muslim Marriages Bill[76] set out a framework for the recognition of Muslim marriages and the regulation of the proprietary consequences of such marriages, however, the Bill was contentious and never became law.[77]

In the *Women's Legal Centre Trust*[78] matter, an application was brought to the Constitutional Court to confirm the constitutional invalidity of sections of the Marriage Act[79] and the Divorce Act.[80] The Constitutional Court found that sections

9, 10, 28 and 34 of the Constitution are applicable here and that the sections[81] of the Acts are unconstitutional because Muslim marriages are not recognised by the Acts. The court considered that if an order were not made to declare sections of the Acts invalid, that Muslim women would "continue to experience grave injustice"[82] and agreed that women in Muslim marriages, as well as children born from such marriages, would be unfairly discriminated against and their right to dignity infringed if the constitutional invalidity of the sections of the Act were not confirmed. In its judgment, the Constitutional Court referred both to the case of *Daniels* as well as *Hassam*.

It was clear that "stereotypical and stunted notions of marriage and family must now succumb to the newfound and restored values of our society, its institutions and diverse people".[83] The court referred to the considerations made in *Hassam* in some detail,[84] and in particular, explored the "stereotypical and stunted notions of marriage and family" and the fact that "[t]hey must yield to societal and constitutional recognition of expanding frontiers of family life and intimate relationships".[85] The importance of rights of equality and dignity as well as the freedom of religion were referred to here as well.[86] When referring to the *Hassam* case, the court focused on the past "prejudiced attitude" that was demonstrated towards Muslim marriages and that a society based on democratic values and human rights cannot follow that approach, and additionally, the "lived realities prevailing in Muslim communities" needs to be taken into account.[87] The court here also made it clear that women in Muslim marriages do not have equal bargaining power as they are often not able to convince their partners to enter into civil marriages[88] and that, as pointed out in the *Hassam* case, the "differentiation caused by the Marriage Act strikes particularly at women, and 'works to the detriment of Muslim women and not Muslim men'".[89]

The court, in the *Women's Legal Centre Trust* case, concluded that this results in women having very small estates or being destitute and that this situation is worsened by having to care for children as well.[90] The conclusion was made that there is not a ground or reason to justify not recognising Muslim marriages

and that women in Muslim marriages need to be protected from economic and social hardships.[91] This case, like the *Hassam* case, referred to the right to human dignity and found that it was infringed in this instance.[92] The court here suspended the invalidity of the sections of the abovementioned Acts, in order to provide the legislature with time to amend the relevant sections. The Registration of Muslim Marriages Bill[93] came into being but has not been made into law. Recent legislation, the Divorce Amendment Act,[94] now provides for a definition of Muslim marriages; for the protection of the interests of minor and dependent children of such marriages; provides for the redistribution of assets when a Muslim marriage is dissolved as well as for the forfeiture of patrimonial benefits in Muslim marriages. The Amendment Act defines a Muslim marriage as "a marriage entered into or concluded in accordance with the tenets of Islam"[95] and now makes provision for spouses in Muslim marriages to be included in the Divorce Act.

6.4 Conclusion

The *Hassam* case opened the door wider for the future recognition of Muslim marriages than the judgment in the *Daniels* case did, allowing for spouses in Muslim polygynous marriages to be protected where a spouse died. There was a clear evolution of the protection of the rights of Muslim spouses that occurred after the decision in the *Hassam* case. The *Hassam* case built on the previous case of *Daniels*, as it extended the protection of spouses to polygynous Muslim marriages. However, this gradual approach left gaps as there was still not full recognition of Muslim marriages and these gaps had to be addressed by the courts in later cases, such as in the *Women's Legal Centre Trust* case.

The *Women's Legal Centre Trust* case reiterated the right to dignity and equality of spouses in Muslim marriages and the development of the legal recognition of women's rights in Muslim polygynous marriages has now developed to such an extent that Muslim marriages are included in the Divorce Act.

The judgment in the *Hassam* case advanced the constitutional values of dignity, equality and religious freedom

in South Africa. The decision also recognised the diversity of the forms of family found in South Africa and the rejection of historical prejudices against Muslim marriages was demonstrated in this case. The *Hassam* case addressed gender injustice because mainly women in Muslim marriages were affected by the exclusions. There has been clear progression from the limited focus on intestate succession in Muslim marriages in the *Hassam* case to the broader legislative reform found in the Divorce Amendment Act of 2024, that provides for the registration of Muslim marriages. The recent case of *HA v NA*,[96] decided on 13 February 2025, provides that a spouse in a Muslim marriage who has been issued with *Talaaq* may still make use of Rule 43 proceedings to claim a contribution towards costs of the civil divorce and claim for interim maintenance while the divorce is still pending. The *HA* case increased the protection of vulnerable spouses in Muslim marriages in South Africa.

Families are found in a variety of forms in South Africa, and the *Hassam* case recognised the dignity of spouses in Muslim marriages. The judgment in *Hassam* clearly reflects South Africa's societal values and the transition of South Africa to embracing legal pluralism; however, challenges remain, as South Africa still needs to fully protect Muslim spouses' marriages, families and rights during divorce. The door that the *Hassam* case opened has led to the decision that women in Muslim marriages have the right to be protected by the South African law in cases of divorce and led to changes in legislation, but this has unfortunately occurred in a piecemeal fashion.

Endnotes

1 *Hassam v Jacobs* 2009 5 SA 572 (CC).
2 *Hassam* (n 1) par 46.
3 81 of 1987.
4 *Hassam* (n 1) par 49.
5 *Hassam* (n 1) par 49.
6 *Hassam* (n 1) par 53 and par 57.
7 *Hassam* (n 1) par 57: "(a) a child's share in relation to the intestate estate of the deceased shall be calculated by dividing the monetary value of the estate by a number equal to the number of the children of the deceased who have either survived or predeceased such person but are survived by their descendants; plus the number of spouses who have survived such deceased; b) subject to paragraph (c), each surviving spouse shall inherit a child's share of the intestate estate or so much of the intestate estate as does not exceed in value the amount fixed from time to time by the Minister for Justice and Constitutional Development by notice in the Gazette, whichever is the greater; and c) where the assets in the estate are not sufficient to provide each spouse with the amount fixed by the Minister, the estate shall be equally divided amongst the surviving spouses".
8 *Hassam* (n 1) par 1. The judgment was *Hassam v Jacobs* 2008 4 All SA 350 (C).
9 *Hassam* (n 1) par 1.
10 As summarised in *Hassam* (n 1) par 3-6.
11 See further Moosa "*Faskh* (divorce) and intestate succession in Islamic and South African law: Impact of the watershed judgment in *Hassam v Jacobs* and the Muslim Marriages Bill" 2024 *Acta Juridica* 1 for an explanation of the differing views held by Islamic scholars and the applicable aspects of Islamic Law.
12 27 of 1990.
13 Relying on the rule in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) (Ltd)* 1984 3 SA 623 (A), the court examined the undisputed averments of the applicant and the averments of the respondent to determine whether a case was made out.
14 *Hassam* (n 1) par 7-8.
15 *Hassam* (n 1) par 9.
16 *Hassam* (n 1) par 9.
17 2002 6 SA 642 (CC).
18 *Jordan* (n 17) *Hassam* (n 1) par 10.
19 2004 5 SA 331 (CC). Here women in monogamous Muslim marriages were allowed to benefit in intestate succession.
20 *Hassam* (n 1) par 11.
21 *Hassam* (n 1) par 12.
22 *Hassam* (n 1) par 13: ss 15(1) and 31(1) of the Constitution.
23 *Hassam* (n 1) par 17.
24 *Hassam* (n 1) par 18.
25 *Hassam* (n 1) par 20.
26 *Hassam* (n 1) par 20.
27 s 9(1): "(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance

persons, or categories of persons, disadvantaged by unfair discrimination may be taken. (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination. (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair".

28 1998 1 SA 300 (CC). See also Van Staden "The right to equality and the adoption of a concrete test for unfair discrimination—*Harksen v Lane*" in Laubscher and Van Staden (eds) *Landmark Constitutional Cases that Changed South Africa* (2023) 185–215.

29 *Harksen* (n 28) par 53, quoted at Hassam (n 1) par 23 in the Case at hand and included here for ease of reference: "(a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not then there is a violation of section 8(1). Even if it does bear a rational connection, it might nevertheless amount to discrimination. (b) Does the differentiation amount to unfair discrimination? This requires a two stage analysis: (i) Firstly, does the differentiation amount to 'discrimination'? If it is on a specified ground, then then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner. (ii) If the differentiation amounts to 'discrimination', does it amount to 'unfair discrimination'? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation. If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of section 8(2). (c) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause (section 33 of the interim Constitution)".

30 *Hassam* (n 1) par 24.

31 1983 1 SA 1006 (AD).

32 *Hassam* (n 1) par 25.

33 *Hassam* (n 1) par 25.

34 *Hassam* (n 1) par 26.

35 4 of 2000.

36 *Hassam* (n 1) par 28, referring to Klare "Legal culture and transformative constitutionalism" 1998 *SAJHR* 146.

37 *Hassam* (n 1) discussed from par 44.

38 *Hassam* (n 1) discussed from par 30.

39 *Hassam* (n 1) par 30.
40 *Hassam* (n 1) par 30.
41 *Hassam* (n 1) par 31.
42 *Hassam* (n 1) par 33.
43 *Hassam* (n 1) par 34.
44 As Muslim personal law allows only men to have more than one wife and not women to have more than one husband: par 34. The women also do not have a say in their husband's decision to marry another wife: *Hassam* (n 1) par 38.
45 In the past other religions were not "deemed worthy of respect" by our courts: *Hassam* (n 1) par 34.
46 *Hassam* (n 1) par 20.
47 *Hassam* (n 1) par 37.
48 *Hassam* (n 1) par 40.
49 *Hassam* (n 1) par 41.
50 *Hassam* (n 1) par 41.
51 *Hassam* (n 1) par 42.
52 *Hassam* (n 1) par 37.
53 *Hassam* (n 1) par 14.
54 *Hassam* (n 1) par 45.
55 *Hassam* (n 1) par 25. See also *Hassam* (n 1) par 26: "the content of public policy must now be determined with reference to the founding values underlying our constitutional democracy, including human dignity and equality, in contrast to the rigidly exclusive approach that was based on the values and beliefs of a limited sector of society as evidenced by the remarks in *Ismail*".
56 *Hassam* (n 1) par 27.
57 Jamneck "The problematic practical application of section 1(6) and 1(7) of the Intestate Succession Act under a new Dispensation" 2014 *PELJ* 867 stresses that one form of family cannot be found at the cost of other forms of families in South Africa. See also Rautenbach "Celebration of difference: Judicial accommodation of cultural and religious diversity in South Africa" 2010 *The International Journal of Diversity in Organisations, Communities and Nations* 117 for a discussion of the judicial accommodation of legal pluralism in South Africa at that time.
58 *Hassam* (n 1) par 48.
59 *Hassam* (n 1) par 57. As well as the amendment of ss 1(1)(*c*)(i) and 1(4)(*f*) to include interlaid include the word spouses and to provide them with the right to inherit a child's share from the deceased estate.
60 For example, see *Hassam* (n 1) par 35.
61 In the case at hand particularly after the death of their spouses: *Hassam* (n 1) par 36.
62 *Hassam* (n 1) par 41.
63 "Citizenship, Muslim family law and a future South African constitution: a preliminary enquiry" 1993 *THRHR* 392.
64 *Hassam* (n 1) par 46.
65 *Hassam* (n 1) par 46.
66 2022 5 SA 323 (CC).
67 The case is discussed below, at impact on judicial development.

68 Osman-Hyder "The impact and consequences of *Hassam v Jacobs NO* on polygynous Muslim marriages [a discussion of *Hassam v Jacobs NO* 2009 11 BCLR 1148 (CC)]" 2011 *Stellenbosch Law Review* 233 discusses whether this case could have been used to fully recognise Muslim marriages in South Africa.
69 [2013] ZAWCHC 159.
70 [2022] ZAWCHC 190.
71 27 of 1990.
72 "An analysis of the rights of a Muslim widow to claim maintenance" 2023 *TSAR* 302.
73 Abduroaf and Moosa (n 72) 305.
74 Abduroaf and Moosa (n 72) 311.
75 Abduroaf and Moosa (n 72) 315.
76 Muslim marriages draft bill of 2010.
77 For a discussion of the contents of the bill and the differing views see further Amien and Leatt "Legislating religious freedom: An example of Muslim marriages in South Africa" 2014 *Maryland Journal of International Law* 505, particularly from 521-536.
78 *Women's Legal Centre Trust* (n 66).
79 25 of 1961.
80 70 of 1979.
81 s 6 of the Divorce Act; s 7(3) of the Divorce Act; s 9(1) of the Divorce Act as well as the common law definition of marriage.
82 *Hassam* (n 1) par 1
83 *Hassam* (n 1) par 44.
84 *Hassam* (n 1) par 45 and 46.
85 *Hassam* (n 1) par 44, referring to the *Daniels* case.
86 *Hassam* (n 1) par 44.
87 *Hassam* (n 1) par 45.
88 *Hassam* (n 1) par 47.
89 *Hassam* (n 1) par 49.
90 *Hassam* (n 1) par 49.
91 *Hassam* (n 1) par 55 and Moosa "A brief analysis of the judgment in *Women's Legal Centre Trust v President of the Republic of South Africa* 2022 5 SA 323 (CC)" 2023 *PELJ* 2 explored problems related to enforcing the interim order and recommended that parties obtain advice from a qualified Islamic scholar before finalising their divorce and made it clear that Muslim marriages are recognised for purposes of the Divorce Act and are still not registered in terms of the Marriage Act.
92 *Hassam* (n 1) par 57.
93 30 of 2022.
94 1 of 2024. Signed into law on 9 May 2024.
95 s 1.
96 [2025] ZAGPPHC 121.

Chapter 8

Is Multilingualism merely a Dream? Recognition of Official Languages in South Africa's Higher Education Institutions

AfriForum v University of the Free State[1]

Roxan Laubscher
Faculty of Law;
University of Johannesburg
Johannesburg, South Africa

Marthinus van Staden
School of Law,
University of the Witwatersrand
Johannesburg, South Africa

"It is only when 'men are hostile [that] the language of their enemies may share their hatred'. In the present matter, it is said to be impossible to distinguish the use of Afrikaans from its speakers, at least in respect of white students at the University. It is important that the burden of the undeniable injustices perpetrated by white Afrikaans-speakers in the past, which are necessarily and justifiably condemned, should not be visited

> disproportionately and uncritically on future generations of white Afrikaans-speakers" (*AfriForum* par 88).

Abstract

This chapter examines the landmark constitutional case of *AfriForum v University of the Free State*, which marks the first time that the Constitutional Court addressed the complex tension between official language recognition and practical implementation in South Africa's higher education context. The case centres on the University's decision to shift from dual-medium instruction in English and Afrikaans to English-only instruction, a change contested by AfriForum and Solidarity. The court's majority judgment interpreted section 29(2) of the Constitution, which guarantees the right to education in an official language of choice where "reasonably practicable", as requiring consideration of equity, practicability and the need for redress. Crucially, the court held that it would be unreasonable to maintain a language policy that entrenched racial segregation, even unintentionally, thereby prioritising transformation and non-discrimination over language rights. The judgment's significance lies in establishing a precedent that would influence subsequent cases including *Gelyke Kanse v Chairperson of the Senate of the University of Stellenbosch* and *Chairperson of the Council of UNISA v AfriForum NPC*. However, the dissenting judgment by Froneman J provided an alternative perspective that questioned whether the exercise of a constitutionally protected language right could amount to unfair racial discrimination and emphasised the broader implications for all official languages beyond Afrikaans. His minority judgments in this case and *Gelyke Kanse* ultimately influenced the court's approach in the *UNISA* case, which took a more nuanced view of Afrikaans as a heterogeneous language and emphasised the importance of progressively introducing all indigenous languages in education. The chapter critiques the majority judgment for its narrow interpretation that fails to adequately recognise language diversity and for neglecting to consider relevant legislation such as the Use of Official Languages Act, which requires national entities to use at least

three official languages. This constitutional landmark thus represents a key moment in South Africa's ongoing negotiation between its commitment to multilingualism and the practical challenges of implementation in a post-apartheid society still grappling with historical inequities.

8.1 Introduction

The recognition of official languages in South Africa may be seen as one of the cornerstones of its democratic transformation as envisioned by the Constitution of the Republic of South Africa, 1996. Section 6 of the Constitution now recognises 12 languages as official languages of the Republic. The provision aims to promote parity of esteem and advance historically marginalised indigenous languages. In higher education institutions, this constitutional mandate, however, poses unique challenges. Language policies in higher education institutions in South Africa have often been contested before the courts, reflecting the tension between promoting multilingualism and addressing practicalities such as accessibility and resource constraints. The first time that this issue was addressed by the Constitutional Court in the higher education context was in the case of *AfriForum v University of the Free State*. The judgment is important because of its impact on the interpretation and recognition of official languages in the higher education context, although arguably, the court's interpretation is a narrow one that does not give adequate recognition to official languages and language diversity. This chapter emphasises the significant aspects of the judgment and shows the ripple effect that these aspects have had on the jurisprudence of the South African courts in the years that followed.

The case concerns a challenge by AfriForum and Solidarity against the University of the Free State's decision to change its language policy from dual-medium instruction in English and Afrikaans to English-only instruction.[2] In 2003, the University formalised a bilingual policy that had been proactively introduced in 1993.[3] However, within two years of implementation, the then Rector, Professor Fourie, acknowledged that the policy had led to the undesirable consequence of having separate lecture

rooms for white and black students.[4] This trend was regularly reported on and persisted, with concerns being raised by staff members and students that the dual-medium policy had given rise not only to racially segregated lecture rooms but also to racial tensions.[5]

Professor Lange, the Vice-Rector (Academic) of the University, characterised the worrisome and persistent challenge of racial segregation as "untenable on a post-apartheid campus".[6] She stated that it was "inherently impossible to avoid racial division when language is maintained and where statistics show that one of the two language streams comprises white and the other black students".[7] Professor Lange went on to say that while this was sometimes described as an ethical or redress issue, it was equally a matter of what was reasonably practicable. She concluded that it was "absolutely impossible to provide language of choice without indirectly discriminating on the basis of race".[8]

A report commissioned by the University authorities to investigate the appropriateness of the continued use of Afrikaans as a medium of instruction highlighted its entrenchment of racial division amongst students and virtual subversion of racial integration.[9] As a result, the University Management recommended a language policy shift. After open and admittedly extensive consultations with interested parties, including AfriForum, Solidarity and language experts, the final report was presented to the University Council for approval.[10] The major finding of the review committee was that the parallel-medium language policy was not working.[11] It was found to divide students largely by race and, therefore, work against the integration commitments of the University. The policy did not, from the student point of view, guarantee equality of access to knowledge in the two different language class groups. It had not kept up with the dramatic changes in the racial and language demography of the University in recent years. Furthermore, the continuation of Afrikaans was seen as a declining language of preference amongst students who viewed themselves as living, learning and labouring in a global world

where English competence provides more access and mobility than any other South African language.[12]

Based on these findings, the University Council adopted a new language policy in 2016.[13] The key points of this policy were that English would become the primary medium of instruction in undergraduate and postgraduate education; the University would embed and enable a language-rich environment committed to multilingualism; an expanded tutorial system would be available in Afrikaans and other languages to facilitate the transition to English instruction; parallel-medium instruction would continue in some professional programmes, the language of administration would be English, and the policy would be implemented flexibly over a period of about five years.[14]

AfriForum and Solidarity challenged this new policy in court.[15] They argued that proper research was not conducted and that most white and some black Afrikaans-speaking students preferred to be taught in Afrikaans. In essence, they saw no justification for the language policy shift.[16]

The High Court ruled in the favour of AfriForum and Solidarity and set aside the decision by the University of the Free State (UFS) Council and Senate to adopt a new language policy in March 2016 that made English the primary medium of instruction. First, the court found that the UFS is an organ of state bound by the Bill of Rights, including section 29(2) of the Constitution, which provides the right to receive education in an official language of choice where reasonably practicable.[17] Second, in adopting the new policy, the UFS Council and Senate failed to properly consider whether it remained reasonably practicable to offer instruction in Afrikaans alongside English, as required by section 29(2).[18] The court found this constituted a "material error of law" that rendered the decision reviewable.[19]

Third, the UFS did not adequately consider the constitutional implications of depriving Afrikaans-speaking students of their existing right to be taught in Afrikaans.[20] The court held that when a person already enjoys the benefit of being taught in their language of choice, "the State bears the negative duty not to take away or diminish the right without

appropriate justification".[21] Put differently, the court recognises that Afrikaans-speaking students at the UFS already had the benefit of receiving education in their chosen language under the previous language policy. By using the term "negative duty", the court is indicating that the state (in this case, the UFS as an organ of state) has an obligation to refrain from interfering with or removing an existing right. This contrasts with a "positive duty", which would require the state to actively provide something. This principle aligns with the doctrine of non-retrogression in human rights law, which holds that once a right has been realised, it should not be diminished or taken away without strong justification.

Fourth, the court held that the decision of the UFS was inconsistent with the Ministerial Policy on Languages in Higher Education, which supports retaining Afrikaans as a medium of instruction and commits to ensuring that its capacity as an academic language is not eroded.[22] The UFS policy had to comply with this Ministerial Policy under the Higher Education Act.[23] The Ministerial Policy acknowledges Afrikaans "as a language of scholarship and science is a national resource".[24] The court viewed the UFS's decision to phase out Afrikaans as a primary medium of instruction as inconsistent with this acknowledgment. The Ministerial Policy expresses support for "the retention of Afrikaans as a medium of academic expression and communication in higher education" and commits to "ensuring that the capacity of Afrikaans to function as such, is not eroded".[25] The UFS's new policy, which significantly reduced the role of Afrikaans, was seen as contrary to this commitment. The Ministerial Policy states that the sustained development of Afrikaans is not the responsibility of only some historically Afrikaans universities.[26] By abandoning Afrikaans as a primary language of instruction, especially when other universities had also curtailed its use, the UFS was seen as failing to uphold this shared responsibility. The Ministerial Policy suggests that the sustainability of Afrikaans as a medium of academic expression can be secured through strategies including "parallel and dual language medium options".[27] The UFS's decision to move away from its previous parallel-medium policy to an English-dominated policy was viewed as inconsistent with this

recommendation. The court emphasised that the UFS's previous 2003 language policy, which provided for parallel-medium instruction in English and Afrikaans, aligned perfectly with the Ministerial Policy, whereas the new 2016 policy did not.[28] This inconsistency was particularly problematic because section 27(2) of the Higher Education Act requires university language policies to be compatible with the Ministerial Policy.[29]

Fifth, the court found there was no rational connection between the decision taken and the surrounding facts and circumstances.[30] While the UFS aimed to address racial segregation, the court held that this was "not one that is rationally connected to the purpose of the empowering provision namely the adoption of a language policy in the interest of the community".[31] The court applied a rationality test, which requires that decisions made by public bodies must have a logical connection to the facts, circumstances and purpose for which the decision-making power was granted. The UFS argued that its primary reason for changing the language policy was to address racial segregation on campus, which it believed was caused by the parallel-medium language policy.[32] The court found that the UFS did not provide sufficient evidence to support its claim that the parallel-medium policy was causing racial segregation. It noted that some African and coloured students chose to study in Afrikaans, and that the demand for English instruction came from all racial groups.[33]

The court interpreted the purpose of adopting a language policy as being "in the interest of the community" and in line with constitutional requirements and ministerial standards.[34] While addressing racial segregation might be a laudable goal, the court found that it was not directly related to the primary purpose of determining a language policy for the University community. The court criticised the UFS for not adequately considering other relevant factors, such as the constitutional right to education in one's chosen language where reasonably practicable, and the practical aspects of continuing to offer Afrikaans instruction.[35] By highlighting this lack of rational connection, the court essentially found that the UFS had based its decision on grounds that were not sufficiently related

to the core purpose of a language policy, and had failed to consider more directly relevant factors. This reasoning formed a significant part of the court's justification for setting aside the UFS's decision. The judgment concluded that had the UFS Council and Senate properly considered the constitutional issues at stake, "the result inevitably would have been different".[36] The court, therefore, reviewed and set aside the decision to adopt the new language policy.

However, the University successfully appealed this decision of the High Court to the Supreme Court of Appeal.[37] The court found that AfriForum failed to prove the existence of "exceptional circumstances" as required by section 18(1) of the Superior Courts Act.[38] AfriForum's argument that the mere deprivation of students' constitutional right to education in their language of choice constituted exceptional circumstances was rejected as conceptually flawed, as it conflated the deprivation of a right with adverse consequences flowing from it, without proving such consequences.[39]

The court held that AfriForum failed to meet the additional requirements in section 18(3) of the Act. AfriForum did not prove on a balance of probabilities that students would suffer irreparable harm if the order was not implemented pending appeal.[40] No evidence was provided of any actual harm to potential first-year Afrikaans students, and no student was identified who intended to exercise the right to study in Afrikaans in the affected faculties.[41] Furthermore, the SCA (Supreme Court of Appeal) found that AfriForum failed to prove that implementing the order pending appeal would not cause irreparable harm to the UFS.[42] The court accepted the UFS's evidence that it had undertaken substantial planning and preparation to implement the new language policy in 2017, expending extensive human and financial resources. Preventing implementation would result in wasted public resources, constituting irreparable harm to the UFS.[43] The Supreme Court of Appeal criticised the High Court for failing to provide proper reasons for its order as required by section 18(4)(*i*) of the Act.[44] The court found the High Court's reasons "materially lacking in substance" and amounting to "an assortment of

some conclusions" rather than a proper attempt at furnishing reasons.[45] Aggrieved by this outcome, AfriForum and Solidarity sought leave to appeal to the Constitutional Court.

8.2 Significant aspects of the judgment

8.2.1 Interpretation of section 29 and the requirement of "reasonable practicability"

The court interpreted section 29(2) of the Constitution as requiring that education in an official language of choice must be "reasonably practicable". This involves considering equity, practicability and the need for redress.[46] The court held that it would be unreasonable to maintain a language policy that entrenched racial segregation or discrimination, even if unintentionally.[47] The Constitutional Court's interpretation of section 29(2) of the Constitution is a central aspect of its judgment. Section 29(2) of the Constitution provides for the right to receive education in an official language of choice "where that education is reasonably practicable".[48] The court emphasised that this right is not unqualified, but subject to the all-inclusive condition of reasonable practicability.[49] In interpreting "reasonably practicable", The court considered the entire context of section 29(2), including the factors listed in the provision: equity, practicability and the need to redress past racially discriminatory laws and practices.[50] The court rejected the notion that these factors could be isolated from each other or from the concept of reasonable practicability.[51]

The court held that reasonable practicability requires not only that the practicability test be met, but also that considerations of reasonableness, extending to equity and the need to address historical injustices, be appropriately accommodated.[52] This interpretation means that even if it is practically possible to offer education in a particular language, it may not be reasonable to do so if it conflicts with broader constitutional imperatives. Crucially, the court stated that it would be unreasonable to adhere to a language policy that has proved to be "the practical antithesis of fairness, feasibility, inclusivity and the remedial action necessary to shake racism

and its tendencies out of their comfort zone".[53] This indicates that the court views the reasonable practicability requirement through the lens of the Constitution's transformative goals.

The court further elaborated that the enjoyment of the right to be instructed in a language of choice must not undermine equitable access, preserve exclusivity, or perpetuate racial supremacy.[54] It held that it would be unreasonable to allow some people to have unimpeded access to education at the expense of others as a direct consequence of pursuing the right to education in a language of choice, particularly when all could be properly educated in one common language.[55] This interpretation effectively means that even if a language policy does not intentionally discriminate or segregate, it may still be deemed unreasonable and impracticable if it has the effect of entrenching racial divisions or hindering transformation. The court thus prioritised the broader constitutional goals of equity, redress and non-racialism in its interpretation of section 29(2).

The court accepted the University's assessment that continuing parallel English-Afrikaans instruction had resulted in racial segregation and tension on campus.[56] It found that the University had reasonably concluded that it was no longer practicable to offer Afrikaans instruction, given these racial dynamics.[57] The court placed significant weight on the University's own evaluation of the situation on campus. It noted that within two years of implementing the dual-medium policy, the then Rector, Professor Fourie, had expressed concerns about unintended consequences, particularly the entrenchment of segregation in lecture rooms along racial lines.[58] The court accepted the University's reports that the policy had led to racial tension, with concerns raised by both staff and students about its injurious consequences.[59] It noted that these issues featured regularly in progress reports on the dual-medium policy implementation.[60] The court emphasised the University authorities' intimate connection to and daily experience on campus, stating that this put them "at a vantage point to understand better and speak with respectable authority on the true state of affairs in their own 'house'".[61] This suggests a degree of deference to the University's assessment of the

situation on the ground. The court accepted the University's conclusion that the use of Afrikaans had unintentionally become a facilitator of ethnic or cultural separation and racial tension from around 2005 to 2016.[62] It agreed with the University's assessment that continued use of Afrikaans would "leave the results of white supremacy not being redressed but kept alive and well".[63]

In addition, the court found that while it may be practicable to retain Afrikaans as a major medium of instruction, it "certainly cannot be 'reasonably practicable' when race relations is poisoned thereby".[64] This finding links back to the court's interpretation of "reasonably practicable" in section 29(2) of the Constitution, emphasising that practicability alone is not sufficient if it conflicts with broader constitutional imperatives. The court also noted the absence of any suggested alternatives that could address the racial tensions while retaining Afrikaans as a medium of instruction.[65] It interpreted this as indicating that no other reasonable alternative was available for the University to consider.[66] In essence, the court found that the University had made a reasonable assessment based on its direct experience and empirical evidence, and that this assessment aligned with the constitutional requirement of reasonable practicability as interpreted by the court. This led to the conclusion that the University's decision to phase out Afrikaans instruction was justified and constitutionally sound.

8.2.2 Compliance with the legislative and policy framework

On the issue of compliance with the ministerial language policy framework, the court held that the University's new policy was not inconsistent with it. The framework allowed for flexibility based on changing circumstances and constitutional imperatives.[67] The court found that the University had adopted a "flexible, pragmatic and reasonable approach" in phasing out Afrikaans instruction to advance transformation and integration.[68] The court acknowledged that the University's language policy must be developed "subject to" the ministerial policy, as required by section 27(2) of the Higher Education

Act. This means that the University's policy must be fundamentally in sync with the ministerial policy.[69] However, the court emphasised that the applicability of the ministerial policy is situational and context-specific.[70] It held that when circumstances change in a way that would cause a university to undermine constitutional values if it were to adhere slavishly to parts of the policy framework, then a situation-sensitive and constitutionally-compliant policy change would have to be effected.[71]

The court noted that the ministerial policy framework itself incorporates constitutional norms and imperatives. It highlighted that the framework cautions universities not to develop their language policies in total disregard of constitutional provisions relevant to language policy.[72] Importantly, the court found that there is nothing in the framework to suggest that its preferred language policy option is to be followed by universities at all costs.[73] It held that constitutional imperatives like access, equity and inclusivity could dictate a radical departure from the preferred option.[74] The court interpreted the ministerial policy as allowing for flexibility in implementation, provided that the language of instruction does not become a barrier to access or an inadvertent tool for racial discrimination.[75]

In assessing the University's approach, the court found that it had adopted a flexible, pragmatic and reasonable approach to implementing a policy that unavoidably diminishes the status of Afrikaans as a medium of instruction. The court noted approvingly that the University had left elements of Afrikaans use intact in areas like tutorials, and in Education and Theology. The court viewed this accommodation as demonstrative of the University's commitment to uphold applicable constitutional norms while pursuing what is in the best interests of all the people whom it serves.[76] The court found that the University's language policy was "subject to" the ministerial policy framework and the Constitution.[77] This finding emphasises the court's view that compliance with the ministerial policy does not require rigid adherence, but rather a flexible approach that balances language rights with

other constitutional imperatives, particularly those related to transformation and non-discrimination.

Although the court held that the University's new language policy was, therefore, consistent with section 29(2) of the Constitution and the ministerial policy framework,[78] the court's reasoning is rather astonishing. First, if universities need not comply with the ministerial policy framework, why have it at all? Surely, universities should comply with, at the very least, the broad purposes of the policy – which is multilingualism. Second, the court's assertion that it would be "unreasonable to… allow some of our people to have *unimpeded access to education and success at the expense of others* as a direct consequence of a blind pursuit of the enjoyment of the right to education in a language of choice. This, in circumstances where all could properly be educated in *one common language*",[79] is also remarkable. No student at the UFS was denied *access* to education based on language, nor can *success* in higher education be guaranteed, whether you study in your preferred language or otherwise.[80] Third, historically, education in *one common language* in South Africa has led to much conflict and linguistic persecution – one can only think of the Soweto uprisings (against compulsory education in Afrikaans under apartheid), or even the Great Trek (against compulsory education in English under British rule).[81] In light of our unique history, would it be reasonable to continue along such a course, given the diverse nature of the South African nation?[82]

Another issue regarding the majority judgment's decision is that it did not consider existing legislation regulating the use of official languages by "national departments, national public entities and national public enterprises". In terms of the Use of Official Languages Act 12 of 2012, national departments, national entities or enterprises must use *at least three* official languages for official communication.[83] This Act and its implications were, however, not considered by the court, although it clearly applies to public universities as organs of state.

8.2.3 Dissenting judgment: An alternative approach to the recognition of official languages

Froneman J, in his dissenting judgment, expressed concern that the majority judgment accepted the University's assertion that it was impossible to provide education in a language of choice without indirectly discriminating on the basis of race.[84] He argued that this stance has significant implications beyond the University's campus, as it sanctions an approach that deprives speakers of an official language of their constitutional right to receive education in their chosen language.[85] The dissenting judgment emphasised the importance of determining the factual and normative boundaries within which the Constitution would allow such an approach.[86] Froneman J believed that the applicants' prospects of success were not as bleak as the majority judgment suggested.[87]

Froneman J identified the central constitutional issue as determining what circumstances justify preventing someone from receiving instruction in their chosen official language.[88] He argued that this enquiry involves two key issues: the proper interpretation of section 29(2) of the Constitution and the role of ministerial policy in formulating language policy at educational institutions.[89] The dissenting judgment criticised the majority's focus on the historical context of Afrikaans as an instrument of oppression, arguing that this perspective was incomplete.[90] Froneman J emphasised the need to consider the broader context, including the struggle of Afrikaans against the dominance of English and its shared struggle with other official languages.[91] The dissenting judgment took issue with the majority's heavy emphasis on the historical context of Afrikaans as an instrument of oppression during apartheid.[92] While acknowledging the importance of this history, Froneman J argued that this perspective was incomplete and potentially skewed the analysis.[93]

Froneman J advocated for a broader contextual understanding. He highlighted that the struggle for recognition of Afrikaans was initially a struggle against the dominance of English, drawing parallels with the struggles of other official languages.[94] This perspective, he argued, was largely absent from

the majority judgment. The dissenting judgment referenced the ministerial policy, which recognised that language was an instrument of control not only in the oppression of the black community but also in the struggle of Afrikaners against British imperialism.[95] Froneman J argued that this more nuanced historical understanding was crucial for a comprehensive analysis of the language rights issue. Furthermore, Froneman J pointed out that the majority judgment failed to acknowledge the constitutional obligation to advance other official languages besides English and Afrikaans.[96] He suggested that this oversight could have implications for the future development of all South African languages in higher education. By emphasising these broader contextual factors, Froneman J argued for a more holistic approach to interpreting section 29(2) and evaluating the University's language policy. He contended that this approach was necessary to fully address the complex issues surrounding language rights in South African education.

Froneman J expressed concern that the majority judgment did not adequately address the question of whether the mere exercise of a constitutionally protected language right can amount to unfair racial discrimination.[97] He argued that this was a novel and important issue that the court had not previously decided. The dissenting judgment questioned the majority's acceptance of the University's assessment that continuing parallel English-Afrikaans instruction had resulted in racial segregation and tension.[98] Froneman J argued that this assessment raised factual issues that were not adequately addressed in the majority judgment.[99]

Froneman J contended that the court should have held a hearing and granted leave to appeal to allow for a more comprehensive examination of the issues.[100] He argued that this approach would have better served the interests of justice and allowed for input from other affected parties, including other universities, Afrikaans-speakers from diverse backgrounds and users of other official languages.[101] Firstly, he contended that even if the case appeared to be "open and shut" as the majority judgment suggested, the interests of justice would have been better served by holding a hearing before deciding whether to

grant leave to appeal.[102] This approach, he argued, would have enhanced the legitimacy of the outcome. Froneman J emphasised that the Constitution represents a negotiated revolution based on a historical compromise.[103] He noted that it has been subjected to criticism across racial lines for its alleged failure to fulfil different and conflicting aspirations and expectations.[104] In this context, he argued that the court's decision could be seen by some, particularly white Afrikaans-speakers, as a betrayal of their expectations about the Constitution's guarantees regarding their home language.[105]

The dissenting judgment stressed that the matter concerned "unfinished business" under the Constitution, at least for a significant portion of white Afrikaans-speakers. Froneman J warned that summarily disposing of the matter without an oral hearing might strengthen fears in certain quarters about the downgrading of Afrikaans.[106] Crucially, Froneman J argued that a hearing would have allowed for input from other affected parties. He noted that the future of Afrikaans as a language of instruction is contested not only at the University of the Free State but also at universities in Pretoria and Stellenbosch.[107] He suggested that it would have been in the interests of justice to allow those institutions a say as intervening parties or friends of the court.

Furthermore, Froneman J emphasised the importance of hearing from organisations that aspire to a more inclusive approach to Afrikaans than the applicants, AfriForum and Solidarity. He noted that white Afrikaans-speakers are becoming a minority of Afrikaans-language users and stressed the need to hear from those Afrikaans-speakers whose role in the origin and history of the language has been marginalised.[108]

Froneman J also argued for the value of input from users of other official languages. He suggested that their perspective on the implications of the court's decision for the advancement of other languages as media of instruction would have been valuable.[109] In essence, Froneman J contended that a more inclusive and comprehensive hearing process would have allowed for a fuller examination of the complex issues

at stake, potentially leading to a more nuanced and widely accepted decision.

The dissenting judgment concluded by expressing concern about the implications of the majority's reasoning for the future of Afrikaans and other official languages in higher education.[110] Froneman J stated that he hoped to be proven wrong, but feared that the majority judgment's reasoning and outcome "do not bode well for the establishment and nurturing of languages other than Afrikaans and English as languages of higher learning".[111] This statement reflects his worry that the court's decision might set a precedent that could hinder the development of other indigenous languages as mediums of instruction in higher education. He acknowledged that it might be better for the country to focus on the inclusiveness that English might bring as the sole language of instruction but argued that such a choice should be made by the public rather than the court. Froneman J asserted that the court's constitutional duty is instead "to create space for other official languages".[112] Froneman J provided additional comments in Afrikaans, emphasising the importance of an inclusive approach to the language and the need for careful consideration of language rights.[113]

8.3 Impact of the judgment

8.3.1 Impact of the court's interpretation of section 29 and the requirement of "reasonable practicability" and compliance with the legislative and policy framework

The *AfriForum* (CC) judgment is the first of its kind to be considered by the Constitutional Court. The use of official languages in higher education, however, remains a contentious issue. The *AfriForum* (CC) Court's interpretation of section 29 of the Constitution has, however, become significant in cases dealing with language rights in higher education. This section considers how the *AfriForum* (CC) judgment was used in subsequent cases dealing with official languages in the South African higher education context.

The constitutional validity of Stellenbosch University's 2016 language policy was challenged in the case, *Gelyke Kanse v Chairperson of the Senate of the University of Stellenbosch*,[114] in terms of section 29(2) of the Constitution. Gelyke Kanse, a non-profit organisation advocating for equal opportunities for Afrikaans and other indigenous languages, sought to reinstate the University's 2014 language policy, arguing that it the previous policy better aligned with section 29(2) and the Ministerial Language Policy for Higher Education (2002).[115] The 2014 policy ensured that students could study in Afrikaans across all courses and levels, whereas English was not universally available.[116] However, in response to student protests and language debates in 2015, the university revised its approach and implemented the 2016 policy, which introduced three modes of instruction: parallel-, dual-, and single-medium.[117] Under this new framework, English became the primary language of instruction, with Afrikaans translations being provided in most cases (dual-medium), and parallel instruction in both languages only where feasible.[118]

The Western Cape High Court ruled that the 2016 policy did not violate section 29(2), as it met the criterion of "reasonable practicability".[119] The court found that the 2014 policy disadvantaged black students who were not proficient in Afrikaans, and measures such as real-time translation marginalised and excluded them.[120] It also rejected the argument that fully parallel instruction in Afrikaans and English across all courses was a viable solution, citing the significant financial burden that it would impose, including a projected 20% increase in tuition fees.[121] Ultimately, and in accordance with the reasoning in the *AfriForum* (CC) case, the Constitutional Court upheld the ruling, affirming that Stellenbosch University had satisfied both the factual and constitutional requirements of reasonable practicability under section 29. Regarding the judgment's adherence to the legislative and policy framework, in the *Gelyke Kanse* case, the court did not consider the University's adherence to the broader legislative and policy framework regarding its language policy. Remarkably, neither the Use of Official Languages Act nor any provincial legislation was referred to in the judgment.

In the most recent Constitutional Court ruling on language policy in higher education, *Chairperson of the Council of UNISA v AfriForum NPC*,[122] the court reviewed an appeal against a Supreme Court of Appeal (SCA)[123] decision that had overturned a revised language policy at the University of South Africa (Unisa). The new language policy purportedly aimed to promote indigenous African languages in teaching and learning while simultaneously removing Afrikaans as a language of instruction.[124] The SCA, however, held that Unisa's

> "understanding of its responsibility under s 29(2) was fallacious. It ineluctably suggests that the institution did not properly comprehend the implications of the right to receive education in the official language of one's choice, the constitutional parameters within which its powers had to be exercised, and the precise ambit of responsibility which s 29(2) imposed upon it, when it reviewed its language policy and adopted a new one."[125]

AfriForum successfully challenged Unisa's policy in the SCA, leading the Constitutional Court to determine whether the University's decision violated section 29(2) of the Constitution.[126] In a unanimous bilingual decision, the Constitutional Court first investigated the history of the Afrikaans language[127] and its depiction as a language of "whites", "racists, oppressors and unreconstructed nationalists".[128] The development of the Afrikaans language, the court held,

> "into a heterogeneous, 'rainbow' language, spoken today by more black people than white people, is a marvellous paradox of human ingenuity and creativity. Recognising the major role played by lowly indigenous peoples and enslaved people in its history and development is crucial. The misconception that it is 'the language of whites' and 'the language of the oppressor' is an iniquitous portrayal of the language and its true roots."[129]

The court ultimately found that Unisa failed to provide sufficient justification for its new language policy and did not offer

compelling evidence that continuing Afrikaans instruction was not "reasonably possible".[130] The university's arguments, citing equity, costs, declining demand for Afrikaans, and demographic changes, were also deemed unsupported by evidence.[131] As a result, the court ruled that, as an organ of state, Unisa must conduct thorough investigations and feasibility studies before altering its language policy to ensure compliance with section 29(2).[132]

Although the *UNISA* ruling suggests a degree of judicial caution in broadly expanding language rights within government institutions, the *UNISA* judgment, nevertheless, represents progress towards a more inclusive approach to multilingualism in public higher education institutions. Despite this, the court did not consider the Use of Official Languages Act or the Gauteng Provincial Languages Act, nor did it address their potential implications for higher education institutions – a significant shortcoming of the judgment.[133]

8.3.2 Impact of Froneman J's minority judgment in *AfriForum* (CC)

Although merely a minority judgment, Froneman J's separate judgment in the *AfriForum* (CC) case, and, arguably, his minority decision in the *Gelyke Kanse* (CC) case, has had a significant impact on both the Supreme Court of Appeal and Constitutional Court judgments in the *UNISA* case. In *Gelyke Kanse* (CC), Froneman J's minority judgment echoed his sentiments in the *AfriForum* judgment, acknowledging the socio-historical context of linguistic rights in South Africa, particularly the privileged position historically occupied by Afrikaans-speaking communities in contrast to other linguistic minorities.[134] Froneman J highlighted the broader linguistic implications of endorsing the University's 2016 Language Policy, particularly the increasing dominance of English in higher education.[135] He further recognised that, while the specific burden of preserving Afrikaans as an academic language does not rest solely on Stellenbosch University, the policy shift represents a broader trend of linguistic marginalisation.[136] He warned that the prioritisation of English in education may contribute to the

erosion of South Africa's linguistic diversity, a phenomenon that extends beyond Afrikaans to our other indigenous languages.[137] Froneman J's minority judgment in *AfriForum* (CC) also emphasised that the ministerial language policy endorsed a much wider view of language usage than the University policy in question, recognising the Constitution's

> "demand that the marginalisation of indigenous languages in the past be practically and positively addressed and that the existing situation favouring Afrikaans and English should only endure 'until such time as other South African languages have been developed to a level where they may be used in all higher education functions.'"[138]

Furthermore, in the *Gelyke Kanse* (CC) case, Froneman J engaged with the constitutional implications of language policy in higher education, particularly in relation to access, equity, and historical redress. He acknowledges the exclusionary consequences of single-medium Afrikaans instruction, which effectively denies access to non-Afrikaans-speaking students, predominantly black students.[139] In addition, he criticised the dual-medium model, arguing that real-time translation from Afrikaans to English may result in the stigmatisation of non-Afrikaans-speakers.[140] Regarding the debate surrounding parallel-medium instruction, Froneman J noted the potential for unintended racial segregation within such a system, particularly between coloured and black students.[141]

Froneman J further interrogated the rationale supporting the argument that retaining Afrikaans as a full-fledged medium of instruction is not "reasonably practicable". He acknowledged the financial and infrastructural constraints cited by the University but warned against the broader consequences of diminishing Afrikaans in higher education and the importance of promoting mother-tongue education at all levels.[142] Drawing from comparative international examples, such as Canada's bilingual legal framework, he suggested that South Africa could adopt a more deliberate approach to fostering multilingualism rather than using English as the default language for

instruction.[143] In the *AfriForum* (CC) minority judgment, Froneman J rightly noted that the majority judgment portrays a "total lack of appreciation" that "Afrikaans remains a minority language and that there is considerable foreign and international authority in support of the proposition that minority languages deserve special measures for their protection".[144]

In his concluding remarks, Froneman J cautioned against an overly rigid application of the principle of "reasonable practicability" in relation to linguistic rights. He argued that dismissing Afrikaans as a viable language of instruction risks undermining South Africa's constitutional commitment to linguistic diversity and inclusion.[145] Rather than viewing multilingualism as an insurmountable challenge, he advocates for a more nuanced and context-sensitive approach that recognises the value of preserving and promoting all official languages in higher education.[146]

In the *UNISA* (CC) judgment, however, there seems to be a distinctly different tone than the one used in Constitutional Court's majority judgments in the *AfriForum* and *Gelyke Kanse* cases. First, the whole judgment in *UNISA* (CC) is bilingual; second, the *UNISA* (CC) judgment starts off with a discussion of the importance and history of the Afrikaans language, instead of only focusing on the Afrikaans language as an instrument of discrimination and oppression.[147] Furthermore, the *UNISA* (CC) judgment unequivocally stated that

> "[t]his Court's decisions in *Gelyke Kanse* and *University of the Free State* do not signal an acceptance that the Afrikaans language must ineluctably be diminished as a language of teaching and learning in our country's institutions of higher education. Apart from the fact that each case must be decided on its facts, the role of Afrikaans in our institutions and civic life cannot be reduced to a simplistic narrative of hegemony and decline. We must resist such simplistic narratives, many of which feed on false myths about the origins and development of the Afrikaans language."[148]

We, therefore, argue that the *UNISA* (CC) judgment took a distinctly different approach to the matter of language usage in higher education than the previous decisions in *AfriForum* (CC) and *Gelyke Kanse* (CC). The *UNISA* (CC) judgment, like Froneman J's minority judgments, also emphasised the importance of developing other languages and their use in education: "[t]he only way to achieve that is to ensure that all indigenous languages are progressively introduced as languages of teaching and learning, within the means reasonably available" – which approach should be welcomed.[149] In this regard, Mokgokong and Phooko agree with Froneman J's judgment in *AfriForum* (CC) that the majority's view that the use of one's constitutionally protected language constitutes unfair discrimination, is unacceptable.[150]

8.4 Conclusion

From the preceding discussion, it is apparent that the decision in the *AfriForum v University of the Free State* (CC) case has had a significant effect on the South African courts' jurisprudence regarding the use of official languages in higher education. Although, as noted by Cameron et al., the *AfriForum* (CC) judgment "did not exude the best of the Court… [forsaking] the aspirations of the 'rainbow' narrative in favour of harsher political realities".[151] Significantly, however, it seems that it will not necessarily be the majority judgment in the *AfriForum* (CC) case which has the greatest impact on the question of the use of languages, other than English, in higher education institutions in South Africa. It is, therefore, submitted, and hoped, that the wider interpretation to the language question, as proffered by Froneman J in his minority judgments in *AfriForum* (CC), as well as in *Gelyke Kanse* (CC), will have a greater impact on the language issue in the long run.

Building on the judgment in the *AfriForum* (CC) case, the court in *Gelyke Kanse* (CC), followed a similar approach, finding that, if the demographics and socio-political context of the universities in question are considered, the continued use of Afrikaans as a medium of instruction would lead to marginalisation, stigmatisation and racial division on their

campuses. These considerations, together with considerations of practicality and costs, led the court in *Gelyke Kanse* (CC) to find that the University of Stellenbosch's new language policy was consistent with section 29 of the Constitution. Unfortunately, like the decision in the *AfriForum* (CC) case, the court in *Gelyke Kanse* (CC) also did not refer to, nor consider the applicable language legislation in the matter, namely the Use of Official Languages Act, as well as the applicable provincial language legislation. In both cases, however, Froneman J, delivered a thoughtful separate judgment wherein he provided a wider and more inclusive perspective on the issue of the use of official languages in the higher education context. It is these minority judgments, we argue, which had a significant impact on the subsequent judgment in the *UNISA* (CC) case.

In the *UNISA* (CC) judgment, the court held that its previous rulings (referring to *AfriForum* and *Gelyke Kanse* (CC)) should not be construed to mean that Afrikaans (and other indigenous languages) should be eliminated from use by all higher education institutions. The court pointed out that all cases should be decided on their own merits, and that the *UNISA* (CC) case could be distinguished from the *AfriForum* and *Gelyke Kanse* (CC) cases in that Unisa was an institution providing distance learning, meaning that there was no possibility of Unisa students feeling excluded, stigmatised, or marginalised by the use of Afrikaans by the institution in the same way as those universities that provide face-to-face on campus teaching. Notwithstanding the different facts in these cases, the broader, more inclusive approach in the *UNISA* (CC) case should be welcomed – indeed, a broader more inclusive view of our language diversity is exactly what is needed in a country as diverse as South Africa with a rich linguistic and cultural heritage. It can only be hoped that the courts will follow the trend set by Froneman J's minority judgments and the *UNISA* (CC) case.

Endnotes

1 2018 2 SA 185 (CC) (*AfriForum* (CC)).
2 *AfriForum* (CC) (n 1) par 15–20.
3 *AfriForum* (CC) (n 1) par 15.
4 *AfriForum* (CC) (n 1) par 15.
5 *AfriForum* (CC) (n 1) par 15.
6 *AfriForum* (CC) (n 1) par 16.
7 *AfriForum* (CC) (n 1) par 16.
8 *AfriForum* (CC) (n 1) par 16.
9 *AfriForum* (CC) (n 1) par 17.
10 *AfriForum* (CC) (n 1) par 17.
11 *AfriForum* (CC) (n 1) par 18.
12 *AfriForum* (CC) (n 1) par 18.
13 *AfriForum* (CC) (n 1) par 19–20.
14 *AfriForum* (CC) (n 1) par 19–20.
15 *AfriForum v Chairman of the Council of the University of the Free State* (A70/2016) 2016 ZAFSHC 130 (21 July 2016) (*AfriForum* (HC)).
16 *AfriForum* (HC) (n 15) par 21.
17 *AfriForum* (HC) (n 15) par 10–11.
18 *AfriForum* (HC) (n 15) par 52.
19 *AfriForum* (HC) (n 15) par 52.
20 *AfriForum* (HC) (n 15) par 52.
21 *AfriForum* (HC) (n 15) par 19.
22 *AfriForum* (HC) (n 15) par 39–42.
23 *AfriForum* (HC) (n 15) par 34; Act 101 of 1997.
24 *AfriForum* (HC) (n 15) par 39.
25 *AfriForum* (HC) (n 15) par 40.
26 *AfriForum* (HC) (n 15) par 40.
27 *AfriForum* (HC) (n 15) par 40.
28 *AfriForum* (HC) (n 15) par 41.
29 *AfriForum* (HC) (n 15) par 41–42.
30 *AfriForum* (HC) (n 15) par 59.
31 *AfriForum* (HC) (n 15) par 56.
32 *AfriForum* (HC) (n 15) par 47–48.
33 *AfriForum* (HC) (n 15) par 50.
34 *AfriForum* (HC) (n 15) par 56.
35 *AfriForum* (HC) (n 15) par 55.
36 *AfriForum* (HC) (n 15) par 59.
37 *University of the Free State v AfriForum* 2018 3 SA 428 (SCA) (*AfriForum* (SCA)).
38 *AfriForum* (SCA) (n 37) par 20–21; Act 10 of 2013.
39 *AfriForum* (SCA) (n 37) par 21.
40 *AfriForum* (SCA) (n 37) par 22.
41 *AfriForum* (SCA) (n 37) par 22.
42 *AfriForum* (SCA) (n 37) par 23–25.
43 *AfriForum* (SCA) (n 37) par 24–25.
44 *AfriForum* (SCA) (n 37) par 27–28.
45 *AfriForum* (SCA) (n 37) par 27.
46 *AfriForum* (CC) (n 1) par 41–50.
47 *AfriForum* (CC) (n 1) par 46.
48 *AfriForum* (CC) (n 1) par 41.
49 *AfriForum* (CC) (n 1) par 42.

50 *AfriForum* (CC) (n 1) par 43-44.
51 *AfriForum* (CC) (n 1) par 45.
52 *AfriForum* (CC) (n 1) par 53.
53 *AfriForum* (CC) (n 1) par 46.
54 *AfriForum* (CC) (n 1) par 49.
55 *AfriForum* (CC) (n 1) par 49.
56 *AfriForum* (CC) (n 1) par 55-62.
57 *AfriForum* (CC) (n 1) par 63.
58 *AfriForum* (CC) (n 1) par 55.
59 *AfriForum* (CC) (n 1) par 56.
60 *AfriForum* (CC) (n 1) par 56.
61 *AfriForum* (CC) (n 1) par 59.
62 *AfriForum* (CC) (n 1) par 62.
63 *AfriForum* (CC) (n 1) par 62.
64 *AfriForum* (CC) (n 1) par 62.
65 *AfriForum* (CC) (n 1) par 62-63.
66 *AfriForum* (CC) (n 1) par 58.
67 *AfriForum* (CC) (n 1) par 65-75.
68 *AfriForum* (CC) (n 1) par 77.
69 *AfriForum* (CC) (n 1) par 66.
70 *AfriForum* (CC) (n 1) par 66.
71 *AfriForum* (CC) (n 1) par 66.
72 *AfriForum* (CC) (n 1) par 70.
73 *AfriForum* (CC) (n 1) par 72.
74 *AfriForum* (CC) (n 1) par 72.
75 *AfriForum* (CC) (n 1) par 71.
76 *AfriForum* (CC) (n 1) par 77.
77 *AfriForum* (CC) (n 1) par 79.
78 *AfriForum* (CC) (n 1) par 79.
79 *AfriForum* (CC) (n 1) par 49.
80 See Venter "Official languages and higher education: The story of an African university" 2019 *Tydskrif vir die Suid-Afrikaanse Reg* 558 570; Laubscher "Innovations in constitutional law: Recognition of language rights in South Africa: innovation or a dismal failure?" 2022 *Gdansk Legal Studies* 63 72.
81 Laubscher (n 80) 72.
82 Laubscher (n 80) 72.
83 See s 4(2)(*b*) of the Use of Official Languages Act.
84 *AfriForum* (CC) (n 1) par 83.
85 *AfriForum* (CC) (n 1) par 83.
86 *AfriForum* (CC) (n 1) par 83.
87 *AfriForum* (CC) (n 1) par 83.
88 *AfriForum* (CC) (n 1) par 85.
89 *AfriForum* (CC) (n 1) par 85.
90 *AfriForum* (CC) (n 1) par 87-93.
91 *AfriForum* (CC) (n 1) par 92-93.
92 Laubscher (n 80) 72-73.
93 *AfriForum* (CC) (n 1) par 87-93.
94 *AfriForum* (CC) (n 1) par 92-93.
95 *AfriForum* (CC) (n 1) par 92.
96 *AfriForum* (CC) (n 1) par 91.
97 *AfriForum* (CC) (n 1) par 96-97.

98 *AfriForum* (CC) (n 1) par 110–114.
99 *AfriForum* (CC) (n 1) par 114.
100 *AfriForum* (CC) (n 1) par 117–125.
101 *AfriForum* (CC) (n 1) par 120–123.
102 *AfriForum* (CC) (n 1) par 118.
103 *AfriForum* (CC) (n 1) par 119.
104 *AfriForum* (CC) (n 1) par 119.
105 *AfriForum* (CC) (n 1) par 120.
106 *AfriForum* (CC) (n 1) par 120.
107 *AfriForum* (CC) (n 1) par 121.
108 *AfriForum* (CC) (n 1) par 122.
109 *AfriForum* (CC) (n 1) par 123.
110 *AfriForum* (CC) (n 1) par 127–128.
111 *AfriForum* (CC) (n 1) par 127.
112 *AfriForum* (CC) (n 1) par 127.
113 *AfriForum* (CC) (n 1) par 129–135.
114 2020 1 SA 368 (CC); also see Laubscher "Overview of the constitutional court judgments on the bill of rights – 2019" 2020 *Tydskrif vir die Suid-Afrikaanse Reg* 308, 318–319; and Munyai "Language conundrum in higher education institutions in South Africa: One step forward or two steps back?" 2024 *De Jure* 177–195.
115 *Gelyke Kanse* (n 114) par 1–12.
116 *Gelyke Kanse* (n 114) par 3.
117 *Gelyke Kanse* (n 114) par 4.
118 *Gelyke Kanse* (n 114) par 4.
119 *Gelyke Kanse* (n 114) par 9; also see *Gelyke Kanse v Chairman of the Senate of Stellenbosch University* 2018 1 All SA 46 (WCC).
120 *Gelyke Kanse* (n 114) par 27–28.
121 *Gelyke Kanse* (n 114) par 30–31.
122 2022 2 SA 1 (CC) (*UNISA* (CC) case); also see Laubscher "Overview of constitutional court judgments on the bill of rights – 2021" 2022 *Tydskrif vir die Suid-Afrikaanse Reg* 356, 367–368.
123 *AfriForum NPC v Chairperson of the Council of the University of South Africa* (765/2018) [2020] ZASCA 79 (*UNISA* (SCA) case).
124 *UNISA* (CC) (n 122) par 3.
125 *UNISA* (SCA) (n 123) par 34.
126 *UNISA* (CC) (n 122) par 37.
127 *UNISA* (CC) (n 122) par 6–23.
128 *UNISA* (CC) (n 122) par 10, 11.
129 *UNISA* (CC) (n 122) par 21.
130 *UNISA* (CC) (n 122) par 57.
131 *UNISA* (CC) (n 122) par 65–77.
132 *UNISA* (CC) (n 122) par 85.
133 Laubscher (n 80) 75.
134 See *Gelyke Kanse* (n 114) par 64–66; also see *AfriForum* (CC) (n 1) par 87, 91.
135 *Gelyke Kanse* (n 114) par 66.
136 *Gelyke Kanse* (n 114) par 66; also see *AfriForum* (CC) (n 1) par 91.
137 *Gelyke Kanse* (n 114) par 67–69.
138 *Afriforum* (CC) (n 1) par 94.
139 *Gelyke Kanse* (n 114) par 70.
140 *Gelyke Kanse* (n 114) par 71.

141 *Gelyke Kanse* (n 114) par 72-74.
142 See *Gelyke Kanse* (n 114) par 77-91.
143 *Gelyke Kanse* (n 114) par 91.
144 *AfriForum* (n 1) par 124.
145 *Gelyke Kanse* (n 114) par 94-95; *AfriForum* (CC) (n 1) par 127.
146 *Gelyke Kanse* (n 114) pat 96-98.
147 *UNISA* (CC) (n 122) par 1-23.
148 *UNISA* (CC) (n 122) par 4.
149 *UNISA* (CC) (n 122) par 22.
150 Mokgokong and Phooko "What has the Constitutional Court given us? *AfriForum v University of the Free State* 2018 (4) BCLR 387 (CC)" 2019 *Obiter* 228 237.
151 Cameron, Cheng, Gore and Webber "Rainbows and realities: Justice Johan Froneman in the explosive terrain of linguistic and cultural rights" 2022 *CCR* 261 287.

Chapter 9

The Constitutional Court's Approach to Affirmative Action

South African Police Service v Solidarity obo Barnard[1]

Marthinus van Staden
School of Law,
University of the Witwatersrand
Johannesburg, South Africa

"'It is the fate of this generation . . . to live with a struggle we did not start, in a world we did not make.' These words of former American President John F Kennedy capture something of the responsibility to deal with the consequences of the past, falling even on those who played no part in it. History is inclined to target the innocent for retribution and restoration following on gross injustice committed by those who thrived on the systematic violation of the human dignity of others. This often seems unfair. Clichés like 'two wrongs don't make a right' express the perceived unfairness" (*Barnard* par 125).

Abstract

The *South African Police Service v Solidarity obo Barnard* case represents a key moment in South Africa's post-apartheid constitutional jurisprudence on affirmative action. This landmark judgment addresses the complex tension between individual rights and the broader societal objective of transformation. The Constitutional Court established what would become known as the "*Barnard* principle", which permits employers to deny appointments that would negatively impact representivity, even to candidates who scored highest in selection processes. The court articulated a nuanced approach to evaluating affirmative action measures, emphasising that while such measures are integral to achieving substantive equality, their implementation must be rationally connected to their purpose. The case established the minimum standard of rationality for assessing implementation decisions but revealed significant judicial disagreement on whether more stringent standards of fairness or proportionality should apply. This judicial divergence reflects broader societal debates about how to balance competing constitutional imperatives of equality, dignity and transformation. The subsequent *Solidarity* case extended the "*Barnard* principle" to all designated groups, clarifying that it applies not only to white candidates but also to African, coloured and Indian persons and both genders. This expansion demonstrates the principle's far-reaching implications for employment equity implementation across all demographic categories. The Barnard judgment's significance lies in its recognition that restitutionary measures are not exceptions to equality but form part of substantive equality itself, while simultaneously acknowledging the importance of human dignity and reasoned decision-making in their implementation. By establishing a framework for evaluating affirmative action measures that balances transformation with individual rights, the case provides crucial guidance for navigating one of the most challenging aspects of South Africa's constitutional democracy: redressing historical injustices while building a non-racial, non-sexist society founded on human dignity, equality and freedom.

9.1 Introduction

The *South African Police Service v Solidarity obo Barnard* case represents a significant milestone in South Africa's jurisprudence on affirmative action and employment equity. This Constitutional Court judgment grapples with the complex interplay between the constitutional imperatives of equality, dignity and redress in the context of employment practices. The case arose from Captain Renate Barnard's unsuccessful applications for promotion within the South African Police Service (SAPS), which were denied on the grounds of maintaining racial representivity within the force.

The *Barnard* case highlights the tension between individual rights and the broader societal goal of transformation, a tension that lies at the heart of South Africa's constitutional democracy. It raises critical questions about how to balance the need for redressing past inequalities with the protection of individual rights, particularly in a workplace context. The court's decision and reasoning provide important insights into the interpretation and application of the Employment Equity Act,[2] as well as the constitutional principles supporting affirmative action measures.

This discussion will examine the facts of the case, the judgments of the lower courts and the Constitutional Court's findings. It will explore the various tests and standards proposed by the judges for evaluating the implementation of affirmative action measures. Furthermore, it will consider the implications of the so-called "*Barnard* principle" and its subsequent interpretation in the *Solidarity* case. By analysing these aspects, we can gain a deeper understanding of the evolving legal framework for affirmative action in South Africa and the ongoing challenges in reconciling competing constitutional values.

9.2 Facts of the case

The case concerns Ms Renate Barnard, a white female captain and employee in the SAPS, who applied for promotion to superintendent twice but was unsuccessful. In 2005, SAPS advertised a promotion position for superintendent within the

National Evaluation Service Division. Ms Barnard and six other applicants responded to the advertisement.[3] Later that year, the applicants were interviewed by a racially diverse panel of six senior police officials. Ms Barnard scored the highest at 86.67% and was recommended as the top candidate by the panel. The only black male candidate on the shortlist scored 17.5% less than Ms Barnard.[4]

The panel met with Divisional Commissioner Rasegatla to discuss their recommendation. The Commissioner declined to support the recommendation, citing insufficient directives on balancing employment equity against service delivery obligations. He noted that black men and women were under-represented in the division and decided that the vacancy should remain unfilled for employment equity reasons. The post was withdrawn and a white male, Superintendent Prinsloo, was laterally transferred to fill the vacancy temporarily.[5]

In 2006, a similar vacancy (post 4701) was advertised.[6] Ms Barnard applied again and was interviewed along with seven other candidates.[7] She again obtained the highest score and was recommended as the most suitable candidate by the panel. The second recommended candidate, Captain Mogadima, an African man, scored 7.33% lower than Ms Barnard.[8] The panel met with Commissioner Rasegatla to present their recommendation. He agreed that Ms Barnard should be promoted, noting that not promoting her after two rounds of applications would foster the wrong impression. Therefore, he recommended to the National Commissioner that Ms Barnard be promoted.[9] However, the National Commissioner declined to appoint Ms Barnard or Mr Mogadima.[10] He took the view that appointing Ms Barnard would not address representivity requirements and that since the post was not critical for service delivery, it should be withdrawn and re-advertised.[11] The post was re-advertised but eventually withdrawn.[12]

Ms Barnard filed a complaint through SAPS grievance procedures requesting her promotion be made effective from 1 December 2005.[13] SAPS responded, explaining the National Commissioner's reasons for not appointing her, including that it did not address representivity and the post was not critical for

service delivery.[14] Dissatisfied with this outcome, Ms Barnard referred an unfair discrimination dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) in 2007.[15] When this remained unresolved, she initiated litigation in the Labour Court.[16]

The Labour Court[17] found in favour of Ms Barnard, ruling that the SAPS had unfairly discriminated against her by not promoting her to the position of Superintendent. The court established several key principles in its judgment. It held that the provisions of the Employment Equity Act and Employment Equity Plans must be applied fairly and with due regard to an individual's constitutional right to equality. The court stated that "it is therefore not appropriate to apply, without more, the numerical goals set out in an Employment Equity Plan. That approach is too rigid".[18] The need for representivity must be weighed against the individual's rights to equality.

The court emphasised that while individuals from non-designated groups will be adversely affected by employment equity plans, the implementation should be undertaken with due regard to the individual's right to equality and dignity.[19] It held that the extent to which employment equity plans may discriminate is limited by law, requiring rational and fair application, recognition of affected individuals' rights to equality and due recognition of their right to dignity.[20] Importantly, the court ruled that where a post cannot be filled by an applicant from an under-represented category because a suitable candidate cannot be found, promotion should not ordinarily be denied to a suitable candidate from another group without clear justification.[21]

In analysing the evidence, the court found that the National Commissioner's reasons for not appointing Ms Barnard were insufficient. The court held that not appointing any candidate was not a fair and appropriate method of implementing the Employment Equity Plan.[22] It ruled that having decided not to appoint a recommended black candidate, it was unfair not to appoint Ms Barnard, who was the best candidate for the job and a member of a designated group under the Employment Equity Act.[23]

The Labour Court also criticised SAPS for procedural lapses, particularly its failure to engage effectively in mediation and conciliation procedures.[24] It emphasised the importance of these processes in preserving employment relationships and fostering dignity and mutual respect.[25] On the issue of service delivery, the court found it difficult to understand how failing to fill a necessary post could be rationally justified by the need for an efficient police force.[26] In conclusion, the Labour Court ruled that the failure to promote Ms Barnard was based on her race and constituted unfair discrimination[27] It found that SAPS had failed to discharge the onus of showing that the proven discrimination was fair.[28] The court ordered SAPS to promote Ms Barnard to the post of Superintendent with effect from 27 July 2006.[29]

The Labour Appeal Court[30] overturned the Labour Court's decision and found in favour of the SAPS. The court held that the failure to appoint Captain Barnard did not constitute unfair discrimination. The court criticised the Labour Court's approach of treating the implementation of restitutionary measures as subject to an individual's right to equality. It stated that this approach "promotes the interests of persons from non-designated categories to continue enjoying an unfair advantage which they had enjoyed under apartheid".[31] The court emphasised that treating restitutionary measures in this manner would "stifle legitimate constitutional objectives and result in the perpetuation of inequitable representation in the workplace".[32]

The court held that the Employment Equity Act and Employment Equity Plans are measures contemplated in section 9(2) of the Constitution, aimed at achieving substantive equality.[33] It found that the SAPS Employment Equity Plan was a "constitutionally mandated tool" to ensure compliance with equitable employment practices and representivity.[34] The court noted that white employees were overrepresented at level 9, where the advertised post was located. It found that appointing Barnard "would have aggravated the over representivity of white employees in level 9 and would have represented a step backwards and in direct violation of a clear constitutional

objective".[35] The court held that discriminating against Barnard in these circumstances was "clearly justifiable".[36]

The court rejected the Labour Court's finding that the failure to appoint Barnard compromised service delivery. It held that the National Commissioner, as the accounting officer, was best placed to determine if service delivery would be compromised and his decision was "unassailable".[37] The court stated that it was not open to a court to "second guess" such decisions on service delivery.[38] The court also found that the National Commissioner had discretion regarding appointments under National Instruction 1 of 2004, which provides that he is under no obligation to fill an advertised post.[39] In conclusion, the court held that the Labour Court had "clearly misconstrued the purpose of the employment equity orientated measures by decreeing that their implementation was subject to an individual's right to equality and dignity".[40] It upheld the appeal and dismissed Barnard's application.

The Supreme Court of Appeal[41] overturned the Labour Appeal Court's decision and found in favour of Captain Barnard. The SCA held that the failure to appoint Barnard constituted unfair discrimination. The court rejected the Labour Appeal Court's conclusion that no discrimination had occurred because no appointment was made. The court stated that it "can 'hardly be contested' that in the present case Barnard was not appointed because she was a white female".[42] The court held that the fact that no appointment was made did not mean there was no discrimination. The court emphasised that when unfair discrimination is alleged under the Employment Equity Act, the onus is on the employer to establish that the discrimination was fair.[43] The court found that the SAPS had not discharged this onus.

The court criticised the National Commissioner's justification for not appointing Barnard as "scant".[44] The court found there was no indication that the Commissioner had grappled with all the issues raised by the recommendation panel and Divisional Commissioner Rasegatla.[45] The court held that the Commissioner's failure to provide evidence explaining his reasoning worked against SAPS' case.[46] The court rejected

SAPS' argument that appointing Barnard would violate the Employment Equity Plan. The SCA held that numerical targets and representivity are not absolute criteria for appointment, as this would turn targets into quotas which are prohibited by the Employment Equity Act.[47]

The court also dismissed the justification that the post was not "critical". The court found this explanation was "contrived", given that the post had been advertised multiple times and temporarily filled by lateral transfer.[48] The court held that the Labour Appeal Court had erred in concluding that only the National Commissioner could determine if service delivery would be affected by not filling the post.[49] Considering all the circumstances, the Supreme Court of Appeal concluded that SAPS had not established that the discrimination against Barnard was fair.[50] The court upheld the appeal and awarded Barnard compensation equal to the difference in salary between Captain and Superintendent for a two-year period.[51]

9.3 Findings of the Constitutional Court

9.3.1 The majority judgment

The majority judgment, written by Moseneke ACJ, upheld the appeal by the SAPS, and set aside the order of the Supreme Court of Appeal. The court found that the National Commissioner's decision not to promote Captain Barnard did not constitute unfair discrimination. The court began by acknowledging the difficult and emotive questions of equality, race and equity at the workplace raised by this case.[52] It emphasised that South Africa's constitutional democracy is founded on explicit values, including human dignity and the achievement of equality in a non-racial, non-sexist society under the rule of law.[53] The court noted that the Constitution has a transformative mission, enjoining active steps to achieve substantive equality, particularly for those disadvantaged by past unfair discrimination.[54]

The court stressed that the quest for equality must occur within the discipline of the Constitution and measures directed at remedying past discrimination must be formulated with

due care not to unduly invade the dignity of all concerned.[55] It emphasised that remedial measures are not an end in themselves and are not meant to be punitive or retaliatory.[56] The judgment outlined the applicable legal framework, including section 9 of the Constitution and the Employment Equity Act. It explained that section 9(2) of the Constitution permits legislative and other measures designed to protect or advance persons disadvantaged by unfair discrimination.[57]

The court criticised the Supreme Court of Appeal for applying the *Harksen*[58] test, which is used to determine unfair discrimination under section 9(3) of the Constitution.[59] The *Harksen* test presumes that discrimination based on listed grounds is unfair unless proven otherwise. However, the Constitutional Court held that this approach was incorrect when dealing with affirmative action measures. The court reiterated the three-pronged test from *Van Heerden*[60] to determine whether a restitution measure falls within the ambit of section 9(2).[61] This test is used to determine whether a restitutionary measure falls within the ambit of section 9(2) of the Constitution, which allows for measures designed to protect or advance persons disadvantaged by unfair discrimination.

The three-pronged test, as outlined by the court, requires that the measure that targets a particular class of people who have been susceptible to unfair discrimination, should be designed to protect or advance those classes of persons and promote the achievement of equality. The court emphasises that once a measure passes this test, it is neither unfair nor presumed to be unfair.[62] This is because the Constitution explicitly says that such measures may be taken. The court notes that section 6(2) of the Employment Equity Act echoes section 9(2) of the Constitution in stating that affirmative action measures are not unfair. However, the court also clarifies that passing this test does not completely insulate the measure from scrutiny. It states that the court's power to interrogate whether the measure is a legitimate restitution measure within the scope of section 9(2) is not ousted.[63]

This test is significant because it provides a framework for assessing the constitutionality of affirmative action measures.

By applying this test, the court can determine whether a particular measure, such as the SAPS Employment Equity Plan in this case, is a legitimate restitutionary measure as envisioned by the Constitution. This approach allows for the implementation of substantive equality while still providing a mechanism for judicial oversight to ensure that such measures remain within constitutional bounds.

Importantly, the court held that while the Employment Equity Plan itself was not subject to challenge, the manner in which it was implemented could be scrutinised.[64] It stated that as a bare minimum, the principle of legality would require that the implementation of a legitimate restitution measure must be rationally related to the terms and objects of the measure.[65] The court makes a clear distinction between the validity of an Employment Equity Plan itself and the manner in which it is implemented. While the Plan was not subject to challenge in this case (as Ms Barnard had accepted its validity), the court emphasises that the implementation of such a plan can be scrutinised.[66] This principle, later referred to as the "*Barnard* principle",[67] is significant as it allows for oversight of how affirmative action measures are applied in practice, even when their underlying policy is accepted as valid.

The court then sets out the minimum standard for assessing the implementation of restitutionary measures, invoking the principle of legality.[68] This principle, fundamental to the rule of law, requires that all exercises of public power must be lawful and rational. In this context, the court states that the implementation of a legitimate restitution measure must be rationally related to the terms and objects of the measure. The court elaborates that the measure "must be applied to advance its legitimate purpose and nothing else".[69] This means that those implementing the measure must act in a way that is logically connected to the goals of the affirmative action policy and not for any other purpose.

Furthermore, the court notes that "irrational conduct in implementing a lawful project attracts unlawfulness".[70] This emphasises that even if the Employment Equity Plan itself is lawful, its irrational implementation can be challenged and

potentially found unlawful. By setting out this standard, the court provides a framework for evaluating the implementation of affirmative action measures. It allows for challenges to specific decisions made under such measures, while still respecting the overall validity of affirmative action as a tool for achieving substantive equality. This approach strikes a balance between the need for transformation and the requirement for rational and lawful administrative action.

The court found that the Supreme Court of Appeal had erred in its approach to the case. It held that the equality claim should have been analysed through the lens of section 9(2) of the Constitution and section 6(2) of the Employment Equity Act, rather than as unfair discrimination under section 9(3).[71] The court emphasised that restitutionary measures allowed under section 9(2) are not exceptions to equality, but form part of the substantive equality envisioned by the Constitution.[72]

The judgment then examined the National Commissioner's decision not to appoint Ms Barnard. It found that the National Commissioner had discretion under the relevant National Instruction to decline to fill an advertised post.[73] The court held that his decision was rational and in line with the Employment Equity Plan's targets, as white women were already overrepresented at the salary level of the position.[74] The court recognised that the National Commissioner, as the head of the South African Police Service, had specific operational knowledge and expertise. This position aligns with the general principle of judicial deference to executive decision-making in operational matters. The court noted that there was "no valid cause to reject the National Commissioner's operational assessment that service delivery would not have suffered from not appointing Ms Barnard".[75] This suggests that Ms Barnard did not provide compelling evidence to contradict this assessment. The National Commissioner had classified the post as "non-critical".[76] While the Court acknowledged that the term "critical" has no legal foundation, it still gave weight to this classification as part of the National Commissioner's operational assessment.

The court considered that the post was ultimately never filled, as "the National Commissioner chose to reconfigure the

division concerned".[77] This lent credence to the assertion that the post was not critical for immediate service delivery. The court rejected the argument that not appointing Ms Barnard would compromise service delivery, finding that there was no evidence to contradict the National Commissioner's assessment that the post was not critical.[78] It also found that Ms Barnard's non-appointment did not constitute an absolute bar to her advancement, given her subsequent promotion.[79] In conclusion, the court found that the National Commissioner had exercised his discretion rationally and reasonably in accordance with the criteria in the Instruction, in pursuit of employment equity targets envisaged in section 6(2) of the Act.[80] It, therefore, upheld the appeal and set aside the order of the Supreme Court of Appeal.[81]

9.3.2 The concurring judgment of Cameron J, Froneman J and Majiedt AJ

The concurring judgment, written by Cameron J, Froneman J and Majiedt AJ, agrees with the main judgment's outcome but offers additional analysis on two key points: the tensions inherent in implementing restitutionary measures and the appropriate standard for assessing the implementation of such measures. The justices begin by acknowledging the difficult and emotive questions of equality, race and equity in the workplace raised by this case.[82] They emphasise the importance of frankly acknowledging the tensions that arise when balancing constitutional imperatives, as this is necessary for societal progress and rational discussion.[83] The judgment highlights the tension between the Constitution's commitment to redressing past inequalities and its goal of establishing a non-racial, non-sexist society. It also notes the tension between individual equality rights and societal equality, as well as tensions that arise when advancing multiple disadvantaged groups.[84]

A key focus of the judgment is the appropriate standard for assessing the implementation of constitutionally compliant restitutionary measures. The justices disagree with the main judgment's view that it is unnecessary to deal with this standard.[85] They argue that Ms Barnard's case falls squarely

within the parameters of the Employment Equity Act and that her statement of case sets out the essential factual allegations for challenging the National Commissioner's decision. The justices propose that the appropriate standard for assessing the implementation of restitutionary measures should be fairness.[86] They argue that this standard is more rigorous than mere rationality and allows courts to assess consistency with the provisions and purposes of the Act.[87] They begin by acknowledging that the main judgment considers rationality as the "bare minimum" requirement for implementing remedial measures.[88] However, they argue that Ms Barnard's challenge requires a "less deferential standard than mere rationality".[89] The justices contend that the Employment Equity Act imposes a standard "different from, and additional to, rationality".[90]

The justices explain that a fairness standard would require "a more exacting level of scrutiny".[91] This heightened scrutiny is necessary because of the important constitutional values that can be in tension when implementing remedial measures. They argue that a fairness standard would allow judges to ensure that decision-makers have "carefully evaluated relevant constitutional and statutory imperatives" before making decisions based predominantly on criteria like race.[92] The justices contend that a rationality standard is insufficient because it would make it difficult to determine if a decision-maker had impermissibly converted numerical targets into quotas.[93] They argue that a rationality standard does not allow a court to properly examine a decision-maker's balancing of multiple designated groups or the interests of those adversely affected by restitutionary measures.[94]

In proposing fairness as the standard, the justices note that it is "sufficiently encompassing to allow courts to assess consistency with the provisions and purposes of the Act".[95] They highlight that the Act recognises the importance of "fair treatment in employment".[96] Furthermore, they argue that fairness is a foundational constitutional value, recognised in various contexts including administrative decision-making, court procedures, labour practices and discrimination.[97]

The justices acknowledge potential objections to using fairness as a standard, such as vagueness and potential internal inconsistency.[98] However, they counter these objections by noting that other open-ended norms in law, such as reasonableness and public policy, have become more certain over time through the building of precedent.[99] They also argue that assessing the fairness of individual implementation is different from determining whether measures amount to unfair discrimination at a general level.[100]

The justices emphasise that the Employment Equity Act does not sanction overly rigid affirmative action measures, prohibits quotas and requires the advancement of multiple designated groups.[101] The justices also highlight the Act's insistence on measures based on "equal dignity and respect of all people".[102] In applying the fairness standard to Ms Barnard's case, the justices examine both the objective facts and the reasons given by the National Commissioner. They criticise the paucity of the National Commissioner's reasons, noting that his decision appears "at best, opaque".[103] They argue that decision-makers should provide adequate reasons, especially when decisions are based primarily on race or other protected attributes.[104]

The judgment pays particular attention to the issues of service delivery and representivity. The justices argue that the SAPS, as a public service provider, is required to prioritise service delivery and should justify decisions that do not enhance it.[105] The judgment notes that the SAPS is constitutionally required to prioritise service delivery and carry out its functions with special regard to efficiency and quality of service. This requirement is not only enshrined in the Constitution but is also recognised in the SAPS's own Employment Equity Plan and internal communications.[106] The justices highlight a letter from the National Commissioner to all provincial commissioners, divisional commissioners and deputy national commissioners, which explicitly stated that interviewing panels should focus on appointing personnel who would enhance service delivery.[107] This demonstrates the importance placed on service delivery within the SAPS. While acknowledging

that the Employment Equity Act does not require the SAPS to always prioritise service delivery over other considerations, the justices argue that it does require the SAPS to justify decisions that do not enhance service delivery.[108] This sets a standard of accountability for decisions that might impact the quality of public services. The judgment critically examines the National Commissioner's decision not to appoint Ms Barnard, noting that it contradicted the recommendation of the Divisional Panel, which had recommended her promotion "in the interest of service delivery".[109]

The justices argue that while the National Commissioner has the right to make operational decisions and deserves some deference because of his expertise, this does not relieve him of the duty to justify the factors which he considered in reaching his conclusion. The justices express concern that without proper justification for balancing representivity and service delivery, there is a risk that decision-makers could prioritise representivity over service delivery without sufficient regard for specific circumstances. They argue that this could create a false dichotomy between representivity and quality of service, which is not necessary or desirable. Importantly, the judgment emphasises that there is no evidence suggesting that achieving representivity must come at the cost of service quality. The justices assert that individuals from disadvantaged backgrounds are just as capable and talented as Ms Barnard, especially given the Act's broad definition of "suitably qualified".[110] The justices argue that a clear explanation is necessary when balancing service delivery and representivity concerns.[111] They provide an example of good practice in the Divisional Panel's recommendation, which acknowledged the representivity issues but still recommended Ms Barnard's appointment because of the potential gains in service delivery.[112]

They also highlight the complexity of representivity, noting that Ms Barnard's appointment could have ameliorated gender representivity even as it exacerbated racial over-representation.[113] The concurring justices provide a nuanced analysis of the complexity of representivity, particularly in relation to Ms Barnard's case, which highlights the

intersectionality of race and gender in affirmative action measures. The judgment points out that Ms Barnard's identity both as white and a woman presents a complex case for representivity considerations.[114] As a white person, she belongs to a historically advantaged group, but as a woman, she is part of a group that has faced historical discrimination. The justices note that women are one of the designated groups under the Employment Equity Act, which requires employers to implement affirmative action measures to redress disadvantages faced by women.[115] The justices delved into a detailed analysis of the gender representation within the SAPS branch where Ms Barnard worked. They note that while there was an even split between men and women overall (61 each out of 122 employees), there was a significant disparity in the higher salary levels. At levels 8 to 12, which required the National Commissioner's approval for appointments, there were 53 male employees but only 25 female employees.[116]

This analysis reveals a substantial pay gap between men and women in Ms Barnard's branch. The justices argue that her promotion to level 9 could have helped to alleviate this imbalance and address gender representivity at that level, where women were under-represented (13 women compared to 16 men).[117] The judgment thus highlights a crucial point: Ms Barnard's appointment could have improved one aspect of representivity (gender) while potentially exacerbating another (racial overrepresentation of white employees).[118] This demonstrates the complex interplay between different aspects of representivity that decision-makers must navigate. The justices acknowledge that the National Commissioner was not obliged to promote Ms Barnard solely because of the gender imbalance. They state that he was entitled to prioritise racial representivity over gender representivity but emphasised that such a decision requires proper justification.[119] This analysis emphasises the importance of a holistic approach to employment equity, as mandated by section 9 of the Constitution and section 15(4) of the Employment Equity Act.[120] The justices argue that decision-makers must consider all relevant aspects of a candidate's identity and how they could advance representivity in a manner consistent with the Act.[121]

Despite their criticisms of the National Commissioner's reasoning, describing his decision as "at best, opaque",[122] the justices ultimately conclude that his decision not to promote Ms Barnard was fair. They base this conclusion on the pronounced over-representation of white women at the salary level in question and the fact that Ms Barnard's subsequent promotion shows that the decision did not constitute an absolute bar to her advancement.[123] While agreeing with the outcome of the main judgment, this concurring judgment provides a more nuanced analysis of the tensions involved in implementing affirmative action measures and proposes a fairness standard for assessing such implementation. It emphasises the importance of careful reasoning and explanation in decisions involving restitutionary measures, particularly when they involve competing constitutional imperatives.

9.3.2 The concurring judgment of Van der Westhuizen J

Van der Westhuizen J's concurring judgment offers a detailed analysis of the constitutional and historical context of affirmative action measures, with a particular focus on human dignity and the balancing of competing rights. The judgment begins by acknowledging the historical context of inequality and the responsibility of current generations to address past injustices.[124] Van der Westhuizen J emphasises that while individuals may be "innocent" of past wrongs, they may still have benefited from unjust systems.[125] The judge then turns to the South African constitutional framework, highlighting the importance of human dignity, equality and non-racialism as founding values.[126] He stresses that discrimination ultimately boils down to the denial of human dignity.[127]

Van der Westhuizen J disagrees with the main judgment's finding that an enquiry into the National Commissioner's decision is not properly before the court. He argues that Ms Barnard's complaint to the Court was indeed about the lawfulness of a decision taken in implementing the Employment Equity Plan.[128]

The judgment provides a detailed analysis of section 9 of the Constitution, emphasising that the measures provided for

in section 9(2) are not exceptions to the right to equality, but form part of it.[129] The judge begins by outlining the structure of section 9, noting that subsection (2) addresses past wrongs, while subsections (3), (4) and (5) prohibit unfair discrimination to prevent future wrongs. He emphasises that this is the constitutional concept of equality agreed upon by the nation, stating that "equality cannot merely be a formal requirement – it has to have substance".[130] Crucially, Van der Westhuizen J argues that the measures provided for in section 9(2) are not exceptions to the right to equality, but form an integral part of it.[131] He cites the Constitutional Court's decision in *Van Heerden* to support this view, quoting: "[Restitutionary measures] are not in themselves a deviation from or invasive of, the right to equality guaranteed by the Constitution… [W]hat is clear is that our Constitution and in particular section 9 thereof, read as a whole, embraces for good reasons a substantive conception of equality inclusive of measures to redress existing inequality".[132] The judge argues that the appropriate assumption under the constitutional framework is that restitutionary or affirmative measures should be welcomed rather than viewed with suspicion. He states that these measures must be understood as "equality-driven mechanisms in their own right, rather than carve-outs from what is discriminatory".[133]

Van der Westhuizen J further emphasises that affirmative measures are critical to realising the constitutional promise of substantive equality. He notes that the structure and wording of Section 9 indicate that measures meeting the requirements of section 9(2) cannot be unfair discrimination under section 9(3) to (5).[134] The judge also points out that while race continues to be an important component of many restitutionary measures, the Constitution recognises that unfair discrimination can occur on various grounds, including social origin, disability, culture, language and birth.[135] This broader understanding of discrimination and disadvantage further emphasises the integral nature of restitutionary measures to the constitutional concept of equality. In essence, Van der Westhuizen J's analysis presents section 9(2) measures not as exceptions to equality, but as necessary tools for achieving the substantive equality envisioned by the Constitution. This interpretation sees

affirmative action as a positive aspect of equality, rather than a deviation from it, emphasising the transformative nature of the South African Constitution. Van der Westhuizen J argues that restitutionary measures should be welcomed rather than viewed with suspicion.[136]

The judge proposes a more nuanced approach to testing the implementation of affirmative action measures. While agreeing with the *Van Heerden* test for the validity of such measures, he argues that something more is needed when evaluating both a measure and its implementation.[137] He suggests that the impact of the implementation on other constitutional rights, particularly the right to human dignity, should be considered.[138] He argues that courts are generally reluctant to presume that provisions in the Constitution operate in tension, but emphasises that we should not overlook the impact of one right on other rights in specific situations.[139] The judge proposes a proportionality analysis, similar to that used in limitations of rights cases, to navigate the potential tension between different constitutional rights and values.[140] This analysis would consider factors such as the importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and its purpose and whether less restrictive means could achieve the purpose.[141] Van der Westhuizen J emphasises that this approach requires a case-sensitive and concrete assessment of competing rights. He argues that a right or value should not be compromised more than necessary in the context of a constitutional state founded on dignity, equality and freedom.[142]

Van der Westhuizen J expresses scepticism about using fairness as a standard for assessing the implementation of section 9(2) measures, arguing that it may lead to internal inconsistency.[143] Van der Westhuizen J explains that if "fairness" in this context relates to the unfair discrimination prohibition in section 9(3), relying on it with regard to affirmative measures under Section 9(2) may be problematic.[144] This is because section 9(3) deals with differentiation that amounts to unfair discrimination, while measures under section 9(2), by definition, do not amount to unfair discrimination.

The judge acknowledges that a fair measure may theoretically be implemented unfairly. However, he argues that in practice, it may seem incoherent to subject the implementation of a section 9(2) measure to section 9(3) fairness considerations. He contends that once a measure has withstood the section 9(2) *Van Heerden* enquiry and is found not to be unfair, another investigation into its fairness, informed by section 9(3) considerations, may not always make practical sense. Van der Westhuizen J also expresses reservations about using fairness in a wider, more general sense as a standard in this context. He argues that fairness is a vague concept and that life, and the law are not always "fair". He points out that the law often imposes restrictions which might seem "unfair" in their impact on individuals, but are necessary for practical reasons.[145] Instead, he proposes a proportionality analysis, which he argues is well-suited for navigating the contested terrain of competing rights or values.[146]

The judgment offers a detailed exploration of human dignity in the context of affirmative action measures.[147] Van der Westhuizen J argues that while affirmative action measures can enhance the dignity of society as a whole, their implementation could also impact on the human dignity of individuals.[148] The judge also considers the issue of service delivery, acknowledging the tension that can exist between efficiency and representivity. However, he cautions against courts making evaluations about service delivery from a distance, arguing that the National Commissioner is better placed to make such assessments.[149] Finally, Van der Westhuizen J addresses the issue of reasons given for decisions. He argues that even if a decision does not constitute administrative action, an applicant may still be entitled to reasons.[150] He concludes that in this case, the reasons provided by the National Commissioner were adequate, although they could have been more comprehensive.[151]

In conclusion, while agreeing with the outcome of the main judgment, Van der Westhuizen J's concurring judgment offers a more nuanced approach to assessing the implementation of affirmative action measures, with a particular emphasis on

human dignity and the need for a proportionality analysis when balancing competing rights and values.

9.3.3 The dissenting judgment of Jafta J

Jafta J's concurring judgment agrees with the main judgment that the appeal should succeed and the Supreme Court of Appeal's order should be set aside.[152] However, he disagrees with the other judgments and provides additional reasons for not deciding the new cause of action raised by Ms Barnard in the Constitutional Court.[153] Jafta J emphasises that Ms Barnard's original claim in the Labour Court was for unfair discrimination based on race, not a review of the National Commissioner's decision.[154] He reiterates the legal principle that parties must plead their cause of action in the court of first instance to warn other parties of the case they must meet, promoting fairness in litigation as guaranteed by section 34 of the Constitution.[155] The judgment explains that allowing a party to raise a new cause of action on appeal is a matter of discretion, which should only be exercised if it would not be unfair to the other parties.[156] Jafta J finds no basis to allow Ms Barnard to raise a different cause of action in the Constitutional Court, as it was not covered by the pleadings or fully canvassed in evidence.

Jafta J then addresses the issue of determining an appropriate standard for implementing affirmative action measures, which was not raised by the parties. He states that courts generally should not raise issues *mero motu* unless they are apparent from the papers and necessary for proper adjudication of the case.[157] He argues that determining the appropriate standard is not necessary to dispose of this case and any opinion on it would be *obiter*.[158]

The judgment expresses concern about the court attempting to determine a standard when its members disagree on what it should be, with some preferring fairness and others proportionality.[159] Jafta J questions the source of fairness as a standard, noting that section 9(2) of the Constitution and the Employment Equity Act mandate restitutionary measures and declare that implementing them does not constitute unfair discrimination.[160] Jafta J argues that applying a fairness

standard would require weighing competing interests, which could undermine the objective of achieving equality in the workplace.[161] He emphasises the importance of considering the historical context that led to white employees being over-represented in certain positions.[162]

The judgment approvingly cites the Labour Appeal Court's reasoning that implementing restitutionary measures cannot be subject to an individual's right to equality, as this would perpetuate inequitable representation.[163] Jafta J notes that as specialist courts, the Labour Court and Labour Appeal Court should lead in developing labour law jurisprudence.[164] In conclusion, Jafta J argues that these issues could have been addressed if the question of standard had been raised and properly argued. Given the circumstances, he believes that it is appropriate to defer the determination of the standard to another case.[165]

9.4 Several different tests

As Le Roux points out,

> "[i]t is disappointing that the Court did not decide the issue of the appropriate test for assessing the implementation of affirmative action measures. This is an issue that will have to be dealt with by arbitrators when considering promotion disputes where the employer has sought to rely on an affirmative action measure in the form of an employment equity plan to justify promotions or the decision not to promote. It is also an issue that an employer will have to consider in deciding whether it will utilise affirmative action criteria when deciding on the selection of employees to be retrenched."[166]

That the lower courts find themselves bound to the "bare minimum" standard of rationality endorsed by the majority in *Barnard* was made clear in *Ethekwini Municipality v Nadesan*,[167] where the Labour Court examined a case where an Indian male candidate, despite scoring highest, was denied a senior position because of over-representation of Indian males at that level.

The court, referencing the *Barnard* case, determined that the municipality's decision lacked rationality and was, therefore, unlawful.[168] This finding of irrationality precluded the need to assess the fairness of the decision.[169] The court essentially concluded that the municipality's exclusion of the applicant constituted unfair discrimination. Although the Employment Equity Plan itself was not challenged, the court reasoned that an irrational act cannot be considered compliant with the plan. The court agreed "that *Barnard* did not hold that employees may not challenge decisions purportedly implementing an equity plan without challenging the plan itself. Such a conclusion would lead to the bizarre situation that an employee would be denied the right to allege unfair discrimination each time a decision was taken purportedly in terms of a perfectly valid and acceptable employment equity plan".[170]

In his discussion of the case, McConnachie argues that the Constitutional Court needs to develop and clarify its approach to reviewing affirmative action measures in three key ways. Firstly, he contends that the *Van Heerden* test should be applied under the Employment Equity Act and other legislation to assess both affirmative action measures and their implementation. He criticises the court's suggestion in *Barnard* that different tests may be needed for measures versus implementation, arguing that there is "no principled or practical reason for creating entirely separate tests".[171] McConnachie argues strongly for applying the *Van Heerden* test consistently to both affirmative action measures and their implementation under the Employment Equity Act and other relevant legislation. He takes issue with the Constitutional Court's suggestion in *Barnard* that separate tests may be needed for assessing measures versus their implementation. He points out that in unfair discrimination cases, a single test (the *Harksen* test) is used to assess both policies and their implementation under section 6 of the Employment Equity Act. He questions why affirmative action should be treated differently, stating "[t]here is no bifurcation of tests in assessing unfair discrimination challenges under section 6 of the EEA".[172] He argues that the *Van Heerden* test was clearly designed to consider both measures and implementation together. He notes that the third requirement of the test, which

focuses on the benefits and negative impacts of affirmative action, "would be impossible to consider … without any regard for how they are or will be implemented in practice".[173]

Importantly, McConnachie contends that separate tests could "dilute the protections afforded to historically disadvantaged groups".[174] He provides an example of how an Employment Equity Plan could harm disabled people either through its design or its implementation. He argues that it would make no sense to apply different levels of scrutiny in these scenarios, as the impact on the disadvantaged group would be the same. The author acknowledges that there are conceptual differences between measures and implementation but maintains that these differences do not justify separate tests. He argues that creating distinct tests could lead to inconsistent outcomes and potentially allow abuses to slip through unchecked.[175] Overall, he advocates for a unified approach using the *Van Heerden* test, arguing that this would provide more coherent and effective protection for disadvantaged groups in affirmative action cases.

Second, McConnachie argues that the court must confirm that the *Van Heerden* test involves a proportionality analysis, rather than mere rationality. He states that "the *Van Heerden* test clearly contemplates some form of proportionality analysis, which involves weighing up the benefits of the affirmative action measure against its impact on those who are excluded".[176] he interprets the third requirement of the *Van Heerden* test as clearly contemplating a proportionality analysis. This requirement asks whether the measure "promote[s] the achievement of equality".[177] McConnachie argues that this necessarily involves weighing the benefits of the affirmative action measure against its negative impacts on excluded groups. He criticises the view expressed by some commentators that *Van Heerden* only requires a rationality analysis. McConnachie contends that a mere rationality test would be insufficient, as it "would only be concerned with assessing whether the measure is rationally capable of advancing the legitimate purpose of benefitting disadvantaged groups".[178] This approach would

ignore any potential negative consequences of affirmative action measures.

McConnachie emphasises the importance of considering these potential negative impacts, particularly where affirmative action measures might harm or exclude members of other historically disadvantaged groups. He provides an example of a bursary scheme that benefits women at the expense of disabled students, arguing that a proportionality analysis is necessary to properly balance these competing interests. He further argues that proportionality is a common tool of practical reasoning used in various areas of constitutional law, not just in the limitations analysis under section 36 of the Constitution. McConnachie notes that proportionality is "applied in areas as diverse as the test for arbitrary deprivations of property, unfair discrimination and public participation in law-making".[179]

Third, and most significantly, McConnachie contends that the court needs to develop a principled approach to varying the intensity of review when applying the *Van Heerden* test. He argues that the court must "openly justify its chosen intensity of review by reference to a set of three principles: the interests at stake, relative institutional competence, and considerations of democratic legitimacy".[180] McConnachie suggests that this "doctrine of deference" is needed to guide courts on when to apply a more or a less stringent approach to affirmative action measures. McConnachie proposes three key principles to guide this "doctrine of deference":[181]

> The interests at stake: This principle requires courts to consider both the general constitutional preference for affirmative action and the specific interests in each case. McConnachie argues that where an affirmative action measure has proven benefits, courts should apply less intense scrutiny. Conversely, if a measure severely impacts historically disadvantaged groups, more intense scrutiny is warranted.[182]
>
> Relative institutional competence: This principle asks courts to recognise the limits of their expertise and be cautious about second-guessing decisions made by

> bodies with greater capacity, experience and information. However, McConnachie notes that this can also justify more intense scrutiny where courts are better equipped to decide matters or where other state organs have displayed incompetence.[183]
>
> Considerations of democratic legitimacy: This principle requires courts to be cautious about second-guessing decisions made by representative bodies. For example, McConnachie suggests that an Employment Equity Plan developed through a bargaining council should generally receive less intense scrutiny. However, he also notes that democratic legitimacy may sometimes require closer scrutiny, particularly where marginalised groups have been ignored in the decision-making process.[184]

McConnachie argues that these principles should be openly weighed and justified in each case. He contends that this approach is necessary not only for transparency and accountability, but also to provide guidance to lower courts on navigating these complex issues. Furthermore, McConnachie suggests that this doctrine of deference should include both a "baseline intensity" of review, a minimum level of scrutiny that cannot be reduced, and principles for varying the intensity beyond this baseline.[185] This approach, he argues, would provide a structured yet flexible framework for courts to assess affirmative action measures consistently and transparently. Overall, McConnachie's central thesis is that greater clarity and guidance is urgently needed on the appropriate standard of review for affirmative action cases, particularly regarding when and how to vary the intensity of scrutiny. He argues that this is crucial for providing certainty and consistency in future decisions.

9.5 Giving meaning to the *Barnard* principle

The later *Solidarity* case[186] demonstrates how the Constitutional Court interpreted and applied the principles established in *Barnard* when evaluating the Department of Correctional Services' Employment Equity Plan. The Solidarity case

concerned a challenge to the Employment Equity Plan of the Department of Correctional Services for the period 2010 to 2014. Solidarity, a trade union and several individual applicants (mostly coloured employees) contested the Department's refusal to appoint them to certain positions. The Department had based its decisions on the fact that coloured people and women were already overrepresented in the relevant occupational levels according to the national demographic profile used in its plan. The applicants argued that the plan was invalid as it did not comply with the Employment Equity Act, particularly in its failure to consider both national and regional demographics when setting numerical targets. They also contended that the Department's decisions constituted unfair discrimination and unfair labour practices. The case progressed through the Labour Court and Labour Appeal Court before reaching the Constitutional Court, with each court offering different interpretations of the plan's validity and the appropriate remedies for the affected employees.[187]

In *Barnard*, the court held that an employer could refuse to appoint a candidate if doing so would worsen representivity at a particular occupational level, even if that candidate scored highest in the selection process.[188] The majority of the *Solidarity* Court affirmed that this principle applies not only to white candidates but also to African, coloured and Indian candidates, as well as to both men and women.[189] As Zondo J, writing for the majority explained, "the transformation of the workplace entails, in my view, that the workforce of an employer should be broadly representative of the people of South Africa".[190] The majority emphasised that achieving a representative workforce requires considering all racial groups and both genders, not just focusing on one or two groups to the exclusion of others.[191] Zondo J stated that "the level of representation of each group must broadly accord with its level of representation among the people of South Africa".[192] Importantly, the majority judgment clarified that the "*Barnard* principle" allows an employer to deny appointment to a candidate from any designated group (African, coloured, Indian, women) if that group is already adequately represented or overrepresented at the relevant occupational

level.[193] This extends the application of *Barnard* beyond just white candidates.

The court found the plan to be unlawful on other grounds, particularly its failure to consider both national and regional demographics as required by section 42 of the Employment Equity Act.[194] This demonstrates the court's willingness to scrutinise the details of employment equity plans for compliance with the Act, even while affirming the general principles from *Barnard*. The majority judgment thus shows how the Constitutional Court has built upon and clarified the *Barnard* precedent, providing more detailed guidance on the implementation of employment equity measures while still emphasising the goal of achieving a workforce broadly representative of South Africa's population.

The majority judgment in *Solidarity*, did not explicitly apply or discuss the *Van Heerden* test or directly address the rationality of the Employment Equity Plan's implementation. He also did not engage in a broader fairness or proportionality analysis as suggested by some of the other judgments in *Barnard*. Instead, the judgment focused primarily on whether the plan complied with specific provisions of the Employment Equity Act. The majority's analysis centred on whether the Department's Employment Equity Plan complied with section 42 of the Employment Equity Act, which requires consideration of both national and regional demographics.[195] Zondo J concluded that the Department had acted unlawfully by failing to consider regional demographics: "In failing to use the demographic profile of both the national and regional economically active population to set the numerical targets, the Department acted in breach of its obligation in terms of section 42(a) and, thus, unlawfully".[196]

This approach, it is submitted, can be characterised as a "statutory compliance test" for evaluating Employment Equity Plans and their implementation. The approach can be seen as a pragmatic test that prioritises the statutory framework created by Parliament to implement the constitutional mandate for affirmative action, rather than developing additional judicial criteria. This aligns with the principle of judicial deference to

legislative choices in implementing constitutional rights, while still allowing for judicial oversight to ensure compliance with the statutory scheme.

Nugent AJ's minority judgment in *Solidarity* offers a different interpretation of the *Barnard* case and its implications. He emphasises the need for a more nuanced and balanced approach to employment equity, drawing on various principles articulated in *Barnard*. Nugent AJ begins by highlighting the court's recognition in *Barnard* of the difficulties in realising the transformative aspirations of the Constitution. He quotes Moseneke ACJ's statement that "[m]easures that are directed at remedying past discrimination must be formulated with due care not to invade unduly the dignity of all concerned".[197] This sets the tone for his critique of the Department's Employment Equity Plan, which he views as lacking the "thoughtful, empathetic, and textured" approach called for in *Barnard*.[198] The minority judgment interprets *Barnard* as requiring a careful balancing of various constitutional imperatives. Nugent AJ cites the concurring judgment of Cameron J, Froneman J and Majiedt AJ in *Barnard*, which stressed the need to remain vigilant that remedial measures "must not unduly invade the human dignity of those affected by them".[199] He argues that the Department's plan fails to achieve this balance, describing it as "cold and impersonal arithmetic".[200]

Nugent AJ's interpretation of *Barnard* leads him to scrutinise the Department's plan more closely than the majority. He argues that the plan's rigid numerical targets constitute quotas, which are prohibited by the Employment Equity Act. He disagrees with the majority's view that the provision for deviations makes the targets flexible, stating "[w]e are concerned with the general application of the Plan – not with special cases to which the Plan does not apply".[201] Drawing on Moseneke ACJ's description in *Barnard* of numerical targets as "employment guidelines", Nugent AJ argues that the Department's plan lacks the necessary flexibility and discretion.[202] He contends that without such flexibility, the plan cannot avoid unduly infringing the dignity of applicants, which was a key concern in *Barnard*.[203]

Importantly, Nugent AJ interprets *Barnard* as requiring a more holistic approach to achieving representivity. He argues that the Department's focus on national demographics alone, without considering regional distribution, is irrational and fails to serve the purpose of an Employment Equity Plan.[204] This interpretation extends the principles from *Barnard* to require a more nuanced consideration of demographic realities. In conclusion, Nugent AJ's minority judgment in *Solidarity* interprets *Barnard* as calling for a "visionary and textured employment equity plan that incorporates mechanisms enabling thoughtful balance to be brought to a range of interests".[205] He views the Department's plan as falling short of this standard, demonstrating a more stringent application of the principles articulated in *Barnard* than the majority judgment.

Nugent AJ argues that if population demographics are used to measure employment equity, all relevant characteristics of the population must be considered, not just a select few. He contends that focusing on only one aspect while disregarding other pertinent factors leads to an irrational outcome, which is not acceptable under the law. To support this view, he cites the *Barnard* case, which established that the implementation of restitutionary measures must be as a "bare minimum" rationally connected to their objectives and purpose. Nugent AJ further reinforces this point by referencing the concurring judgment of Cameron J, Froneman J and Majiedt A in *Barnard*, which affirmed that rationality is the minimum standard for all exercises of public power. This emphasis on rationality forms the basis of Nugent AJ's critique of the Department's Employment Equity Plan, suggesting that its narrow focus on national demographics without considering regional distribution fails to meet this fundamental legal requirement.[206]

Devenish views the *Solidarity* case as a landmark judgment that addresses crucial employment equity and labour relations issues in South Africa. He considers it a "great triumph par excellence for non-racism" in South African jurisprudence.[207] The author praises the majority judgment for its interpretation of the Employment Equity Act. He notes that the court held that all subgroups falling under the "black" group must be

equitably represented within all occupational levels, prohibiting overrepresentation of one group over another.[208] He also approves of the court's distinction between prohibited quotas and permissible numerical target.[209] However, Devenish finds the minority judgment by Nugent AJ more compelling, particularly regarding the issue of quotas versus numerical targets. He argues that Nugent A's approach is "both rational and flexible, and in effect is two-dimensional and as a result, preferable to the one-dimensional one advocated by Zondo J".[210] Devenish appreciates Nugent AJ's emphasis on both flexibility and rationality in implementing employment equity measures.

Devenish sees the judgment as a significant victory for non-racism and the protection of vulnerable minorities against domination by the African majority. He states that the judgment makes it "categorically clear that there is no place for racial domination in our constitutional dispensation or body politic".[211] He believes that this ruling will have a substantial impact on other government departments and promote diversity and constitutionalism.[212] Furthermore, Devenish commends the judgment for its nuanced approach to equality, citing various previous cases that have shaped South Africa's equality jurisprudence. He emphasises the importance of achieving substantive equality while being careful not to unduly invade the dignity of all concerned.[213]

In conclusion, Devenish views the *Solidarity* judgment as an important advancement in understanding and applying non-racism in the South African Constitution. While acknowledging that transformation is not always painless, he argues that the judgment demonstrates the need for a judicious balancing of conflicting interests. Ultimately, Devenish favours Nugent AJ's approach, which he believes epitomises the "wisdom of Solomon" to a greater extent than Zondo J's judgment.[214]

9.6 Conclusion

In conclusion, the *Solidarity* case demonstrates that the Constitutional Court is still grappling with the appropriate test for evaluating the implementation of affirmative action measures. While the *Barnard* case established some key

principles, the divergent approaches taken by the majority and minority judgments in *Solidarity* reveal that there is no clear consensus on how these principles should be applied in practice.

In *Barnard*, the various judgments differ in their approaches to the appropriate test for evaluating the implementation of affirmative action measures. The main judgment by Moseneke ACJ holds that the implementation of remedial measures must be rational, stating this is the "bare minimum" requirement. It does not endorse a more stringent standard, finding it unnecessary to "define the standard finally" in this case.[215] The concurring judgment by Cameron J, Froneman J and Majiedt AJ agrees with the rationality standard "bare minimum" requirement but argued for a fairness standard that is "rigorous enough to ensure that the implementation of a remedial measure is 'consistent with the purpose of [the] Act'".[216] They contend that mere rationality is insufficient, as it would not allow proper scrutiny of whether numerical targets are being applied too rigidly as quotas or whether the interests of different designated groups are being appropriately balanced.[217]

The concurring judgment by Van der Westhuizen J proposed a proportionality analysis to evaluate the implementation of affirmative action measures. He suggested examining whether "the impact of the implementation of a section 9(2) measure on other rights is more severe than necessary to achieve their purpose".[218] This would involve weighing competing rights and interests in a context-specific manner. Van der Westhuizen J is sceptical of using fairness as the standard, arguing that it risks internal inconsistency to subject section 9(2) measures to a fairness analysis after they have already been found not to constitute unfair discrimination.[219] He contends that proportionality is better suited to navigating "the contested terrain of competing rights or values".[220] Jafta J, in dissent, argued against determining any general standard in this case. He contends the issue was not properly raised by the parties or adequately argued before the court.[221] He expresses concerns about the court raising the issue *mero motu* when it is not necessary to resolve the case at hand.[222]

In *Solidarity,* the majority judgment, authored by Zondo J, focused primarily on compliance with the specific provisions of the Employment Equity Act, particularly the requirement to consider both national and regional demographics. This approach emphasises statutory compliance as the key criterion for evaluating affirmative action measures. In contrast, the minority judgment by Nugent AJ advocated for a more nuanced, context-sensitive approach that considers a broader range of factors, including the impact on individual dignity and the rationality of the measures considering demographic realities.

This ongoing debate about the correct approach is of crucial importance from a societal perspective. Affirmative action measures are intended to address historical injustices and promote substantive equality, but their implementation can have far-reaching consequences for individuals and communities. The approach taken by courts in evaluating these measures can significantly influence their effectiveness in achieving societal transformation, as well as their impact on social cohesion and individual rights. A more rigid, compliance-focused approach might provide clarity and predictability for employers implementing affirmative action plans, but it risks overlooking important nuances and potentially perpetuating new forms of disadvantage. Conversely, a more flexible, context-sensitive approach might better account for the complex realities of South Africa's diverse population, but it could lead to uncertainty and inconsistency in the application of affirmative action measures. The lack of a settled approach also reflects the ongoing societal debate about how best to achieve the constitutional goal of substantive equality while respecting individual rights and maintaining social cohesion. As South Africa continues to grapple with the legacy of apartheid and persistent inequalities, the evolution of legal tests for evaluating affirmative action measures will play a crucial role in shaping the country's path towards a more equitable society.

Ultimately, the tension evident in the *Solidarity* judgments emphasises the need for continued dialogue and jurisprudential development in this area. As the Constitutional Court refines its approach in future cases, it will need to balance the imperative

of transformation with the protection of individual rights, the promotion of social cohesion and the practical realities of implementing affirmative action in a diverse and complex society. This ongoing process of legal and societal negotiation is essential for ensuring that affirmative action measures effectively contribute to the realisation of South Africa's constitutional vision of equality and dignity for all.

The "*Barnard* principle", as elucidated and expanded in *Solidarity*, has significant implications for the implementation of affirmative action measures in South Africa. This principle, which allows employers to refuse appointments that would negatively affect representivity, has been extended beyond its original application to white candidates. As Zondo J clarified in *Solidarity*, it now applies to all designated groups, including African, coloured and Indian candidates, as well as both men and women.[223] This extension of the "*Barnard* principle" has far-reaching consequences. It means that members of any designated group may be denied appointment or promotion if their group is already adequately represented or overrepresented at the relevant occupational level. This approach aims to achieve a workforce that is broadly representative of South Africa's demographic diversity across all levels.

However, the application of this principle raises complex issues. While it may promote overall representivity, it can lead to individual hardships and potentially create new patterns of disadvantage within and between designated groups. It may, for instance, disadvantage individuals from designated groups in regions where their group constitutes a majority, as seen in the case of coloured applicants in the Western Cape. Moreover, the "*Barnard* principle", as applied in *Solidarity*, emphasises demographic representivity as a primary measure of employment equity. This focus on numbers, while quantifiable and seemingly objective, may not always align with the broader goals of substantive equality and social transformation. It might, in some cases, overshadow other important factors such as individual merit, skills shortages, or specific operational needs of employers.

The expansion of the "*Barnard* principle" thus adds another layer of complexity to the already challenging task of implementing affirmative action measures. It requires employers and courts to navigate a delicate balance between achieving broad representivity and avoiding unfair discrimination against individuals from any designated group.

As South African society continues to evolve, the application and consequences of the "*Barnard* principle" will likely be subject to further scrutiny and refinement. Future cases may need to address how this principle can be applied in a manner that promotes substantive equality while also respecting individual rights and the diverse needs of different regions and sectors of the economy. The ongoing development of this principle will play a crucial role in shaping the future of employment equity and affirmative action in South Africa.

Endnotes

1 2014 6 SA 123 (CC) (*Barnard* (CC)).
2 55 of 1998.
3 *Barnard* (CC) (n 1) par 7.
4 *Barnard* (CC) (n 1) par 8.
5 *Barnard* (CC) (n 1) par 9.
6 *Barnard* (CC) (n 1) par 10.
7 *Barnard* (CC) (n 1) par 11.
8 *Barnard* (CC) (n 1) par 11.
9 *Barnard* (CC) (n 1) par 13.
10 *Barnard* (CC) (n 1) par 14.
11 *Barnard* (CC) (n 1) par 14–15.
12 *Barnard* (CC) (n 1) par 15.
13 *Barnard* (CC) (n 1) par 16.
14 *Barnard* (CC) (n 1) par 16.
15 *Barnard* (CC) (n 1) par 17.
16 *Barnard* (CC) (n 1) par 17.
17 *Solidarity obo Barnard v South African Police Services* 2010 31 ILJ 742 (LC) (*Barnard* (LC)).
18 *Barnard* (LC) (n 17) par 25.1.
19 *Barnard* (LC) (n 17) par 25.2.
20 *Barnard* (LC) (n 17) par 25.3.
21 *Barnard* (LC) (n 17) par 25.4.
22 *Barnard* (LC) (n 17) par 33.
23 *Barnard* (LC) (n 17) par 33.
24 *Barnard* (LC) (n 17) par 38.
25 *Barnard* (LC) (n 17) par 39.
26 *Barnard* (LC) (n 17) par 42.
27 *Barnard* (LC) (n 17) par 43.2.
28 *Barnard* (LC) (n 17) par 43.6.
29 *Barnard* (LC) (n 17) par 44.
30 *South African Police Services v Solidarity obo Barnard* 2013 34 ILJ 590 (LAC) (*Barnard* (LAC)).
31 *Barnard* (LAC) (n 30) par 30.
32 *Barnard* (LAC) (n 30) par 30.
33 *Barnard* (LAC) (n 30) par 34.
34 *Barnard* (LAC) (n 30) par 34.
35 *Barnard* (LAC) (n 30) par 42.
36 *Barnard* (LAC) (n 30) par 42.
37 *Barnard* (LAC) (n 30) par 46.
38 *Barnard* (LAC) (n 30) par 46.
39 *Barnard* (LAC) (n 30) par 43.
40 *Barnard* (LAC) (n 30) par 47.
41 *Solidarity obo Barnard v South African Police Service* 2014 2 SA 1 (SCA) (*Barnard* (SCA)).
42 *Barnard* (SCA) (n 41) par 52.
43 *Barnard* (SCA) (n 41) par 50.
44 *Barnard* (SCA) (n 41) par 56.
45 *Barnard* (SCA) (n 41) par 67.
46 *Barnard* (SCA) (n 41) par 75.
47 *Barnard* (SCA) (n 41) par 68.
48 *Barnard* (SCA) (n 41) par 73.

49 *Barnard* (SCA) (n 41) par 74.
50 *Barnard* (SCA) (n 41) par 79.
51 *Barnard* (SCA) (n 41) par 81.
52 *Barnard* (CC) (n 1) par 1.
53 *Barnard* (CC) (n 1) par 28.
54 *Barnard* (CC) (n 1) par 29.
55 *Barnard* (CC) (n 1) par 30.
56 *Barnard* (CC) (n 1) par 30.
57 *Barnard* (CC) (n 1) par 35.
58 1998 1 SA 300 (CC). See also Van Staden "The right to equality and the adoption of a concrete test for unfair discrimination – *Harksen v Lane*" in Laubscher and Van Staden (eds) *Landmark Constitutional Cases that Changed South Africa* (2023) 185–215.
59 *Barnard* (CC) (n 1) par 51.
60 *Minister of Finance v Van Heerden* 2004 6 SA 121 (CC) par 43.
61 *Barnard* (CC) (n 1) par 36.
62 *Barnard* (CC) (n 1) par 37.
63 *Barnard* (CC) (n 1) par 37.
64 *Barnard* (CC) (n 1) par 38.
65 *Barnard* (CC) (n 1) par 39.
66 *Barnard* (CC) (n 1) par 38.
67 For example, in *Solidarity v Department of Correctional Services* 2016 5 SA 594 (CC) (*Solidarity*) par 37–40. See also *Ethekwini Municipality v IMATU obo Naidoo* (D285/15) 2017 ZALCD 15 (6 June 2017).
68 *Barnard* (CC) (n 1) par 39.
69 *Barnard* (CC) (n 1) par 39.
70 *Barnard* (CC) (n 1) par 39.
71 *Barnard* (CC) (n 1) par 51.
72 *Barnard* (CC) (n 1) par 52.
73 *Barnard* (CC) (n 1) par 47.
74 *Barnard* (CC) (n 1) par 66–67.
75 *Barnard* (CC) (n 1) par 64.
76 *Barnard* (CC) (n 1) par 64.
77 *Barnard* (CC) (n 1) par 64.
78 *Barnard* (CC) (n 1) par 64.
79 *Barnard* (CC) (n 1) par 67.
80 *Barnard* (CC) (n 1) par 70.
81 *Barnard* (CC) (n 1) par 72–73.
82 *Barnard* (CC) (n 1) par 74.
83 *Barnard* (CC) (n 1) par 77.
84 *Barnard* (CC) (n 1) par 77.
85 *Barnard* (CC) (n 1) par 75.
86 *Barnard* (CC) (n 1) par 76.
87 *Barnard* (CC) (n 1) par 98.
88 *Barnard* (CC) (n 1) par 94.
89 *Barnard* (CC) (n 1) par 95.
90 *Barnard* (CC) (n 1) par 95.
91 *Barnard* (CC) (n 1) par 95.
92 *Barnard* (CC) (n 1) par 96.
93 *Barnard* (CC) (n 1) par 96.
94 *Barnard* (CC) (n 1) par 96.
95 *Barnard* (CC) (n 1) par 98.

96 *Barnard* (CC) (n 1) par 98.
97 *Barnard* (CC) (n 1) par 98.
98 *Barnard* (CC) (n 1) par 99–101.
99 *Barnard* (CC) (n 1) par 100.
100 *Barnard* (CC) (n 1) par 101.
101 *Barnard* (CC) (n 1) par 87–89.
102 *Barnard* (CC) (n 1) par 89.
103 *Barnard* (CC) (n 1) par 107.
104 *Barnard* (CC) (n 1) par 106.
105 *Barnard* (CC) (n 1) par 108–111.
106 *Barnard* (CC) (n 1) par 108.
107 *Barnard* (CC) (n 1) par 108.
108 *Barnard* (CC) (n 1) par 108.
109 *Barnard* (CC) (n 1) par 109.
110 *Barnard* (CC) (n 1) par 110.
111 *Barnard* (CC) (n 1) par 111.
112 *Barnard* (CC) (n 1) par 112.
113 *Barnard* (CC) (n 1) par 115–116.
114 *Barnard* (CC) (n 1) par 114.
115 *Barnard* (CC) (n 1) par 114–115.
116 *Barnard* (CC) (n 1) par 115.
117 *Barnard* (CC) (n 1) par 115.
118 *Barnard* (CC) (n 1) par 116.
119 *Barnard* (CC) (n 1) par 116.
120 *Barnard* (CC) (n 1) par 119.
121 *Barnard* (CC) (n 1) par 118.
122 *Barnard* (CC) (n 1) par 107.
123 *Barnard* (CC) (n 1) par 123.
124 *Barnard* (CC) (n 1) par 125–129.
125 *Barnard* (CC) (n 1) par 128.
126 *Barnard* (CC) (n 1) par 129–120.
127 *Barnard* (CC) (n 1) par 130.
128 *Barnard* (CC) (n 1) par 133.
129 *Barnard* (CC) (n 1) par 133–136.
130 *Barnard* (CC) (n 1) par 135.
131 *Barnard* (CC) (n 1) par 136.
132 *Barnard* (CC) (n 1) par 136.
133 *Barnard* (CC) (n 1) par 137.
134 *Barnard* (CC) (n 1) par 138.
135 *Barnard* (CC) (n 1) par 139.
136 *Barnard* (CC) (n 1) par 137.
137 *Barnard* (CC) (n 1) par 142–145.
138 *Barnard* (CC) (n 1) par 161–167.
139 *Barnard* (CC) (n 1) par 161.
140 *Barnard* (CC) (n 1) par 165.
141 *Barnard* (CC) (n 1) par 163.
142 *Barnard* (CC) (n 1) par 166.
143 *Barnard* (CC) (n 1) par 157–160.
144 *Barnard* (CC) (n 1) par 158.
145 *Barnard* (CC) (n 1) par 159.
146 *Barnard* (CC) (n 1) par 165.
147 *Barnard* (CC) (n 1) par 168–183.

148 *Barnard* (CC) (n 1) par 176–177.
149 *Barnard* (CC) (n 1) par 184–189.
150 *Barnard* (CC) (n 1) par 191–192.
151 *Barnard* (CC) (n 1) par 194.
152 *Barnard* (CC) (n 1) par 196.
153 *Barnard* (CC) (n 1) par 197.
154 *Barnard* (CC) (n 1) par 200–201.
155 *Barnard* (CC) (n 1) par 213–214.
156 *Barnard* (CC) (n 1) par 212.
157 *Barnard* (CC) (n 1) par 217–219.
158 *Barnard* (CC) (n 1) par 221.
159 *Barnard* (CC) (n 1) par 222.
160 *Barnard* (CC) (n 1) par 223–226.
161 *Barnard* (CC) (n 1) par 228–229.
162 *Barnard* (CC) (n 1) par 230–231.
163 *Barnard* (CC) (n 1) par 231–232.
164 *Barnard* (CC) (n 1) par 232.
165 *Barnard* (CC) (n 1) par 233.
166 "The Barnard decision – what it means: Differences in the decisions of the Constitutional Court in key judgement on affirmative action" 2014 *Contemporary Labour Law* 11 17.
167 2021 42 ILJ 1480 (LC) (*Nadesan*).
168 *Nadesan* (n 167) par 40.
169 *Nadesan* (n 167) par 26.
170 *Nadesan* (n 167) par 18.
171 McConnachie "Affirmative action and intensity of review: *South African Police Service v Solidarity obo Barnard*" 2015 163 *Constitutional Court Review* 186.
172 McConnachie (n 171) 186.
173 McConnachie (n 171) 186.
174 McConnachie (n 171) 186.
175 McConnachie (n 171) 187.
176 McConnachie (n 171) 172.
177 McConnachie (n 171) 171.
178 McConnachie (n 171) 188.
179 McConnachie (n 171) 188.
180 McConnachie (n 171) 185.
181 McConnachie (n 171) 193.
182 McConnachie (n 171) 193.
183 McConnachie (n 171) 194.
184 McConnachie (n 171) 194.
185 McConnachie (n 171) 195.
186 *Solidarity* (n 67) 62.
187 *Solidarity* (n 67) 1–17.
188 *Solidarity* (n 67) 62.
189 *Solidarity* (n 67) 39–40.
190 *Solidarity* (n 67) 40.
191 *Solidarity* (n 67) 40–41.
192 *Solidarity* (n 67) 40.
193 *Solidarity* (n 67) 42.
194 *Solidarity* (n 67) 78–80.
195 *Solidarity* (n 67) 78–80.

196 *Solidarity* (n 67) 79.
197 *Solidarity* (n 67) 99.
198 *Solidarity* (n 67) 102.
199 *Solidarity* (n 67) 100.
200 *Solidarity* (n 67) 102.
201 *Solidarity* (n 67) 113.
202 *Solidarity* (n 67) 116–117.
203 *Solidarity* (n 67) 117.
204 *Solidarity* (n 67) 131.
205 *Solidarity* (n 67) 133.
206 *Solidarity* (n 67) 122.
207 "A great triumph par excellence for non-racism in our jurisprudence: *Solidarity v Department of Correctional Services* 2016 (5) SA 594 (CC)" 2017 *Obiter* 222 222.
208 Devenish (n 207) 222–223.
209 Devenish (n 207) 223.
210 Devenish (n 207) 225.
211 Devenish (n 207) 227.
212 Devenish (n 207) 226–227.
213 Devenish (n 207) 227–228.
214 Devenish (n 207) 228.
215 *Barnard* (CC) (n 1) par 39.
216 *Barnard* (CC) (n 1) par 97.
217 *Barnard* (CC) (n 1) par 96.
218 *Barnard* (CC) (n 1) par 164.
219 *Barnard* (CC) (n 1) par 158.
220 *Barnard* (CC) (n 1) par 165.
221 *Barnard* (CC) (n 1) par 215.
222 *Barnard* (CC) (n 1) par 221.
223 *Solidarity* (n 67) 39–40.

Chapter 10

Independent Candidates and Electoral Reform in South Africa: Striking a Balance between Sections 18 and 19 of the Constitution

New Nation Movement NPC v President of the Republic of South Africa[1]

Roxan Laubscher
Faculty of Law;
University of Johannesburg
Johannesburg, South Africa

Marthinus van Staden
School of Law,
University of the Witwatersrand
Johannesburg, South Africa

"In sum, choosing to associate is an exercise of the right to freedom of association. Choosing to dissociate from that which you earlier associated with is also an exercise of that right. Choosing not to associate at all too is an exercise of the right. A restraint on any of these choices is a negation of the right. It is axiomatic then that if

> the state compels an individual to associate when she or he does not want to, that limits the right to freedom of association. That must mean the reading of section 19(3)(*b*) contended for by the respondents results in a denial of the right to freedom of association" (*New Nation Movement* par 58–59).

Abstract

The *New Nation Movement NPC v President of the Republic of South Africa* case represents a watershed moment in South African constitutional jurisprudence that fundamentally transformed the country's electoral landscape. In a historic ruling, the Constitutional Court found that the Electoral Act 73 of 1998 was unconstitutional to the extent that it prevented adult citizens from standing as independent candidates in national and provincial elections. This landmark decision hinged on the court's novel interpretation of section 19(3)(*b*) of the Constitution, which guarantees every adult citizen the right "to stand for public office and, if elected, to hold office". The majority judgment held that this right must be read harmoniously with section 18, which protects freedom of association, concluding that compelling individuals to join political parties to contest elections infringes on both these fundamental rights. The court rejected arguments that other constitutional provisions, particularly those referring to a "multi-party system" or proportional representation, necessitated a party-only electoral system, finding instead that independent and party representation could coexist within the constitutional framework. This revolutionary interpretation required Parliament to amend the electoral system within 24 months, leading to significant electoral reforms that were implemented before the 2024 elections. Subsequent cases have built upon and refined this expanded definition of political candidature, addressing challenges in implementing the new electoral provisions. Despite the relatively minimal impact of independent candidates in the 2024 elections, the *New Nation Movement* judgment remains significant for its fundamental reinterpretation of political rights in the South African

Constitution, potentially reshaping the country's democratic landscape by diversifying political representation and enhancing voter choice beyond the traditional party-centric system.

10.1 Introduction

An effective and representative electoral system plays a crucial role in modern democracies, while a representative and responsible government is vital for maintaining the legitimacy of an elected government. Recent electoral reforms in South Africa have introduced independent candidates into the political arena, a significant departure from the traditional party-centric system. These reforms to the South African electoral system were necessitated by the ruling in *New Nation Movement NPC v President of the Republic of South Africa*, where the Constitutional Court ruled that the Electoral Act 73 of 1998 did not allow adult citizens to be elected as independent candidates to parliament or the provincial legislatures, violating section 19 of the Constitution of the Republic of South Africa, 1996. The court ruled that the rights to association and dignity should not be limited to political party members, and that the reference to "multi-party" democracy in section 1(*d*) of the Constitution does not necessarily exclude the participation of independent candidates but rather means that the state should not be a one-party state. The Constitutional Court ordered Parliament to amend the electoral system defects within 24 months, which legislation was approved by the National Assembly in October 2022 and became law in June 2023. The inclusion of independent candidates could promise to diversify political representation and enhance voter choice, but may present challenges in terms of implementation, voter education, and the dynamics of political competition. Furthermore, the new hybrid system does not provide a suitable mechanism to handle surplus votes for independent candidates. This chapter explores the significant impact that the *New Nation Movement* (CC) case has had on the South African electoral system and the impact and development of the principles of this case in subsequent judgments.

The case concerns a constitutional challenge to the Electoral Act[2] brought by several applicants, including New

Nation Movement NPC, Chantal Dawn Revell, GRO[3] and Indigenous First Nation Advocacy SA PBO.[4] The central issue was whether the Electoral Act is unconstitutional because it does not allow adult citizens to be elected to the National Assembly and Provincial Legislatures as independent candidates, but only through membership of political parties.[5] The applicants argued that this requirement violates two constitutional rights: the right to stand for public office under section 19(3)(*b*) of the Constitution of the Republic of South Africa, 1996 and the right to freedom of association under section 18.[6] Section 19(3)(*b*) of the Constitution states that "[e]very adult citizen has the right to stand for public office and, if elected, to hold office". Section 18 of the Constitution provide that "[e]veryone has the right to freedom of association". They contended that the Constitution does not prohibit individual participation in elections alongside the party system and that forcing citizens to join political parties to stand for office infringes on their freedom of association.[7]

The case originated in the Western Cape High Court,[8] where the applicants brought an urgent application in late 2018. The applicants initially sought an urgent order compelling Parliament to remedy the perceived invalidity before the May 2019 elections, but later amended their request to have it resolved "as soon as possible".[9] They argued that the current closed party list system allows political parties, rather than the electorate, to choose representatives and does not ensure individual accountability.[10] The applicants contended that section 19(3)(*b*) of the Constitution should be interpreted to mean that citizens have the right to stand as independent candidates in all levels of government.[11] They relied heavily on a statement from the Constitutional Court's judgment in *My Vote Counts NPC v The Minister of Justice and Correctional Services*[12] to support this interpretation.[13] The statement reads as follows:

> "[Section 19 of the Constitution] addresses the fundamental right every citizen has 'to stand for public office and, if elected, to hold office'. Our constitution does not itself limit the enjoyment of this right to local government elections. The right to stand for public office is tied up to the right to 'vote in elections for any

> legislative body' that is constitutionally established. Meaning, every adult citizen may in terms of the Constitution stand as an independent candidate to be elected to municipalities, Provincial Legislatures or the National Assembly. The enjoyment of this right is not and has not been proscribed by the Constitution. It is just not facilitated by legislation. But that does not mean that the right is not available to be enjoyed by whoever might have lost confidence in political parties. It does, in my view, remain open to be exercised whenever so desired, regardless of whatever logistical constraints might exist."[14]

However, the court noted that prior to the *My Vote Counts* judgment, there had been no suggestion that section 19(3)(*b*) implied a right to run independently for office or that the electoral system might be unconstitutional.[15] The court also pointed out that the Constitution's founding values in section 1(*d*) refer to a "multi-party system of democratic government" and that sections 46(1)(*a*)[16] and 105(*a*)[17] of the Constitution give Parliament the discretion to prescribe electoral systems for the National Assembly and provincial legislatures.[18]

The High Court also considered an earlier Constitutional Court decision, *Ramakatsa v Magashule*,[19] which appeared to contradict the *My Vote Counts* statement by emphasising the centrality of political parties in the electoral system.[20] This left the High Court in the difficult position of having to reconcile two seemingly contradictory *obiter dicta* from the highest court.[21] In *Ramakatsa*, the Constitutional Court of South Africa emphasised the centrality of political parties in the electoral system for several key reasons. Firstly, the court noted that in South Africa's system of democracy, political parties occupy the centre stage and play a vital role in facilitating the exercise of political rights.[22] This is affirmed by section 1 of the Constitution, which establishes a multi-party system of democratic government as one of the founding values of the state.[23] The court highlighted that elections are primarily contested by political parties, which determine the lists of candidates who become elected

to legislative bodies. Even the number of seats in the National Assembly and provincial legislatures are determined based on representations by interested parties, which are typically political parties.[24]

Furthermore, the court noted that South Africa's electoral system for national and provincial legislatures is based on proportional representation, meaning that citizens vote for political parties rather than independent candidates. It is the registered parties that nominate candidates for election on regional and national party lists. The court stated that "[t]he Constitution itself obliges every citizen to exercise the franchise through a political party".[25]

The court also pointed out that the Constitution requires Parliament to enact legislation providing for the funding of political parties represented in national and provincial legislatures, in order to enhance multi-party democracy.[26] This direction of public resources towards political parties emphasises their role as "the veritable vehicles the Constitution has chosen for facilitating and entrenching democracy".[27] By emphasising these factors, the court highlighted the integral role that political parties play in South Africa's constitutional democracy and electoral system. Political parties are seen as the primary means through which citizens exercise their political rights and participate in the democratic process, particularly at the national and provincial levels. This centrality of parties in the system forms an important context for interpreting and applying constitutional provisions related to political rights and participation.

In the High Court, the applicants' case largely rested on the statement from *My Vote Counts*, which the court determined was *obiter dictum* and, therefore, not binding, although still of significant persuasive force.[28] The court noted that even if it were to accept the *My Vote Counts* dictum, there were difficulties in reconciling its statements about the right of independent candidates not being facilitated by legislation but remaining open to be exercised.[29] The court also considered that Parliament was already addressing the issues raised in the application since late 2017, questioning whether it was appropriate for the

court to intervene in the parliamentary process.[30] Finally, the court criticised the applicants' use of terms like "civil war" and "genocide" in their papers, describing such language as reminiscent of humanity at its worst and compounding the problem.[31]

Following the High Court's dismissal, the applicants sought leave to appeal directly to the Constitutional Court.[32] The court had to determine two main issues: whether section 19(3)(*b*) affords citizens the right to contest elections as independents and, if so, whether the Electoral Act's failure to facilitate this renders it unconstitutional.[33] The respondents, including the Minister of Home Affairs and the Electoral Commission, opposed the challenge.[34] They argued that section 19(3)(*b*) does not confer a right on citizens to contest elections as independents and that the Constitution requires a party-based proportional representation system.[35] The Minister contended that there is no conflict between the Electoral Act and the Constitution, and that the Constitution accords Parliament discretion to prescribe an electoral system embracing proportional representation.[36]

The Speaker of the National Assembly, while formally abiding by the court's decision, filed an affidavit disputing the applicants' interpretation of section 19(3)(*b*). The Speaker argued that various constitutional provisions confirm that a system based on proportional representation through political parties was and remains constitutionally mandated.[37] The Speaker's position was that the Constitution of South Africa mandates a system of proportional representation through political parties for elections to the National Assembly and provincial legislatures. The Speaker relied on several provisions of the Constitution to support this argument. These included sections 46(1)(*d*) and 105(1)(*d*), which state that the electoral system for the National Assembly and provincial legislatures must "result, in general, in proportional representation".[38] The Speaker also pointed to sections 57(2)[39] and 236[40] of the Constitution, which make specific provisions for political parties in the National Assembly and require national legislation to provide funding for parties participating in the national and provincial legislatures.[41] Furthermore, the Speaker cited sections

178(1)(*h*)[42] and 193(5),[43] which provide for the representation of political parties in various constitutional bodies and processes.[44] For example, section 178(1)(*h*) requires that six members of the National Assembly, at least three of whom must be from opposition *parties*, serve on the Judicial Service Commission.[45] The Speaker's argument was that these provisions, taken together, demonstrate a constitutional commitment to a party-based system of proportional representation. The implication is that the Constitution envisions political parties as the primary vehicles for representation in the national and provincial legislatures, rather than independent candidates.

However, in the Constitutional Court, the applicants argued for a different reading of the Constitution that would allow for independent candidates to contest elections at these levels. The court had to weigh these competing interpretations considering the constitutional text, its historical context, and the broader principles of South Africa's democratic system. A key applicant, Ms Revell, provided a specific example of how the current system affects her rights. As a representative of the Korana nation, a section of the Khoi and San people, she explained that she is averse to joining a political party. She argued that being forced to do so would make her answerable to a party rather than directly to her nation.[46] This illustrates the applicants' argument that the current system infringes on individuals' freedom of association and their right to stand for public office independently. The applicants emphasised that they were not disputing the right of political parties to contest elections or the multi-party system of democracy. Rather, their complaint was narrowly focused on the Electoral Act's failure to cater for the exercise of the rights in section 19(3) by individuals.[47]

The Constitutional Court was thus tasked with interpreting section 19(3)(*b*) considering other constitutional provisions, considering the historical context of political rights in South Africa, and determining whether the Electoral Act's exclusive focus on party-based representation is constitutionally valid. The court also had to consider whether any limitation on

constitutional rights, if found, could be justified under section 36 of the Constitution.[48]

10.2 Significant aspects of the judgment

10.2.1 The extended definition of who may stand and run for political office in term of section 19(3)(*b*) of the Constitution

The judgment by Madlanga J, representing the majority of the Constitutional Court, addressed the constitutionality of the Electoral Act in relation to independent candidates contesting national and provincial elections. The court granted leave to appeal, finding that the matter raised several novel and far-reaching issues of constitutional importance.[49] First, the case addressed a fundamental question about the interpretation of political rights enshrined in the Constitution, specifically the right "to stand for public office and, if elected, to hold office" under section 19(3)(*b*).[50] This interpretation had not been definitively settled in previous cases. Second, the challenge to the Electoral Act raised significant questions about the nature of South Africa's electoral system and the constitutional requirements for democratic representation.[51] This went to the heart of how citizens can participate in the country's democracy. Third, the case required the court to consider the relationship between various constitutional provisions, including those on political rights, freedom of association, and the electoral system.[52] This complex interpretive exercise had far-reaching implications for understanding the Constitution's overall scheme. Fourth, the outcome of the case had the potential to fundamentally alter the electoral landscape in South Africa by potentially allowing independent candidates to contest national and provincial elections for the first time since the advent of democracy in South Africa.[53] Finally, the court noted that these issues were "without doubt of import",[54] recognising their significance for the country's democratic processes and constitutional order. By characterising the issues as novel and far-reaching, the court justified granting leave to

appeal directly to the Constitutional Court, bypassing the usual appellate hierarchy.[55]

The central question was whether the Electoral Act is unconstitutional to the extent that it prevents citizens from standing as independent candidates for the National Assembly and provincial legislatures.[56] In interpreting section 19(3)(*b*) of the Constitution, which provides that every adult citizen has the right "to stand for public office and, if elected, to hold office", the court held that this right should be read harmoniously with other constitutional provisions, particularly the right to freedom of association in section 18 of the Constitution.[57] The court found that compelling individuals to join political parties to stand for office infringes on their freedom of association and dignity.[58]

The majority rejected arguments that other constitutional provisions, such as those referring to political parties or proportional representation, necessitated a party-only electoral system.[59] It held that the Constitution does not mandate exclusive party representation, and that independent and party representation can coexist.[60] Importantly, the court affirmed that section 19(3)(*b*) confers on adult citizens the right to stand for public office as independents, separate from political party structures.[61] The Electoral Act's failure to provide for this renders it unconstitutional.[62] The court declared the Electoral Act unconstitutional to the extent that it requires candidates to be members of political parties.[63] However, it suspended the declaration of invalidity for 24 months to allow Parliament to remedy the defect.[64] This prospective order avoids invalidating past elections whilst giving Parliament time to amend the electoral system.[65] In conclusion, the majority judgment upheld the right of citizens to stand as independent candidates in national and provincial elections, finding the current electoral system's exclusion of independents to be unconstitutional.

In a separate but concurring judgment by Jafta J, the Justice broadly agreed with the majority's conclusion but emphasised a different path of reasoning, focusing primarily on the interpretation of section 19(3) of the Constitution. Jafta J began by outlining the proper approach to interpreting section 19, emphasising the importance of historical context,

particularly the disenfranchisement of African people under apartheid.[66] He stressed that the language of section 19 must be accorded a "generous and purposive meaning" to give citizens the fullest protection afforded by the section.[67] Additionally, he highlighted the relevance of international law, specifically Article 25 of the International Covenant on Civil and Political Rights, in interpreting section 19.[68] In interpreting section 19(3), Jafta J concluded that it confers rights exclusively on adult citizens as individuals, not political parties.[69] He rejected the High Court's reasoning that section 19(3)(*b*) does not expressly state that standing for office includes standing as an independent candidate, arguing that this approach incorrectly assumes that systems allowing individuals to contest elections cannot coexist with systems catering for political parties.[70]

Jafta J emphasised that section 19(3)(*b*) confers the right to stand for public office on every adult South African individually, just as they hold the right to vote as individuals.[71] He argued that while Parliament has the power to regulate the exercise of this right, it cannot enact legislation that prevents its exercise altogether.[72] Addressing the apparent contradiction between this interpretation and the judgment in *Ramakatsa*, Jafta J argued that the contradiction is "more apparent than real".[73] He explained that *Ramakatsa* was concerned specifically with cases where an adult South African has chosen a political party as the vehicle through which to exercise their right to vote, and did not hold that the right to vote can only be exercised through political parties.[74]

Regarding the Electoral Act, Jafta J found that its failure to cater for adult South Africans wishing to contest elections as individuals renders it inconsistent with the Constitution.[75] He rejected arguments that this inconsistency could be justified or that it should be interpreted harmoniously with section 157(2)(*a*) of the Constitution, which deals with municipal elections.[76] In conclusion, Jafta J supported the order proposed in the majority judgment, finding that the Electoral Act is unconstitutional to the extent that it fails to enable adult South Africans to stand for public office as independent candidates in national and provincial elections.[77]

10.2.2 Froneman J's dissenting judgment – an alternative approach

Justice Froneman's dissenting judgment disagreed with the majority and concurring judgments, arguing that their approach to and interpretation of section 19(3)(*b*) of the Constitution was flawed. He contended that they did not properly consider the constitutionally required electoral framework within which the right "to stand for and, if elected, to hold office" must be exercised.[78] Froneman J emphasised the importance of interpreting constitutional provisions in light of the Constitution as a whole, citing the principle from *Matatiele* that individual constitutional provisions cannot be considered in isolation.[79] He argued that the content of the right in section 19(3)(*b*) should be determined by considering the foundational values and constitutional norms governing the electoral system, rather than focusing on notional abilities or preferences of individual citizens.[80]

Central to Froneman J's reasoning was the interpretation of section 1(*d*) of the Constitution, which establishes a "multi-party system of democratic government" as a foundational value. He argued that this plainly means a "multi-[political] party" system, supported by other constitutional provisions and this Court's jurisprudence.[81] He contended that the Constitution prescribes a representative democracy founded on the principle of elected officials representing groups of people, necessarily implying a system based on political parties.[82] Froneman J argued that in ordinary language, "multi-party" clearly means "multi-[political] party".[83] He supported this by referencing dictionary definitions and common understanding of the term. He pointed to section 236 of the Constitution, which provides for the funding of political parties to "enhance multi-party democracy", as evidence that the Constitution itself understands "multi-party" to mean a system of political parties.[84]

Froneman J cited the Constitutional Court's decision in *Ramakatsa*, which recognised the crucial role of political parties in facilitating political rights.[85] This jurisprudence, he argued, supports the interpretation that the Constitution envisions a party-based system. Froneman J contended that a multi-

party system necessarily implies a representative democracy, where elected officials represent groups of people. He cited section 42(3) of the Constitution, which states that the National Assembly is elected to represent the people, as support for this view.[86] Froneman J argued that if the Constitution intended to prescribe something other than political parties in its fundamental system of democratic government, it would have explicitly stated so. He noted the absence of any constitutional provisions detailing what groupings other than political parties are prescribed.[87] By linking these points, Froneman J sought to establish that the Constitution's reference to a "multi-party system" is not merely a prohibition on one-party rule, but a positive prescription for a system based on political parties as the primary vehicles for democratic representation. This interpretation, he argued, necessarily implies that the right to stand for office under section 19(3)(*b*) should be understood within this party-based framework, rather than as an individual right to stand as an independent candidate.

Froneman J rejected the majority's interpretation that section 19(1) includes a right not to join a political party that informs the interpretation of section 19(3)(*b*). He argued that section 19 deals with distinct, non-overlapping rights, and that choosing not to join a political party does not create a constitutional right to stand for office as an independent.[88] The dissenting judgment emphasised the constitutional requirement for an electoral system that results in proportional representation, arguing that this supports a party-based system.[89] Froneman J contended that the Constitution does not prescribe independent candidacy at national and provincial levels, and at most allows for its possibility through legislation.[90] Froneman J argued that interpreting section 19(3)(*b*) as securing a right for independent candidates makes an "illogical leap" by conflating permissive and prescriptive constitutional norms.[91] He emphasised that those who do not wish to participate through political parties retain other democratic rights, such as freedom of expression and assembly.[92] In conclusion, Froneman J would have dismissed the appeal, finding that the Electoral Act's failure to provide for independent candidates in national and provincial elections is not unconstitutional. He argued

that the choice to allow independent candidates is a matter for legislative design, not constitutional prescription.[93]

No subsequent cases have, however, favoured or elaborated on this interpretation of candidature in South African politics. It is, however, open to the courts to revisit this approach in future, especially after the 2024 elections revealed that independent candidates played little to no role in the national elections.

10.3 Impact of the judgment

10.3.1 Impact regarding the extended definition of who may stand and run for political office in term of section 19(3)(*b*) of the Constitution

The *New Nation Movement* (CC) Court's novel interpretation of section 19(3)(*b*) as including independent candidates as well as political parties (and the country's subsequent drastic electoral reforms) was further developed and built upon in several other cases. The first case that accepted the *New Nation Movement* (CC) case's extended definition of who may run and stand for election was *Independent Candidate Association South Africa NPC v President of the Republic of South Africa*.[94] This case entailed an application for direct access to the Constitutional Court to challenge the constitutionality of certain provisions of the Electoral Amendment Act 1 of 2023, specifically regarding item 1 of Schedule 1A of the Act, which allows independent candidates to contest for seats in the National Assembly.[95] The schedule in question inter alia determines that the 200 seats in the National Assembly should be filled by independent candidates and candidates from regional lists of political parties (called regional seats), while the other 200 seats should be filled by candidates from the national lists of political parties (called compensatory seats).[96] The applicant claimed that by dividing the seats in the national assembly into a 200/200 split, parliament violated the constitution.[97]

After considering the submissions of both parties in detail, the court found that both the applicant's and the respondents' proposed split of the parliamentary seats, namely

the 350/50 split and the 200/200 split respectively, achieved the constitutional requirement of general proportionality,[98] although only the 200/200 split completely avoided the situation of "overhang".[99] An "overhang" occurs "where the election formula requires political parties to be allocated more seats than are actually available in the Legislature. Put differently, overhang occurs where a party wins more regional seats than the compensatory or national party vote entitles it to".[100] As to the interpretation of section 19 of the Constitution, and referring to the *New Nation Movement* (CC) case, the court in *Independent Candidates Association* held that the amended electoral system had to incorporate representation for political parties as well as independent candidates, while also complying with the constitutional requirement of proportionality as enshrined in section 46 of the Constitution.[101] The main contention of the applicant is that, in terms of the 200/200 split, this will require independent candidates "to earn more votes in order to secure a single seat in the National Assembly compared to political parties"[102] and the 200/200 split, therefore, infringes upon sections 19(2) and 19(3) of the Constitution, undermining the fairness of elections and the right to vote and stand for public office.[103] Highlighting various cases relating to the importance of political rights, South Africa's history of political exclusion, and the close link between the right to vote and free and fair elections,[104] the court dismissed the applicant's section 19 challenge, finding that the applicant failed to prove that parliament's measures limited the political rights in question.[105] In relation to this contention, the Constitutional Court held that:

> "As Parliament points out in its submissions, the Electoral Amendment Act entitles every adult citizen to a vote, and they can, in keeping with this Court's ruling in *New Nation II*, vote for either a political party or an independent candidate. The Electoral Amendment Act also allows citizens to stand for political office and to hold office if elected. The contention that a vote for a political party counts double to that of an independent candidate, which as the applicant argues leads to a limitation of the section 19 rights, is, as I have already demonstrated,

> without merit. This argument is based on the assumption that voters will not split their vote, an assumption which I have already shown to be unsustainable."[106]

The second case which built upon the *New Nation Movement* (CC) judgment's extension of political participation to independent candidates was *One Movement South Africa NPC v President of the Republic of South Africa*.[107] In this case, the Constitutional Court had to decide whether the newly enacted Electoral Amendment Act infringed upon independent candidates' right to stand for election to public office, as well as their right to dignity and their right to freedom of association.[108] The applicant argued that the Act violated these rights in two significant ways. The first challenge concerned the "signature requirement". The applicant contended that to qualify for election, both independent candidates and new political parties, meaning, those not presently represented in the National Assembly or any provincial legislature, were obligated to gather signatures from registered voters in the relevant region. This number had to be equivalent to 15% of the quota from the previous election in that region.[109] This stipulation, set out in section 31(B)(3) of the Act, defined a quota as the total votes required for a candidate or party to secure one seat.[110]

The applicant claimed that imposing a 15% signature requirement on independent candidates was excessively burdensome, acting as a prohibitive obstacle to their participation and rendering the provision arbitrary and unjustifiable.[111] Conversely, the Minister defended the requirement, stating that its purpose was to ensure that only candidates with a realistic chance of gaining electoral support could contest elections.[112] The Minister further argued that without such a provision, an excessive number of candidates could contest elections, leading to an unmanageably lengthy and complex ballot paper.[113] A parliamentary representative echoed this sentiment, asserting that the requirement prevented ballots from being flooded with names of candidates who stood no realistic chance of winning.[114] Similarly, the Electoral Commission supported the 15% threshold, maintaining that it

ensured the seriousness of candidates and their likelihood of securing at least one seat.[115]

In the majority judgment, Chief Justice Zondo concluded that the applicant had failed to demonstrate that the 15% signature requirement unfairly disadvantaged independent candidates.[116] It must, however, be noted that Zondo CJ's judgment is not the majority judgment regarding the signature requirement – see the discussion of Kollapen J's judgment below for the majority judgment on the signature requirement. Zondo CJ emphasised that the applicant's principal objection was that section 31(B)(3) applied equally to both independent candidates and new political parties.[117] Zondo CJ held that the applicant's fundamental issue was instead with the size of electoral regions and the parliamentary decision to structure them as constituencies.[118] Zond CJ's judgment explained that larger regions had higher quotas, which in turn, increased the number of required signatures, while smaller regions had lower quotas and thus a reduced signature requirement.[119] However, the applicant had not sought to challenge Parliament's decision to designate provinces as electoral constituencies.[120] Zondo CJ concluded that section 31(B)(3) did not amount to an outright denial of the right to stand for election but was merely a regulatory measure.[121] Drawing on past rulings, the court determined that regulatory provisions do not necessarily constitute limitations of rights.[122] Consequently, Zondo CJ held that the 15% signature requirement did not limit the right to stand for election or the right to human dignity.[123]

The applicant's second challenge pertained to the provisions regulating seat reallocation in cases where independent candidates vacated their seats because of resignation or death[124] or where seats were forfeited under specific conditions.[125] Regarding the recalculation of seats, Zondo CJ handed down the majority judgment. The majority on the recalculation aspect, per Zondo CJ, indicated that forfeiture occurred when:

> "(a) …a party has submitted a national or regional list with fewer names of party candidates than the number of

> seats to be allocated to it, the number of seats for which it has no listed candidates is forfeited; (b) if an independent candidate stands to be allocated more than one seat in a region, any excess seats won by the candidate are forfeited since an individual candidate can, by definition, only hold one seat; [or] (c) if an independent candidate contests the election in more than one region and wins a seat in more than one region, that candidate will be allocated a seat in the region where he or she received the highest proportion of votes and any excess seats are forfeited."[126]

The applicant contended that votes for independent candidates signified more than support for the individual; rather, they constituted a rejection of party politics.[127] However, the majority dismissed this argument, reasoning that a voter could choose an independent candidate for a provincial legislature while still supporting a political party for the National Assembly.[128] The court held that votes for independent candidates whose seats were forfeited were not transferred to political parties but were instead excluded from the calculations.[129] The majority further held that voting for an independent candidate did not necessarily equate to a rejection of party politics.[130] The applicant further criticised the recalculation method, arguing that it unfairly benefited political parties.[131] The respondents, however, defended the provision, asserting that disregarding votes for independent candidates in forfeiture cases preserved inter-party proportional representation.[132] The majority, however, ultimately ruled against the applicant's second argument.[133]

In the first dissenting opinion, Justice Kollapen asserted that section 31(B)(3) was unconstitutional, arguing that it imposed a restriction on the right to stand for public office and related political rights.[134] It is important to note that Maya DCJ, Mhlantla J, Theron J and Rogers J concurred with Kollapen J's judgment on the signature requirement, which makes his judgment the majority judgment regarding the signature requirement. Kollapen J found that the state had not justified the restriction as reasonable and necessary in a democratic

society.[135] Kollapen J criticised the majority's reliance on the New National Party case, arguing that its principles applied only in limited contexts.[136] Kollapen J explored the scope of sections 18(1), 19(1), and 19(3) of the Constitution, emphasising their centrality to democracy.[137] He specifically highlighted the *New Nation Movement* (CC) case's interpretation of sections 19 and 18 of the Constitution and its *collective* and *individual* exercise.[138] Regarding the importance of the signature requirement, Kollapen J noted:

> "Parliament's characterisation of the politics and the economics of contestation suggests that frivolous or meritless contestation has never been a problem with political parties. Political parties, Parliament tells us, make sensible political and economic decisions around whether and when to contest an election. This begs the question: why should the same not be expected of independent candidates? This question goes unheeded and unanswered."[139]

Regarding less restrictive means that could have been used to curtail frivolous contestation of elections, Kollapen J held that alternative measures were not properly considered: "the signature requirement is not the only mechanism for discouraging frivolous contestation. An independent candidate will also be required to lodge a monetary deposit".[140] Kollapen J, in his dissenting judgment, therefore, found that the 15% requirement excessively burdened independent candidates.[141] He concluded that the Act unjustifiably limited political rights of individual candidates.[142] Significantly, Kollapen J's judgment emphasised the importance of the electoral legislation supporting, instead of hindering, the participation of independent candidates in light of the *New Nation Movement* (CC) case:

> "*New Nation Movement* has led to a historic moment in the journey of our young constitutional democracy. For the first time, independent candidates will stand for seats in the national and provincial legislature. Parliament meets

> this historic moment with a first-of-its-kind signature requirement for independent candidates. We must be cautious and guard against such a requirement becoming a barrier to contestation. In effect, the signature requirement renders somewhat hollow the promise that New Nation Movement heralded in unlocking and giving section 19 of the Constitution its full and proper effect."[143]

Justice Theron, in another separate dissenting judgment, agreed with the second judgment regarding the signature requirement.[144] Additionally, Theron J raised concerns about the seat recalculation process, arguing that it disproportionately favoured larger parties over independent candidates and smaller parties, thereby violating section 19 of the Constitution.[145] Ultimately, Theron J concluded that the challenge had not been fully explored at trial and should have engaged in oral argument.[146]

10.4 Conclusion

From the preceding discussion it is clear that *New Nation Movement* (CC) has brought about a significant change in our constitutional system's understanding of political candidature. Including independent candidates in national elections has changed our political landscape significantly, challenging our courts' perception of the interplay between sections 18 and 19 of the Constitution. This broad understanding of political candidature has been confirmed and further developed in two subsequent cases, namely *Independent Candidate Association* (CC) and *One Movement SA*.

In *Independent Candidate Association*, the Constitutional Court confirmed the broad definition of political participation as introduced in the *New Nation Movement* (CC) case, extending the right to run for office to independent candidates alongside political parties, while adding that the legislature and the executive have some leeway in deciding how seats in the legislature should be calculated as long as it does not infringe on the political rights of independent candidates and complies with the Constitution's proportionality requirement in general.

In addition, the *One Movement SA* judgment has further elaborated and contributed to our courts' understanding and application of the new expanded definition of candidature in South African electoral law in two ways. First, the majority (per Kollapen J) held that the signature requirement, as outlined in the Electoral Amendment Act, imposed an unconstitutional burden on independent candidates and should be lowered so that it does not impede the political participation of individual candidates unnecessarily. Second, regarding the reallocation of seats, the majority (per Zondo CJ) held that the reallocation or recalculation of seats after an individual has vacated or lost a seat in the legislature, as outlined in the Electoral Amendment Act, was not unconstitutional as the recalculation of seats should disregard the votes cast for persons (independent candidates) who no longer comply with the requirements of candidature.

It is unfortunate, however, that none of these judgments considered the dissenting judgment of Froneman J in the *New Nation Movement* (CC) case; both cases merely accepted the majority's reasoning that section 19 of the Constitution in fact could (and should) be read to include both political parties' and independent candidates' right to run for election in national and provincial elections. Arguably, Froneman J's reasoning has merit. Following the 2024 national and provincial elections, the participation of independent candidates had almost no impact on the outcome of the elections. This may be because the legislature tried to fit an independent candidate system into a system primary designed for and based on the participation of political parties only. Pretorius, therefore, argues that it may not be possible to apply the new electoral provisions together with the current constitutional provisions as it stands – proper application would require a number of constitutional amendments.[147] He refers, inter alia, to provisions relating to the composition and functioning of the legislatures, the probable exclusion of independent candidates from participating in some of the parliamentary committees, and their exclusion from involvement in making some important appointments.[148] Furthermore, Pretorius points out that "no independent member of a provincial legislature would be eligible to be appointed as a delegate to the National Council of Provinces (unless

nominated by a political party)", which means that independent candidates cannot play any role in the Council.[149] Consequently, it remains uncertain whether this trend will change in future, or whether this change to the electoral system will continue to play a minimal role in our elections. It, therefore, remains to be seen what courts will make of the new electoral provisions and their application after the somewhat underwhelming result of the 2024 elections regarding the participation of independent candidates and whether these provisions will become merely theoretical, without any real impact.

Endnotes

1 2020 6 SA 257 (CC) (*New Nation Movement* (CC)); this chapter is partly based on a paper entitled, Laubscher "Independent candidates and electoral reform in South Africa – one step forward, and two steps back?", presented at the International Society of Public Law Conference (ICON-S) on "The Future of Public Law: Resilience, Sustainability and Artificial Intelligence" held in Madrid, Spain on 8-10 July 2024. Also see Zongwe "New Nation Movement NPC and Others v President of the Republic of South Africa and Others 2020 (6) SA 257 (CC)" 2021 *SAIPAR Case Review* Article 6 (issue does not have page numbers), available at: https://scholarship.law.cornell.edu/scr/vol4/iss1/6 (06-12-2025); also see Wolf "Practical implications for the electoral system: *New Nation Movement NPC v President of the Republic of South Africa*" 2021 *SALJ* 58–87.
2 73 of 1998.
3 The judgment does not provide any specific information about who or what GRO is. It is simply listed as one of the applicants in the case. Beyond being named as the third applicant, no further details about GRO's identity or nature are given in the judgment.
4 *New Nation Movement* (CC) (n 1) par 3-4.
5 *New Nation Movement* (CC) (n 1) par 2.
6 *New Nation Movement* (CC) (n 1) par 4.
7 *New Nation Movement* (CC) (n 1) par 139-140.
8 *New Nation Movement PPC v President of the Republic of South Africa* 2019 5 SA 533 (WCC) (*New Nation Movement* (HC)).
9 *New Nation Movement* (HC) (n 8) par 2.
10 *New Nation Movement* (HC) (n 8) par 5.
11 *New Nation Movement* (HC) (n 8) par 11.
12 2018 5 SA 380 (CC) (*My Vote Counts*).
13 *New Nation Movement* (HC) (n 8) par 11-12.
14 *My Vote Counts* (n 12) par 29; quoted in *New Nation Movement* (HC) (n 8) par 24.
15 *New Nation Movement* (HC) (n 8) par 12.
16 The section provides that "[t]he National Assembly consists of no fewer than 350 and no more than 400 women and men elected as members in terms of an electoral system that is prescribed by national legislation".
17 The section provides that "[a] provincial legislature consists of women and men elected as members in terms of an electoral system that is prescribed by national legislation".
18 *New Nation Movement* (HC) (n 8) par 14.
19 2013 2 BCLR 202 (CC) (*Ramakatsa*).
20 *New Nation Movement* (HC) (n 8) par 26.
21 *New Nation Movement* (HC) (n 8) par 23.
22 *Ramakatsa* (n 19) par 65.
23 *Ramakatsa* (n 19) par 66.
24 *Ramakatsa* (n 19) par 67.
25 *Ramakatsa* (n 19) par 68.
26 *Ramakatsa* (n 19) par 67.
27 *Ramakatsa* (n 19) par 67.
28 *New Nation Movement* (HC) (n 8) par 22-23.

29 *New Nation Movement* (HC) (n 8) par 28–29.
30 *New Nation Movement* (HC) (n 8) par 31.
31 *New Nation Movement* (HC) (n 8) par 33.
32 *New Nation Movement* (CC) (n 1) par 1.
33 *New Nation Movement* (CC) (n 1) par 138.
34 *New Nation Movement* (CC) (n 1) par 3.
35 *New Nation Movement* (CC) (n 1) par 132–133.
36 *New Nation Movement* (CC) (n 1) par 133.
37 *New Nation Movement* (CC) (n 1) par 135, 81–82.
38 *New Nation Movement* (CC) (n 1) par 14.
39 The section reads as follows: "The rules and orders of the National Assembly must provide for (*a*) the establishment, composition, powers, functions, procedures and duration of its committees; (*b*) the participation in the proceedings of the Assembly and its committees of minority parties represented in the Assembly, in a manner consistent with democracy; (*c*) financial and administrative assistance to each party represented in the Assembly *in proportion to its representation*, to enable the party and its leader to perform their functions in the Assembly effectively; and (*d*) the recognition of the leader of the largest opposition party in the Assembly as the Leader of the Opposition" (emphasis added).
40 The section reads as follows: "To enhance multi-party democracy, national legislation must provide for the funding of political parties participating in national and provincial legislatures on an equitable and proportional basis."
41 *New Nation Movement* (CC) (n 1) par 82.
42 The section reads as follows: "There is a Judicial Service Commission consisting of six persons designated by the National Assembly from amongst its members, at least three of whom must be members of opposition *parties* represented in the Assembly" (emphasis added).
43 The section reads as follows: "The National Assembly must recommend persons (*a*) nominated by a committee of the Assembly proportionally composed of members of *all parties* represented in the Assembly; and (*b*) approved by the Assembly by a resolution adopted with a supporting vote (i) of at least 60 per cent of the members of the Assembly, if the recommendation concerns the appointment of the Public Protector or the Auditor-General; or (ii) of a majority of the members of the Assembly, if the recommendation concerns the appointment of a member of a Commission" (emphasis added).
44 *New Nation Movement* (CC) (n 1) par 83.
45 Emphasis added.
46 *New Nation Movement* (CC) (n 1) par 52.
47 *New Nation Movement* (CC) (n 1) par 139–140.
48 *New Nation Movement* (CC) (n 1) par 113–120.
49 *New Nation Movement* (CC) (n 1) par 11–13.
50 *New Nation Movement* (CC) (n 1) par 10.
51 *New Nation Movement* (CC) (n 1) par 2, 11.
52 *New Nation Movement* (CC) (n 1) par 18–22.
53 *New Nation Movement* (CC) (n 1) par 2, 11.
54 *New Nation Movement* (CC) (n 1) par 11.

55 *New Nation Movement* (CC) (n 1) par 12–13.
56 *New Nation Movement* (CC) (n 1) par 2.
57 *New Nation Movement* (CC) (n 1) par 18–22.
58 *New Nation Movement* (CC) (n 1) par 49–62.
59 *New Nation Movement* (CC) (n 1) par 65.
60 *New Nation Movement* (CC) (n 1) par 78–80.
61 *New Nation Movement* (CC) (n 1) par 162–163.
62 *New Nation Movement* (CC) (n 1) par 112–120.
63 *New Nation Movement* (CC) (n 1) par 121–122.
64 *New Nation Movement* (CC) (n 1) par 125–126.
65 *New Nation Movement* (CC) (n 1) par 124–125.
66 *New Nation Movement* (CC) (n 1) par 141–143.
67 *New Nation Movement* (CC) (n 1) par 144.
68 *New Nation Movement* (CC) (n 1) par 145–146.
69 *New Nation Movement* (CC) (n 1) par 148–155.
70 *New Nation Movement* (CC) (n 1) par 156–158.
71 *New Nation Movement* (CC) (n 1) par 162.
72 *New Nation Movement* (CC) (n 1) par 160.
73 *New Nation Movement* (CC) (n 1) par 193.
74 *New Nation Movement* (CC) (n 1) par 193–194.
75 *New Nation Movement* (CC) (n 1) par 179–180.
76 *New Nation Movement* (CC) (n 1) par 182–191.
77 *New Nation Movement* (CC) (n 1) par 195.
78 *New Nation Movement* (CC) (n 1) par 196.
79 *New Nation Movement* (CC) (n 1) par 197; see *Matatiele Municipality and Others v President of the Republic of South Africa and Others (1)* 2006 5 SA 47 (CC).
80 *New Nation Movement* (CC) (n 1) par 198.
81 *New Nation Movement* (CC) (n 1) par 200–204.
82 *New Nation Movement* (CC) (n 1) par 202–203.
83 *New Nation Movement* (CC) (n 1) par 201.
84 *New Nation Movement* (CC) (n 1) par 201.
85 *New Nation Movement* (CC) (n 1) par 202.
86 *New Nation Movement* (CC) (n 1) par 203.
87 *New Nation Movement* (CC) (n 1) par 204.
88 *New Nation Movement* (CC) (n 1) par 213–219.
89 *New Nation Movement* (CC) (n 1) par 220–224.
90 *New Nation Movement* (CC) (n 1) par 225–230.
91 *New Nation Movement* (CC) (n 1) par 231.
92 *New Nation Movement* (CC) (n 1) par 232.
93 *New Nation Movement* (CC) (n 1) par 230–233.
94 2024 2 SA 104 (CC); also see Laubscher "Overview of constitutional court judgments on the bill of rights – 2023" 2024 *TSAR* 323 332–335.
95 *Independent Candidates Association* (n 94) par 1.
96 *Independent Candidates Association* (n 94) par 1.
97 *Independent Candidates Association* (n 94) par 1.
98 *Independent Candidates Association* (n 94) par 63–68.
99 *Independent Candidates Association* (n 94) par 82–83.
100 *Independent Candidates Association* (n 94) par 62; also see par 69 which explains an "overhang" as follows: "when more seats are required to be allocated to restore proportionality as between

represented parties after the allocation of regional (or constituency) votes, than are available in the Legislature. Overhang occurs when a party wins more regional seats than it is overall entitled to when the compensatory tier outcome is calculated."

101 *Independent Candidates Association* (n 94) par 12.
102 *Independent Candidates Association* (n 94) par 34.
103 *Independent Candidates Association* (n 94) par 128.
104 *Independent Candidates Association* (n 94) par 140–154; see *New Nation Movement* (CC) (n 1); *Kham v Electoral Commission* 2016 2 SA 338 (CC); *New National Party of South Africa v Government of the Republic of South Africa* 1999 3 SA 191 (CC); and *August v Electoral Commission* 1999 3 SA 1 (CC).
105 *Independent Candidates Association* (n 94) par 155.
106 *Independent Candidates Association* (n 94) par 150–151.
107 2024 2 SA 148 (CC); see Laubscher (n 94) 323 335–338.
108 *One Movement SA* (n 107) par 5.
109 *One Movement SA* (n 107) par 25.
110 *One Movement SA* (n 107) par 24.
111 *One Movement SA* (n 107) par 25.
112 *One Movement SA* (n 107) par 31.
113 *One Movement SA* (n 107) par 35.
114 *One Movement SA* (n 107) par 37.
115 *One Movement SA* (n 107) par 41–58.
116 *One Movement SA* (n 107) par 79.
117 *One Movement SA* (n 107) par 78.
118 *One Movement SA* (n 107) par 59.
119 *One Movement SA* (n 107) par 60.
120 *One Movement SA* (n 107) par 68.
121 *One Movement SA* (n 107) par 124.
122 *One Movement SA* (n 107) par 107–125; see *South African Transport and Allied Workers Union v Garvas* 2013 1 SA 83 (CC); *Mlungwana v S* 2019 1 BCLR 88 (CC); and *Affordable Medicines Trust v Minister of Health* 2006 3 SA 247 (CC).
123 *One Movement SA* (n 107) par 171.
124 *One Movement SA* (n 107) par 21.
125 *One Movement SA* (n 107) par 190.
126 *One Movement SA* (n 107) par 191.
127 *One Movement SA* (n 107) par 198.
128 *One Movement SA* (n 107) par 198.
129 *One Movement SA* (n 107) par 199.
130 *One Movement SA* (n 107) par 198.
131 *One Movement SA* (n 107) par 200.
132 *One Movement SA* (n 107) par 201.
133 *One Movement SA* (n 107) par 211.
134 *One Movement SA* (n 107) par 215.
135 *One Movement SA* (n 107) par 215.
136 *One Movement SA* (n 107) par 253.
137 *One Movement SA* (n 107) par 269–281.
138 *One Movement SA* (n 107) par 278.
139 *One Movement SA* (n 107) par 311.
140 *One Movement SA* (n 107) par 341.
141 *One Movement SA* (n 107) par 288.

142 *One Movement SA* (n 107) par 342.
143 *One Movement SA* (n 107) par 343.
144 *One Movement SA* (n 107) par 357.
145 *One Movement SA* (n 107) par 367–370.
146 *One Movement SA* (n 107) par 385.
147 Pretorius "Independent candidacy and electoral reform: *New Nation Movement NPC v President of the Republic of South Africa*" 2022 *PER/PELJ* 1 27, available at http://dx.doi.org/10.17159/1727- 3781/2022/v25i0a12746 (06-12-2025).
148 Pretorius (n 147) 27.
149 Pretorius (n 147) 27.

UJ Press

This second volume of landmark constitutional cases builds on the success of Volume 1 by analysing ten additional transformative judgments that have shaped South Africa's constitutional landscape. The book demonstrates how the Constitutional Court has progressively developed fundamental rights jurisprudence through cases addressing corporal punishment of minors, state accountability for gender-based violence, tax collection powers, strike violence, religious freedom, parental rights of unmarried fathers, Muslim marriages, language rights in education, affirmative action, and electoral reform.

South Africa's 1996 Constitution represented a dramatic break from the country's apartheid past, establishing a robust Bill of Rights and empowering the Constitutional Court to enforce these rights. Since then, the Court has delivered numerous landmark judgments that have transformed various areas of law and society. While Volume 1 examined foundational cases establishing core constitutional principles, this second volume explores how these principles have been applied and developed in specific domains affecting everyday South Africans.

The book aims to provide accessible and comprehensive analyses of complex constitutional jurisprudence for legal practitioners, academics, students, and the public. Each chapter examines a significant judgment by explaining its factual and legal context, identifying its most important constitutional contributions, and tracing its impact on subsequent legislation and jurisprudence. The chapters share a common structure but cover diverse subjects, offering a holistic view of South Africa's evolving constitutional democracy.

This volume makes a distinctive intellectual contribution by moving beyond traditional case commentaries to trace the evolution of South African constitutional law across multiple domains. It highlights how constitutional principles established in early cases have been refined and applied in subsequent judgments and legislation, demonstrating the living nature of the Constitution. The book also reveals patterns in the Court's jurisprudential approach, particularly its commitment to substantive equality, transformative constitutionalism, and the protection of vulnerable groups.

A key feature of the work is its accessibility to non-legal readers while maintaining rigorous legal analysis. The authors have structured each chapter to be standalone yet interconnected with others, allowing readers to understand individual cases while perceiving broader jurisprudential developments. By covering cases from diverse areas of law, the book offers a unique perspective on how constitutional principles transcend traditional legal boundaries to create a coherent rights-based legal system.

The book will fill a significant gap in the literature by providing a comprehensive yet accessible analysis of how South Africa's constitutional jurisprudence has evolved beyond its foundational cases to address contemporary challenges. It will serve as an invaluable resource for understanding the practical impact of constitutional rights on South African society and the ongoing project of transformative constitutionalism.

ISBN 978-1-997468-90-5