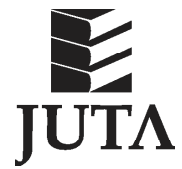


Constitutional Court Review

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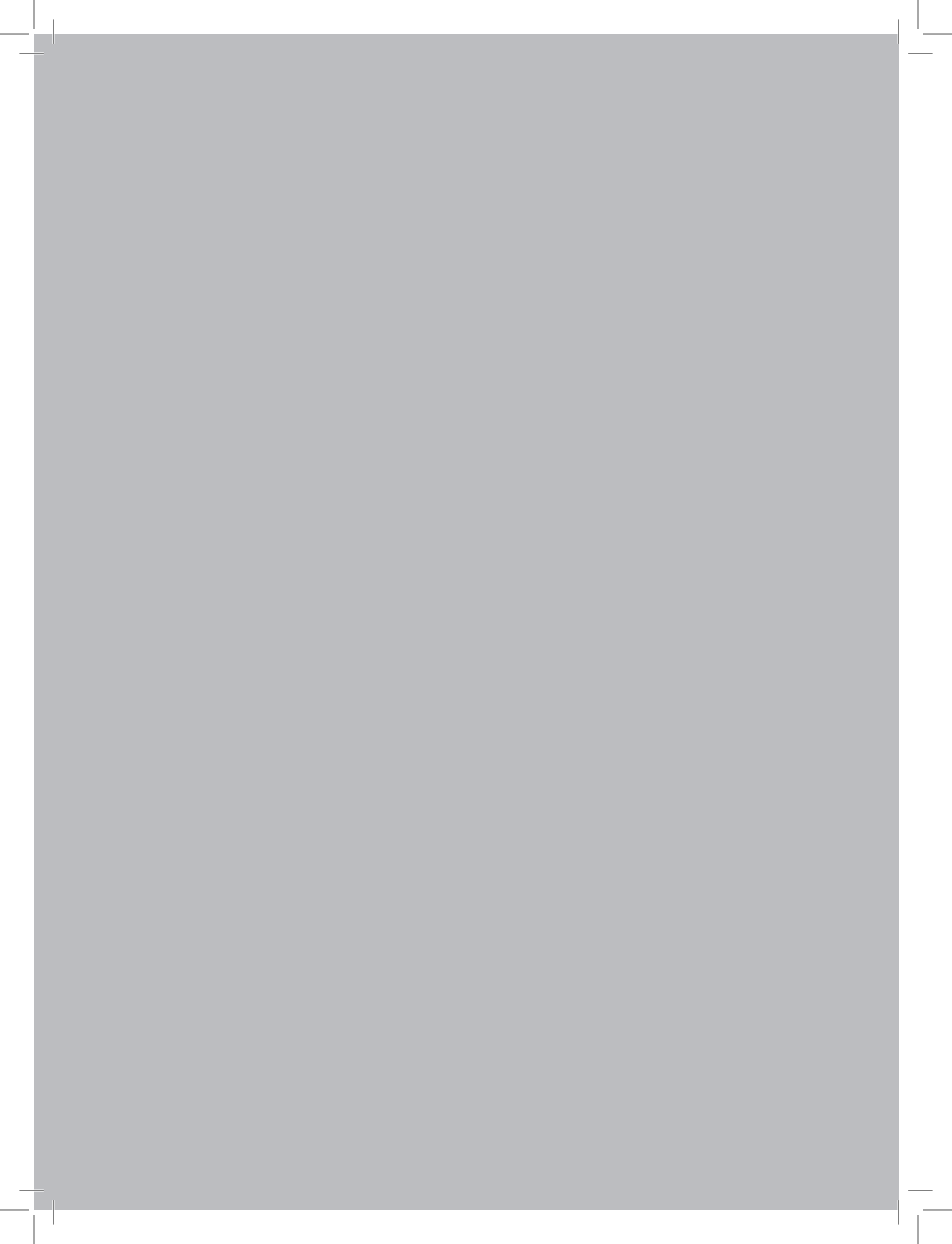
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Local Government



Confronting the State of Local Government: The 2013 Constitutional Court Decisions

Jaap de Visser*
Nico Steytler†

I INTRODUCTION

In September 2014 the then Minister of Cooperative Governance and Traditional Affairs, Pravin Gordhan, divided municipalities into three groups: a third of the municipalities was carrying out their tasks adequately, a third was just managing, and the last third was ‘frankly dysfunctional’ because of poor governance, inadequate financial management, and poor accountability mechanisms.¹ What this analysis starkly illustrates is that local government cannot be seen as a uniform institution, operating in the same manner, facing the same challenges. Most, but not all metropolitan municipalities are highly functional and the same applies to the so-called ‘secondary cities’. Then there are highly dysfunctional rural municipalities but also rural municipalities that perform well. Yet a uniform system of law applies to them all.

Within the context of a both performing and failing local state, the Constitutional Court had to confront some key issues about local governance during 2013. First, in *Lagoonbay*² the Court had to respond to the claim for the empowerment of municipalities with respect to planning responsibilities. Second, in *Liebenberg NO v Bergrivier Municipality*³ and *eThekweni Municipality v Ingonyama Trust*⁴ the Court had

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¹ Department of Cooperative Governance and Traditional Affairs *Back to Basics: Serving our Communities Better!* (2014), available at <http://www.cogta.gov.za/summit2014/wp-content/uploads/2014/10/LG-Back-to-Basics-Approach-Documents.pdf> (‘*Back to Basics*’).

² *Minister of Local Government, Environmental Affairs and Development Planning of the Western Cape v Lagoonbay Lifestyle Estate (Pty) Ltd and Others* [2013] ZACC 39, 2014 (1) SA 521 (CC), 2014 (2) BCLR 182 (CC) (‘*Lagoonbay*’).

³ *Liebenberg NO and Others v Bergrivier Municipality* [2013] ZACC 16, 2013 (5) SA 246 (CC), 2013 (8) BCLR 863 (CC) (‘*Liebenberg*’).

⁴ *eThekweni Municipality v Ingonyama Trust* [2013] ZACC 7, 2014 (3) SA 240 (CC), 2013 (5) BCLR 497 (CC) (‘*Ingonyama Trust*’).

to entertain challenges with regard to the municipal power to levy and collect property rates and the quest for financial sustainability. Third, in *Brittania Beach v Saldanha Bay Municipality*⁵ and *Rademan v Moghaka Municipality*⁶ the Court was confronted by efforts of residents to hold their municipalities to account. In *Rademan* the municipality could fairly be described as ‘frankly dysfunctional’. We will argue that the Constitutional Court was more than willing to assert the municipal domain of governance. Further, the Court was willing to condone less than perfect rule-compliant tax collection, thereby accommodating – to some extent – weak municipal administrations. Finally, the Court skirted around the problem of dysfunctionality and the legal remedies that desperate residents lack who cannot hold their municipalities to account.

II CONTEXT

The establishment of the new local government regime in December 2000 has not resulted in meeting the goals of ‘developmental local government’, as articulated in the 1998 White Paper on Local Government.⁷ Some of the outcomes of developmental local government were identified as the provision of household infrastructure and services and the creation of liveable, integrated cities, towns and rural areas.⁸

By 2009 many, but not all, local governments were showing clear signs of distress and some of outright dysfunctionality. Outward manifestations of this state of affairs included: the ever increasing civil society protests against poor service delivery in both urban and rural areas;⁹ the withholding of rates in some rural municipalities;¹⁰ the rising number of provincial interventions in terms of s 139 of the Constitution;¹¹ the issuing of disclaimers, adverse and qualified audit reports by the Auditor-General for the majority of municipalities because of their poor financial management;¹² and a plethora of court cases and reports on maladministration, corruption and fraud in the procurement of goods and services.

The poor state of health of local government was widely acknowledged from both inside and outside of government. In 2009 the Department of Cooperative

⁵ *Britannia Beach Estate (Pty) Ltd and Others v Saldanha Bay Municipality* [2013] ZACC 30, 2013 (11) BCLR 1217 (CC) (‘*Britannia Beach*’).

⁶ *Rademan v Moghaka Local Municipality and Others* [2013] ZACC 11, 2013 (4) SA 225 (CC), 2013 (7) BCLR 791 (CC) (‘*Rademan*’).

⁷ White Paper on Local Government, *Government Gazette* 18739, General Notice 423 (13 March 1998).

⁸ *Ibid* at 22.

⁹ D Powell, M O’Donovan & J de Visser *Civic Protest Barometer* (2015), available at http://dullahomarinate.org.za/our-focus/mlgi/civic-protests-barometer-2007-2014/at_download/file.

¹⁰ D Powell, J de Visser, A May & P Ntliziywana ‘The Withholding of Rates and Taxes in Five Municipalities’ (2010) 12(4) *Local Government Bulletin* 9.

¹¹ D Powell, M O’Donovan, Z Ayele & T Chigwata *Municipal Audit Consistency Barometer* (2013), available at http://dullahomarinate.org.za/our-focus/mlgi/municipal-audit-consistency-barometer/at_download/file.

¹² D Powell, M O’Donovan, Z Ayele & T Chigwata *Operation Clean Audit 2014 – What Went Wrong And Why?* (2013), available at <http://dullahomarinate.org.za/our-focus/mlgi/operation-clean-audit-2014>.

Government and Traditional Affairs conducted an assessment of each of the 283 municipalities in the nine provinces with the aim of identifying the root causes for poor performance, distress or dysfunctionality in municipalities.¹³ The resultant Report stated that:

[p]rovincial assessments exposed that causal reasons for distress in municipal governance pointed to:

- a) tensions between the political and administrative interface;
- b) poor ability of many councillors to deal with the demands of local government;
- c) insufficient separation of powers between political parties and municipal councils;
- d) lack of clear separation between the legislative and executive;
- e) [sic]
- f) inadequate accountability measures and support systems and resources for local democracy; and
- g) poor compliance with the legislative and regulatory frameworks for municipalities.¹⁴

The Report also identified the three main causes that prompted provincial interventions in municipalities in terms of s 139 of the Constitution in the extreme cases where a municipality could not or did not fulfil its executive obligations:¹⁵

The most common failures that have triggered s 139 provincial interventions fall into three broad categories:

- (1) **Governance:** Political infighting, conflict between senior management and councillors and human resource management issues.
- (2) **Financial:** Inadequate revenue collection, ineffective financial systems, fraud, misuse of municipal assets and funds.
- (3) **Service delivery:** Breach of sections 152 and 153 of the Constitution which outline service delivery obligations of municipalities.

The important references for the purpose of this article are to ‘inadequate accountability measures and support systems and resources for local democracy’ and to the ‘inadequate revenue collection, ineffective financial systems, fraud, misuse of municipal assets and funds’. On the one hand, municipalities collect too little revenue. On the other hand they too often squander what they have in the absence of adequate accountability measures.

Five years later, as noted above, the assessment of local government by the new Minister Pravin Gordhan was no better. In a policy document, titled *Back to Basics: Serving our Communities Better!*, the Minister divided the 278 municipalities between the top third municipalities that have ‘got the basics right and are performing their functions at least adequately’ (mainly the metros and secondary cities), the middle third that are ‘fairly functional’ (rural towns), and the bottom

¹³ Department of Cooperative Governance and Traditional Affairs *State of Local Government in South Africa: Overview Report - National State of Local Government (2009)* (*State of Local Government Report*) available at <http://www.gov.za/sites/www.gov.za/files/state-local-gov-rpt1.pdf>.

¹⁴ *Ibid* at 10.

¹⁵ *Ibid* at 19.

third (mostly rural areas) that are ‘frankly dysfunctional’.¹⁶ Among the ailments of the bottom third are:

endemic corruption, and poor financial management leading to continuous negative audit outcomes. There is a poor record of service delivery, and functions such as fixing potholes, collecting refuse, maintaining public places or fixing street lights are not performed. While most of the necessary resources to render the functions or maintain the systems are available, the basic mechanisms to perform these functions are often not in place. It is in these municipalities that we are failing our people dramatically, and where we need to be intervening urgently in order to correct the decay in the system.¹⁷

A further concern identified was the viability of certain municipalities: ‘The low rate of collection of revenue continues to undermine the ability of municipalities to deliver services to communities.’¹⁸

Over the past decade and a half, the response of the national government to these challenges has been two-fold: first, a persistent drive to continuously tighten the legislative framework for municipalities, and second, a series of support programmes. The first strategy is based on the vain belief that systemic problems can be legislated out of existence, whereas, in fact, the more regulation was poured over local government, the greater the lawlessness that ensued.¹⁹ The second response, namely large scale support programmes, such as ‘Project Consolidate’ and ‘Siyenza Manje’ could resolve immediate problems but not systemic ones. Provinces, bearing the responsibility of monitoring, supporting, and if need be intervening in failed municipalities,²⁰ were often incapable of doing so effectively.²¹

The state of local government that the Constitutional Court confronts is thus comprised of: municipalities, large and small, that are performing well and can do more; most municipalities that are financially vulnerable as they must collect the bulk of their revenue; and dysfunctional municipalities which are not accountable to the residents they serve.

III EMPOWERING LOCAL GOVERNMENT TO CONTROL THE LOCAL SPACE

The first judgment, *Lagoonbay*, falls in the first category, namely a dispute about local government’s constitutional powers and the Court’s role in strengthening local government by protecting these powers. It is part of a series of four Constitutional Court judgments dealing with the delineation of municipal powers over land use planning. In terms of the Constitution ‘municipal planning’ is a municipal competence,²² a matter over which the national and provincial

¹⁶ *Back to Basics* (note 1 above) at 4.

¹⁷ *Ibid* at 4–5.

¹⁸ *Ibid* at 5.

¹⁹ N Steytler ‘The Strangulation of Local Government’ (2008) *Journal of South African Law* 518.

²⁰ See N Steytler & J de Visser *Local Government Law of South Africa* (2013) Chapter 15.

²¹ *State of Local Government Report* (note 13 above) at 17.

²² Constitution ss 156(1) and (2) read with Schedule 4B.

governments have only limited regulatory powers in terms of s 155(7).²³ It is useful to provide a brief overview of the other three cases because this ‘quartet’ of judgments, of which *Lagoonbay* is part, signals a firm and consistent trend on municipal powers.

The first judgment in the series was handed down in 2010 when the Court struck down parts of the Development Facilitation Act.²⁴ The City of Johannesburg had taken issue with provincial tribunals rezoning land and deciding on the establishment of townships/subdivision of land in its jurisdiction. It argued that these powers fell within its constitutional competency for ‘municipal planning’ and that provinces could not usurp those powers. In *Gauteng Development Tribunal*, the Court agreed and struck down those parts of the DFA that established and empowered the provincial tribunals to rezone land and decide on the establishment of townships/subdivision of erven.²⁵ This was a victory for municipal autonomy and cast doubt over the strong role hitherto played by provinces in land use planning matters. Many provinces, the Western Cape included, saw their powers to discourage inappropriate development and encourage appropriate development diminishing.

The second judgment, *Maccsand*,²⁶ was handed down in 2012 and built on the precedent set by *Gauteng Development Tribunal*. The question was whether the fact that a mining company had obtained a mining license obviated the need for it to obtain municipal land use approvals in terms of the Western Cape’s Land Use Planning Ordinance.²⁷ The mining company, supported by the national Minister of Minerals and Energy argued that the granting of a mining license trumps municipal authority over ‘municipal planning’: otherwise national government’s exclusive authority over mining would be usurped by the municipality. The Court dismissed this approach with the simple argument that ‘LUPO regulates the use of land and not mining’.²⁸ *Maccsand* was an important marker in the development of a better understanding of the division of powers between spheres of government. The fact that a particular activity, regulated by local government, attracts the legislative attention of further spheres of government is not constitutionally problematic.

In *Lagoonbay*, the province pursued its case from a different angle (and achieved partial success). The dispute revolved around a development in the jurisdiction of George Municipality. The development included two golf courses, a hotel, a private park and a gated residential community. It was, by all accounts, controversial and its impact stretched beyond the boundaries of George. The case revolves around various planning instruments, the detail of which is not discussed here. But the crux is this: on the basis of certain provisions of LUPO, the MEC had

²³ On the ambit of the national and provincial governments’ regulatory powers, see Steytler & De Visser (note 20 above) at 24(11) – 24(13).

²⁴ Act 67 of 1995 (DFA).

²⁵ *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others* [2010] ZACC 11, 2010 (6) SA 182 (CC), 2010 (9) BCLR 859 (CC) (‘*Gauteng Development Tribunal*’).

²⁶ *Maccsand (Pty) Ltd v City of Cape Town and Others* [2012] ZACC 7, 2012 (4) SA 181 (CC), 2012 (7) BCLR 690 (CC) (‘*Maccsand*’).

²⁷ 15 of 1985 (LUPO).

²⁸ *Maccsand* (note 26 above) at para 47.

reserved for herself the right to approve the rezoning and subdivision that were necessary to make the development happen. The argument was that ‘the location and impact of the proposed development constitutes “Regional and Provincial Planning”, not ‘municipal planning’.²⁹ The municipality approved the subsequent application for rezoning and subdivision but also referred the matter to the MEC. The MEC refused the application. That decision was challenged by the developer who wanted the Court to declare that the municipality’s approval was sufficient to proceed with the development. The developer argued, on the basis of *Gauteng Development Tribunal* that only municipalities may decide on rezoning and subdivision. They furthermore argued, with reference to *CDA Boerdery (Edms) Bpk and Others v The Nelson Mandela Metropolitan Municipality and Others*,³⁰ that the sections of LUPO relied upon by the MEC were impliedly repealed with the coming into operation of the Constitution.

In response, the MEC accepted that, in a large majority of cases, municipalities must consider land use applications as their impact is limited to the geographical area of the municipality. However, he argued that there is a category of planning decisions which have an impact beyond the area of a single municipality and that therefore fall within the ambit of ‘provincial planning’ and/or ‘regional planning and development’ as contained in Part A of Schedules 4 and 5 of the Constitution. The MEC’s argument was accepted in the Western Cape High Court.³¹ On appeal, the Supreme Court of Appeal disagreed and held that the rezoning was a matter for the municipality, not the provincial government. It based this on an understanding of zoning schemes as an instrument ‘to determine use rights and to provide for control over use rights and over the utilisation of the land in the area of jurisdiction of a local authority’.³²

The scene was thus set for a constitutional argument on the reach of the municipality’s constitutional authority with regard to ‘municipal planning’ and provincial powers with regard to the same functional area. However, the constitutional argument fell flat as the developer – Lagoonbay – did not attack the provisions of LUPO the MEC relied upon. Instead, it argued that these sections had been ‘impliedly repealed’ by s 8 of the Local Government: Municipal Systems Act³³ and s 83(1) of the Local Government: Municipal Structures Act³⁴ because these provisions no longer empower provinces to rezone and subdivide. The Constitutional Court did not accept this argument because these Acts do little more than restate the Constitution. They do not provide for any alternative for the intricate and critically important scheme set forth by LUPO and there is no neatly identifiable provision that can be removed to address the unconstitutionality.

²⁹ *Lagoonbay* (note 2 above) at para 4. ‘Regional planning and development’ is a Schedule 4A functional area, while ‘provincial planning’ is an exclusive Schedule 5A functional area.

³⁰ *CDA Boerdery (Edms) Bpk en Andere v Nelson Mandela Metropolitan Municipality* [2007] ZASCA 1, 2007 (4) SA 276 (SCA).

³¹ *Lagoonbay Lifestyle Estate (Pty) Ltd v Minister of Local Government, Environmental Affairs and Development Planning of the Western Cape and Others* [2011] ZAWCHC 327, [2011] 4 All SA 270 (WCC).

³² *Lagoonbay Lifestyle Estate (Pty) Ltd v The Minister for Local Government, Environmental Affairs and Development Planning of the Western Cape & Others* [2013] ZASCA 13 at para 8.

³³ Act 32 of 2000.

³⁴ Act 117 of 1998.

Because the MEC's actions were based on unchallenged provisions of LUPO the Court was thus forced to limit its enquiry to the question as to whether the MEC acted *ultra vires* LUPO.³⁵ In essence, the judgment emphasises the rule of law. A validly enacted provincial law remains valid until set aside by the Constitutional Court. Decisions taken in terms of those laws are valid, no matter how incompatible they may be with the Constitution. This is different only if the decision itself is *ultra vires* the empowering law.

However, the Court did confess that it was tempted to follow the Supreme Court of Appeal in setting aside the MEC's conduct.³⁶ It even elaborated, in five neat points, what its argument would have been (had it succumbed to that temptation). First, national and provincial spheres are, in principle, not entitled to usurp the functions of local government. Secondly, the constitutional vision of autonomous spheres of government must be preserved. Thirdly, while the Constitution confers planning responsibilities on each of the spheres of government, those are different planning responsibilities, based on 'what is appropriate to each sphere'. Fourthly, "planning" in the context of municipal affairs is a term which has assumed a particular, well-established meaning which includes the zoning of land and the establishment of townships'. Lastly, the provincial competence for 'urban and rural development' is not wide enough to include powers that form part of 'municipal planning'.³⁷ These factors led the Court to the compelling (but inconsequential) conclusion that 'there is therefore a strong case for concluding that, under the Constitution, the Provincial Minister was not competent to refuse the rezoning and subdivision applications'.³⁸

Number four of the quartet of Constitutional Court judgments on municipal powers in land use planning was decided in 2014 but deserves consideration as it is the judgment in which the Court could complete the reasoning which it was forced to abandon in *Lagoonbay. Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v The Habitat Council and Others*.³⁹ dealt with the constitutionality of s 44 of LUPO, which provided that persons aggrieved by a land use control decision taken by a municipality, may appeal to the Premier who considers the appeal and may replace the municipal decision with his or her own decision regardless of the nature or scale of the development. The Court held that s 44 was unconstitutional: "The provincial appellate capability impermissibly usurps the power of local authorities to manage "municipal planning", intrudes on the autonomous sphere of authority the Constitution accords to municipalities, and fails to recognise the distinctiveness of the municipal sphere."⁴⁰

The MEC had urged the Constitutional Court to retain the provincial appeal authority in cases where the development has an impact beyond the municipality's

³⁵ *Lagoonbay* (note 2 above) at para 45.

³⁶ *Ibid* at para 46.

³⁷ *Ibid*.

³⁸ *Ibid*.

³⁹ *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v The Habitat Council and Others; Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v City of Cape Town and Others* [2014] ZACC 9, 2014 (4) SA 437 (CC), 2014 (5) BCLR 591 (CC) ('*Habitat Council*').

⁴⁰ *Ibid* at para 13 (footnotes omitted).

boundary. The MEC's first argument was that without the provincial executive's 'surveillance', the provincial government would be powerless to stop big decisions with extra-municipal effects. The Court, with reference to *Maccsands*, did not accept this argument. No matter how big the development, provinces must use powers of their own to stop the undesirable ones instead of relying on a power to reverse municipal decisions.⁴¹

The second argument was that s 155(7) of the Constitution permits the provincial government to exercise oversight over municipalities and thus permits provinces to hear appeals against municipal decisions. The Constitutional Court disagreed. It held that s 155(7) does not permit the usurpation of the power or the performance of the function itself, but allows the provincial government to determine norms and guidelines. Thirdly, the MEC argued that the appeal power enables the provincial government to protect provincial interests as otherwise 'parochial municipal interests will triumph'.⁴² To this, the Court responded tersely by stating that the Constitution intends for those 'parochial interests' to prevail in subdivision and zoning decisions 'subject only to the oversight and support role of national and provincial government, and to the planning powers vested in them'.⁴³ Section 44 of LUPO was thus declared unconstitutional in its entirety.

The quartet of Constitutional Court decisions, with *Lagoonbay* as the awkward middle one, establishes a firm and consistent trend on municipal powers, most eloquently expressed in the Court's five-point confession in *Lagoonbay*. Turning the attention back to the overall theme of this article – the Court being confronted with both assertive, capable local governments as well as with dysfunctional ones – it is telling that in all of these cases, the charge against national and provincial government's tight-fisted approach was led by municipalities in the top third of Minister Gordhan's categorisation. In three of the four cases, a metropolitan municipality asserted its authority and in *Lagoonbay* the authority of a secondary city, namely George Municipality, was vindicated.

The consequence of the quartet of cases is that all municipalities, still under the yoke of provincial ordinances or old order national legislation, are given expansive scope in the field of planning. It is also a further indicator that the Court is generous in its interpretation of local powers. The result is that both highly functional urban municipalities, facilitating large developments, and dysfunctional rural municipalities benefit from the Court's approach. Put differently, the mere fact that dysfunctional municipalities may not be able to exercise such 'increased' powers effectively or efficiently is no bar for empowering the able and the willing.

Having increased powers is one thing; having the financial resources to exercise those powers productively is another. Moreover, if the exercise of powers is transmogrified in public obligations to provide basic services, the powers to levy and collect property rates are crucial.

⁴¹ Ibid at paras 20–22.

⁴² Ibid at para 23.

⁴³ Ibid.

IV EXTRACTING REVENUE

Local governments find themselves in a precarious financial position. They are reliant on raising their own revenue for the bulk of their expenditure. For the 2013/14 financial year they collectively raised 73 per cent of their revenue, the rest coming from transfers in the form of an equitable share and conditional grants.⁴⁴ This figure, of course, masks the great disparities between local governments. The eight metropolitan municipalities raised 83 per cent of their revenue, while the 70 most rural municipalities were reliant on transfers for 73 per cent of their revenue.⁴⁵ This disparity is the result of the differing economic contexts in which the municipalities apply their power to impose property rates and charge user fees for water and electricity, their main revenue sources.

The strength of local government autonomy, and ostensibly the pillar of its democratic accountability, is the fact that the majority of municipalities raise and collect the bulk of their own income. This creates a special relationship with their ratepayers and customers. However, collecting revenue has not been easy. Aggregate municipal consumer debts were R98 billion as at 30 September 2014.⁴⁶ As noted, the failure to collect sufficient revenue threatens the sustainability of many municipalities. It is this backdrop that makes *Liebenberg* and *Ingonyama Trust* particularly important. Both judgments deal with the imposition of property taxes, a key source of income for local government. Prior to the ushering in of the new local government dispensation in 2000, rural land owners were not required to pay property rates. The introduction of wall-to-wall municipalities placed the entire country under local democracy, and, one has to hasten to say, all land owners under the obligation to pay property taxes. Two groups of rural land owners had previously fallen outside the reach of property rates – private agricultural land and communal land, the one historically white and wealthy, the other black and impoverished.

A Empowering Municipalities to Collect Rates

In *Liebenberg*,⁴⁷ land owning farmers in the rich wheat farming district of the Swartland protested against having to pay property rates when they were first introduced by the Bergrivier Municipality in 2001. They refused to pay for the following eight years. This was a case of ratepayers that could pay, but did not

⁴⁴ National Treasury *Budget Review 2014* (2014) 100, available at <http://www.treasury.gov.za/documents/national%20budget/2014/review/FullReview.pdf>.

⁴⁵ *Ibid.*

⁴⁶ National Treasury *Local Government Revenue and Expenditure: First Quarter Local Government - Section 71 Report for the period: 1 July 2014 – 30 September 2014* (5 December 2014) 2, available at http://www.treasury.gov.za/comm_media/press/2015/2015061501%20-%20Press%20Release%20S71.pdf.

⁴⁷ *Liebenberg* (note 3 above).

want to in the context of a reasonably performing municipality,⁴⁸ against which no complaints about the quality of services or governance were levelled.

As both the Constitution and the local government legislation empowered municipalities to levy rates on all properties, the disgruntled farmers' legal focus was limited to procedural challenges – the levying of property rates was irregularly done, first in terms of the Local Government Transition Act,⁴⁹ the Local Government: Municipal Finance Management Act,⁵⁰ and then the Local Government: Municipal Property Rates Act.⁵¹ Of course, the farmers (or rather their lawyers) had a field day. The laws are replete with detailed rules to municipalities on how to levy rates, how to be participatory as much as possible. These detailed rules are termed by Geoff Budlender as 'trip wires';⁵² a municipality is bound to trip up on one or other of the requirements in the relevant legislation.

The farmers complained, among others matters, about the following:

- (a) During the 2002/3 financial year, the Municipality failed to publicly give notice of its rates resolution as required by s 10G(7)(d)(ii) of the LGTA;
- (b) For the 2004/5 to 2008/9 financial years the municipality did not display a notice stating the 'general purport' of the rates resolution, including the rebate for farmers (as required by s 10G(7)(c)(ii) of the LGTA);
- (c) For the 2005/6 to 2008/9 financial years, the notice published on the rates resolution omitted to state that objections could be lodged within 14 days as required by s 10G(7)(c)(iv) of the LGTA, but not required by the MFMA;
- (d) For the 2006/7 to 2008/9 financial years, the rates resolution was not published in the *Provincial Gazette* as required by s 14(2) of the Rates Act.

In the end, the issues were (a) which rules applied; and (b) how the courts should deal with non-compliance of the specific applicable rules. On both scores the majority opinion of the Court, penned by Mhlantla AJ, came out strongly in favour of the Municipality, interpreting the law purposively to give local government maximum leverage over unwilling ratepayers.

1 *Which Rules Applied?*

The LGTA, by its very transitional nature, was the most accommodating for municipalities. During the transitional phase; it imposed the least demanding publication requirements on municipalities. The Rates Act, giving effect to s 229(2)(b) of the Constitution, is more demanding, setting specific requirements for public notification and participation. The first issue to be decided was whether

⁴⁸ For example, in its report over the 2012–2014 financial year, the Auditor-General's finding with respect to Bergrivier was 'unqualified with findings'. This indicates that the financial statements contain no material misstatements and is a good indicator that the Municipality is reasonably well-governed. The Auditor-General pointed out that the municipality had improved on its performance compared to the previous financial year. Auditor-General *General Report on the Audit Outcomes of Local Government 2012-13 – Western Cape* (2013) 143.

⁴⁹ Act 209 of 1993 (LGTA).

⁵⁰ Act 56 of 2003 (MFMA).

⁵¹ Act 4 of 2004 (Rates Act).

⁵² G Budlender 'Presentation at launch of *Local Government Law of South Africa*' (Cape Town, 29 May 2008) (on file with the authors).

s 10G(7) of the LGTA, which was repealed by s 179 of the MFMA, but kept alive as a transitional provision, was finally extinguished by the enactment of the Rates Act, or only when this Act's transitional provisions lapsed on 30 June 2011.

On this score the Court split. A plain reading of s 179 of the MFMA would have meant that the enactment of the Rates Act finally meant the death knell of s 10G(7) (and success for the farmers), while a broad construction, which would not strain the text too far, would keep s 10G(7) of the LGTA alive (and the municipality in business). The latter route was chosen, because Mhlantla AJ held that the purpose of the Rates Act should not only be ascertained from its own provisions, but also from 'the broader context within which it was passed and the relationship between the various statutory enactments that have sought to restructure local government'.⁵³ The Municipality could thus rely on the LGTA to excuse its failure to publish the rates resolution in the *Provincial Gazette* as required by s 14(2) of the Rates Act. Even where the LGTA imposed a burden, such as that the published notice must state that objections could be lodged within 14 days of the publication, the Municipality could rely on the MFMA, which had no such requirement.⁵⁴ The import is clear; an interpretation that empowers municipalities to levy rates should be preferred above one that impedes municipalities, at least in the transitional phase.

The background to this is that the LGTA was the legislated outcome of the multiparty negotiations on the future of local government in post-apartheid South Africa. It regulated the complicated transformation of the fragmented and illegitimate system of Apartheid local government into a system that aligns with the new constitutional order. Importantly, it sought to do so without major disruption to existing systems and services. The Court emphasises that the LGTA had a specific purpose, namely to afford local government time to develop new rating systems. The Court, while lightly annoyed with the poorly worded transitional provisions, thus displayed understanding with regard to the complexity of the local government transformation and protected local government's revenue stream as an essential platform from which to exercise a developmental mandate.

2 *Impact of Non-compliance with the Rules?*

The second battery of arguments, launched by the farmers, was essentially a series of procedural flaws on the basis of which they sought to have the imposition of property rates set aside. The Court considered these arguments against the backdrop of a general approach to assessing a municipality's compliance with statutory prescripts, namely:

[A] failure by a municipality to comply with relevant statutory provisions does not necessarily lead to the actions under scrutiny being rendered invalid. The question is whether there has been substantial compliance, taking into account the relevant statutory provisions in particular and the legislative scheme as a whole.⁵⁵

⁵³ *Liebenberg* (note 3 above) at para 39.

⁵⁴ *Ibid* at para 73.

⁵⁵ *Ibid* at para 26.

Even when the less demanding rules of the LGTA applied, the failure to apply them scrupulously did not necessarily invalidate the imposition of rates. Writing for the majority Mhlantla AJ first quoted, with approval, the Court's earlier holding in *African Christian Democratic Party v Electoral Commission*, that 'the question is whether the steps taken by the local authority are effective when measured against the object of the Legislature, which is ascertained from the language, scope and purpose of the enactment as a whole and the statutory requirement in particular'.⁵⁶ With reference to a matter where property rates was in issue, she quoted with approval the following SCA dictum: "To nullify the revenue stream of a local authority merely because of an administrative hiccup appears to me to be so drastic a result that it is unlikely that the Legislature could have intended it".⁵⁷

Consequently, the fact that the Municipality failed to publicly give notice of its rates resolution as required by s 10G(7)(d)(ii) of the LGTA, was not material. The Municipality went through a public participation process and was responsive thereto, and these measures were 'substantially effective in achieving the objects of s 10G(7) in particular and the legislative scheme as a whole'.⁵⁸ The complaint that the public notice stating the 'general purport' of the rates resolution, did not including the rebate for farmers (as required by s 10G(7)(c)(ii) of the LGTA) was also dismissed, as the notice said that details of the resolution were available for inspection.⁵⁹

The motivation for this very accommodating approach to local government need not be a question for speculation as the Court provided it in clear terms in the final two paragraphs of the judgment: municipalities are largely self-reliant and those who can pay should do so. Mhlantla AJ referred to the early Constitutional Court decision in *Pretoria City Council v Walker*, in which Langa DP wrote that '[a] culture of self-help in which people refuse to pay for services they have received is not acceptable'.⁶⁰ She then continued:

Effective cooperation between citizens and government at local level is a foundational building block of our democracy. The State must of course uphold the rule of law and ensure its obligations are discharged. But, at the same time the culture of non-payment for municipal services has, as this Court has said before, "no place in a constitutional State in which the rights of all persons are guaranteed and all have access to the courts to protect their rights".⁶¹

The *Liebenberg* judgment is thus a further example of the Court coming down on the side of local government, helping it not to stumble over the 'tripwires' designed by a zealous national government and used by farmers reluctant to pay local government taxes.

⁵⁶ *African Christian Democratic Party v Electoral Commission and Others* [2006] ZACC 1, 2006(3) SA 305 (CC), 2006 (5) BCLR 579 (CC) at para 25.

⁵⁷ *Nokeng Tsa Taemane Local Municipality v Dinokeng Property Owners Association* [2012] ZASCA 128, [2011] 2 All SA 46 (SCA) at para 14, quoted in *Liebenberg* (note 3 above) at para 24.

⁵⁸ *Liebenberg* (note 3 above) at para 61.

⁵⁹ *Ibid* at para 67.

⁶⁰ *City Council of Pretoria v Walker* [1998] ZACC 1, 1998 (2) SA 363 (CC), 1998 (3) BCLR 257 (CC) ('*Walker*') at para 93.

⁶¹ *Liebenberg* (note 3 above) at para 80, quoting *Walker* (note 60 above) at para 92.

While the outcome is surely correct – not every hiccup should invalidate a revenue raising measure – it does raise questions of legal certainty and the faithful adherence to the principle of legality. Khampepe J in her minority judgment gave a stirring defence of the principle:

Where the State purports to extract taxes from its citizens – conduct that goes to the very heart of the social contract between government and its people – that extraction must be done in a lawful manner. Where a local authority purports to impose rates, that imposition must be done in accordance with the constraints that Parliament has imposed. If we are to give cognisance to the fact that the Constitution now empowers municipalities to exercise original legislative powers, we must also accept that municipal authorities may no longer adopt an informal approach to the exercise of their powers.⁶²

One cannot but agree with her sentiment that ‘the principle of legality [lies] at the heart of our modern constitutional dispensation’.⁶³ The problem remains, however, that of over-prescription by the legislature.⁶⁴ Every ‘must’ – and there are hundreds of them scattered throughout the suite of local government legislation – cannot render local administrative decisions vulnerable to procedural challenges with potentially grave consequences for municipalities. In its eagerness to ensure the correct and desirable process, the legislator has often overreached its aim. The courts, not wanting to see dire financial consequences for the municipality will on a case by case basis ‘rewrite’ the statute book for what is reasonable in a particular set of circumstances.

As noted above, sustainable financial resources lie at the heart of a well-functioning municipality that delivers services. In the transition phase of local government, municipalities – particularly in rural areas where the skills base is uneven – have struggled to find their way through the thicket of the evolving financial legislation that has increased in density. In *Liebenberg* the Court accommodated municipalities by applying a soft approach to regulatory compliance, an approach from which struggling municipalities would derive the most benefit. However, it is on this very point that the Court split. It will always be a difficult path to tread between, on the one side, protecting municipalities from getting routinely tripped up, and, on the other side, weakening adherence to the rule of law. The majority’s approach of requiring substantial compliance with the policy purpose of the legislative requirements is appropriate; it is doubtful whether the skills capacity of a municipality to comply with the requirements should be a relevant factor at all.

B (Retrospective) rating of communal land

There are, however, limits to the Court’s willingness to accommodate municipalities’ need to spread the tax net as wide as possible. In *Ingonyama Trust*⁶⁵ the Court dealt with a complainant from the other end of the spectrum from that of private landowners, namely the owners of communal land in KwaZulu-Natal.

⁶² *Liebenberg* (note 3 above) at para 164.

⁶³ *Ibid* at para 165.

⁶⁴ See Steytler (note 19 above).

⁶⁵ *Ingonyama Trust* (note 4 above).

These areas fell outside the formal structures of local governance during the apartheid era. The local government transformation, culminating in 2000 when a ‘wall-to-wall’ system of local government was established, brought this category of land under the jurisdiction of municipalities’ rates regimes.

In *Ingonyama Trust*, the metropolitan municipality approached the High Court in 2009 for a declaratory order that the communal land held in trust by the Ingonyama Trust, which fell within the boundaries of the municipality, was rateable land as from May 1996, when the first election of transitional councils were held, until June 2005 when the Rates Act came into force. The Rates Act also repealed the Rating of State Property Act,⁶⁶ which exempted state land from rates. The question was whether the Rating Act applied to the land held by the Ingonyama Trust from 1996 to June 2005. The High Court held that it did not, making the trust land subject to rates, a decision that was reversed by the Supreme Court of Appeal.⁶⁷

In refusing the Municipality leave to appeal because there were no prospects for success, the Constitutional Court confirmed the SCA decision that the land held by the Trust was state property within the meaning of the Act and the Constitution and thus exempt from property taxes. In refusing leave, the Court also said that ‘it would not ordinarily be in the interests of justice for a municipality to be allowed to levy rates on immovable property, dating back eight to 17 years, without any explanation for its failure to do so within the relevant financial years’.⁶⁸ In passing the Court laid down a general principle against the retrospective levying of rates: ‘An underlying principle regarding the levying of rates is that they must be levied within the financial year in respect of which the rates are charged.’⁶⁹ Jafta J advanced the following reasons for this rule. Firstly, a property owner would find it difficult to dispute the valuation of the rated property, years after the event. Secondly, as an increase in rates is bound up in the municipal budget, and the need for public notification and participation, the retrospective levying of rates would circumvent such processes.⁷⁰ One could further add the reason for notification of the rates resolution, namely, ratepayers must be informed in advance about their rates liability so that they can manage their financial affairs accordingly.

This decision does not fly in the face of the Court’s general supportive approach of strengthening and protecting municipal revenue raising powers. The Court will, however, not tolerate egregious transgressions of basic legal precepts such as the rule against retrospectivity.

V EXTRACTING ACCOUNTABILITY FOR EXPENDITURE

From a democratic theory perspective, the link between taxes and democracy was forged at the Boston Tea Party on 16 December 1773 with the demand:

⁶⁶ Act 79 of 1984.

⁶⁷ *Ingonyama Trust v Etbekwini Municipality* [2012] ZASCA 104, 2013 (1) SA 564 (SCA).

⁶⁸ *Ingonyama Trust* (note 4 above) at para 41.

⁶⁹ *Ibid.*

⁷⁰ *Ibid* at paras 41–42.

‘No taxation without representation’. It is fundamentally unfair to pay taxes with no control over expenditure decisions on the tax revenue so raised. Thus a fundamental notion of democratic governance was established. The raising and spending of revenue is the prerogative of the elected government. The Constitutional Court, in the celebrated case of *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others*,⁷¹ held that the adoption of a municipal budget and revenue-raising measure is a legislative act and thus not subject to administrative review.

This logic also establishes a fundamental democratic accountability relationship between the elected representatives and the electorate. Where an elected government extracts hard-earned money from its citizens, the latter has every incentive to hold the elected government accountable for the purpose and manner in which the taxpayers’ money is spent. Dissatisfaction about expenditure decision should, theoretically at least, lead to the withdrawal of the political mandate of the elected government at the next election. However, the five yearly disapproval rating is insufficient in modern democracies; a continuous engagement in decision making has become part and parcel of the modern concept of participatory democracy. As noted above, the Constitutional Court has confirmed that this principle underpins the Constitution and informs local governance. The Local Government: Municipal Systems Act requires residents’ participation in the key decisions of the municipal council, the MFMA demands participation in the budgeting process, and the Rates Act in the levying of rates, all statutory provision that have been given effect to by the courts.⁷² The requirements of consultation with residents have not resulted on the whole in a satisfied citizenry, as evidenced by numerous cases where residents claim that municipalities did not act in a transparent or accountable manner. In 2013, the Constitutional Court was confronted with two such cases where it had to carefully assess whether the municipalities’ conduct could withstand constitutional scrutiny.

A Constitutional Duty to Account?

In *Brittania Beach v Saldanha Bay Municipality*⁷³ a group of developers unsuccessfully tried to employ the principle of accountability to extract an account from the municipality in respect of certain sums they alleged were overpaid. They failed, not because the Court did not accept democratic accountability but rather because they leapfrogged the applicable statutory instruments to extract accountability and instead wanted to rely directly on constitutional principles. The payments were capital contributions, levied as conditions to land use approvals. By the time the issue reached the Constitutional Court, the better part of the dispute had been resolved by the Supreme Court of Appeal’s ruling that the capital contributions

⁷¹ *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* [1998] ZACC 17, 1999 (1) SA 374 (CC), 1998 (12) BCLR 1458 (CC) at paras 44 and 46.

⁷² See *South African Property Owners Association v City of Johannesburg Metropolitan Municipality and Others* [2012] ZASCA 157, 2013 (1) SA 420 (SCA), 2013 (1) BCLR 87 (SCA) (‘*SA Property Owners Association*’) at para 32.

⁷³ *Brittania Beach* (note 5 above).

were validly imposed.⁷⁴ The developers still argued, however, that the Supreme Court of Appeal overlooked the fact that a constitutional duty to account rests on the municipality on the basis of s 195 of the Constitution, containing the basic values and principles of public administration.

However, the Constitutional Court held that these do not give rise to independent rights and that the Constitution, statutes, and court proceedings provide specific rights and remedies that could have been pursued. Since the claim for a duty to account was not located within any statutory framework, it failed. The outcome may have been different, had the claim been based on a specific statutory remedy, such as a request for access to information in terms of the Promotion of Access to Information Act⁷⁵ or a claim based on the provisions of the Municipal Systems Act. There is a clear echo of *Lagoonbay*, where the Court refused to leapfrog LUPO despite its dubious constitutional status. Constitutional arguments that overlook the existence of relevant and applicable statutory instruments are unlikely to face a generous Constitutional Court.

The Court also held that a duty to account does not arise as a result of a fiduciary relationship between citizens and the municipality. The fiduciary relationship, so the Court reasoned, 'is a far cry from democratic accountability'.⁷⁶ This is important in the context of *Rademan* (discussed below), another judgment where the rules of contract were invoked to resolve disagreement between the municipality and its residents.

On the face of it, the Court merely applied the general rule that litigants must first resort to the specific rules, in this case to foster accountability, before seeking support in the Constitution. The question that *Rademan* indirectly posed was much more profound: what are the remedies when the usual rules of ensuring accountability and proper government fail, and the municipality fails to meet its basic mandate of general service delivery, as one third of (dysfunctional) municipalities routinely do?

B What is the Remedy when Local Government Fails?

Unresponsive or dysfunctional municipalities have evoked two sorts of protests, each coming from the polar sides of South Africa's class and race divide. In the townships – occupied almost exclusively by black people – 'service delivery protests' by the impoverished have increased over the years both in numbers and violence.⁷⁷ The majority of protests occurred in the better performing top third of municipalities – mainly in the metros.⁷⁸ However, a substantial number occurred in the dysfunctional third. Significantly, protest action has had no link with political choices. High levels of service delivery protests did not translate into any significant shifts in political support. This has been explained by the fact

⁷⁴ *Saldanha Bay Municipality v Britannia Beach Estate (Pty) Ltd* [2012] ZASCA 206.

⁷⁵ Act 2 of 2000 (PAIA).

⁷⁶ *Britannia Breach* (note 5 above) at para 18.

⁷⁷ Powell, O'Donovan & De Visser (note 9 above).

⁷⁸ *Ibid* at 5.

that protests focus on service delivery matters, while elections are still conducted along the politics of identity.⁷⁹

On the other side of the race and class divide have been protests by mainly white ratepayers associations in the form of withholding property rates payments. A 2010 study of five municipalities found that there were genuine service delivery problems that prompted the withholding of rates and that these grievances were attributed to real or perceived incapacity, maladministration and corruption in the municipality.⁸⁰ These views were shored up by the Auditor-General's reports that revealed actual problems in financial management. Although the financial impact of the withholding was limited (less than R10 million was withheld nation-wide with half of that located in three municipalities), the political impact was substantial as it played into historical divisions and racial stereotypes.

The constitutionality of this form of protest action eventually reached the Constitutional Court in *Rademan v Moqhaka Municipality*.⁸¹ Moqhaka Municipality, one of the five municipalities in the abovementioned study, should by all measures be a viable and effective municipality; with Kroonstad it has a large agricultural town at its core and a productive agricultural sector in the surrounding areas. Yet, on governance indicators it has done very poorly. It has collected eight successive disclaimers over the past years, that is, the Auditor-General could not conduct an audit of its financial statements in order to express an opinion.⁸² Such was the state of a deeply troubled governance situation. For example, during the 2011-2012 financial year, R52 million of the Municipality's expenditure was unauthorised, R111 million was irregular expenditure and R13 million was fruitless and wasteful expenditure. The Auditor-General issued a disclaimer and attributed the problems to three reasons: (1) key positions being vacant or key officials lacking competencies; (2) lack of consequences for poor performance; and (3) slow response by politicians in addressing root causes.⁸³ In 2012-2013, the Municipality made little progress, causing the Auditor-General to comment that the Municipality is 'stagnating'.⁸⁴

Ms Rademan decided to withhold the payment of rates because, euphemistically put, 'she was unhappy about what she regarded as poor or inefficient service delivery by the Municipality'.⁸⁵ She continued, however, to pay her electricity account, a strategy followed by other members of the Moqhaka Ratepayers and Residents' Association. The Municipality in response proceeded, after notification, to cut off her electricity supply, which prompted Rademan to turn to the courts for its restoration. Before the Kroonstad Magistrate's Court she argued: (a) the

⁷⁹ S Booyesen 'With the Ballot and the Brick: The Politics of Attaining Service Delivery' (2007) 7(1) *Progress in Development Studies* 21.

⁸⁰ Powell, De Visser, May & Ntliziywana (note 10 above).

⁸¹ *Rademan* (note 6 above).

⁸² Auditor General *General Report on the Audit Outcomes of Local Government 2012-13 – Free State* (2013) 58 (*Audit Outcomes Report Free State*).

⁸³ Auditor-General *Consolidated General Report on the Local Government Audit Outcomes 2011-12* (2013) 205, available at https://www.agsa.co.za/Portals/0/MFMA2011-12Extracts/MFMA_2011-12_consolidated_reports/AGSA_MFMA_CONSOLIDATED_REPORT_2011_12.pdf.

⁸⁴ *Audit Outcomes Report Free State* (note 82 above) at 59.

⁸⁵ *Rademan* (note 6 above) at para 4.

disconnection should be preceded by a court order; (b) she was not in arrears with her electricity account; and (c) not one of the conditions allowing disconnection in terms of the Electricity Regulation Act⁸⁶ was present. Her success in obtaining a court order for the restoration of the electricity supply was short-lived as the Free State High Court upheld the Municipality's appeal. Rademan pursued the matter further in Bloemfontein, but the Supreme Court of Appeal was not moved.⁸⁷ It affirmed that no prior court order is required by the Municipal Systems Act for a disconnection. The court's pragmatic answer was that such a requirement would be both 'unrealistic and untenable'.⁸⁸ Given the extent of service delivery protests and demonstration across the country, and ratepayers withholding rates, the court observed that it would be impractical to approach a court before every termination of a service. Also, the Municipal Systems Act made provision in s 102 for the consolidation of accounts, meaning that a customer could not pick and choose which account to pay and which not. The court did not address the third argument – whether s 21(5) of the Electricity Regulation Act governed the matter. What is clear from the litigation is that none of the arguments addressed the core issue: could the withholding of taxes be a legitimate remedy for poor service delivery?

Rademan was thus the test case for this form of protest. Although Rademan's delay in lodging an appeal against the Supreme Court of Appeal decision was 'excessive' and the reason proffered for it 'less than satisfactory', the Constitutional Court condoned the late application.⁸⁹ The main reason for doing so was the consent of the Municipality; it did so because of the matter was 'of great importance and interest to local government authorities throughout the country on which they need certainty' which only the Constitutional Court could provide.⁹⁰

When *Rademan* was argued before the Constitutional Court only two arguments were raised. First, the electricity supply could not be cut off as she was not in arrears on the payment of her electricity account. The second was that the municipality's power to cut off electricity supply was circumscribed by s 21(5) of the Electricity Regulation Act. On the first the Court held that s 102 of the Municipal Systems Act, as supplemented by the municipality's by-law, gave the municipality the power to consolidate the accounts of a consumer. The effect of such a consolidation is that if only part of the account is paid, the consumer is in breach of his or her obligation to pay and enforcement measures can be applied. On the second ground the Court confirmed the decisions of the courts *a quo*. Section 21(5)(c) of the Electricity Regulation Act allows the termination of the supply of electricity if the consumer contravened the conditions of payment set by the municipality, including the consolidation of accounts and the termination of services in the event of being in arrears.⁹¹ Froneman J argued, in our view

⁸⁶ Act 4 of 2006 s 21(5).

⁸⁷ *Rademan v Moghaka Municipality and Others* [2011] ZASCA 244, 2012 (2) SA 387 (SCA) ('*Rademan SCA*').

⁸⁸ *Ibid* at para 16. The matter was not raised before the Constitutional Court in *Rademan*.

⁸⁹ *Rademan* (note 6 above) at para 3.

⁹⁰ *Ibid*.

⁹¹ *Ibid* at para 29.

correctly, that the Electricity Regulation Act was not applicable to the case at all as it deals with the supply of electricity and not with the payment of rates.⁹² The matter should be resolved in terms of the Municipal Systems Act and the municipality's by-laws.

The Court's resolution of these issues did not break new ground. The issue of electricity (and even water) disconnections has been litigated extensively over the years.⁹³ The legal edifice of extracting payments of rates and other charges through the threat of electricity disconnection has been made watertight. Section 102 of the Municipal Systems Act allows for the consolidation of accounts. The provisions of s 102(2) of that Act, dealing with the suspension of payment due to a dispute, applies only when actual amounts due are contested. Municipalities must, however, enact by-laws to operationalise this power. The details of the Moqhaka Municipality's by-laws and agreement with electricity consumers attest to the concerted effort to make sure that any attempt of escaping the payment of rates is thwarted.

The legal skirmishes about the application of the Municipal Systems Act or the Electricity Regulation Act and municipal by-laws and agreements were merely diversionary legal strategies and issues. The real issue, also aired before the Court, was the vexed question as to what is 'the remedy of a resident or ratepayer ... where the municipality demands payment for a service or for services in circumstances where the municipality has not provided the service or services'.⁹⁴ The municipality's short answer was that a dissatisfied consumer must approach a court for a declaratory order that the service or services be rendered. Zondi J was of the view that Rademan's case was not that 'the Municipality claimed payment for services that it had not rendered. Indeed, in the present matter it has not been proved that the Municipality was claiming payment for services that had been rendered poorly or inefficiently'.⁹⁵ This view is rather surprising because it was indeed Rademan's case in the Magistrate's Court that she was withholding rates because of poor services.⁹⁶ However, Zondo J rose to the hypothetical challenge as follows:

[W]here a municipality claims payment from a resident or ratepayer for services, it is only entitled to payment for services that it has rendered. By the same token, where a municipality claims from a resident, customer or ratepayer payment for services, the resident, customer or ratepayer is only obliged to pay the municipality for services that have been rendered. There is no obligation on a resident, customer or ratepayer to pay the municipality for a service that has not been rendered. Accordingly, where, for example, a municipality included into an account for services an item for electricity when in fact no electricity has been connected to the particular property and, therefore no electricity has been supplied, the customer is entitled to take the stance that he or she will pay the total bill less the amount claimed for electricity supply.⁹⁷

⁹² Ibid at para 49.

⁹³ Steytler & De Visser (note 20 above) at 13-72 – 13-75.

⁹⁴ *Rademan* (note 6 above) at para 41.

⁹⁵ Ibid at para 42.

⁹⁶ Ibid at para 6.

⁹⁷ Ibid at para 42.

The example of electricity supply is not very helpful: no one disagrees that if no electricity is delivered, no payment obligation follows. It is a contractual relationship between a customer and a municipality for a ‘trading service’, that is, an individualised and measurable service. The real question is if general, non-individualised services are not delivered, or poorly delivered, could the rates that are meant to pay for such services, be withheld? Can the above dictum be used to also affirm a more general social contract?

The Court refers to three specific categories of persons who may become liable for payments: residents, customers and ratepayers. Each of these categories of payers relates to one or other of a municipality’s revenue sources: trading services, rates and other regulatory payments such as licensing fees, penalties and the like. In the category ‘customers’ fall persons receiving individualised accounts for measurable services such as electricity, water, sanitation and waste removal. The category ‘residents’ probably refers to charges paid by individuals such as licensing fees. The reference to ‘ratepayers’ then deals with those services that the entire community benefits from, such as the maintenance of roads, stormwater systems, and street lighting, services which are usually funded by rates revenue.

Although taxes are defined as payment of moneys not in return for any definite service, in the case of a municipality the link between property rates and generalised services is all too visible; they are used to finance the non-trading services, including road maintenance, street lighting, and cleaning. As the Minister of Cooperative Governance and Traditional Affairs noted, it is the potholes in the roads, the uncollected garbage, the streetlights that do not work,⁹⁸ that indicate that the rates are not appropriately used. The question is whether Zondo J has opened the door slightly by introducing the principle of ‘no services no rates’?

Implicit in the dictum is that where ratepayers can show that they are not receiving such community services, or if they are rendered ‘poorly or inefficiently’, there is no duty to pay rates. Of course, as the Court emphasised, no or poor service delivery must be clearly proved. The strong message that the Court implicitly delivered was that the duty to pay rates is not an absolute obligation, irrespective of whether or not any or poor services are delivered in return. The Court thus did not take up the municipality’s suggestion that the appropriate remedy for a municipality’s failure to provide services is to approach a court for a declaratory order. Instead the Court asserted the basic principle of contract. In the case of a trading service, the normal rules of contract apply. In the case of ratepayers, the imperative of the social contract governs: no rates without services.

However, such an argument runs counter to a long line of decisions condemning ‘self-help’ measures. When the matter first came to the Constitutional Court in 1998, it involved residents from white suburbs in Pretoria withholding payments because of complaints about unfair discrimination in debt collection measures. Langa DP was forthright: withholding payments was a practice that had ‘no place

⁹⁸ *Back to Basics* (note 1 above) at 4-5.

in a constitutional state in which the rights of all persons are guaranteed and all have access to the courts to protect their rights'.⁹⁹ He continued:

Local government is an important tier of public administration as any. It has to continue functioning for the common good; it however cannot do so efficiently and effectively if every person who has a grievance about the conduct of a public official or a government structure were to take the law into their own hands or resort to self-help by withholding payment for services rendered. That conduct carries with it the potential for chaos and anarchy and can therefore not be appropriate. The kind of society envisaged in the Constitution implies also the exercise of responsibility towards the systems and structures of society. A culture of self-help in which people refuse to pay for services they have received is not acceptable. It is pre-eminently for the courts to grant appropriate relief against any public official, institution or government when there are grievances. It is not for the disgruntled individual to decide what the appropriate relief should be and to combine with others or take it upon himself or herself to punish the government structure by withholding payment which is due.¹⁰⁰

Similar sentiments were expressed by the Constitutional Court in *Liebenberg*.¹⁰¹ The chaos that may follow on self-help in the form of withholding rates is undeniable. The question, however, remains: what are the remedies for desperate residents and ratepayers facing dysfunctional municipalities? In this regard the *Rademan* Court skirted the issue. It did not provide any set of principles or guidance, as it did in *Lagoonbay* where the key matter was also not squarely before them, on how the Court may come to the assistance of residents at the end of their tether.

So the question remains: what are the legal options? Could the provincial or national government be compelled to intervene on behalf of the residents? In terms of s 139 of the Constitution the provincial executive may intervene in a municipality when the latter cannot or does not perform its executive obligations. This is a discretionary power which places no obligation on the provincial executive.¹⁰² In numerous cases, where it is undisputable that executive obligations are not fulfilled, provincial executives have not assumed responsibilities for those obligations despite the fact that they are 'necessary to maintain essential national standards or meet established minimum standards for the rendering of a service'.¹⁰³ It must be arguable that circumstances of dysfunctionality should transform this power into an obligation. The very constitutional object of local government is 'to ensure the provision of services to communities in a sustainable manner'.¹⁰⁴

Both the national and provincial government are also under a constitutional obligation to 'support and strengthen the capacity of municipalities to manage their own affairs, to exercise their powers and perform their functions'.¹⁰⁵ While this is a lesser measure than the intervention in terms of s 139 of the Constitution,

⁹⁹ *Walker* (note 60 above) at para 92.

¹⁰⁰ *Ibid* at para 93.

¹⁰¹ *Liebenberg* (note 3 above).

¹⁰² *MEC for Local Government, Mpumalanga v IMATU* [2001] ZASCA 99, 2002 (1) SA 76 (SCA).

¹⁰³ Constitution s 139(1)(b)(i).

¹⁰⁴ Constitution s 152(1)(b).

¹⁰⁵ Constitution s 154(1).

it nevertheless requires measures to be taken. Furthermore, these measures are not only legislative. Would a court be willing to give an order to that effect?

What is to be done when the national and provincial governments fail to act? The Constitutional Court has recognised in *Joseph* the rights of residents to basic municipal services and was willing to enforce it against a municipality.¹⁰⁶ Residents should be able to argue that the right to basic municipal services includes the filling of potholes in roads, the cleaning of public spaces, and the fixing of street lights. They could further argue that they have a right to the provision of ‘accountable government’,¹⁰⁷ including having auditable financial statements which enable the Auditor-General to find out whether or not residents’ taxes and paid fees were misspent or stolen. If self-help is not an option, a court should be willing to impose a structural interdict compelling a dysfunctional municipality to report on progress made with clearly set targets for better administration.

VI CONCLUSION

The state of local government presents particular challenges for the Constitutional Court. It is a state institution that, at the one end of the spectrum, constitutes effective government in the majority of metropolitan municipalities and secondary cities, playing a crucial role in the economic development and well-being of the country and addressing poverty. At the other end there are dysfunctional municipalities, operating outside the law having abandoned their basic service duties to their residents. For all the municipalities, whether from the top or bottom third, to perform their constitutionally enshrined developmental mandate they must (a) have the appropriate powers; (b) have access to sustainable financial resources; and (c) do so in a partnership of accountability with the communities they serve.

The Court responded to the first two challenges in a forthright manner, while with respect to the third the outcome is not clear. First, the Court has been supportive of the incremental extension of local government powers over the local space. In *Lagoonbay* (followed up by *Habitat Council* in 2014) the Court continued its line of holdings, correctly asserting the powers of local government against provinces in the field of the built environment.

Second, the Court has gone out of its way to ensure the sustainability of municipalities by asserting their access to their limited revenue resources. In *Liebenberg* the majority of the Court did so in two ways: first, it gave the most generous interpretation of the legal framework by rescuing the LGTA from oblivion, and giving the municipality the more municipal-friendly set of rules for collecting property rates. Second, it went soft on compliance requirements. Following a line of judgments dealing with similar situations, it did not require close compliance with legal framework. All that is required is substantial compliance. This approach is of particular significance for municipalities with weak administrations that are struggling to govern within a plethora of

¹⁰⁶ *Joseph and Others v City of Johannesburg and Others* [2009] ZACC 30, 2010 (4) SA 55 (CC), 2010 (3) BCLR 212 (CC). See also Steytler & De Visser (note 20 above) at 17–6.

¹⁰⁷ Constitution s 152(1)(a).

prescriptive rules. For the dissenting judges, this accommodating approach came at too high a cost, that of legality both in keeping the LGTA alive and being soft on compliance. We disagree with the dissent that the costs are too high. Although legal certainty is important, some sensible way must be found through the thicket of overregulation.

It should be added that the Court was not overzealous in arming municipalities with every conceivable tax-extractive device. In *Ingonyama Trust* it was not willing to empower the eThekweni Metropolitan Municipality to levy property rates retrospectively.

Third, the Court did not come out strongly in favour of the third element; the partnership of accountability of the municipality with its residents. In *Britannia Beach* the applicants failed to exact accountability (obtaining access to information), not because the Court rejected the notion of democratic accountability, which is enshrined in the Constitution, but because the applicants leapfrogged the applicable statutory instruments in their attempt. Using the statutory instruments may have brought joy to the developers.

When a complaining ratepayer, Ms Rademan, followed the statutory instruments route to hold the wayward municipality to account for its failure to provide services, she also failed. The simple reason was that the statutory instruments at her disposal could provide no remedy for her problem – the municipality’s failure to provide basic services because of deep systemic problems resulting in a dysfunctional municipality. Although the issue was not pertinently argued, the Court did not provide any guidance on how the intractable problem of dysfunctionality is to be approached. In the absence of any statutory remedies, the only route to success is to go directly to the Constitution and seek to enforce the right to basic municipal services. Although the Court may have hinted that self-help is a possibility when services are not forthcoming, it is unlikely that avenue will find ultimate judicial sanction. The only other option is, relying directly on the Constitution, to fashion judicial remedies that may protect residents governed by dysfunctional municipalities.

Britannia Beach and Lagoonbay: The Constitutional Court in Muddy Waters? Some Comparative Reflections on the Benefits of an Active Judiciary

*Henk Kummeling**

I INTRODUCTION

In their very illuminating paper De Visser and Steytler offer ample explanation for the outcome of the Constitutional Court's 2013 decisions. In my view, the most striking element in their reasoning is that they do not stick to legal explanations. They see an overall trend: the Court protects the integrity and revenue stream of a well-functioning municipality. This all against the backdrop of the recent report of the Ministry of Cooperative Governance and Traditional Affairs in which municipalities were divided into three groups: 'a third of the municipalities was carrying out their task adequately, a third was just managing and the last third was "frankly dysfunctional" because of poor governance, inadequate financial management and poor accountability mechanisms.'¹

Picking up on De Visser and Steytler's analysis, the main question in this paper is whether the Constitutional Court is an *active court* in the sense that it has an *active* approach to finding the law, establishing the law, and determining the facts in order to bring the dispute to an end? I deliberately use the term 'dispute' instead of 'case' because very often we see that courts' decisions only attach a new legal pearl to an already lengthy string, and thereby do not really bring an end to or offer a solution for the conflict. The dispute on the ground persists.

II *BRITANNIA BEACH*

In *Britannia Beach*² the Constitutional Court did not accept accountability as an independent right, although democratic accountability as laid down in s 195 of the Constitution is, in the wording of the Court, 'a fundamental value of the

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¹ J De Visser & N Steytler 'Confronting the State of Local Government: The 2013 Constitutional Court Decisions' (2016) 6 *Constitutional Court Review* 1, 1.

² *Britannia Beach Estate Ltd & Others v Saldanha Bay Municipality* [2013] ZACC 30, 2013 (11) BCLR 1217 (CC) ('*Britannia Beach*').

Constitution.³ The Court also stated that there were more specific remedies available and pointed to the constitutional right of access to information held by the state⁴ and the Promotion of Access to Information Act.⁵

De Visser and Steytler refer to the applicants' reliance on s 195 of the Constitution as a 'lazy' constitutional argument. Of course they are right, however in my view there are also grounds for the conclusion that there is some 'lazy' reasoning on the part of Court as well. Why? First, one must admit that in general judges are very reluctant to step into the domain of 'accountability', because it is often considered to be an exclusive playing field of the two political powers, namely the executive and the legislature. The problem with accountability, however, is that it is not always a clear legal concept. In fact it is a container term or concept. It is susceptible to input of various elements into it, depending on what is useful to an interpreter in any given situation. We see this happening in parliamentary debates all over the world. We saw this recently in South Africa when questions on the obligations of the President under s 92 of the Constitution with regard to matters of accountability about upgrades at his Nkandla homestead arose.⁶ However, in constitutional law literature there is a common understanding that accountability not only means giving information and answering questions. It also means giving reasons⁷ for your actions and decisions, clarifying them and even defending them.⁸

I am not certain, therefore, whether the Constitutional Court was correct when it argued that the applicants had other efficacious legal avenues and instruments available to them to get what they wanted. Access to information is only one element of the much wider concept of accountability. It would have been very helpful if the Court had given more insight to its understanding of the meaning of the constitutional value of accountability and of 'a duty to account'.⁹ In short, I would have welcomed more clarity.¹⁰

³ Ibid at para 17. See also GE Devenish *A Commentary on the South African Constitution* (1998) 271.

⁴ Constitution s 32(1)(a).

⁵ Act 2 of 2000, referred to in *Britannia Beach* (note 2 above) at para 20.

⁶ In 2014, the Public Protector, Thuli Madonsela, found that President Zuma had committed unethical conduct. According to her, the President had benefited unduly from the use of state funds to improve his rural home. The changes to Mr Zuma's private home, including a swimming pool and a cattle enclosure, cost taxpayers about \$23 million. Public Protector *Secure in Comfort: Report on an Investigation into Allegations of Impropriety and Unethical Conduct Relating to the Installation and Implementation of Security Measures by the Department of Public Works at and in Respect of the Private Residence of President Jacob Zuma at Nkandla in the KwaZulu-Natal Province* (2014).

⁷ For interesting reading on reason-giving, see M Bishop 'Vampire or Prince? The Listening Constitution and *Merajong Demarcation Forum & Others v President of the Republic of South Africa & Others*' (2009) 2 *Constitutional Court Review* 313; and G Staszewski 'Reason-Giving and Accountability' (2008-2009) 93 *Minnesota Law Review* 1253.

⁸ AW Heringa & P Kiiver *Constitutions Compared: An Introduction to Comparative Constitutional Law* (2nd Ed, 2009) 114-7; L Verhey 'Political Accountability: A Useful Concept in EU Inter-Institutional Relations?' in L Verhey, P Kiiver & S Loeffen (eds) *Political Accountability and European Integration* (2009) 55, 62-70.

⁹ See *Britannia Beach* (note 2 above) at para 19.

¹⁰ Especially when and if the Court's decisions have an *erga omnes* effect.

As I state above, and as I elaborate later, it is of great value to have *active courts*, ie courts that, for instance, go the extra mile in gathering sufficient facts to enable them to really and finally resolve disputes before them.

Could there be any truth in the argument that the Court's approach in *Britannia Beach* is informed, at least partly, by the fact that Saldanha Bay is a well-functioning municipality? If so, then immediately the 'what if' question arises. What if it had been a dysfunctional municipality, a municipality with poor accountability mechanisms? Would the outcome have been different? Should the outcome have been different? In politics one does not answer 'what if' questions because they steer one into choppy waters, but in academia these kinds of questions are paramount.

Many scholars would argue that, since the principle of accountability lies in the political domain, disputes concerning government responses have to be solved in that same domain, and that there is no room for judges to interfere. This line of reasoning, of course, has a strong basis in the strict application of the notion of separation of powers. However, there are only a few countries left that stick, or purport to stick, to such an approach.¹¹ This strict approach to separation of powers is not very helpful because, while the powers stay in their allocated fields, the intended constitutional mechanism comes to a halt. The notion of checks and balances is a far more fruitful and productive invention of constitutional scholars. It implies that there is a mutual responsibility for making the constitutional framework work. If there is a branch that does not live up to its constitutional responsibilities at any given time, it is the duty of another branch to send a wake-up call to that branch. Therefore, constitutional courts all over the world send messages to the legislature and the administration in the form of interpretations, declarations of unconstitutionality, setting terms for the resuming of constitutional duties, obligations to report back to the court on the progress and so on, until constitutional norms are enforced, and the normal order has been reinstalled.¹²

So the question is, if a municipality is 'dysfunctional' in the sense that the authorities are offering no explanation for their decisions, are not willing to discuss them, and are only defending them on the basis that they have the majority, should courts not find ways to intervene in order to make the constitutional/legal mechanism function properly? An affirmative answer may be especially appropriate for local government since accountability is supposed to be enhanced by decentralisation.¹³

¹¹ Heringa & Kiiver (note 8 above) at 146. The US seems to be the odd one out. Krotoszynski even talks about a 'US separation of powers obsession'. See RJ Krotoszynski Jr 'The Separation of Legislative and Executive Power' in T Ginsburg & R Dixon (eds) *Comparative Constitutional Law* (2013) 248.

¹² On the remedies the Constitutional Court has to offer, see M Bishop 'Remedies' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, 2008) Chapter 9. Also very enlightening: CB Lewis *Judicial Remedies in Public Law* (5th Edition, 2014).

¹³ J de Visser *Developmental Local Government: A Case Study of South Africa* (2005) 25.

III LAGOONBAY

The most interesting element of *Lagoonbay*,¹⁴ by far, is its *obiter dictum* explaining that parts of the Land Use Planning Ordinance¹⁵ (LUPO) are unconstitutional and what its argument would have been if the relevant provisions had been attacked.¹⁶ The Court made it clear that the outcome would have been different if the correct arguments had been presented to it. Why this reluctance on the part of the Court to apply constitutional law *ex officio* in order to solve the case in a way that would have provided clarity for everybody? It would have provided clarity, not only for provinces and municipalities but also for future applicants on the question of whether or not provincial ministers were competent to make decisions on rezoning of properties.

In many countries there is a fierce debate going on with regard to judicial activism. In legal literature this term is mostly framed as the ‘activism vs self-restraint’ dichotomy. Posner is quite right that the term judicial activism serves as a vague, all-purpose pejorative.¹⁷ This line of reasoning might be understandable when you have the classical issue of the political question doctrine in the back of your mind. But it becomes quite different when one places the term in the context of the pursuit of an answer to the question: what is the actual role of the judge in determining the relevant law and facts for purposes of solving the dispute (in practice)?

In the words of Balakrishnan:

[I]n many countries, especially in those with a common law tradition, constitutional litigation is being seen as an adversarial process where the onus is on the pleaders to shape the overall course of the proceedings through their submissions. In this conception, the role of the judge is a passive one. But can a judge or court be effective when it is cast in that passive mould? In many countries judges have started to ask incisive questions for the parties involved as well as exploring solutions. This has caused a raging debate on the proper scope and limits of the judicial role.¹⁸

Very often this debate is cast in the dichotomy of adversarial vs inquisitorial systems. This is especially so when it comes to criminal law. Literature shows, however, that many countries are mitigating their adversarial systems towards more inquisitorial ones – at least there is a strong appeal by academics to become less adversarial. This is the case, even in countries with a very strong adversarial tradition, like the United States,¹⁹ England & Wales and Australia.²⁰

¹⁴ *Minister of Local Government, Environmental Affairs and Development Planning of the Western Cape v Lagoonbay Lifestyle Estate (Pty) Ltd & Others* [2013] ZACC 39, 2014 (1) SA 521 (CC), 2014 (2) BCLR 182 (CC) (‘*Lagoonbay*’).

¹⁵ 15 of 1985.

¹⁶ *Lagoonbay* (note 14 above) at para 46.

¹⁷ See for example RA Posner ‘The Rise and Fall of Judicial Self-Restraint’ (2012) 100 *California Law Review* 519, 533.

¹⁸ KG Balakrishnan ‘Judicial Activism under the Indian Constitution’ Speech (Trinity College Dublin, 14 October 2009), available at http://supremecourtsofindia.nic.in/speeches/speeches_2009/judicial_activism_tcd_dublin_14-10-09.pdf.

¹⁹ RC Cramton ‘Furthering Justice by Improving the Adversary System and Making Lawyers More Accountable’ (2002) 70 *Fordham Law Review* 1599.

²⁰ H Stacy & M Lavach (eds) *Beyond the Adversarial System* (1999).

When courts take up a more active role, serious questions of course arise in light of the separation of powers doctrine. On the other hand, the individual costs (sometimes even bankruptcy) and societal costs can be unacceptably high when lawyers/judges restrict themselves to a narrow legal playing field and cause problems to drag on for ages in a stream of ongoing litigation.

That is why in the Netherlands in recent decades procedural law, especially in the area of administrative law, has been reformed so as to empower courts to take up a more informal, active role.²¹ For instance, a court may bring, on its own motion/initiative, additional legal grounds or additional facts to substantiate its judgment.²² The court may set time limits for the administrative authorities to arrive at a new decision. It even has the power to rule that its judgment shall take the place of the annulled decision or the annulled part of the administrative authority's decision.²³ This power is only used in cases where, according to the law, there is only one possible decision.

The Administrative Jurisprudence Division of the Council of State, one of the highest administrative courts in the Netherlands,²⁴ in recent years has developed a very active and informal approach to the handling of cases.²⁵ One example is that legal representatives are no longer allowed to orally present their (lengthy) heads of argument. Instead the court sends them questions before the hearing and expects them to present answers during the hearing. This has resulted in improved timeliness, fewer court delays and greater overall satisfaction on the part of the litigants.²⁶

What follows may seem a side issue but hopefully it becomes clear that it bears relevance to my key point. The preliminary results of research conducted by the South African Human Sciences Research Council (HSRC) on the adjudication of socio-economic rights shows that lawyers find that courts are not suited for implementing socio-economic rights, let alone the progressive realisation of these rights.²⁷ This is remarkable, coming from lawyers in a country whose Constitutional Court achieved worldwide acclaim for the *Grootboom* judgment and

²¹ This approach fits very well in the more general Dutch legal culture which can be qualified as one of *informal pragmatism*. See FJ Bruinsma *Dutch Law in Action* (2nd Edition, 2003) 14.

²² General Administrative Law Act s 8:69 (2)(3).

²³ *Ibid* s 8:72 (4)(5).

²⁴ The occasional reader might wonder why I do not bring in the Dutch Constitutional Court. The Kingdom of the Netherlands does not have 'a' constitutional court. Every court is a constitutional court in the sense that they are obliged to apply the Constitution and they are allowed to annul administrative decisions when they are not in line with the Constitution. The only thing the courts are not allowed to do is to test the constitutionality of statutes. But since self-executing treaty provisions override national legislation, and by virtue of the Constitution every court is allowed to test that, at least when human rights are concerned, there is no pressing need for the introduction of constitutional review of legislation. This is admittedly an anomaly. For more on this see Heringa & Kiiver (note 8 above) at 165.

²⁵ T Barkhuizen, W den Ouden & YE Schuurmans 'The Law on Administrative Procedures in the Netherlands' (2012) *Netherlands Administrative Law Library* 1, 15.

²⁶ F van Dijk 'Improved Performance of the Netherlands Judiciary: Assessment of the Gains for Society' (2014) 6 *International Journal for Court Administration* 83.

²⁷ G Pienaar *Presentation at Colloquium on Poverty and Human Rights in Africa* (Cape Town, 27 November 2014).

the *TAC* judgments.²⁸ These are judgments studied and hailed all over the world for the way the Court made socio-economic rights legally enforceable!²⁹

The reasons lawyers give for their opinions in the HSRC study are that these rights are too political, but also that courts do not have enough information or evidence in order to decide specific cases. The first argument I understand, the latter I do not. Courts can easily ask parties to produce the necessary information. In India courts have even developed a practice of appointing fact-finding commissions on a case-by-case-basis which are deputed to enquire into the subject-matter of the case and report back to the court. And when it comes to matters involving complex legal considerations, the courts also seek the services of senior counsel by appointing them as *amicus curiae* to the court.³⁰

Against this background, we still have to find an answer for the question why the South African Constitutional Court only deals with the unconstitutionality of impugned provisions of LUPO as an *obiter dictum*? This is the more astonishing since the Court points out that it ‘enjoys a wide jurisdiction and, when deciding a constitutional matter within its power, is obliged to “declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency”’.³¹ But then comes this:

That being said, this court has time and time again reiterated the importance of challenging the constitutional validity of legislation in a manner that is accurate, timeous and comprehensive. Unless considerations of justice and fairness require otherwise, parties must be held to their pleadings. It is not for the Court to trawl through the record and submissions in the hope of finding a means of assisting a particular litigant.³²

The Court then dutifully continues by explaining in fact how wide its discretion is, but ending with the conclusion that it will not consider the constitutionality of LUPO, because the Supreme Court of Appeal did not consider the constitutional validity of ss 16 and 25 at all: ‘[i]f we were to evaluate LUPO’s validity in these proceedings, we would be forced to do so without the valuable insights of and analysis of that Court – a situation that should be avoided where possible.’³³

²⁸ *Government of the Republic of South Africa and Others v Grootboom and Others* [2000] ZACC 19, 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC); *Minister of Health and Others v Treatment Action Campaign and Others (No 2)* [2002] ZACC 15, 2002 (5) SA 721 (CC), 2002 (10) BCLR 1033 (CC). Coming back to what I wrote earlier on the role of courts’ remedies in ‘reminding’ other powers what their constitutional duties are, it must be said that, although I already stated that the HIV/AIDS-case was lauded worldwide, there is also some severe criticism for the fact that the Constitutional Court did not demand that the Mbeki-Government report back on the progress, thus leaving a lot of room for President Mbeki and his ministers to stick to their old policies and practices. See RW Johnson *South Africa’s Brave New World, The Beloved Country Since the End of Apartheid* (2013) 201.

²⁹ Although I am well aware of the fact that the Court has been accused of avoidance in socio-economic rights decisions in recent years. See B Ray ‘Evictions, Aspirations and Avoidance’ (2014) 5 *Constitutional Court Review* 173, 175.

³⁰ KG Balakrishnan (note 18 above) at 5. See also J Fowkes ‘How to Open the Doors of the Court – Lessons on Access to Justice from Indian PIL’ (2011) 27 *South African Journal on Human Rights* 434.

³¹ *Lagoonbay* (note 14 above) at para 35.

³² *Ibid.*

³³ *Ibid* at para 40.

And then, once again, it emphasised the fact that Lagoonbay did not bring the constitutionality of LUPO to the floor.³⁴

With all due respect to the Court, it cannot on the one hand state that it could not decide the issue without the insights of the Supreme Court of Appeal, and yet deliver an *obiter dictum* that clearly showed that the Court was in fact able to evaluate and decide the same issue.

The Court's decision contains a lesson for the 'lazy lawyer', who did not bring in the correct arguments. However, at what expense? New costly and time-consuming cases, or at least one, have to be brought to the Court in order to get clarity on the constitutionality of LUPO. Would it not have been preferable if the Court ruled *ex officio* on this issue?

On a final analysis, I am not sure if I agree with De Visser and Steytler when they end on the positive note that the Constitutional Court was upholding the principle of legality. This principle implies that authorities act on the basis of the law and according to the law, which means the law as the entire complex, including the highest legal levels. It is arguable the principle of legality does not mean acting in conformity with unconstitutional legal arrangements simply on the basis that they have not, yet, been constitutionally contested.

IV CONCLUDING REMARKS

Kader Asmal once said: '[t]hose who assert that a wall separates law and politics urge that in general judges should be oblivious to the social consequences of their decisions. This should be rejected. A preferable starting point is that law's highest purpose is to serve social ends.'³⁵ In my view this is not only true for the big social issues. It is also relevant for the smaller ones, the social consequences of a court's decision for the parties, and perhaps even their families and relatives. Is a court decision really helpful in bringing conflicts between parties to an end, or is it only a contribution to a lawyer's paradise of ongoing legal debates? Going to court very often is time-consuming and costly; it should not only be lawyers who are satisfied with the outcome. And this is because court decisions, while delivering another building block or even a solution in a legal debate, very often do not create a solution for the practical problem that lies at the root of the legal debate. This leads to high costs for individuals, and sometimes to bankruptcy when court cases drag on. This often has high societal costs, for instance, in never ending conflicts between groups of persons or continued uncertainty of the feasibility of investment plans that could bring more economic prosperity or welfare in a certain area.

That is why it is very important that courts, especially constitutional courts, have an active approach in finding the law, establishing the law and in finding the relevant facts in order to bring disputes to an end. This does not mean that

³⁴ Ibid at para 41.

³⁵ Cited in: A Krog *Country of My Skull: Guilt, Sorrow, and the Limits of Forgiveness in the New South Africa* (2009) 291. The opposite view is expressed in most extreme terms by US Supreme Court Judge A Scalia when he said that indifference to hundreds of deaths that might result from embracing a broad interpretation of the Second Amendment is the sign of a good judge. Cited in Posner (note 17 above) at 541.

the court can no longer decide cases cautiously, incrementally, emphasising the particular rather than the general, and avoiding large scale reasoning.³⁶ It also does not mean that I would like constitutional courts to take principled decisions that run counter to strongly held public attitudes or that threaten to bring them into direct confrontation with the political branches.³⁷ The point I make is neither about ‘judicious avoidance’ nor about some form of ‘political question doctrine’. It is simply about solving the case at hand by bringing the dispute to an end while taking into account all the ordinary constraints the judiciary normally has to deal with.

To come back to my initial question: is the Constitutional Court an *active court*? Based on this very small sample of cases my answer has to be negative. But perhaps it is better if I would employ the same reserved approach as the distinguished South African Constitutional Court and conclude that that an active role has not been shown in the presented cases.

Is there an explanation for the Court’s approach to be found in South Africa’s adversarial tradition in litigation? Perhaps this is indeed the case. However, is the Constitutional Court obliged to strictly uphold this tradition? Although I am well aware of the fact that the Court functions against the backdrop of a somewhat conservative legal culture,³⁸ I see no constitutional ground for that. This runs counter to developments in other parts of the world where it is arguable that there is a tendency towards a more active role for judges in resolving disputes. Even if the South African Constitutional Court would want to cling to the adversarial tradition, I suppose it could have done more given its self-proclaimed ‘wide jurisdiction when deciding a constitutional matter’.³⁹

³⁶ See I Currie ‘Judicious Avoidance’ (1999) 15 *South African Journal on Human Rights* 165.

³⁷ See T Roux ‘Principle and Pragmatism on the Constitutional Court of South Africa’ (2009) 7 *International Journal of Constitutional Law* 133.

³⁸ D Bilchitz ‘Avoidance Remains Avoidance: Is it Desirable in Socio-Economic Rights Cases?’ (2014) 5 *Constitutional Court Review* 297, 298.

³⁹ *Lagoonbay* (note 14 above) at para 35.

Adding Injury to Insult: Intrusive Laws on Top of a Weak System

*Phindile Ntliziywana**

I INTRODUCTION

Local governments often encounter difficulties when state functions and powers are devolved to them.¹ Capacity at local level often becomes the Achilles heel of devolution. This is the case in South Africa.² The South African national government has undertaken a variety of capacity-building initiatives to address the capacity problems faced in the South African system of local government. A flurry of legal instruments containing capacity-building measures have been passed and more are in the offing. This paper is inspired by the argument raised by Steytler and De Visser about the national government's attempt to legislate systemic problems faced by municipalities out of existence. I consider the overregulation relating, among others, to the professionalisation³ of, and capacity building at, local government. I argue that the practice of throwing a law at the problem erodes respect for the rule of law, a principle explicitly listed as one of the foundational values of our constitutional democracy,⁴ in that many rules make compliance impossible, leading to compliance fatigue and the resultant lawlessness. The multiplicity of laws also threatens to undermine municipalities' constitutionally-entrenched independence and authority over their own affairs.

I begin in Part II by painting a general picture of the current state of local government in South Africa, in order to uncover the rationale for the national government's interventions in local government. In Part III, I look at the initial short term interventions the national government attempted, which did not yield tangible outcomes. In Part IV I show how the overregulation that forms the crux of this paper has its basis in the Constitution and the statutes giving effect thereto. I set out specific instances of duplication, contradiction and overlapping by competing national departments vying for regulatory control of local government. I conclude the Part by considering the implications of overregulation

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¹ BW Honadle 'Theoretical and Practical Issues of Local Government Capacity in an Era of Devolution' (2001) 31 *Journal of Regional Analysis and Policy* 77.

² J Seddon & G de Tommaso 'Civil Service Reform and Decentralization' in J Litvack & J Seddon (eds) *Decentralization Briefing Notes* (1999) 39.

³ In this context, professionalisation relates to the insistence by the national government on qualifications and experiential requirements; adherence to the code of professional ethics; and the insulation of professional independence of senior managers from political meddling.

⁴ Constitution s 1.

for municipal autonomy and the rule of law. I end the article with a suggestion for a single set of regulations and improved coordination.

II BACKGROUND

It has been 22 years since the dawn of democracy in South Africa and 16 years into the implementation of a new and transformed local government system.⁵ Indications are that this new system of local government is today in a critical phase.⁶ On the one hand, it has not only managed to absorb the pressures and pains of a wholesale transformation (which took place at breath-taking speed) but has also made great strides towards extending service delivery and development to marginalised communities.⁷ Local government has emerged from being an institution that was racially configured and only covering urban nodes⁸ – resulting in deep structural disparities – to an institution with democratically elected leadership, constitutional status and a developmental philosophy.⁹ It now covers the entire landscape of the country and it is working tirelessly to rectify the ravages of apartheid.

On the other hand, as expectations of service delivery at local level have risen, it has become evident that the broader transformation of local government is either imperfect or incomplete.¹⁰ The de-racialisation and democratisation of the local government system were not on their own sufficient to achieve the developmental

⁵ The period between 1995 and 1998 saw the amalgamation of racially-defined municipalities into integrated, wall-to-wall municipalities, in terms of the Local Government Transition Act 209 of 1993. This is what Doreen Atkinson refers to as ‘first generation issues’. Between 1998 and 2000 the ‘second generation issues’ were raised as part of the 1998 Local Government White Paper process. These debates attempted to flesh out the meaning of the constitutional provisions on local government. During this phase, over-arching normative questions were addressed, culminating in the key concept of ‘developmental local government’. This resulted in the enactment of the Local Government: Municipal Structures Act 117 of 1998 (Municipal Structures Act) and the Local Government: Municipal Systems Act 32 of 2000 (Municipal Systems Act). The second generation issues were further taken forward in 2000 when municipalities were re-demarcated and elections took place under the re-demarcated municipalities. Unlike the first generation phase, the second generation phase emphasised the overall vision and rationale of local government.

⁶ Department of Cooperative Governance and Traditional Affairs *State of Local Government in South Africa: Overview Report - National State of Local Government* (2009), available at <https://pmg.org.za/files/docs/091017tas.pdf>.

⁷ Y Carrim ‘Towards a Better Understanding of these Service Delivery Protests’ Presentation to the National Council of Provinces (23 April 2010), available at <http://www.dta.gov.za/cgta/index.php/speeches/former-deputy-minister-yunus-carrim/271-towards-better-understanding-of-service-delivery-protests-ncop-budget-debate-vote>.

⁸ V Johnson ‘Outsourcing Basic Municipal Services: Policy, Legislation and Contracts’ (2004) LLM dissertation, University of the Western Cape, available at <http://etd.uwc.ac.za/xmlui/handle/11394/1318>.

⁹ Green Paper on Local Government *Government Gazette* 18370, General Notice 1500 (17 October 1997)(Defines the developmental philosophy of local government to entail three inter-related aspects, namely, (a) the powers and functions of local government should be exercised in a way that has a maximum impact on economic growth and social development of communities; (b) as the sphere of government closest to the ground, local government has to integrate or coordinate the activities of other agents – including other spheres of government – within a municipal area; and (c) local government has a unique role to play in terms of building and promoting democracy.)

¹⁰ D Powell ‘Imperfect Transition – Local Government Reform in South Africa 1994-2012’ in S Booysen (ed) *Local Elections in South Africa: Parties, People, Politics* (2012) 11, 12.

aspirations of government, nor to meet the expectations for municipal services by communities.¹¹ The consequence is a massive burden on a municipal system that had previously confined its activities to a narrow range of local services.¹² This is all the more so given that between 1993 and 2000, the population of South Africa increased from 37 million to 44 million, while the number of municipalities decreased from over 1000 to 284.¹³ In 2006, the number of municipalities decreased further to 283, whilst the population increased to 48 million.¹⁴ Further changes were implemented in 2011, with yet another reduction of municipalities to 278, serving the increased population of 51 million.¹⁵ From 2016, there will be 267 municipalities, while the population has increased to 54 million.¹⁶ This means that some of the new municipalities are geographically much larger than before, more particularly the district municipalities. The magnitude of this mismatch between the number of municipalities and the population they now have to serve was neatly illustrated in 2003 by Doreen Atkinson:

Xhariep District Municipality in the Southern Free State is the size of Hungary; the Northern Free State District municipality has the same diameter as Belgium; and the Namakwa District Municipality is almost as wide as Kansas.¹⁷

A comparison of South Africa's current 54 million population with a country like Brazil, which has over 190 million inhabitants, indicates that the average population per municipality in South Africa is 172 thousand people, while Brazil has only 34 thousand people per municipality.¹⁸ The increase in the size of municipalities means that the beneficiaries of the range of services the municipalities now have to offer have also increased substantially, placing a further burden on municipalities. This is compounded by the high number of unfilled

¹¹ R Cameron *The Democratisation of South African Local Government: A Tale of Three Cities* (1999).

¹² G van der Westhuizen & B Dollery *South African Local Government Efficiency Measurement* (April, 2009) Working Paper, Centre for Local Government, University of New England, available at https://www.une.edu.au/__data/assets/pdf_file/0003/16149/04-2009.pdf.

¹³ Statistics South Africa *Community Survey 2007* (2007) 12, available at <http://www.statssa.gov.za/publications/P0301/P0301.pdf>.

¹⁴ *Ibid.*

¹⁵ Statistics South Africa *Census 2011* (2012) 14, available at <http://www.statssa.gov.za/publications/P03014/P030142011.pdf>.

¹⁶ Statistics South Africa *Mid-Year Population Estimates* (2015) 7, available at <http://www.statssa.gov.za/publications/P0302/P03022014.pdf>.

¹⁷ D Atkinson 'Post-apartheid Local Government Reforms: A Small Town Perspective' (2003) *Occasional Paper, Centre for Development and Enterprise* 2.

¹⁸ J de Visser 'Demarcation and Establishment of Municipalities in South Africa and Brazil: Comparative Notes' conference presentation at the Colloquium on National Minimum Criteria for the Creation, Merger and Dissolution of Municipalities (Brasilia, September 2011), available at <http://www.docfoc.com/demarcation-and-establishment-of-municipalities-in-south-africa-and-brazil>. Brazil has 5564 municipalities.

posts in some municipalities.¹⁹ The situation is further exacerbated by chronic shortages of revenue streams, particularly in rural municipalities.²⁰ The shift in size and responsibility has not only required an increase in the services offered, but also added to the pressure on the existing resources as well as on service delivery apparatus. As a result, the incomplete or imperfect transformation of local government has led to failures to rectify the ravages of apartheid.²¹

Citizens are demanding the promises and benefits of democratisation and deracialisation.²² When these promises are not fulfilled, they become disenchanted and manifest their frustrations with delivery failures through social movement-style protests.²³ Poorer communities mostly use protest actions (often violent) to bring their grievances with municipalities to the attention of government.²⁴ Wealthier communities, meanwhile, tend to organise themselves into ratepayer associations. Given South Africa's history, this divide is racial.²⁵

Against the foregoing background, it becomes clear that the new system of local government is mired, in the main, in a morass of chaos, with a few pockets of excellence mostly in urban areas – the 'top third' discussed in the lead paper.²⁶ Notwithstanding the enhanced status of local government, the efficiency of municipalities in discharging their service delivery and developmental obligations leaves much to be desired. It is clear that the system is not working as smoothly as it was envisaged. This brought about the need for further steps to be taken ostensibly to perfect the imperfections of transformation or, put differently, to complete it. In what follows, I will look at the response of the national government since it became clear the attempt to transform local government

¹⁹ See Municipal Demarcation Board *State Municipal Capacity Assessment 2010/2011 National Trends in Municipal Capacity* (2012) 38, available at http://led.co.za/sites/default/files/cabinet/orgname-raw/document/2012/state_of_municipal_capacity_assessment_2010_11_national_trends_report.pdf. (Showed that on a provincial level the vacancy rates were highest in provinces with large rural population, such as Limpopo (47.2%), Kwazulu-Natal (39.9%) and the Eastern Cape (36.9%). If we had a skills pool of suitably qualified individuals to fill these vacancies, the increase in size would translate into economies of scale in the sense that there would be a concomitant increase in human resource capacity covering a large area.)

²⁰ RW Bahl & PJ Smoke (eds) *Restructuring Local Government Finance in Developing Countries: Lessons from South Africa* (2003) 8.

²¹ Some of these being the inequalities and poverty occasioned by the skewed patterns of development in the apartheid era.

²² A McLennan 'Unmasking Delivery: Revealing the Politics' (2007) 7(1) *Progress in Development Studies* 5.

²³ Ibid at 14.

²⁴ D Powell, M O'Donovan & J de Visser *Civic Protest Barometer 2001-2014* (2015), available at <http://mlgi.org.za/talking-good-governance/20150219%20Civic%20Protest%20Barometer%20Published%20%20DP.pdf>.

²⁵ D Powell, J de Visser, A May & P Ntliziywana *The Withholding of Rates and Taxes in Five Municipalities: Report of the Community Law Centre for S.A.L.G.A* (2010), available at <http://mlgi.org.za/publications/publications-by-theme/local-government-in-south-africa/withholding-of-rates/Withholding%20of%20rates%2015Nov010.pdf>.

²⁶ See Department of Cooperative Governance and Traditional Affairs *Back to Basics: Serving our Communities Better!* (2014), available at <http://www.cogta.gov.za/sites/cogtapub/B2BDOCS/The%20Back%20to%20Basics%20Approach%20Concept%20Document.pdf#search=back%20to%20basics>.

is either incomplete or imperfect.²⁷ The next section reviews, firstly, the *ad hoc* initiatives undertaken by the national government to capacitate municipalities, consistent with its constitutional duty to support local government. Secondly, it considers the legislative interventions by the national government into the human resource practices of municipalities, which also forms part of the broader support effort by the upper spheres of government. The latter is the crux of this article.

III GOVERNMENT'S INITIAL RESPONSE

Pursuant to its constitutional duty to support local government, the national government responded to these persistent challenges by introducing various *ad hoc* initiatives aimed at perfecting the imperfect transition. These attempts were short-term deployment interventions aimed at providing targeted hands-on support and engagement programmes for weaker municipalities with significant capacity gaps. Their aim was to build the necessary capacity needed by local government to perform its mandate.

In the first place, national government introduced Project Consolidate, through which a number of technical experts were deployed to assist selected municipalities to deal with their service delivery bottlenecks and institutional challenges.²⁸ Second, the Joint Initiative on Priority Skills Acquisition (JIPSA) was introduced. It aimed to create short-term, but sustainable, interventions to the skills problems across all spheres of government. Municipalities were among the intended chief beneficiaries, as they suffered from a dire need of engineering, planning, artisan, technical and project management skills.²⁹

Third, the Siyenza Manje Project was launched in 2005, aimed at the deployment of experts or skilled consultants to municipalities to assist with the implementation of infrastructure projects, planning and financial capacity building.³⁰ Fourth, government initiated the Municipal Finance Management Support Programme. It was aimed at enhancing key financial management capacity in selected municipalities.³¹ Fifth, the Local Government Leadership Academy and its Municipal Leadership Development Programme was launched with the aim to accelerate and improve service delivery to communities by enhancing the leadership competencies of elected and appointed officials through structured and tailored leadership skills programmes.³² Sixth, a Five Year Local Government Strategic Agenda was introduced in 2006, aimed at mainstreaming

²⁷ Powell (note 10 above) at 12.

²⁸ E Pieterse & M Van Donk 'Developmental Local Government: Squaring the Circle Between Policy Intent and Practice' in Van Donk et al (eds) *Consolidating Developmental Local government: Lessons from the South African Experience* (2008) 53–54.

²⁹ Department of Provincial and Local Government *National Capacity Building Framework for Local Government: In support of the Five Year Local Government Strategic Agenda (2008-2011)* (2009) 73, available at <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/policy/090701capacitybuildingframework.pdf>.

³⁰ Ibid at 74.

³¹ Ibid at 72.

³² Ibid at 73.

all the hands-on support to local government to improve municipal governance, performance and accountability.³³

In addition to the above, government adopted the Local Government Turn-around Strategy which replaced the Five Year Local Government Strategic Agenda. The main aim of the turn-around strategy was to counteract the root causes of the crises undermining local government.³⁴ In the last place, government has recently adopted yet another *ad hoc* programme called the Back to Basics strategy aimed at turning around at least two thirds of the country's municipalities over the next two years.³⁵

Bar one, these *ad hoc* measures did not manage to produce lasting and tangible outcomes. The last strategy – Back to Basics – is ongoing and its efficacy has not yet been adjudged. The rest of these interventions had a very limited impact in building sustained capacity because they were introduced as 'quick fix' solutions only to fill gaps rather than building the actual capacity. The National Development Plan says, in this regard, that the 'tendency to jump from one quick fix or policy fad to the next' has had the effect of creating 'instability in organisational structures and policy approaches that further strain limited capacity'.³⁶ The NDP further states that the search for a quick fix has diverted attention from more fundamental priorities, namely, deficit in skills and professionalism that affects all elements of the public service.³⁷ Instead of building sustained capacity for effective performance, the *ad hoc* initiatives have had perverse outcomes.

This led to the introduction of legislative interventions in human resource practices, which initially promised to provide a lasting solution by, among other things, professionalising municipal administration. However, I argue that due to overreach and a lack of coordination, these legislative measures now threaten to stifle local government and threaten the rule of law.

IV OVERREGULATION

When it became clear that the capacity constraints confronting local government persisted despite the deployment of skilled experts through a variety of *ad hoc* administrative measures discussed above, national government responded by, among others, attempting to professionalise municipal administration through regulation. A suit of parallel and overlapping laws were promulgated by the Department of Cooperative Governance and Traditional Affairs (CoGTA), the National Treasury and, later, the Department of Public Service and Administration (DPSA), to address capacity problems and professionalise

³³ Ibid at 73.

³⁴ Department of Cooperative Governance and Traditional Affairs *Local government turnaround strategy: Working together, turning the tide in local government* (2009), available at <http://www.dta.gov.za/cgta/index.php/2014-04-29-10-00-08/publications-2/771-lgtas-information-booklet-1/file>.

³⁵ S Stone & K Magubane 'Pravin Gordhan Pins Hopes on Back to Basics Strategy' *Business Day* (19 September 2014).

³⁶ National Planning Commission *National Development Plan: Vision 2030* (2011) 364, available at http://www.gov.za/sites/www.gov.za/files/devplan_2.pdf (NDP).

³⁷ Ibid.

municipal administrations.³⁸ This set the scene for tripwires of ‘must do’ requirements. It is worth setting out the constitutional and statutory basis for the variety of the regulatory interventions by the three departments before delving deeper into those.

A The Legal Basis for Regulation of Local Government

1 Constitutional Basis

The constitutional basis for capacity building through regulation is s 155(7) of the Constitution, which provides that ‘[t]he national ... and the provincial government have the legislative and executive authority to see to the effective performance by municipalities of their functions ... by *regulating* the exercise by municipalities of their executive authority’.³⁹ Regulation is a form of supervision by the ‘upper’ spheres of government that sets the necessary framework within which local government functions can responsibly be exercised.⁴⁰ In the *First Certification* judgment, the Constitutional Court held the term ‘regulate’ to mean ‘a broad managing or controlling rather than a direct authorisation function’.⁴¹ In the more recent *Habitat Council* judgment, which is discussed by De Visser and Steytler, the Constitutional Court held that s 155(7) does not entail the usurpation of the power or the performance of the function itself, but permits national and provincial governments to determine norms and guidelines.⁴²

Further, s 216(1) of the Constitution provides that national legislation must establish a national treasury and prescribe measures to ensure both transparency and expenditure control in each sphere of government, by introducing generally recognised accounting practice; uniform expenditure classifications; and uniform treasury norms and standards. Section 216(2), in turn, provides that the national treasury must enforce compliance with the measures established in terms of s 216(1).

It is clear that the Constitution envisages a number of measures to regulate issues related to human resource management. In what follows, I explain that the source of duplications and parallel measures stemming from various government departments is the Constitution itself. Section 155(7) envisages regulations/guidelines setting parameters within which local government can operate,

³⁸ Local Government: Municipal Performance Regulations for Municipal Managers and Managers Directly Accountable to Municipal Managers, *Government Gazette* 29089, General Notice R805 (1 August 2006)(Performance Regulations); Local Government: Municipal Finance Management Act: Municipal Regulations on Minimum Competency, *Government Gazette* 29967, General Notice R493 of 2007 (15 June 2007)(Competency Regulations); Local Government Systems Amendment Act, 2011; and Local Government: Regulations on Appointment and Conditions of Employment of Senior Managers, *Government Gazette* 36223, Government Notice 167 (7 March 2013)(Appointment Regulations).

³⁹ Emphasis added.

⁴⁰ P Ntliziywana ‘Insulating Administrative Decision-Making Relating to Individual Staff Appointments from Political Meddling: *Manana v King Sabata Dalindyebo Municipality*’ (2012) 129 *South African Law Journal* 49.

⁴¹ *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* [1996] ZACC 26, 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC) at para 377.

⁴² *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v The Habitat Council and Others* [2014] ZACC 9, 2014 (4) SA 437 (CC)(‘*Habitat Council*’) at para 22.

whereas s 216 envisages mandatory rules. The following discussion focuses on the national legislation giving effect to the constitutional provisions just discussed.

2 *Statutory Basis*

The Local Government: Municipal Systems Act⁴³ and the Local Government: Municipal Finance Management Act⁴⁴ are the primary pieces of legislation that give effect to the provisions of s 155(7) of the Constitution.⁴⁵ They are aimed at seeing to the effective performance by municipalities of their functions by regulating their human resource management, among other matters. They also envisage the promulgation of regulations to give further effect to the regulation of recruitment practices, ethics and discipline.⁴⁶

The Municipal Systems Act contains provisions for human resource management which set forth basic values and principles governing local public administration. It provides that the administration of a municipality must be responsive to the needs of the residents and facilitate a culture of public service and accountability among staff.⁴⁷ In fact, municipalities have the duty to provide an accountable government without fear or prejudice.⁴⁸ They must also prevent corruption,⁴⁹ and ensure an equitable, fair, open and non-discriminatory working environment.⁵⁰ The roles and responsibilities of managers and other staff members must also be aligned with the priorities and objectives of the municipality's integrated development plan.⁵¹ The resources must be used in the best interest of the local community and municipal services must be provided to the local community in a financially sustainable way.⁵²

In giving effect to the injunction to regulate human resource practices, s 72 read with s 120 of the Municipal Systems Act enjoins the national minister responsible for local government (ie Minister of CoGTA) to make regulations dealing with capacity building within municipal administration.⁵³ The regulations envisaged by ss 72 and 120 of the Municipal Systems Act were issued in 2006 as the Performance Regulations.⁵⁴

In addition to giving effect to s 155(7) of the Constitution, the MFMA is also the national legislation envisaged in s 216. It prescribes measures to ensure transparency in local government by introducing generally recognised accounting practices; uniform expenditure classifications; and uniform treasury norms

⁴³ Act 32 of 2000 (Systems Act).

⁴⁴ Act 56 of 2003 (MFMA).

⁴⁵ However, these are not the only laws emanating from national government regulating local government. There is also the Municipal Structures Act and the Local Government: Municipal Property Rates Act 6 of 2004 (Municipal Property Rates Act).

⁴⁶ Systems Act s 120 read with s 72 and MFMA s 168.

⁴⁷ Systems Act ss 6(2)(a) and (b) read with ss 51(a) and (b).

⁴⁸ Systems Act ss 4(2)(b), 6(2)(b) and 51(b).

⁴⁹ Systems Act ss 6(2)(c) and 51(c).

⁵⁰ Systems Act s 51(m).

⁵¹ Systems Act s 51(d).

⁵² Systems Act ss 4(2)(a) and (d).

⁵³ Systems Act s 72(1)(d).

⁵⁴ Performance Regulations (note 38 above).

and standards. As envisaged by the Constitution, the Act enjoins the National Treasury to enforce compliance with the measures listed above.

As such, it also provides a statutory basis for the regulation of local government recruitment practices in South Africa. It requires officials to meet prescribed competency levels in financial and supply chain management.⁵⁵ Section 168 of the MFMA also requires the National Treasury to make regulations or issue guidelines that prescribe financial management competency levels for the municipal administration. The regulations in terms of s 168 of the MFMA have been promulgated as the Competency Regulations.⁵⁶ Up next is a discussion of regulations envisaged by ss 72 and 120 of the Municipal Systems Act and by s 168 of the MFMA, which, as will be seen, are a source of overregulation in practice.

B Overregulation in practice

Overregulation began with the promulgation of the suite of laws that were meant to give effect to ss 155(7) and 216(1) of the Constitution, particularly with the aim of regulating human resource practices at local level. Leading the pack were the Municipal Systems Act and the MFMA. On the face of it, these laws are hardly over burdensome; they contain only 120 sections and 30 items in schedules, and 180 sections, respectively. However, a closer look reveals that they each contain a thousand individual provisions, with many ‘musts’ that oblige municipalities or municipal officials to behave in a prescribed manner in an area that could arguably have been left to their discretion.⁵⁷ This count, which, taken alone, would constitute trip wires, excludes the various regulations issued in terms of these Acts. Those additional regulations are the crux of the present discussion to which I now turn.

1 Performance Regulations

Empowered by the Municipal Systems Act, the then Department of Provincial and Local Government (now CoGTA) in 2006 responded to the persistent challenges facing local government by introducing the Performance Regulations. Their goal was to monitor local government and, ultimately, improve outcomes and performance.⁵⁸ The Performance Regulations subject the employment of a municipal manager and those managers reporting directly to him or her to the signing of an employment contract and performance agreement,⁵⁹ with the aim of measuring and evaluating their performance.⁶⁰ These regulations employ a carrot and stick approach to ensuring satisfactory performance. In the case of outstanding performance, the officials concerned are rewarded with a performance bonus for a job well done.⁶¹ However, when performance is below

⁵⁵ MFMA ss 83, 107 and 119.

⁵⁶ Competency Regulations (note 38 above).

⁵⁷ N Steytler ‘The Strangulation of Local Government (2008) *Tydskrif vir die Suid-Afrikaanse Reg* 518.

⁵⁸ The Preamble provides that these regulations seek to set out how the performance of municipal managers will be uniformly directed, monitored and improved.

⁵⁹ Performance Regulations reg 4.

⁶⁰ Performance Regulations reg 27.

⁶¹ Performance Regulations reg 32(2).

par, the regulations deploy corrective measures to ensure that substandard performance does not recur.⁶²

Although the Performance Regulations' main focus is on performance or results, they cursorily regulate recruitment of personnel – ostensibly to ensure that there is no mismatch between performance expectations and the skills employees actually possess.⁶³ The regulations make it an inherent requirement of the job that municipal managers (and managers directly accountable to them) must have a recognised bachelor degree in a relevant field, five years relevant experience and core managerial and occupational competencies.⁶⁴

2 *Competency Regulations*

Unfortunately, the National Treasury – empowered by the MFMA – saw a gap to introduce its own set of regulations to regulate human resource practices of municipalities. The introduction of these new regulations, the Competency Regulations, was the start of overregulation.

The Competency Regulations were issued in 2007, barely a year after the promulgation of the Performance Regulations. They provide for general and minimum competency levels for financial and supply chain management officials. The focus of these regulations is on the competence of municipalities' staff. The National Treasury has also issued a number of guidelines to give flesh to the competency framework contained in the Competency Regulations. The guidelines apply to financial and supply chain management officials at senior and middle management levels. The competency framework consists of minimum qualifications, work related experience, core managerial competencies and core occupational competencies for financial officials both at senior and middle management levels.⁶⁵ As a result, there were two sets of laws regulating human resource practices at local government. In certain instances, it became unclear which competency framework applied. For example, the Performance Regulations required a bachelor degree across the board, while the Competency Regulations differentiated municipalities according to their budget size, requiring higher qualifications for larger municipalities, and lower qualifications for smaller ones.

3 *Municipal Systems Amendment Act*

Not to be outdone by the National Treasury, in 2011 CoGTA convinced Parliament to amend certain provisions of the Municipal Systems Act dealing with the recruitment of staff in the upper echelons of municipal administration. The Local Government: Municipal Systems Amendment Act⁶⁶ came into force on 5 July 2011. The provisions were amended to provide for new procedures and competency criteria for appointments, and for the consequences of non-compliant appointments. For example, the amended Act provides that, to be

⁶² Performance Regulations reg 32(3).

⁶³ The competency framework is contained only in reg 38.

⁶⁴ Ibid.

⁶⁵ Competency Regulations regs 3, 5, 7, 9, 11 and 12.

⁶⁶ Act 7 of 2011.

appointed as a municipal manager (or a manager directly accountable to the municipal manager),⁶⁷ a person must have specific qualifications and experience which would be set out in regulations or guidelines.⁶⁸

This set the scene for CoGTA to unleash more laws on municipalities. It issued the Local Government: Regulations on Appointment and Conditions of Employment of Senior Managers⁶⁹ in 2014. This (third) set of regulations replaced a large portion (but not all) of the Performance Regulations. This added a further layer of compliance to local government administration.

The amended Municipal Systems Act provides that appointments made contrary to the competency framework – that is, the Appointment Regulations – are null and void.⁷⁰ If a person is appointed contrary to that framework, the MEC must enforce compliance, including applying to court to declare the appointment invalid.⁷¹ If the MEC fails to enforce compliance with the competency framework, the Minister of CoGTA may step in.⁷²

As opposed to the competency frameworks contained in the Performance Regulations and Competency Regulations, the amendments to the Municipal Systems Act introduced external enforcement. This means that in the three sets of regulations regulating human resource practices at local government, municipalities might decide to choose the less stringent framework. The mere existence of three different sets of regulations leaves the room open for cherry-picking. Three municipalities might choose three different laws to regulate the same issues.

4 *Appointment Regulations*

The Appointment Regulations contain detailed and prescriptive competence requirements for the appointment of senior managers.⁷³ The competence requirements are so detailed that they straddle two annexures. Senior managers must have a bachelor's degree in a relevant field (mostly social sciences, public administration or law), five years' experience, advanced knowledge⁷⁴ and the competencies set out in Annexure A of the Appointment Regulations.

The Appointment Regulations clearly lower the bar in comparison to the National Treasury's Competency Regulations. For example, the National Treasury uses a differentiated approach relative to a municipality's budget size, with high capacity municipalities having higher qualifications and experience requirements while low capacity municipalities have lower standard requirements. The requirements in the Appointment Regulations (as in the Performance Regulations) are the same across the board – at the low capacity municipality standard – regardless of whether the appointment is made in a high capacity or a

⁶⁷ So-called 'section 56 managers'.

⁶⁸ Municipal Systems Act s 54A.

⁶⁹ *Government Gazette* 37245, Government Notice 21 (17 January 2014)(Appointment Regulations).

⁷⁰ Municipal Systems Act s 54A(3).

⁷¹ Municipal Systems Act s 54A(8).

⁷² Municipal Systems Act s 54A(9).

⁷³ Appointment Regulations regs 8 and 9.

⁷⁴ Appointment Regulations Annexure B.

low capacity municipality. The only exception is the Chief Financial Officer, whose requirements are the same as those contained in the Competency Regulations.

This presents the real possibility of municipalities cherry-picking the regulations that suit their circumstances at any given time. The lack of uniformity in the application of rules is not conducive to legal certainty. Furthermore, the detailed competence requirements contained in the Appointment Regulations might fail the constitutional test, as will be seen on the discussion of municipal autonomy hereunder, for violating its various provisions relating to municipalities' ability or right to exercise their powers and conduct their internal affairs without any impediments.⁷⁵

5 *Public Administration Management Act (PAMA)*⁷⁶

PAMA was passed into law at the instance of the DPSA, and signed into law on 22 December 2014. PAMA regulates employment in the public administration, specifically looking at transfers and secondments of employees between national, provincial and local spheres.⁷⁷ This places DPSA squarely within the triangle of the departments warring for regulatory control of local government⁷⁸ – secondments are also dealt with in the Municipal Systems Act⁷⁹ and the Appointment Regulations.⁸⁰ DPSA collides head-on with CoGTA – there are two regulatory regimes from two national departments on the same subject matter.

C Implications of overregulation for the rule of law

Broadly speaking, the rule of law denotes a system in which the laws are public knowledge, clear in meaning, and applied equally to everyone.⁸¹ In *President of the Republic of South Africa v Hugo* the Constitutional Court stated that the rule of law requires laws to be accessible, clear and general.⁸² In *New National Party* the same Court found that the rule of law 'prevents Parliament from acting *arbitrarily* or *capriciously* when making law'.⁸³ It can be summed thus: the rule of law requires laws to be publicly available, general in their application, clear, prospective and relatively stable.⁸⁴

⁷⁵ Constitution ss 151 and 160.

⁷⁶ Act 11 of 2014.

⁷⁷ PAMA ss 5 and 6.

⁷⁸ PAMA s 3.

⁷⁹ Municipal Systems Act s 54A(6).

⁸⁰ Appointment Regulations reg 20.

⁸¹ T Carothers 'The Rule of Law Revival' (1998) 77(2) *Foreign Affairs* 95.

⁸² *President of the Republic of South Africa v Hugo* [1997] ZACC 4, 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC) at para 102.

⁸³ *New National Party v Government of the Republic of South Africa* [1999] ZACC 5, 1999 (3) SA 191 (CC), 1999 (5) BCLR 489 (CC) at para 19 (emphasis added).

⁸⁴ J Raz 'The Rule of Law and its Virtue' (1977) *Law Quarterly Review* 93, 198ff; BZ Tamanaha *On the Rule of Law: History, Politics, Theory* (2004) 93; P Craig 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework' (1997) *Public Law* 467, 469; LL Fuller *The Morality of Law* (1977) 41.

The rule of law rests on two legs: legality and rationality.⁸⁵ The principle of legality requires the exercise of power to be within the framework of the law. The exercise of public power is only legitimate where lawful. Public officials may exercise no power or perform no function beyond that conferred upon them by law.⁸⁶ Otherwise, the exercise of such power is *ultra vires* and the official exercising it is in breach of the rule of law.⁸⁷ An important development of the principle of legality is contained in the Constitutional Court's *SARFU* judgment, where the Court said, 'the exercise of the powers is also clearly constrained by the principle of legality and, as is implicit in the Constitution, the President must act in good faith and *must not misconstrue [his or her] powers*'.⁸⁸ This applies equally to any other public functionary. This development is important in our context of a plethora of contradictory laws regulating the same subject matter. I argue below that – in light of the complicated and contradictory regulations – a municipality is likely to misconstrue not only its powers, but also the purpose for which those powers were given.

The principle of rationality was developed by the Constitutional Court in *Pharmaceutical Manufacturers*.⁸⁹ In a unanimous judgment, Chaskalson P (as he then was) explained rationality as follows:

It is a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the Executive and other functionaries must, at least, comply with this requirement. If it does not, it falls short of the standards demanded by our Constitution for such action.⁹⁰

As argued by De Visser and Steytler, the many prescriptive and contradictory requirements contained in the legal framework set out above constitute what Geoff Budlender refers to as 'trip wires'⁹¹ over which a municipality is bound to fall. Municipalities are caught between, on the one hand, delivering services to an already impatient public and, on the other, deciding which laws to apply,

⁸⁵ R Krüger 'The South African Constitutional Court and the Rule of Law: The *Masetbla* Judgment, A Cause for Concern?' (2010) 13(3) *Potchefstroom Electronic Law Journal* 468, 475ff. See *Masetbla v President of the Republic of South Africa* [2007] ZACC 20, 2008 (1) SA 566 (CC), 2008 (1) BCLR 1 (CC) (Court was split on whether procedural fairness also constitutes a requirement of the rule of law. Moseneke DCJ, writing for the majority, excluded procedural fairness from the scope and the requirements of the rule of law, while Ngcobo J (as he then was) made it the requirement of the rule of law. In this article, I stick to the two uncontroversial requirements.)

⁸⁶ *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* [1998] ZACC 17, 1999 (1) SA 374 (CC), 1998 (12) BCLR 1458 (CC) at para 59.

⁸⁷ J Jowell 'The Rule of Law Today' in J Jowell & D Oliver (eds) *The Changing Constitution* (2000) 20.

⁸⁸ *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* [1999] ZACC 11, 2000 (1) SA 1 (CC), 1999 (10) BCLR 1059 (CC) at para 148 (emphasis added and footnotes omitted).

⁸⁹ *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others* [2000] ZACC 1, 2000 (2) SA 674 (CC), 2000 (3) BCLR 241 (CC).

⁹⁰ *Ibid* at para 85.

⁹¹ G Budlender 'Talk at launch of *Local Government Law of South Africa*' (Cape Town, 29 May 2008) (on file with the authors).

deciphering their meaning and then ticking boxes as a way of complying with a flurry of ever growing legal requirements. This position potentially makes municipalities misconstrue the laws or act arbitrarily or capriciously. This could have a negative impact on the rule of law's legality and rationality requirements. Compliance with the legal rules can become more important than achieving the *object* of the rules.⁹² When that happens, there is no longer a rational relationship between the purpose for which the law was passed and its application.

An example of this preference of form over substance is the court challenge to the Nelson Mandela Bay Metropolitan Municipality's decision to appoint Mrs Msengana-Ndlela as the municipal manager. Msengana-Ndlela was the former Director-General of CoGTA and was eminently suitable to run an administration of a large municipality.⁹³ Despite her qualifications, years of experience and proven capability, the United Democratic Movement challenged her appointment for non-compliance with the Competency Regulations.⁹⁴ The one qualification Msengana-Ndlela lacked was that she had not completed the Municipal Finance Management Programme required by the Competency Regulations. The regulations were (ab)used in an attempt to exclude a high calibre individual from the pool of eligible candidates in a manner that defeats the larger objective that the regulations sought to achieve – to professionalise local government by recruiting qualified, experienced and competent personnel.

It could be said that the office-bearers who challenged her appointment misconstrued the purpose for which the law was passed and applied the law arbitrarily or capriciously to exclude precisely the kind of personnel required to achieve excellence.⁹⁵ They lost the plot by privileging form over substance. This conduct undermines both the principle of legality (which requires the executive authorities not to misconstrue their powers) and the principle of rationality (which demands a rational connection between the exercise of power and the objectives for which the power was given). Achieving the objective of the rules became of secondary importance.⁹⁶ These are the consequences of having so many rules that they cloud the purposes for which the rules were passed in the first place.

The purpose of a particular law could also be misconstrued due to preoccupation with compliance with a flurry of legal requirements. While on its

⁹² Steytler (note 57 above).

⁹³ See P Ntliziywana & J de Visser 'The Unexpected Pitfalls of Professionalising Local Government: Former Local Government Director-General "not qualified" to be City Manager?' *Politicsweb* (28 June 2013), available at <http://www.politicsweb.co.za/news-and-analysis/the-unexpected-pitfalls-of-professionalising-local>. Mrs Msengana-Ndlela was the Director-General of CoGTA (the national department responsible for overseeing the entire local government system in South Africa) for seven years. She was employed as a senior civil servant in various provincial and national government departments before that. She holds several degrees, including a Bachelor of Commerce, a Bachelor of Education, a Master's degree in Business Leadership and a PhD in Urban Governance, Leadership and Local Economic Development. During her tenure in CoGTA, the department's budget grew from R6 billion to over R24 billion and she achieved seven successive clean audits while managing these funds. She also oversaw a range of major policy and legislative initiatives, including the passing of the Municipal Property Rates Act and the Intergovernmental Relations Framework Act 13 of 2005. *Ibid.*

⁹⁴ *Ibid.*

⁹⁵ *Ibid.*

⁹⁶ Steytler (note 57 above) at 529.

face, compliance constitutes respect for the rule of law, it can lead to compliance fatigue so that municipalities attempting to comply with every requirement act arbitrary or capriciously – the focus becomes compliance, not professionalism or service delivery. This, arguably, violates the rationality principle.

Furthermore, local government legislation is becoming so excessively complex and confusing for non-specialist administrators that it threatens to undermine the basic requirement that laws must be ascertainable and accessible. Complying with a complex and elaborate legal framework carries a considerable price tag that many municipalities cannot afford.⁹⁷ For the more capable municipalities it is a bearable burden; for the less-fortunate ones, it becomes an obstacle in the way of governance.⁹⁸ Even those municipalities who can afford to comply are forced to expend resources to establish an in-house legal service, or to call on external experts to help them navigate their way through the maze of regulations. Those that cannot afford consultants are left to their own devices to misconstrue their powers. The worst possible consequence of overregulation is when municipalities opt out of lawful governance because compliance is too difficult or costly.⁹⁹ In this instance, the weight of the legal obligations have a profoundly disempowering effect on smaller, low resourced municipalities.¹⁰⁰ In that way, overregulation can directly result in the violation of the rule of law. Yet, ironically, non-compliance with over-burdensome regulation can be the rational choice.

The Competency Regulations are particularly amenable to this problem because they are extremely complex. The wording of these regulations present an interpretation headache and there are as many interpretations as there are lawyers. The Msengana-Ndlela debacle, discussed earlier, presents a perfect example of the intricacy of the regulation. For the post of a municipal manager, the regulations require, first, at least a bachelor's degree and a higher diploma in a relevant field. Alternatively, the candidate can get a certificate in municipal financial management by completing the Municipal Finance Management Programme. Second, the regulations require five years' experience at senior management level. Third, the regulations require compliance with the management competencies contained in the Performance Regulations.¹⁰¹ And fourth, the candidate must demonstrate 'competence in the unit standards related to financial and supply chain management, which can be obtained by completing the Municipal Finance Management Programme' – the same programme referred to in the first requirement. The first three requirements are straight forward and Msengana-Ndlela easily complied with them. However, the last requirement presents interpretation difficulties.

⁹⁷ Ibid at 527.

⁹⁸ Ibid at 521.

⁹⁹ Ibid at 530.

¹⁰⁰ Ibid at 528.

¹⁰¹ Competency Regulations reg 3.

The difficulty is that it is both an alternative as well as an addition to the higher education qualifications requirement. With regard to the former, if an official does not have a bachelor's degree required by the first requirement, he or she can enrol for the certificate in municipal financial management as an alternative to it.¹⁰² However, with regard to the latter, if an official already possesses a bachelor's degree, he or she must still meet the fourth requirement, which essentially is the certificate in municipal financial management. The proviso with regard to the latter is that if an official already possesses higher educational qualification, he or she must be assessed by accredited training providers to establish the extent to which his or her higher education qualifications and experience offset the 21 unit standards required for the certificate in municipal financial management. It is possible therefore that the assessment of Msengana-Ndlela, with all her qualifications and experience, would reveal that she must still meet one or two of the 21 unit standards or that her qualifications and experience counterbalance the fourth requirement.

This is where a number of municipalities and lawyers, get it wrong.¹⁰³ The regulations do not meet the rule of law requirement that the law must be clear and must serve a rational purpose. The correct interpretation is that no matter how many degrees an official may have accumulated or how many years of experience he or she has, the certificate in financial management remains compulsory, unless the assessment of his or her qualifications and experience reveal otherwise. This is how a former Director-General with a PhD was deemed unsuitable to serve as a municipal manager, a position requiring only a bachelor degree.

The second difficulty with the Competency Regulations relates to the actual legal consequences of non-compliance. The appointment date is critical to determine the consequences of non-compliance. There are three categories. First, those officials who were appointed before the Competency Regulations came into effect on 1 July 2007 are safe, as long as they comply with the competency requirements before 30 September 2015.¹⁰⁴

The second category is officials who were appointed after 1 July 2007, but before 30 September 2015. Their employment contract should stipulate that they must attain the competencies before 30 September 2015.¹⁰⁵ If they do not meet the deadline, they will supposedly be in breach of their employment contracts. However, the Competency Regulations are not clear on what happens if an official does not meet the deadline.¹⁰⁶ They are not automatically dismissed on 30 September 2015 – our labour laws do not allow for that. So, the municipality would have to do something, but what? Must the official be dismissed? Or perhaps demoted? The National Treasury has not explained to municipalities what to

¹⁰² Competency Regulations reg 3.

¹⁰³ The South African Local Government Association (SALGA) and the City of Cape Town have commissioned legal opinions on the interpretation of these requirements.

¹⁰⁴ Competency Regulations reg 15 provides that their continued employment would not be affected, provided that they attain the prescribed requirements before the end of the grace period.

¹⁰⁵ Competency Regulations reg 15.

¹⁰⁶ Competency Regulations reg 18(1) simply says that no municipality may employ, after the deadline, a person as a financial or supply chain manager if that person does not meet the competency levels prescribed for the relevant position.

do, except to say that there will not be further extensions and that the process followed by municipal councils, as employers, to enforce these requirements must be consistent with the relevant laws.¹⁰⁷ Again, this legal uncertainty violates the rule of law requirement that a law must be clear in its meaning.

The last category is those officials appointed after 30 September 2015. For those, the consequences of non-compliance are clearer. After the end of the grace period, any appointment in violation of the Competency Regulations will be unlawful and can be challenged in court.¹⁰⁸

Another key issue emanating from the Competency Regulations that is threatening the rule of law relates to the continuous shifting of deadlines. The Competency Regulations suspended the immediate application of the competency framework to allow the officials who were already employed by municipalities when the Regulations were issued to acquire the prescribed minimum competency levels.¹⁰⁹ These officials were initially given a five-year period of grace within which to acquire all the prescribed competency levels.¹¹⁰ The deadline for the attainment of the relevant competency levels was 1 January 2013 and has been extended twice to 30 September 2015.¹¹¹ After this deadline, the employment of new financial and supply chain management officials who do not meet the minimum competency levels is strictly prohibited.¹¹²

The practice of putting a target in a law and then softening it a number of times as the deadline approaches threatens the rule of law. It is not conducive for legal certainty. Municipal officials are likely not to take the regulations seriously when they eventually become effective. This will have grave consequences for the principle of legality as it undermines the efficacy of the law. Now that the law has become effective, municipalities are carrying on with their business as usual. They are unlikely to treat the law with the seriousness it requires.

In what follows, I look at the impact of overregulation on municipal autonomy.

D Implications of overregulation for municipal autonomy

As noted earlier, the practice of throwing laws at a problem can also potentially fail the constitutional test for violating its various provisions relating to the municipalities' ability or right to exercise their powers and regulate their internal affairs without any impediments. The relevant provisions that are threatened by this practice are ss 151(4) and 160 of the Constitution. These provisions confer

¹⁰⁷ National Treasury mentioned the Labour Relations Act 66 of 1995, the Municipal Systems Act (as amended), the Performance Regulations, the MFMA, the Competency Regulations and the MFMA Exemption Notice of March 2014 in a joint media statement issued on 30 September with CoGTA, available at http://www.treasury.gov.za/comm_media/press/2015/2015093001%20-%20MinimumCompetencyStatement.pdf.

¹⁰⁸ Competency Regulations reg 18.

¹⁰⁹ Competency Regulations reg 15.

¹¹⁰ *Ibid*.

¹¹¹ Firstly, in 2012 by MFMA Circular 60 of 20 April 2012 (on file with the author). Later by the Exemption Notice issued on 14 March 2014, available at <http://mfma.treasury.gov.za/RegulationsandGazettes/Documents/Gazette%20No.37432,14%20March%202014.pdf>.

¹¹² Competency Regulations reg 18.

autonomy on the municipal council over internal affairs of the municipality¹¹³ and proscribe national and provincial governments from ‘comprom[ising] and imped[ing] a municipality’s ability or right to exercise its powers or perform its functions’.¹¹⁴

I argue that the flurry of laws issued by the national government, with their mandatory and prescriptive requirements, are actually impeding or compromising the municipalities’ ability or right to exercise their powers and perform their functions. Instead of expending their energy on delivering the much needed services and in discharging their developmental mandate, municipalities find themselves having to tick boxes and comply with hundreds if not thousands of ‘musts’ scattered throughout local government legislation. This state of affairs has the potential to erode the autonomy of local government and relegate the local sphere to an implementing agent of other spheres.

In its haste and overzealousness to fix local government, the national government inadvertently created a snare that traps local government instead of creating an enabling environment for local government to discharge its responsibilities. The five sets of secondary legislation¹¹⁵ from three different departments regulating the human resource practices with respect to senior managers in local government all contain peremptory norms that do not allow for local discretion. Following the Court’s finding in *Habitat Council*,¹¹⁶ the combined effect of these laws is a violation of s 151(4) of the Constitution. These laws encroach on the institutional integrity of local government and compromise the municipalities’ ability to exercise their own powers and perform their own functions. The contradictory, overlapping and parallel support and enforcement measures by national government go beyond the permissible limits of regulation in s 155(7) of the Constitution. In the words of the *Habitat Council* Court, they impermissibly intrude on the autonomous sphere of authority accorded to municipalities by the Constitution.¹¹⁷ From the local government perspective, the combined effect of these attempts constitutes the usurpation of local government’s power. Municipalities find themselves hamstrung by national regulation. This is not the broad managing and controlling envisaged by s 155(7) of the Constitution.

As highlighted by De Visser and Steytler, in the context of municipal powers relating to land use planning, the courts have been eager to jealously guard this newly found autonomy of the local sphere. In this context, there are just too many peremptory norms which, if not complied with, and if courts were

¹¹³ Constitution s 160 provides that a Municipal Council makes decisions concerning the exercise of all the powers and the performance of all the functions of the municipality.

¹¹⁴ Constitution s 151(4).

¹¹⁵ Performance Regulations of 2006 from then DPLG; Competency Regulations of 2007 from Treasury; Appointment Regulations of 2014 from CoGTA; Disciplinary Regulations of 2011 from CoGTA; and Financial Misconduct Regulations of 2014 from Treasury. There are also mooted regulations from DPSA.

¹¹⁶ *Habitat Council* (note 42 above) at para 22.

¹¹⁷ See also *Minister of Local Government, Environmental Affairs and Development Planning of the Western Cape v Lagoonbay Lifestyle Estate (Pty) Ltd & others* [2013] ZACC 39, 2014 (1) SA 521 (CC), 2014 (2) BCLR 182 (CC) at para 46.

to follow the approach of the minority judgment in *Liebenberg*,¹¹⁸ could render local administrative decisions vulnerable to procedural challenges with grave consequences for municipal autonomy. Will the courts hold that human resource decisions (appointments, suspensions, dismissals) are invalid purely because one of the ‘musts’ in the increasingly confusing set of laws has not been complied with?

Take, for example, the following scenario as presented by De Visser elsewhere:

The Municipal Manager of a small rural municipality needs to address the problem of a manager who is not performing, is possibly incompetent and is accused of mismanaging municipal funds. How many different laws must she consult to address this situation effectively and in accordance with the rule of law? On the issue of competency and performance, there are three laws.... The Municipal Manager may therefore have to consult at least six laws to deal with her problem, excluding internal council protocols and policies. Her efforts to deal with a real problem in line with the rule of law are thus complicated by two Departments seemingly competing for space to regulate local government.¹¹⁹

The correct approach to follow is the generous approach adopted by the majority of the Court in *Liebenberg* where it found that an administrative hiccup should not necessarily invalidate the actions of the Municipal Manager in question. The following *dictum* should find particular resonance:

[A] failure by a municipality to comply with relevant statutory provisions does not necessarily lead to the actions under scrutiny being rendered invalid. The question is whether there has been substantial compliance, taking into account the relevant statutory provisions in particular and the legislative scheme as a whole.¹²⁰

The current scenario may encourage the courts to rewrite the statute book and thus assert the independence of local authority that is being eroded by warring departments.

E Duplication and Overlapping Resulting in Overregulation

The outpouring of laws also causes duplication and overlap. There is a barrage of similar laws regulating the same or similar subject matter. In this section, I dissect the provisions emanating from different statutes and regulations regulating compulsory education requirements and ethics.

1 Compulsory Education Requirements

aa Municipal Systems Act and Appointment Regulations

Compulsory educational requirements for employment are already dealt with sufficiently by CoGTA through the Municipal Systems Act (as Amended) and the Appointment Regulations. Section 54A(3) read with s 56(2) of the Municipal Systems Act provides that the appointment of a municipal manager or a manager

¹¹⁸ *Liebenberg NO and Others v Bergrivier Municipality* [2013] ZACC 16, 2013 (5) SA 246 (CC), 2013 (8) BCLR 863 (CC) (‘*Liebenberg*’).

¹¹⁹ J De Visser ‘Editorial’ (2012) 14(3) *Local Government Bulletin*.

¹²⁰ *Liebenberg* (note 116 above) at para 26.

reporting directly to the municipal manager is null and void if the person does not have the prescribed skills, expertise, competencies or qualification. Reg 8(1)(b) of the Appointment Regulations, in turn, provides that no person may be appointed as a senior manager unless he or she possesses the relevant competencies, qualifications, experience, and knowledge set out in Annexures A and B to these regulations.¹²¹

bb Competency Regulations

On the other hand, the National Treasury also deals thoroughly with compulsory education requirements through the Competency Regulations. Regulations 3, 5, 7, 9, 11 and 12 of the Competency Regulations contain a comprehensive list of compulsory education requirements for financial and supply chain management officers. As noted earlier the Competency Regulations create detailed requirements for appointment, depending on the budget size of a municipality. A financial officer is defined as any official exercising ‘financial management responsibilities’, including the accounting officer, the chief financial officer, a senior manager or any other financial official.¹²² Given the breadth of the definition, these regulations appear to apply to all senior managers including, for example, human resource managers who manage huge budgets and therefore exercise financial management responsibilities.

The Appointment Regulations and the Competency Regulations contradict each other. One example is the compulsory requirement under the Competency Regulations for a certificate in municipal financial management discussed earlier. The Appointment Regulations, in turn, say that a certificate of competency in a particular field is *not* a requirement but an added advantage. Municipalities could easily choose the less stringent of the two regulations and render the Competency Regulations redundant.

cc Public Administration Management Act

PAMA contains provisions relating to compulsory educational requirements for employment in public administration which includes local government. Section 13(1) of PAMA provides that:

[t]he Minister [of DPSA] may, after approval by the Cabinet, direct that the successful completion of specified education, training, examinations or tests is—

- (a) a prerequisite for specified appointments or transfers; and
- (b) compulsory in order to meet development needs of any category of employees.

Subsection (2) provides that, in the case of a directive to be applicable to local government, the Minister of DPSA must consult organised local government and obtain the concurrence of the Minister of CoGTA before seeking the approval of the Cabinet contemplated in subsection (1). This means that there are *more* compulsory education requirements in the offing for local government. If it acts

¹²¹ Annexure B requires a Bachelor degree in public administration/political science/law or equivalent; five years of experience at senior management level; and knowledge in relevant fields for a municipal manager.

¹²² Competency Regulations reg 1.

under PAMA, DPSA will be adding nothing new except adding an additional layer of ‘musts’ to the already strangulated sector. The existing frameworks already contradict each other and leave room for cherry-picking; a third competency framework from DPSA will add an additional, unnecessary layer of compliance.

2 *Ethics*

aa PAMA

On the ethical side, PAMA prohibits employees from conducting business with the state and instructs employees to disclose their financial interests. Failure to do so constitutes misconduct.¹²³ At a local level, this is dealt with sufficiently in item 5A of the Code of Conduct for Municipal Staff Members contained in schedule 2 to the Municipal Systems Act. This constitutes duplication and an additional ‘trip wire’. Section 4(1)(b) of the Code of Conduct for Municipal Staff Members also prohibits a staff member of a municipality from taking a decision on behalf of a municipality in which that staff member or his spouse, partner or business associate, has a direct or indirect personal or private business interest. Section 4(3) further provides that no staff member of a municipality may be a party to or benefit from a contract for the provision of goods or services to any municipality or any municipal entity established by a municipality.¹²⁴ As can be seen, PAMA and the Code of Conduct for Municipal Staff Members are pure duplication. Requiring municipalities to comply with different provisions emanating from different sources but addressing the same issues, constitutes adverse overregulation which potentially violates the rule of law.

bb Financial Misconduct Regulations *vis-à-vis* Codes of Conduct

The Financial Misconduct Regulations,¹²⁵ published in terms of the MFMA by the National Treasury in 2014, seek to regulate the processes and procedures to be followed by municipalities when dealing with the (alleged) commission of financial misconduct. They apply to all officials and political office bearers within municipalities and municipal entities.

First, a question that needs to be answered honestly relates to how an official (and a political office bearer) could commit financial misconduct without falling foul of the Codes of Conduct for Councillors and Municipal Staff Members? The introduction of the Financial Misconduct Regulations presupposes that one can commit an act of financial misconduct and not fall foul of the Code of Conduct. The Codes of Conduct comprehensively cover instances of financial misconduct. If by committing an act of financial misconduct a councillor or municipal staff member is also committing a breach of the Code of Conduct for Councillors or for Municipal Staff Members, as the case may be, then there was no need for the enactment of these Regulations. All that was required was the beefing up of the

¹²³ PAMA s 8.

¹²⁴ Item 6 of the Code of Conduct for Councillors, schedule 1 of the Municipal Systems Act, contains similar provisions in relation to councillors.

¹²⁵ Municipal Regulations on Financial Misconduct Procedures and Criminal Proceedings, *Government Gazette* 37699, General Notice R430 (30 May 2014).

Codes of Conduct. Their existence only serves as a source of duplication, causes legal uncertainty on which laws to apply and may result in the erosion of the rule of law.

Second, reg 3(1)(a) of the Financial Misconduct Regulations provides that ‘any allegation of financial misconduct against the accounting officer, a senior manager or the chief financial officer of a municipality, must be reported to the municipal council of the municipality, the provincial treasury and the national treasury.’ This is in direct conflict with item 13 of the Code of Conduct for Municipal Staff Members which requires that a breach of the Code should be reported to a superior officer or the speaker of the council, not the other functionaries mentioned in reg 3(1)(a). This confusion will result in yet another instance of cherry-picking the laws that suit the one reporting the alleged breach. Again, this results in legal uncertainty which ultimately undermines the principle of legality and consequently the rule of law.

Furthermore, certain provisions of the Financial Misconduct Regulations seem to go beyond the term ‘regulating’ and may be unconstitutional. First, reg 19 provides for intervention by the National and Provincial Treasuries in the event that the municipal council does not take the recommendations of the Disciplinary Board¹²⁶ seriously. If that happens, the National and Provincial treasuries *may direct* the council to take the recommended steps. This goes beyond regulation, which was said to be limited to the determination of ‘norms and guidelines’ in *Habitat Council*.¹²⁷ It constitutes a direct authorisation function.

In *Habitat Council*, the Constitutional Court had to decide the contours of the constitutional duty of oversight bestowed on provincial government by s 155(7) of the Constitution. In the context of the concurrent planning functions, the Court held that the province’s exercise of appellate powers over municipalities’ exercise of their planning functions constituted an impermissible usurpation of the power of local authorities to manage municipal planning.¹²⁸ The Court went on to say that the provincial appellate capability intrudes into the autonomous sphere of authority the Constitution accords to municipalities, and fails to recognise the distinctiveness of the municipal sphere.¹²⁹ It follows that the power to *direct* councils to do certain things, as reg 19 of the Financial Misconduct Regulations suggests, amounts to an impermissible usurpation of powers conferred on the local sphere of government. It ‘encroaches on the geographical, functional or institutional integrity of local government’¹³⁰ in the same way that the appellate powers of the province were found to intrude on the autonomous sphere of authority accorded to municipalities.

Second, it is not clear what reg 19 actually means by ‘may direct’. What is it that a Provincial Treasury or the National Treasury may direct? Does it mean that they may direct the municipality to investigate the allegation or that they may

¹²⁶ A board established in terms of reg 4 to investigate allegations of financial misconduct and to monitor the institution of disciplinary proceedings against an alleged transgressor.

¹²⁷ *Habitat Council* (note 42 above).

¹²⁸ *Ibid* at para 13, see also para 22.

¹²⁹ *Ibid* at para 13.

¹³⁰ Constitution s 41(1)(g).

do the investigation themselves by designating a person or persons in line with s 106 of the Municipal Systems Act and item 14(4) of the Code of Conduct for Councillors? If 'may direct' means the latter, then this provision is a duplication of the existing law. In any event, the lack of clarity on the purpose of this provision leads to legal uncertainty and thus the violation of the essential requirement of the rule of law that laws must be clear in meaning.

cc Disciplinary Regulations

CoGTA issued the Disciplinary Regulations¹³¹ in 2011, which deal with all forms of misconduct committed by senior managers. Insofar as the senior managers are concerned they, once again, replicate the Financial Misconduct Regulations, the Disciplinary Regulations and the Codes of Conduct for Councillors and Municipal Staff Members. This adds not only to overregulation, but to the perceived competition between CoGTA and the National Treasury which suffocates the local sphere of government.¹³² The regulations or guidelines envisaged by PAMA to regulate conduct and levels of ethics expected of public administration officials will add DPSA as the third point of a triangle of competition over local government.

V THE CASE FOR A SINGLE SET OF REGULATIONS AND IMPROVED COORDINATION

The effect of the multitude of regulations I have discussed is this: At least in the arena of personnel regulation, local government has been reduced to an agent that merely complies with the demands of other spheres of government instead of expending its resources and energy on delivering much needed services to local residents. This manifestly 'intrudes on the autonomous sphere of authority the Constitution accords to municipalities'.¹³³ And it undermines the rule of law by creating an impenetrable and contradictory set of regulations that often incentivise conduct that is contrary to the purpose the regulations sought to achieve.

For the sake of legal certainty, I suggest that CoGTA and the National Treasury should synchronise efforts and come up with a single, comprehensive set of regulations to replace the overregulation, duplication and overlaps that currently infect local government. The blueprint for this system already exist – the proposals

¹³¹ Local Government: Disciplinary Regulations for Senior Managers, General Notice 344, *Government Gazette* 34213, General Notice 344 (21 April 2011).

¹³² SALGA 'Presentation at the 8th National Municipal Managers Forum' (2014), available at http://www.salga.org.za/app/webroot/assets/files/MediaRoomStatements/8th%20National%20Municipal%20Managers%20Forum/1_%20%20SALGA%20CEO%20Presentation.pdf (Suggests that the turf battles and competition between National Treasury, CoGTA and now DPSA are caused by poorly defined roles and responsibilities between national departments. They further suggest that the on-going turf battles between these departments distract from the task of capacitating local government.)

¹³³ *Habitat Council* (note 42 above) at para 13.

contained in the Draft Green Paper on Cooperative Governance.¹³⁴ The first of these proposals relates to the development of a single integrated system of administering municipal legislation based on standardised regulations, guidelines and circulars similar to the system employed by the National Treasury.¹³⁵ The second relevant proposal is to establish a ‘Standing Interdepartmental Committee of the Department of Cooperative Governance, National Treasury and the Department of Public Service and Administration’.¹³⁶ This committee should enable the sharing of knowledge and information to ensure that the respective laws, guidelines and regulations emanating from these departments, especially as they relate to local government, are consistent and coherent.¹³⁷ This committee should be established by a Cabinet decision and should report to Cabinet, in order to enforce its formal nature.

The need for this committee, which will enforce cooperation at a horizontal level, is occasioned by the fact that the Intergovernmental Relations Framework Act¹³⁸ defines intergovernmental relations and institutional arrangements within government with a focus on the vertical relations between the three spheres.¹³⁹ There is an inadequate focus on the horizontal relations between government departments addressing the same issue (local government) within the same sphere (national). That is the biggest contributor to the overregulation, duplication and turf battles decried in this paper. This absence of a horizontal mechanism to regulate inter-departmental relations is proving to be the most difficult challenge in improving capacity and, as a corollary, service delivery in the majority of municipalities.¹⁴⁰

A further suggestion relates to the establishment of a special Cabinet Committee on provincial and local government whose aim will be to discuss and scrutinise all policy and legislation impacting on sub-national government before they go to Cabinet for decision.¹⁴¹

There are many other laudable policy proposals contained in the Draft Green Paper. Government should be encouraged to hasten the development of some of these structures, especially those that seek to facilitate horizontal intergovernmental coordination, as they promise to deal with the perceived competition and turf battles between national departments. These bodies could

¹³⁴ Department of Cooperative Governance ‘Draft Green Paper on Cooperative Governance’ (2011) 32 (‘Draft Green Paper’).

¹³⁵ Ibid at 64. See generally SJ Greýling *The South African Local Government National Capacity Building Framework of 2011: Critical Future Considerations for 2016* (2015) PhD dissertation, University of Johannesburg.

¹³⁶ Draft Green Paper (note 132 above) at 32. See generally LP Malan ‘Intergovernmental Relations in South Africa: A Revised Policy Approach to Co-operative Government. (2012) 5(2) *African Journal of Public Affairs* 115.

¹³⁷ Malan (note 134 above) at 122.

¹³⁸ Act 13 of 2005.

¹³⁹ Draft Green Paper (note 132 above) at item 5.

¹⁴⁰ Ibid.

¹⁴¹ Ibid at 32.

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go a long way to aligning the existing laws into a single coherent policy. They would ensure that future policy initiatives are coherent. In addition, by eliminating competition for control over local government, they would hopefully ensure that national and provincial laws do not intrude impermissibly on the autonomous sphere of authority accorded to municipalities.

Playing With Power: The Competing Competencies of Provincial and Local Government

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Any discussion of local government often elicits a kind of cognitive dissonance. We know, and we are told by both courts¹ and politicians,² that local government is important. At the same time, local matters are associated with the parochial and petty, and are often viewed as being mundane or just unglamorous.

Yet the work performed by municipalities marks our everyday experiences of government. These experiences in turn shape our perceptions of being governed. For instance, a municipality is responsible for providing the roads outside our houses, emptying our bins, lighting our streets, and providing infrastructure to bring us potable water or to take away stormwater and sewerage. When these services fail, public dissatisfaction and disaffection are almost certain to follow.

The ‘foundational objects’ of local government, set out in s 152(1) of the Constitution, link to broader themes of providing democratic and accountable government, and sustainable development. The description of the work actually done by municipalities is less prosaic. The range of ‘local government matters’ is described in s 156(1)(a) of the Constitution, read with parts B of schedules 4 and 5. These schedules list, in an unadorned fashion, ‘functional areas’ for which

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† Member of the Cape Bar.

¹ The elevated role of municipalities under the Constitution of the Republic of South Africa, 1996 (Constitution) was recognised in *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* [1998] ZACC 17, 1999 (1) SA 374 (CC), 1998 (12) BCLR 1458 (CC) (‘*Fedsure*’) at paras 26 and 38; *City of Cape Town v Robertson* [2004] ZACC 21, 2005 (2) SA 323 (CC) at para 60; and *CDA Boerdery (Edms) Bpk v Nelson Mandela Metropolitan Municipality and Others* [2007] ZASCA 1, 2007 (4) SA 276 (SCA) at paras 37–40.

² The need to ensure effective local government is evident from the resolutions of the 53rd National Conference of the African National Congress (December 2012) available at <http://www.anc.org.za/docs/res/2013/resolutions53r.pdf>. This matter has been taken up by Minister Pravin Gordhan through his ‘Back to Basics’ campaign, launched in September 2014, which regards local government as ‘the building block on which the reconstruction and development of our country and society was built’. Department of Cooperative Governance and Traditional Affairs *Back to Basics: Serving our Communities Better!* (2014) available at <http://www.cogta.gov.za/summit2014/wp-content/uploads/2014/10/plgsummit-backtobasics-discussion-document.pdf>. Clause 1.3.10 of the Federal Constitution of the Democratic Alliance states the principle that power should be devolved ‘to locate government as close as possible to the people’, available at <http://www.da.org.za/wp-content/uploads/2013/12/DA-Federal-Constitution-approved-by-Congress-9-May-2015.pdf>.

each sphere of government is responsible.³ The tasks for which municipalities are responsible⁴ range from the small⁵ to the essential. In addition, municipalities must also be assigned further functions by the national and provincial spheres of government. Most notably, municipalities are usually made the primary agents responsible for fulfilling the constitutional promise of providing everyone with access to adequate housing.⁶

In some ways the list of functions ascribed to municipalities is a product of history and happenstance. While the Constitution fundamentally altered the stature of local government, in many instances the list of functions for which municipalities are responsible was based on the type of things that municipalities

³ In addition to defining the role of local government, the schedules to the Constitution also list powers enjoyed by the national and provincial spheres of government. These can be divided into three categories:

- The first category comprises areas of concurrent national and provincial control. In terms of ss 44(1)(a)(ii) and 104(1)(b)(i) of the Constitution, both the national and provincial spheres of government have concurrent legislative competence in respect of those functions in Part A of Schedule 4 to the Constitution. The President and national cabinet enjoy the executive power to implement national legislation (in terms of s 85(2)(a) of the Constitution); and the Premiers and the provincial cabinets enjoy executive control to implement both national and provincial legislation (s 125(2)(a) of the Constitution).
- The second category comprises functions falling under exclusive provincial control. In terms of s 104(1)(b)(ii) of the Constitution, the provincial sphere of government has exclusive legislative competence in respect of those functions in Part A of Schedule 5 to the Constitution. The national sphere of government has no power in respect of these functional areas, save in limited circumstances of compelling national interest (in s 44(2) of the Constitution, read with section 76(1)). See *Ex parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill* [1999] ZACC 15, 2000 (1) SA 732 (CC), 2000 (1) BCLR 1 (CC) ('*Liquor Bill*') at para 48.
- The third category comprises areas of exclusive national control. In terms of s 44(1)(a)(ii) of the Constitution the national Parliament has a residual power to legislate on any matter. If a matter is not dealt with in Schedules 4 and 5, then the national sphere of government enjoys exclusive legislative and executive power (subject to the principle that it may choose to assign such power to another sphere of government).

⁴ This control includes both executive responsibility (s 156(1)) and legislative power for the effective administration of these matters (s 156(2)).

⁵ Part B of Schedule 5 to the Constitution, for instance, refers to control of billboards, pet cemeteries, fencing and the licensing of dogs.

⁶ The roles of the national, provincial and local spheres of government in respect of housing are delineated in the Housing Act 107 of 1997 and in a series of complementary provincial Acts. In terms of s 9(1) of the Housing Act, municipalities must, as part of their integrated development planning, 'take all reasonable and necessary steps within the framework of national and provincial housing legislation and policy' to, *inter alia*, ensure that the inhabitants of their areas of jurisdiction have access to adequate housing on a progressive basis; and to initiate, plan, co-ordinate, facilitate, promote and enable appropriate housing development. The 'Policy Context' in part 1 of the National Housing Code also highlights the importance of building the capacity of municipalities and extending the role of municipalities in the provision of subsidised housing.

had always done.⁷ This is not necessarily a bad thing. Past experience is a useful guide to determine what can, or cannot, properly be dealt with by municipalities.

But our understanding of municipal functions must also be linked to an appreciation of the type of society envisaged in the Constitution, and the role that municipalities can realistically play in actualising that vision. Municipalities can achieve their constitutional objectives only if they are empowered to do that which they are best placed to do, and if they are able to do that which they are meant to do.

Roberto Unger reminds us that—

our institutional choices do not merely execute the predefined program of our interests and ideals. They work out that program. It is, in large part, by enriching the institutional possibilities, and pushing them in one direction rather than another, that we make them – and therefore ourselves – into one thing rather than another.⁸

If our governmental structures are not shaped by what we want to achieve, then our preordained structures will determine what we can achieve.

In 1993 *Adv. Pius Langa SC*, as he then was, considered the nature of open government in a constitutional state, and recognised the following:

Whatever structures are envisaged, they must operate within a set of rules that are notable for their clarity, simplicity and conscious intention to link openness and clean administration with the broader task of building and entrenching democracy ...

It is also important that whatever different structures are created are linked to a manageable and non-bureaucratic system that allows coordination and interaction to avoid duplication, delay and expense. Flexibility is a necessary principle, not for expediency but for the fact that the South Africa of the future will be swift-flowing and adaption will be necessary as we eliminate apartheid practices and procedures from the body politic.⁹

The structures of government are thus not an end in themselves, but must be conceived of as a means to achieve a better society. Against this backdrop we consider two broad aspects: First, we deal with the autonomy of municipalities, and some of the challenges that it poses; secondly, we deal with the Constitutional Court's approach in cases in which the functional responsibilities and powers

⁷ The approach adopted by the Constitutional Court in *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* [2010] ZACC 11, 2010 (6) SA 182 (CC), 2010 (9) BCLR 859 (CC) ('GDT') treats the functional competencies in the Constitution as a codification of that which went before. The Court considered the responsibilities of the provincial and municipal spheres for 'planning'. In understanding the ambit of the functional area for 'municipal planning', the Court commenced by referring to four old order provincial ordinances, which granted municipalities certain powers over the zoning of land and the establishment of townships. *Ibid* at para 30. The Court later (at para 57) held that –

'planning' in the context of municipal affairs is a term which has assumed a particular, well-established meaning which includes the zoning of land and the establishment of townships. In that context, the term is commonly used to define the control and regulation of the use of land. There is nothing in the Constitution indicating that the word carries a meaning other than its common meaning which includes the control and regulation of the use of land. It must be assumed, in my view, that when the Constitution drafters chose to use 'planning' in the municipal context, they were aware of its common meaning.

⁸ RM Unger *Democracy Realized: The Progressive Alternative* (1998) 17.

⁹ P Langa 'Open Government, Accountability and Democracy in South Africa' in H Corder & F McLennan (eds) *Controlling Public Power: Administrative Justice Through the Law* (1995) 153, 158.

of provinces and municipalities appear (at least at first blush) to overlap. These have arisen in a series of relatively technical cases dealing with the ambit of the ‘municipal planning’ function (in Part B of Schedule 4), and the competing provincial responsibilities for ‘regional planning and development’ (in Part A of Schedule 4) and ‘provincial planning’ (in Part A of Schedule 5).

I THE AUTONOMY OF MUNICIPALITIES

Before 1994 local government structures were subsidiary to national and provincial administrations. Under both the Interim¹⁰ and Final Constitutions, local government took ‘a place in the constitutional order’.¹¹

Section 40 of the Constitution provides that the three spheres of government (national, provincial and local) are ‘distinctive, interdependent and interrelated’. At the same time, each sphere of government must ‘not encroach on the geographical, functional or institutional integrity of government in another sphere’.¹²

The autonomy of municipalities is recognised in s 151(3), which asserts that municipalities have the right to govern based on their ‘own initiative’. Section 151(4) states further that the national and provincial spheres of government ‘may not compromise or impede a municipality’s ability or right to exercise its powers or perform its functions’.

In theory the functions performed by municipalities should be those that can most appropriately be dealt with by a smaller unit of government. EF Schumacher emphasised the ‘duality of the human requirement when it comes to size.’ For some purposes one needs structures that are exclusive, and for other purposes structures that are comprehensive. The determination is one of ‘appropriate scale’.¹³

As noted, the structure of the Constitution marks a clear choice that the functions which most affect people’s lives are performed by municipalities. This echoes the German concept of subsidiarity, which is distilled from the structure of the Basic Law. Kommers notes that this traces its origins to Catholic social thought which ‘affirms that there is nothing done at a higher or larger organisation that cannot be done as well by a lower or smaller one’.¹⁴ The Constitution strongly reflects this idea that the autonomy of municipalities must be protected, allowing them to undertake functions which are most appropriately handled by the smallest units of government.

II THE LIMITED ROLE FOR NATIONAL AND PROVINCIAL INTERVENTION

The national and provincial spheres of government have some powers to intrude into the affairs of municipalities which are ‘not insubstantial’. But in practice these

¹⁰ Act 200 of 1993 (Interim Constitution).

¹¹ *Fedsure* (note 1 above) at para 38.

¹² Constitution s 41(1)(g).

¹³ EF Schumacher *Small is Beautiful: Economics as if People Mattered* (1989) 70.

¹⁴ DP Kommers *The Constitutional Jurisprudence of the Federal Republic of Germany* (2nd Edition, 1997) 112–113.

are limited.¹⁵ In the ordinary course, the national and provincial spheres have only ‘oversight’ functions referred to in ss 155(6) and (7) of the Constitution.¹⁶ These are effectively confined to supporting and monitoring local government.¹⁷

The power to ‘support’ (s 155(6)(a)) or ‘support and strengthen’ (s 154(1)) municipalities amounts to the promotion of capacity. The power of provincial governments to ‘regulate’ municipalities only arises to ensure that municipalities in fact perform their functions. The Court has made it clear that regulation in this context ‘connotes a broad managing or controlling rather than a direct authorisation function’.¹⁸ In practical terms this supporting role means that a province may provide documents like model by-laws, a model zoning scheme and handbooks, as well as advice.¹⁹

The monitoring power is the underlying power from which the provincial power to support, promote and supervise local government emerges. It denotes a power to observe or keep under review, and does not represent a substantial power in itself. It is not a power to control local government affairs.

Only in cases of serious dysfunction may a province intervene in the affairs of a municipality.²⁰ Such an intervention is triggered by an on-going failure to fulfil

¹⁵ Under the Interim Constitution, provinces had a greater ability to intrude into municipal affairs. See *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* [1996] ZACC 26, 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC) (‘*First Certification Judgment*’) at para 299. (The Constitutional Court noted that most of the criticisms against the scheme in the new text of the draft Constitution (referred to as the NT) ‘were levelled at the alleged diminution of provincial powers and functions’, including a diminution of its powers over local government. This illustrates that the Final Constitution reduced the powers of Provincial Governments to intrude into the affairs of municipalities.)

¹⁶ Constitution s 155(6)–(7) reads as follows:

(6) Each provincial government must establish municipalities in its province in a manner consistent with the legislation enacted in terms of subsections (2) and (3) and, by legislative or other measures, must —

(a) provide for the monitoring and support of local government in the province; and
(b) promote the development of local government capacity to enable municipalities to perform their functions and manage their own affairs.

(7) The national government, subject to section 44, and the Provincial Governments have the legislative and executive authority to see to the effective performance by municipalities of their functions in respect of matters listed in Schedules 4 and 5, by regulating the exercise by municipalities of their executive authority referred to in section 156 (1).

¹⁷ *First Certification Judgment* (note 15 above) at para 367; *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* [1996] ZACC 24, 1997 (2) SA 97 (CC), 1997 (1) BCLR 1 (CC) at para 171.

¹⁸ *First Certification Judgment* (note 15 above) at para 377.

¹⁹ See *ibid* at para 372 (The Court has held that the powers of provincial supervision and support would permit a provincial ‘legislative intervention to promote the performance and management capacity of local government or recast the manner in which local government matters are administered’.)

²⁰ *Ibid* at para 370 (The Court held that this power ‘is considerable and may be particularly important in the field of local government, where administrative and executive structures are likely to be in need of greater support than are comparable structures in higher spheres of government.’)

an ‘executive obligation’ (s 139(1)),²¹ or a failure to pass a budget (s 139(4)). But even in those cases, the intervention must be as limited as possible.²²

The limited powers of provinces to intervene in the business of municipalities reflects another aspect of the Constitutional structure; the relative weakness of the provincial sphere. This is an incident of the constitutional negotiations, in which the ANC reluctantly accepted the need for provincial governments at all. It has recently been widely reported that the ANC still supports the reduction in the number of provinces.

Provinces also have no substantial taxation power, other than limited income earned from processing applications, or granting liquor and gambling licences. Provinces are mainly funded by the national government in an annual allocation (under the Division of Revenue Act²³), and most of that money simply flows through the provincial government to municipalities.

The only powers that provinces enjoy exclusively are contained in Part A of Schedule 5 to the Constitution, but none of these is of great moment.²⁴ In addition, provinces enjoy concurrent powers with the national government over those functions in Part A of Schedule 4 to the Constitution. These are more substantial, but subject to the policy dictates and legislative lead of the national sphere of government whenever it counts most (as is evident from the regulation of education). Conflicts between the national and provincial legislation should be avoided, but s 146 of the Constitution recognises that inconsistencies between national and provincial legislation may occur, and provides a deadlock-breaking mechanism in those instances. This provides a default position that provincial legislation prevails,²⁵ but the exceptions created (ie when national legislation trumps) are substantial.

In addition, provinces are encouraged to assign their functions to municipalities if the affected municipalities have the requisite capacity, and the matter can be most effectively be dealt with at a municipal level.²⁶

III THE CHALLENGES FOR STRONG MUNICIPALITIES

The relationship between the powers of provincial and local government has arisen most pointedly in cases dealing with apparently overlapping functions enjoyed by each of these spheres of government. However, before turning to the legal issues we believe it is important also to understand the serious practical challenges faced by municipalities. It is all very well to empower municipalities

²¹ *City of Cape Town v Premier, Western Cape* [2008] ZAWCHC 52, 2008 (6) SA 345 (C) at para 79. Compare *Mnquma Local Municipality and Another v The Premier of the Eastern Cape and Others* [2009] ZAECHC 14 at para 51.

²² Constitution s 139. See also *Premier, Western Cape v Overberg District Municipality* [2011] ZASCA 23, 2011 (4) SA 441 (SCA) at para 27ff.

²³ Act 1 of 2015.

²⁴ They include abattoirs, ambulance services, provincial archives, provincial libraries, liquor licences, provincial museums, provincial planning, provincial cultural matters, provincial recreation and amenities, provincial sport, provincial roads and traffic, and veterinary services.

²⁵ Constitution s 146(5).

²⁶ Constitution s 156(4), read with s 104(c).

in law and to place them at the forefront of service delivery, but this is bound to cause problems unless the municipalities are properly capacitated and supported.

The problems experienced by poor-performing municipalities are not created by under-regulation, or necessarily solved by additional regulation. The functions of local government are practical, and require capable office bearers and officials exercising discretionary powers and getting things done. Like all discretionary powers, the powers enjoyed by municipalities can and should be guided,²⁷ but it is not desirable or possible to dictate remotely how decisions ought to be made, or to impose a ‘paint-by-numbers’ scheme for decision-making. Additional regulation merely succeeds in creating trip-wires for the diligent official, and at worst allows for selective formalism to obscure an impure motive.²⁸

The problem is also not one of too little government. On the contrary, the problem remains that there is too much government, which results in a thinning of resources and skilled office bearers and officials. Ambitious and able politicians aspire to positions in other spheres of government, which are often viewed as having more cachet. Every major party faces the perennial problem of identifying sufficient numbers of people, who are able, available and electable in every small town across the country. Furthermore, there is a tendency for party caucuses in municipal councils to be dominated by a small number of people, with others being used as little more than voting fodder.

Municipalities struggle to appoint qualified technocrats and professionals, such as engineers or building control officers. The example of land use decisions, which has arisen in recent cases in the Constitutional Court, is instructive. Metropolitan municipalities and larger local municipalities have experience with large or complicated development proposals. Smaller municipalities, even if otherwise functional, have little experience with these sorts of developments. The consequence of recent cases is that municipalities alone must approve land use decisions for all developments, no matter how large or complex. In the result, the quality of decisions can be weak and dominated by parochial considerations. In *Habitat Council*,²⁹ Cameron J intimated that such parochialism was acceptable. Yet this fails to appreciate the serious consequences of municipal decisions, which can, and often do, radiate beyond the geographical limits of the municipality.

²⁷ *Dawood v Minister of Home Affairs and Others; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs and Others* [2000] ZACC 8, 2000 (3) SA 936 (CC), 2000 (8) BCLR 837 (CC) at paras 46–8; *Janse van Rensburg NO and Another v Minister of Trade and Industry and Another NNO* [2000] ZACC 18, 2001 (1) SA 29 (CC), 2000 (11) BCLR 1235 (CC).

²⁸ See *Minister of Social Development and Others v Phoenix Cash & Carry—Pmb CC* [2007] ZASCA 26, 2007 (9) BCLR 982 (SCA) at para 2 (The SCA dealt with the assessment of tenders and noted that ‘a process which lays undue emphasis on form at the expense of substance facilitates corrupt practice by providing an excuse for avoiding the consideration of substance; it is inimical to fairness, competitiveness and cost-effectiveness. By purporting to distinguish between tenderers on grounds of compliance or non-compliance with formality, transparency in adjudication becomes an artificial criterion.’)

²⁹ *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v The Habitat Council and Others; Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v City of Cape Town* [2014] ZACC 9, 2014 (4) SA 437 (CC), 2014 (5) BCLR 591 (CC) (‘*Habitat Council*’) at para 22.

IV OVERLAPPING FUNCTIONAL COMPETENCES

The functional competences of both local and provincial government have received significant attention by the Constitutional Court recently. We focus our attention on *Lagoonbay*³⁰ and *Habitat Council*,³¹ both of which involved powers exercised by the Western Cape provincial government under the Land Use Planning Ordinance 15 of 1985 (LUPO), a piece of old-order legislation that until recently still operated throughout Western Cape and in parts of the Northern Cape and Eastern Cape.³²

Unsurprisingly, LUPO (and similar old order ordinances in other provinces) did not readily fit into the constitutional scheme. LUPO arose from the era in which municipalities were subsidiary to provincial and national government structures. In practical terms, municipalities were always responsible for creating so-called ‘forward planning’ instruments (known as structure plans), and for taking the front-line decisions on most land use planning decisions. These land use decisions included all aspects of township planning, such as the attribution of zonings to properties; rezoning properties to change the permissible uses of the property; and the consolidation or subdivision of cadastral land units (ie creating registerable erven). However, while these functions were performed by municipalities, under LUPO the provinces retained significant control. Thus the forward planning instruments envisaged in LUPO had to be vetted by the provincial Administrator, and land use planning decisions were always taken by municipalities under delegated powers from the Administrator. In addition, the Administrator retained an appellate power in respect of land use decisions made by the municipality. These powers of the Administrator remained vested in the member of the Western Cape’s executive council responsible for development planning (the MEC), who thus retained considerable power in deciding land use planning authorisations.

After the Constitutional Court’s judgment in *GDT*,³³ many of the key provisions of LUPO were obviously assailable. That case established that the type of planning functions which had been performed by municipalities under old order ordinances like LUPO, were now covered by the rubric of ‘municipal

³⁰ *Minister of Local Government, Environmental Affairs and Development Planning of the Western Cape v Lagoonbay Lifestyle Estate (Pty) Ltd* [2013] ZACC 39, 2014 (1) SA 521 (CC), 2014 (2) BCLR 182 (CC) (‘*Lagoonbay*’).

³¹ *Habitat Council* (note 29 above).

³² In terms of s 229 of the Interim Constitution, LUPO remained in force in the area of the old Cape province. In terms of ss 235(6) and (8) of the Interim Constitution, the administration of LUPO in the area of the then new Western Cape province was assigned to the provincial government of the Western Cape with effect from 17 June 1994. See Proclamation 115 of 1994, published in *Government Gazette* 15813 (17 June 1994). With the commencement of the Final Constitution, LUPO and other old-order laws again continued in force (item 2 of Schedule 6 to the Constitution). Under items 2(2)(b) and 14(5) of Schedule 6 to the Constitution, the previous assignment of LUPO to the Western Cape Province remains in force. Like other legislation that was in force when the Final Constitution took effect and that was administered by a provincial government, LUPO is now treated as provincial legislation. See *Weare v Ndebele NO* [2008] ZACC 20, 2009 (1) SA 600 (CC), 2009 (4) BCLR 370 (CC) at paras 33 and 36.

³³ *GDT* (note 7 above).

planning'. As such these functions were now to be performed by municipalities alone, and the province had no general power to usurp these functions.

But the problems with LUPO did not arise in most cases, because, as noted above, most of the land use decisions were actually taken by municipalities (albeit under delegated powers). A show-down, however, was set in any case in which the MEC invoked his original powers to decide land use applications under LUPO; or in a case in which the MEC invoked his appellate power and overturned a municipal decision. The first situation arose in *Lagoonbay* and the second in *Habitat Council*.

In *GDT* the Court established that traditional land use decisions generally fell under the rubric of 'municipal planning', and were thus reserved for municipalities. In particular, the *GDT* Court held that, as a result, national and provincial players could not assume the power to decide *all* land use planning matters. But the question which remained was whether the provincial administration could in *some* cases legitimately play a role in deciding applications for land use planning authorisations, pursuant to their control over 'provincial planning' or 'regional planning and development'. This required a proper understanding of the relationship between the apparently similar 'planning' functions attributed to the provincial and local spheres of government.

The delineation of functional areas of competence in respect of the national and provincial governments had been elucidated by the Court in *Liquor Bill*.³⁴ Cameron AJ (as he then was) stated, with regard to the relationship between national and provincial functional areas of competence:

[W]here a matter requires regulation interprovincially, as opposed to intraprovincially, the Constitution ensures that national government has been accorded the necessary power, whether exclusively or concurrently under Schedule 4, or through the powers of intervention accorded by section 44(2). The corollary is that where provinces are accorded exclusive powers these should be interpreted as applying primarily to matters which may *appropriately* be regulated intraprovincially.³⁵

Following this logic, and the pronouncements in *GDT*, the Western Cape provincial government recognised that every land use planning decision would always affect municipal interests, and in most cases the effects of a development would be limited to the area of the municipality concerned. In the language of *Liquor Bill*, such applications would thus most appropriately be dealt with intra-municipally, and land use planning decisions could only be taken by the municipality in the area.

However, it was also recognised that in a small but significant category of cases, the planning decision would have material effects beyond the area of the municipality. It was particularly in these large scale developments that the question arose as to the extent to which the province could determine land use matters, pursuant to its own constitutionally mandated planning functions.

³⁴ *Liquor Bill* (note 3 above).

³⁵ *Ibid* at para 53 (emphasis added).

V LAGOONBAY

*Lagoonbay*³⁶ concerned the proposed development of a large-scale, upmarket, gated community with two golf courses and a commercial village, among other things. The development created a new node between the existing towns of Mossel Bay and George. It was located wholly within the boundaries of the George municipality, but was right against the boundary of the Mossel Bay municipality.

Like many big developments of this kind, several approvals were required. The developers first applied for an amendment of a structure plan for the area, which still identified the land as being designated for industrial use. This structure plan was one of the applicable ‘forward planning’ instruments, which aimed to guide future development of the area. For these purposes it had status both under LUPO and the Physical Planning Act.³⁷ Under these legislative provisions the structure plan had to be amended as a first step before any other land use decisions could be considered. In 2004 the then MEC approved this amendment of the structure plan subject to conditions – including a condition that future zoning decisions be referred to her office, as the development raised ‘regional and provincial planning’ concerns. Under LUPO the zoning of land would usually be dealt with by a municipality (using delegated powers). But because of the MEC’s condition, the result was that a special case was created in which the power would be reserved for the province.

Having achieved the amendment of the structure plan, the developer sought further authorisations and approvals, including environmental authorisation, which was granted. It finally sought the requisite land use approvals, including rezonings and subdivisions of land. These were approved in principle by the George municipality, but then referred to the MEC pursuant to the 2004 condition. The MEC considered the matter and disagreed with the Municipality, with the result that he refused to grant the requisite land use approvals. In so doing he explicitly relied on the 2004 condition, and his original powers under LUPO.

For the developer this was naturally a huge blow. Having progressed with planning for some time, and having made a substantial investment, the MEC’s decision meant that the development could not proceed. The developer challenged the MEC’s decision on several grounds, including that he had acted *ultra vires*, in that he had usurped a municipal planning function. The developer did not, however, challenge the lawfulness of either the 2004 condition, or the provisions of LUPO.

In response to the *ultra vires* attack, the MEC pleaded that his consideration of the land use applications sought by the developer accorded with the Constitution. In summary, the argument was that the particular development envisaged was one

³⁶ *Lagoonbay* (note 30 above)

³⁷ Act 125 of 1991 (PPA).

of those which would have effects beyond the area of the George municipality,³⁸ and there could be no objection to the MEC deciding land use applications in such cases. In considering the matter the MEC was not usurping municipal control of ‘municipal planning’, but exercising the province’s own provincial planning functions.

This approach by the MEC relied upon the effects of the land use approvals sought. To the extent that the development would have effects which radiated beyond one municipality, they triggered the province’s power to control provincial and regional planning. The effects-based approach posited that the word ‘planning’ retained the same meaning when used in Schedules 4 and 5 of the Constitution. The meaning of this word did not alter in the phrases ‘municipal planning’ and ‘provincial planning’. There was thus nothing intrinsic about specific types of planning decisions (such as a zoning decision, or a subdivision decision), which made them unalterably municipal or provincial in nature. What distinguished municipal and provincial planning was the level at which the development was considered, based on the types of effect the actual construction work would have. For certain types of work, both the local and provincial spheres of government would have an interest. In particular, a municipality would be legitimately interested in the minutiae, while the province would be interested in higher-level considerations.

This effects-based approach was posited on the notion that the distinction between provincial and municipal functions was not always clear-cut. The respective functions had to be interpreted to have distinctive content,³⁹ but as stated by Jafta J in *GDT*, the ‘functional areas allocated to the various spheres of government are not contained in hermetically sealed compartments.’⁴⁰

The High Court⁴¹ agreed with the MEC’s submission that while the impact of the majority of planning decisions is limited to the geographical area of the relevant municipality, there is a category of planning decisions which will have an impact across a larger region beyond the jurisdiction of a single municipality. The present development fell into this category, and accordingly the province also had an interest in the required planning decisions.

In respect of the operative provisions of LUPA, the developer argued that the sections at issue had been impliedly repealed by the Constitution and the Local Government: Municipal Structures Act,⁴² insofar as these established that municipal planning was an exclusively municipal function. No direct challenge to

³⁸ These inter-municipal effects included: the fact that the development (particularly the two golf courses) would place an increased demand on resources in a water-scarce area, and the proposed solution of irrigating the golf courses from rivers ran counter to provincial guidelines; the land was reported to be of high agricultural value; the development would create an adverse impact on traffic; the development would have set a precedent for ribbon development along the coast outside the urban edge. In addition a large scale development like this would affect property rates across the area, and affect the scope for any other development. In the MEC’s view, all these raised provincial concerns.

³⁹ *Liquor Bill* (note 3 above) at paras 49–51 and 56.

⁴⁰ *GDT* (note 7 above) at para 55.

⁴¹ *Lagoon Bay Lifestyle Estate (Pty) Ltd v Minister of Local Government, Environmental Affairs and Development Planning of the Western Cape and Others* [2011] ZAWCHC 327, [2011] 4 All SA 270 (WCC) at paras 10 and 11.

⁴² Act 117 of 1998.

the provisions of LUPO was brought. The High Court held that, in the absence of a successful direct challenge to the provisions of LUPO, they remained operative and valid.

On appeal to the Supreme Court of Appeal,⁴³ the tables were turned. The SCA disregarded the MEC's effects-based submissions, reasoning as follows: (i) the authority to regulate the use of land within a municipal area is conferred upon a municipality, while the authority to regulate the use of land within a particular region is a provincial competence; (ii) the land in question was located within the geographical area of the George Municipality; (iii) ergo, the zoning decisions that were the subject of appeal fell within the functional area of exclusive competence of the George municipality.

The SCA, therefore, set aside the MEC's decisions refusing the land use decisions and upheld the municipality's approvals of those decisions. For reasons which are not immediately relevant (but which were in our view clearly flawed), the SCA also remitted the consideration of the amendment of the structure plan to the MEC.⁴⁴

The Constitutional Court did not deal with the effects-based approach. Instead, the Court placed great emphasis on the fact that the developer had not challenged the provisions of LUPO, or the 2004 condition. The Court rejected the notion that parts of LUPO had been impliedly repealed. Absent a direct challenge to LUPO, it remained operative and valid.

The Court also sought to distinguish two different land use approvals sought by the developer: the first being for the rezoning of the property; and the second for the subdivision of the property into smaller parcels. With respect to the zoning decision, the Court held that the operative provision of LUPO (s 16) permitted the MEC to decide such applications, or to delegate the power to municipalities. In the absence of a challenge to LUPO, the Minister was lawfully entitled to exercise his original power and to decide the matter.

With respect to the subdivision the Court held for idiosyncratic reasons in the case that these had to be decided by the George municipality. This was because the 2004 condition only required that rezoning decisions be spun up to the MEC. The condition did not apply to subdivision decisions, which the municipality could decide under its delegated powers.

The Constitutional Court's judgment is a curious exercise in formalism, in that it decided the matter based on the presumption that the provisions of LUPO were valid (granting the MEC powers to make planning decisions, such as rezoning and subdivision of land), but at the same time it made comments (albeit

⁴³ *Lagoonbay Lifestyle Estate (Pty) Ltd v Minister for Local Government, Environmental Affairs and Development Planning of the Western Cape* [2013] ZASCA 13.

⁴⁴ The SCA reasoned that the conditional nature of the MEC's approval of the amendment of the structure plan meant that the ultimate decision to amend it had been deferred, or was in some way inchoate. It further found that the condition that the Western Cape government had the right finally to approve the rezoning was 'impossible of performance' (presumably because rezoning was a matter exclusively for the municipality to determine), which further rendered the MEC's amendment of the structure plan null. This, however, lost sight of the fact that the structure plan amendment had not been challenged. Furthermore, if the structure plan had never been approved, then the subsequent land use decisions by the municipality were self-evidently unlawful and invalid. PPA s 27(1).

obiter) that make it clear that these provisions of LUPO were inconsistent with the Constitution. The Court went so far as stating that the approach adopted by the SCA was ‘tempting’. After extracting several principles, the Court continued that ‘at the very least there is therefore a strong case for concluding that, under the Constitution, the [MEC] was not competent to refuse the rezoning and subdivision applications.’⁴⁵

The Court’s attempt to avoid making a finding about the lawfulness of the provisions of LUPO was all the more remarkable, considering that by the time it delivered its judgment, *Habitat Council*⁴⁶ was already before it. The issue was thus plainly not one which could be avoided.

VI HABITAT COUNCIL

Habitat Council involved the proposed redevelopment of a historical building in Cape Town. The building formed part of a city-block dominated by eighteenth century buildings historically connected to the Lutheran Church. The building comprised a two-storey converted warehouse, built in about 1764. The original Lutheran community congregated in secret in the loft of this building.

The City of Cape Town Metropolitan Municipality refused an approval required for the redevelopment of this historical building in terms of LUPO. The developer appealed to the MEC, in terms of s 44 of LUPO. The MEC overturned the City’s decision, and approved the development.

A second case, heard at the same time, concerned a development on the mountain slopes above Gordon’s Bay. In that case the City had delayed making a decision. The previous MEC had treated this as a deemed refusal, and exercised his appellate powers to approve the development.

In both cases the MEC’s appellate power in terms of s 44 of LUPO was directly challenged.

In the High Court and the Constitutional Court the MEC accepted that s 44 was unconstitutionally overbroad, in that it permitted the Province to reconsider every planning decision taken by municipalities under LUPO – regardless of whether the proposed development was small or large and regardless of the effects of the particular development.

The issues which remained were whether the retrospective application of a finding of invalidity should be limited; and whether the finding of invalidity should be prospectively suspended. The limitation of retrospectivity raised little

⁴⁵ *Lagoon Bay* (note 30 above) at para 46 (references omitted):

(a) barring exceptional circumstances, national and provincial spheres are not entitled to usurp the functions of local government; (b) the constitutional vision of autonomous spheres of government must be preserved; (c) while the Constitution confers planning responsibilities on each of the spheres of government, those are different planning responsibilities, based on ‘what is appropriate to each sphere’; (d) ‘planning’ in the context of municipal affairs is a term which has assumed a particular, well-established meaning which includes the zoning of land and the establishment of townships and (e) the provincial competence for ‘urban and rural development’ is not wide enough to include powers that form part of ‘municipal planning’.

⁴⁶ *Habitat Council* (note 29 above).

debate. In the High Court the two disputed decisions were set aside, but the retrospective finding of unconstitutionality was otherwise limited.

The main debate was primarily generated by the suspension of a finding of unconstitutionality. In this regard the MEC also accepted that s 44 of LUPO could not be allowed to stand in its existing, overbroad form. But he suggested that the section could be recrafted to accord more closely with the Constitution.

The suggested recrafting of s 44 distinguished between two categories of development. The first category arose when the proposed development would have both intra-, and extra-municipal effects. Resuscitating the effects argument from the *Lagoonbay* case, the MEC argued that in these cases he could quite validly decide appeals against a municipal decision. His consideration would be limited to the extra-municipal impacts of the development, which implicated his provincial planning power. If these effects justified him substituting his decision for that of the municipality, then that would be unproblematic.

The second category arose when land use applications had only intra-municipal effects. In these cases the MEC accepted that his powers would be more attenuated. As an expression of his oversight powers he would be able to consider cases only where the municipality's decision was obviously bad – and displayed the kind of flaw which would render it susceptible to be set aside in review proceedings. In such cases it would impose an unfair duty on litigants to challenge the decision, and an unfair duty on courts to hear cases about patently flawed decisions. The MEC should in these cases be empowered to set aside the decision and remit the matter to the municipality for reconsideration. The municipality could then either choose to correct or stand by its decision. To avoid decisions being caught in a loop between the municipality and the MEC, the reconsidered decision would be final.

The High Court accepted the approach suggested by the MEC.⁴⁷ The Court thus found that s 44 of LUPO was unconstitutional, but imposed a recrafted version of the section to apply until a new planning law could be passed.

Before the matter came before the Constitutional Court (for confirmation), the judgment in the *Lagoonbay* case appeared. In the light of the strong *obiter* remarks referred to above, the MEC accepted that his argument in the respect of the first category of appeals had to be amended. It now appeared clear that land use decisions of the type envisaged in LUPO were always, and exclusively, municipal. Even if these had extra-municipal effects, the MEC could not invoke his provincial planning powers to revisit the decision of the municipality.

At the same time, however, the Province's functional responsibility for regional planning and development, and provincial planning, could not be stripped of any meaning. The MEC argued that the Province was entitled to require an additional provincial planning approval in some cases. In other words, in cases in which a proposed development affected both municipal and provincial planning interests, the developer would be required to obtain the usual land use planning

⁴⁷ *Habitat Council v Provincial Minister of Local Government, Environmental Affairs and Development Planning in the Western Cape; City of Cape Town v Provincial Minister of Local Government, Environmental Affairs and Development Planning in the Western Cape* [2013] ZAWCHC 112, 2013 (6) SA 113 (WCC).

approvals from the municipality, and an additional, separate approval from the Province. The Provincial decision would not replace the municipal one – both would be required. This sort of layered decision-making, in which different decision-makers make different decisions regarding the same subject matter, had been accepted by the Court in *Maccsand*.⁴⁸

In light of this scheme, the appellate power in s 44 presented an imperfect, but acceptable method to ensure that large-scale developments served before the MEC, so that he could exercise his provincial planning powers. In other words, although in form his decision would be an appeal against the land use decisions of the municipality, in substance he would be exercising his separate provincial planning power.

The Constitutional Court rejected this argument entirely. In the first category of cases, the Court rejected the argument that a provincial power had to be retained as an interim measure to consider large-scale developments. The Court characterised the MEC's argument as being based on the 'bogey' that municipalities, left to themselves, would not consider the wider repercussions of large developments. This was overstated, as large developments would require a myriad of approvals in addition to the municipal land use decisions, some of which would be considered by the Province. Provinces, the Court held, thus 'have co-ordinate powers to withhold or grant approvals of their own'. In the second category of cases, the Court rejected the suggestion that provincial oversight functions extended to a power as argued for by the MEC.

The Court's finding in respect of the first category of cases unfortunately failed to ascribe any meaning to the provincial planning function. It is correct that the Province may consider other approvals and authorisations for the same development, but those will consider the activity from a different perspective and for other purposes, such as environmental approval. It would be quite improper for the Province to use those other processes to slip in considerations of provincial planning issues. The Province's power over 'provincial planning' thus remained hollow.

VII ISSUES ARISING FROM THE COURT'S APPROACH

A What Does Provincial Planning Mean?

The ambit of the municipal power over 'municipal planning' is now quite clear. So too, it is clear what is *not* included as part of the provincial power over 'provincial planning'. However, the positive content of the provinces' power remains obscure. Taken at face-value the Court's judgments do not leave much scope for the provincial planning function at all. But quite clearly the constitutionally mandated provincial planning powers cannot be completely empty either. This would not only be contrary to ordinary interpretative presumptions, but would be practically undesirable as well. It would leave all planning matters exclusively in the hands of municipalities, knowing full well that many of them have both

⁴⁸ *Maccsand (Pty) Ltd v City of Cape Town* [2012] ZACC 7, 2012 (4) SA 181 (CC), 2012 (7) BCLR 690 (CC).

limited experience and expertise, and a mandate to privilege their own parochial interests over those of the province as a whole.

In our view provincial planning includes at least two things: First, the provinces can create so-called forward planning instruments with teeth. These plans will operate at a regional or provincial level and be ‘coarser-grained’ than municipal plans, but will effectively lay out a vision for the future development of the affected area. They will thus identify areas for the expansion of residential or industrial areas. In so doing the plans will determine in advance the types of uses for which land can be used, and concomitantly how that land may not be used.

Secondly, the provinces can require an additional approval for individual land use applications that have inter-municipal effects. This planning approval may be called something different, and will arise under a different statutory source, but it will substantively involve the same sorts of factors as those considered by the municipality.

B A Compartmentalised Approach

The Constitutional Court’s approach implies that certain types of planning decisions are, by their nature, always municipal – regardless of the impact of the actual activity in a case. There is no room for overlap. The functional areas are thus more hermetically sealed than it had previously suggested.

This approach has the benefit of certainty and an element of predictability. A developer will know that all of the well known land use approvals (for things like the rezoning and subdivision of land) must be directed to the municipality alone, and only the municipality’s approval is required.

But the benefit of this certainty is off-set by the fact that municipalities may not always be equipped or able to make complex planning decisions, or that decisions are made based exclusively on local considerations. In our view, the understanding of the powers enjoyed by different spheres of government must be rooted in a clear appreciation of the challenges faced by local government, and the need to consider the radiating effects of decisions taken by municipalities throughout a region. We suggest that that this requires a more careful consideration of the legitimate and important role to be played by provincial governments, pursuant to their own planning powers.

The Court’s pronouncements have not given consideration to the role which can or should be played by provinces. This is disappointing. The Court’s rigid model, and its focus on entrenching municipal powers, also means that little room is left for the provinces to influence planning decisions. This may well have the effect of complicating, rather than simplifying the ordeal faced by developers when undertaking a project. As noted above, in order to give effect to its functional competence for provincial planning, a province will have to introduce an additional authorisation, over and above the traditional land use approvals.

Indeed, this is evident from the new Western Cape Land Use Planning Act,⁴⁹ which has now repealed LUPO. The new Act recognises that traditionally

⁴⁹ Act 3 of 2014.

required land use approvals must now be considered by the affected municipality. An additional requirement for a separate provincial authorisation has been introduced in cases that trigger provincial planning interests. The practical upshot is that the developer now requires two, separate approvals instead of one.

This stratification of layers of decisions dealing with the same subject matter entrenches the perennial difficulties associated with compartmentalised decision-making. In instances where developers have had to jump through the fire hoops of disparate decision-making bodies, an obstruction that ought to have presented itself early will often only lawfully rear its head at the end of the line. These complications will make obtaining final approval more time-consuming, more risky, and more expensive, with deleterious effects on development and investment.

The Court's positive assertion in *Habitat Council* that land use planning decisions are meant to be based on the parochial obliterates the possibility for integrated decision making, and for co-operative governance.⁵⁰

C What is Left of Provincial Oversight?

It remains unclear how provincial governments, in the planning context, are expected to, on the one hand, promote the development of local government capacity to enable them to perform their own functions and manage their own affairs, and to see to the effective performance by municipalities of their functions, on the other. If provinces are bound to take a 'hands-off' approach, and to leave municipalities to decide municipal planning issues alone, it becomes difficult for the provinces to assist. All that a provincial administration could do would be to offer its help, which could be voluntarily accepted (or not). This is unsatisfactory as the municipalities that need help most are likely to be reluctant to ask. The reluctance to seek assistance will only be exacerbated when the province and the municipality are controlled by different political parties.

VIII CONCLUSION

The elevated status of municipalities under the Constitution accords with the importance of the work performed at the level of local government. Municipalities are best placed to consider local issues, and to consult with the affected community. Strong local government deepens democratic participation.

The Constitutional Court's recent judgments recognise and protect the right of municipalities to perform their functions free from unwanted interference by other spheres of government. This enhances the role played by municipalities.

At the same time, municipalities face significant challenges. An ideological commitment to the autonomy of municipalities cannot ignore the fact that many municipalities are neither prepared nor able to perform their functions.

In addition, respect for the autonomy of municipalities should be balanced with an appreciation that other spheres of government may have a legitimate interest

⁵⁰ See Constitution s 41.

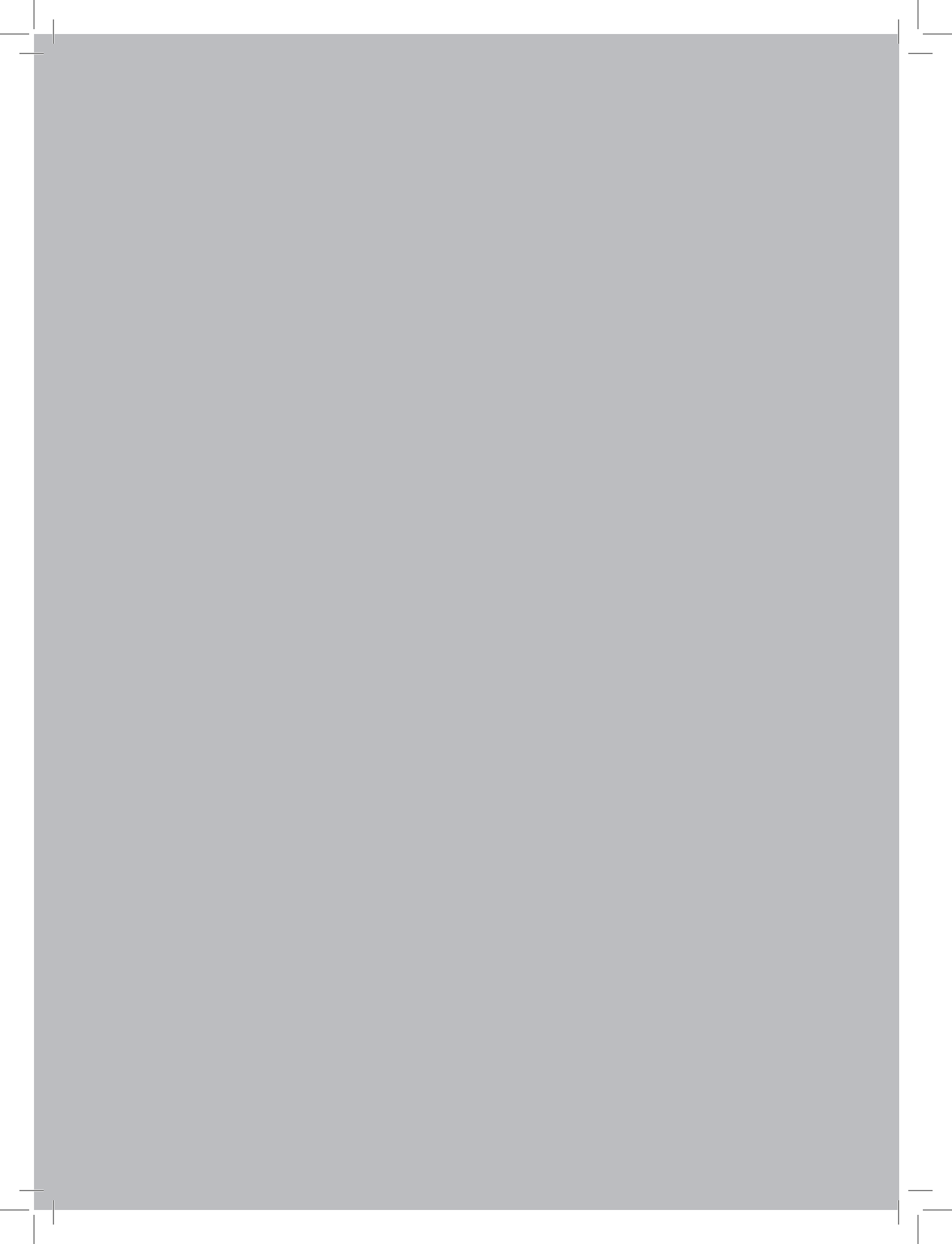
in the same subject matter. It may be more desirable that provincial and municipal interests in the same subject matter are considered in a single, integrated process.

A fastidious protection of the right of municipalities to make certain types of decision, or to grant certain types of authorisations, can have unintended consequences. In order to give effect to their interests in the same subject matter, other spheres of government will then be compelled to impose additional requirements, or require additional authorisations. This not only leads to additional bureaucracy, frustration, delay and risk, but can also undermine any ability to make integrated decisions.

The approach adopted by the Court in *Lagoonbay* and *Habitat Council* has the benefit of clearly defining the role of municipalities and entrenching their exclusive right to consider traditional land use planning decisions, as part of their exclusive control over the functional area of municipal planning. But this approach rests on the artificial assumption that traditional land use planning decisions raise issues affecting only the municipality involved.

Plainly, some developments will have impacts beyond the area of a single municipality, and will also implicate provincial interests – based on the province’s functional responsibility for provincial or regional planning matters. Excluding the provinces from any role in adjudicating traditional land use planning applications, means that these processes cannot be used as a vehicle for the provinces to consider the impact of the proposed development on provincial interests. The result is that provinces will have no choice but to impose a requirement for a separate, additional authorisation for some developments, so that they may consider the impact on provincial interests.

Customary Law



Transformative Constitutionalism and Customary Law

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I INTRODUCTION

The late Chief Justice Pius Langa famously wrote:

The Constitution is located in a history which involves a transition from a society based on division, injustice and exclusion from the democratic process to one which respects the dignity of all citizens, and includes all in the process of governance. As such, the process of interpreting the Constitution must recognise the context in which we find ourselves, and the Constitution's goal of a society based on democratic values, social justice and fundamental human rights. This spirit of transition and transformation characterises the constitutional enterprise as a whole.¹

Early in the constitutional era, Karl Klare wrote penetratingly about the legal work which has to be undertaken if the Constitution is to achieve its transformative purpose.² The work has to start with a questioning of the origins, underlying premises and purposes of the *status quo* law. Martin Chanock has done this across a broad sweep of our law, in a book which has received insufficient attention from South African lawyers.³ André van der Walt has undertaken a sustained and profound analysis in relation to property law.⁴

Current contestations over the dominant role afforded to officially recognised traditional leaders in respect of mining and investment ventures on communal land,⁵ and interventions by the Ingonyama Trust to convert indigenous ownership

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¹ *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd; in re Hyundai Motor Distributors (Pty) Ltd & Others v Smit NO & Others* [2000] ZACC 12, 2001 (1) SA 545 (CC), 2000 (10) BCLR 1079 (CC) stressed at para 21.

² K Klare 'Legal Culture and Transformative Constitutionalism' (1998) 14 *South African Journal on Human Rights* 146.

³ M Chanock *The Making of South African Legal Culture 1902-1936: Fear, Favour and Prejudice* (2001).

⁴ Van der Walt has written prolifically in this regard. See, eg, AJ van der Walt *Property and Constitution* (2012) 193–195.

⁵ A Claassens & B Matlala 'Platinum, Poverty and Princes in Post-Apartheid South Africa' (2014) 4 *New South African Review* 113. See the discussion in A Manson & BK Mbenga *Land Chiefs Mining: South Africa's North West Province since 1840* (2014) 155–160; S Mswana 'Chief's Justice? Mining, Accountability and the Law in the Bakgatla-Ba-Kgafela Traditional Authority Area' (2014) 49 *South African Crime Quarterly* 21; and B Matlala 'We Want the Bread not the Crumbs: Challenging Traditional Authority in the Platinum Belt' (2014) 49 *South African Crime Quarterly* 31.

vesting in families into leases,⁶ illustrate the pressing need for a comprehensive review of the impact of transformative constitutionalism on the customary law. Since 2003 a range of laws have been enacted or proposed that bolster the power of traditional leadership in various ways. The first was the Traditional Leadership and Governance Framework Act;⁷ the second was the Communal Land Rights Act,⁸ which was struck down by the Constitutional Court in 2010.⁹ Repeated attempts to enact the controversial Traditional Courts Bill¹⁰ were thwarted by opposition to it by the majority of provinces in the National Council of Provinces in 2014.

The first part of this article looks at the great potential for transformation of the customary law in the early judgments of the Constitutional Court. The second part reviews the work of the Constitutional Court on this project in 2013. Third, we look at further research which needs to be undertaken at this complex interface, at a critical historical moment. The fourth part asks questions about the place of customary law in South African law: whether ‘living law’ is a component of the transforming amalgam of South African law, or whether customary law enables the maintenance of legal segregation for those living in the former Bantustans.

Many of the questions which arise in relation to the transformation of the customary law also apply to the transformation of the common law. This article should not be understood as an argument for customary law exceptionalism. Still, the transformative project in respect of customary law is distinctive. It requires at least the following steps:

- 1 Recognise the customary law as a consensual system of processes, practices and rules¹¹ which govern the lives of millions of people.¹²
- 2 Recognise that the source of true customary law is processes, practices and rules on the ground, which change over time.
- 3 Recognise that, as Martin Chanock has shown, the insulation and separation of common law from customary law under apartheid and colonialism was a key component of the overarching project of racial domination. Continuing insulation reinforces the segregationist ideal of different legal regimes for different categories of people. That is very different from the conception

⁶ Ingonyama Trust Board (2014) *Annual Report 2013-2014 – Briefing to the Portfolio Committee on Rural Development and Land Reform* at 16–7, available at <http://pmg-assets.s3-website-cu-west-1.amazonaws.com/141015ingonyama.pdf>.

⁷ Act 41 of 2003 (Framework Act).

⁸ Act 11 of 2004 (CLRA).

⁹ *Tongoane and Others v National Minister for Agriculture and Land Affairs and Others* [2010] ZACC 10, 2010 (6) SA 214 (CC), 2010 (8) BCLR 741 (CC).

¹⁰ B 15-2008 and B 1-2012.

¹¹ See S Roberts & J Comaroff *Rules and Processes: The Cultural Logic of Dispute in an African Context* (1981); J Comaroff ‘Rules and Rulers: Political Processes in a Tswana Chiefdom’ (1978) 13 *Man - The Journal of the Royal Anthropological Institute* 1 at 2; and *Shilubana and Others v Nwamitwa* [2008] ZACC 9, 2008 (9) BCLR 914 (CC), 2009 (2) SA 66 (CC) at paras 61, 65 and 66.

¹² The teaching and practice of the law generally show little acknowledgment of the relevance of customary law values to most South Africans. Blindness to the self-referential privileging of ‘imported’ legal constructs at the expense of customary repertoires that remain strong despite decades of state distortion, has material consequences for law’s legitimacy and its reach.

- of indigenous law in *Alexkor* as a system which ‘feeds into, nourishes, fuses with and becomes part of the amalgam of South African law’.¹³
- 4 Interrogate the ‘official’ versions of customary law which we have inherited – the cases decided by the courts under colonialism and apartheid, the legislation imposed by successive governments, and the writings in the textbooks on which the courts rely. We have to ask: What is the social and political function of these versions, and to what extent do they reflect the true customary law?
 - 5 Apply this analysis not only to the so-called ‘private law’ relationships under customary law, but also to the sources and content of the authority of traditional leadership under customary law.¹⁴

II TRANSFORMATION OF CUSTOMARY LAW PRIOR TO 2013

Before one looks at the 2013 judgments, one has to take stock of how far this project had progressed in the Constitutional Court by that time.

Leaving aside the *Certification* judgment, it took a surprisingly long time for customary law to reach the Constitutional Court.¹⁵ The first two cases were the 2003 *Alexkor* case,¹⁶ which addressed customary land rights, and the 2004 *Bhe* case,¹⁷ which addressed customary succession and the inheritance rights of women and children. In those cases, the Court laid down five far-reaching principles.

First, customary law is subject to the Constitution. It has to be interpreted in light of the Constitution.¹⁸ That might seem self-evident, but at the time it was not.

Second, customary law must not be viewed through a common-law lens.¹⁹ Again, that may seem obvious to some, but it is far from apparent to many lawyers and particularly common-law lawyers.

Third, customary law evolves and develops to meet the changing needs of the community. This recognises customary law as ‘living law’.²⁰ The notion that a system of law is not static, not inscribed in a book, and must not be vitrified, is a powerful tool in the process of transformation.²¹

Fourth, while customary law can be established by reference to writers on the subject, caution has to be exercised when dealing with textbooks and old authorities,

¹³ *Alexkor Ltd and Another v The Richtersveld Community and Others* [2003] ZACC 18, 2004 (5) SA 460 (CC), 2003 (12) BCLR 1301 (CC) (*Alexkor*) at para 51.

¹⁴ Customary law illustrates vividly the political and conceptual difficulties which are inherent in the public-private divide. Our use of the term ‘private’ in this context should not be understood to reflect an endorsement of the distinction.

¹⁵ *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* [1996] ZACC 26, 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC).

¹⁶ *Alexkor* (note 13 above).

¹⁷ *Bhe and Others v Magistrate, Khayelitsha, and Others* [2004] ZACC 17, 2005 (1) SA 580 (CC), 2005 (1) BCLR 1 (CC).

¹⁸ *Alexkor* (note 13 above) at para 51.

¹⁹ *Ibid* at para 55.

²⁰ *Ibid* at paras 52–3; *Bhe* (note 17 above) at paras 109, 154 and 219.

²¹ This observation is of course not limited to customary law: The same applies to common law, which also develops over time.

because they often distorted the true customary law.²² This distortion goes beyond the tendency to view indigenous law through the prism of legal conceptions that were foreign to it. The distortion also arose from political assumptions and purposes which were dominant under colonialism and apartheid,²³ from a failure to understand the true nature of the phenomenon which was being observed, and from a failure to appreciate the changing nature of customary law. The Court in effect said: ‘Do not rely unthinkingly on old decisions, they may be wrong’. That is a radical step. Courts usually look backward, to precedent, to find out what the law is today. The justification for reliance on precedent is that it creates certainty or at least predictability – but it is also conservative in its consequences.²⁴ Now we had the Court saying that as far as customary law is concerned, precedent should be used with caution, because looking backward can entrench past distortions.

Fifth, the judgments build on and take forward the Court’s contextual approach to the realisation of rights, which foregrounds the real-life effect of poverty and inequality in people’s lives.²⁵ This is stressed in various Constitutional Court judgments, including *Zondi*,²⁶ *Dawood*,²⁷ *Moblomi*,²⁸ and *Minister of Home Affairs v Fourie*.²⁹ The contextual approach to legal reasoning was pivotal to the Court’s finding in *Alexkor* that the Precious Stones Act³⁰ was discriminatory because of its effect, notwithstanding its racially neutral language. The decision hinged on the context of registered title for white people, and unrecognised indigenous ownership by black people. It was also central to the Court’s findings in *Bhe*. When examining the provisions of the Black Administration Act,³¹ the Court stated that ‘section 23 cannot escape the context in which it was conceived’.³² It referred to the Act as a ‘cornerstone of racial oppression, division and conflict ... that caused untold suffering to millions of South Africans’.³³

In justifying the need to impose an interim remedy pending the enactment of new legislation on inheritance, the Court pointed out that the potential alternative remedy of making a will is available only to ‘those with sufficient resources, knowledge and education or opportunity to make an informed choice’.³⁴ It highlighted the unrealistic nature of requiring ‘people who, in the vast majority,

²² *Alexkor* (note 13 above) at para 54.

²³ *Bhe* (note 17 above) at paras 62, 72 and 86 (Spells out the distortions arising from the overarching political purpose of laws such as the Black Administration Act of 1927 in entrenching segregation and racial domination.)

²⁴ J Brickhill ‘Precedent and the Constitutional Court’ (2010) 3 *Constitutional Court Review* 79.

²⁵ D Davis & K Klare ‘Transformative Constitutionalism and the Common and Customary Law’ (2010) 26 *South African Journal on Human Rights* 403 at 494–6.

²⁶ *Zondi v MEC for Traditional and Local Government Affairs and Others* [2004] ZACC 19, 2005 (3) SA 589 (CC), 2005 (4) BCLR 347 (CC).

²⁷ *Dawood and Another v Minister of Home Affairs and Others* [2000] ZACC 8, 2000 (3) SA 936 (CC), 2000 (8) BCLR 837 (CC).

²⁸ *Moblomi v Minister of Defence* [1996] ZACC 20, 1997 (1) SA 124 (CC), 1996 (12) BCLR 1559 (CC).

²⁹ *Minister of Home Affairs v Fourie; Lesbian and Gay Equality Project and Others v Minister of Home Affairs* [2005] ZACC 19, 2006 (1) SA 524 (CC), 2006 (3) BCLR 355 (CC).

³⁰ Act 44 of 1927.

³¹ Act 38 of 1927.

³² *Bhe* (note 17 above) at para 61.

³³ *Ibid*.

³⁴ *Ibid* at para 66.

are so poor that they are not in a position to ensure that their rights are protected and enforced' to engage in litigation to enforce the heir's duty of support.³⁵

The Court's adoption of 'living law' jurisprudence is in part a product of its contextual approach. Codified versions of 'official customary law' are exposed as distortions when viewed in their wider historical context, and current practice emerges as a key criterion in the Court's affirmation of the flexible and evolving nature of custom in real life.

The distortion of customary law did not arise only from the imposition of statutory 'customary law' under colonialism and apartheid. It also arose from the failure to recognise the nature of customary law and its dynamism in the face of changing circumstances. The transformation project therefore requires a fundamental re-assessment.

A number of cases have applied and sometimes extended those fundamental principles. The *Shilubana* case³⁶ in 2008 dealt with customary leadership. It raised issues which are relevant to the themes which we discuss here, and we therefore devote some attention to it. The core facts of the case³⁷ are that *Hosi* Fofozza, the chief of the Valoyi traditional community, died in 1968. The applicant (Ms Shilubana), his eldest daughter, was not considered for the position, in accordance with the principle of male primogeniture that then governed succession to chieftainship. Instead the chief's younger brother, Richard, succeeded him. During Richard's reign, and with his participation, the royal family of the Valoyi unanimously resolved to confer chieftainship on the applicant, Ms Shilubana. The royal council accepted and confirmed that *Hosi* Richard would transfer his powers to Ms Shilubana. On the same day, a 'duly constituted meeting of the Valoyi tribe' under *Hosi* Richard resolved that 'in accordance with the usages and customs of the tribe' Ms Shilubana would be appointed *Hosi*. Mr Nwamitwa, who was the eldest child of Richard, applied to the High Court for an order declaring that he, and not the applicant, was entitled to succeed Richard upon his death. The High Court and the Supreme Court of Appeal held in Mr Nwamitwa's favour.

Ms Shilubana claimed that the Valoyi had acted within their power in amending the customary law to restore the traditional leadership to the house from which it had been removed by gender discrimination, even though the gender discrimination occurred prior to the coming into operation of the 1996 Constitution.

Ms Shilubana succeeded in her appeal. The Court held that the contemporary practice of the Valoyi reflected a valid legal change that resulted in Ms Shilubana's succession to the chieftainship. Two important passages capture the central principles which the Court established:

[W]here there is a dispute over the legal position under customary law, a court must consider both the traditions and the present practice of the community. If development

³⁵ Ibid at para 96.

³⁶ *Shilubana* (note 11 above).

³⁷ Drawn principally from the South African Law Reports headnote (*Shilubana and Others v Nwamitwa* 2009 (2) SA 66 (CC)).

happens within the community, the court must strive to recognise and give effect to that development, to the extent consistent with adequately upholding the protection of rights. In addition, the imperative of s 39(2) must be acted on when necessary, and deference should be paid to the development by a customary community of its own laws and customs where this is possible, consistent with the continuing effective operation of the law.³⁸

...

Customary law must be permitted to develop, and the enquiry must be rooted in the contemporary practice of the community in question. Section 211(2) of the Constitution requires this. The legal status of customary-law norms cannot depend simply on their having been consistently applied in the past, because that is a test which any new development must necessarily fail. Development implies some departure from past practice. A rule that requires absolute consistency with past practice before a court will recognise the existence of a customary norm would therefore prevent the recognition of new developments as customary law. This would result in the courts applying laws which communities themselves no longer follow, and would stifle the recognition of the new rules adopted by the communities in response to the changing face of South African society. This result would be contrary to the Constitution and cannot be accepted.³⁹

Shilubana was thus of fundamental importance in clarifying how the content of customary law is determined, and how customary law is developed.

The next two cases dealing with customary law are of limited relevance to the themes which we address in this article. *Gumede*,⁴⁰ in 2008, dealt with the validity of the provision in the Recognition of Customary Marriages Act⁴¹ governing the proprietary consequences of customary marriages concluded before the commencement of Act. *Tongoane*,⁴² in 2010, raised the vital issue of customary land rights, but was decided on the narrow basis that the Communal Land Rights Bill had been wrongly tagged and therefore invalidly enacted.

The pre-2013 cases reflect a jurisprudence which is aimed at a fundamentally democratic conception of customary law, rather than an autocratic conception. The law comes from practice, and practice comes from the people. It is of course an interactive or dialectical process: practice affects law, and law affects practice.⁴³ But the essence is that law is not simply imposed from the top – it is determined by practice. This is an approach which at first glance is somewhat counter-intuitive for lawyers. But one can in fact find at least a similar rhetoric (if not a similar practice) in the common law, if one considers how the courts explained shifts in the common law in the pre-Constitutional era. It was said that if particular conduct incites moral indignation, and the legal convictions of ‘the community’ demand that the conduct ought to be regarded as unlawful, the common law is considered to have developed to achieve that result.⁴⁴ The Court

³⁸ *Shilubana* (note 11 above) at para 49.

³⁹ *Ibid* at para 55.

⁴⁰ *Gumede (born Shange) v President of the Republic of South Africa and Others* [2008] ZACC 23, 2009 (3) SA 152 (CC), 2009 (3) BCLR 243 (CC).

⁴¹ Act 120 of 1998 s 7.

⁴² *Tongoane* (note 9 above).

⁴³ See references in note 11 above.

⁴⁴ *Minister van Polisie v Ewels* 1975 (3) SA 590 (A) 597.

recognised this in *Shilubana*, stating that: ‘Like the common law [customary law] is adaptive by its very nature.’⁴⁵

III THE 2013 CASES

And so we come to the 2013 cases. Before discussing them it is necessary to provide some background with regard to the impact of the Framework Act on the delineation of customary boundaries, and the geographical jurisdiction of traditional leaders. Section 28 of the Act deems pre-existing traditional leaders to be ‘senior traditional leaders’, and pre-existing tribal authorities to be ‘traditional councils’ under the Act, provided they comply with new composition requirements. The requirements are that 40 per cent of the members of a traditional council must be elected and 30 per cent must be women.⁴⁶ A one-year deadline was initially set for the composition requirements to be met, but this has been extended several times by provincial laws enacted pursuant to the Framework Act, and by amendment to the principal Act.

These provisions entrench the controversial Apartheid-created tribal authority boundaries which were established virtually wall-to-wall throughout the former homelands under the 1951 Bantu Authorities Act.⁴⁷ At public hearings in Parliament,⁴⁸ rural communities objected to these boundaries. They detailed – with examples – how the boundaries perpetuate the outcome of past manipulation that has serious material consequences for groups who were placed within the wrong boundaries during Apartheid. The answer they were given in 2003 is that the Commission on Traditional Leadership Disputes and Claims would investigate and remedy such historical mistakes, and that the new composition requirements would ‘transform’ discredited structures by requiring the participation of women and some elected members in traditional councils. Government’s failure to implement these promised ‘safety valve’ mechanisms has been highlighted by rural delegates in subsequent public hearings during 2008, 2010, 2012 and 2013 and is discussed later.

The underlying premise of the Framework Act and subsequent traditional leadership laws appears to be that customary law is an adjunct of the powers vested in officially recognised traditional leaders and councils. This implies – as

⁴⁵ *Shilubana* (note 11 above) at para 54.

⁴⁶ There has been widespread failure to meet these composition requirements as discussed below.

⁴⁷ Act 68 of 1951.

⁴⁸ In 2003 during the legislative process leading up to the enactment of the Framework Act, during 2008 and 2012 in respect of the Traditional Courts Bill, during 2010 during public hearings about the Repeal of the Black Authorities Act and in 2013 during public hearings about the Restitution of Land Rights Amendment Act. See T Thipe *Voices in the Legislative Process: A report on the public submissions to Parliament on the Traditional Courts Bill (2008 and 2012)* (2013) 1(1) Occasional paper of the Centre for Law and Society available at <https://open.uct.ac.za/handle/11427/2462?show=full>; N Luwaya *Report on the Provincial Traditional Courts Bill Hearings: Exploring Rural People’s Democratic Participation and Freedom of Expression* (2013) 1(2) Occasional paper of Centre for Law and Society, available at [http://www.cls.uct.ac.za/usr/lrg/publications/Issues_in_L&S_issue02\(nov2013\).pdf](http://www.cls.uct.ac.za/usr/lrg/publications/Issues_in_L&S_issue02(nov2013).pdf). See also M Jara & M de Souza *Custom, Citizenship and Rights: Community Voices on the Repeal of the Black Authorities Act* Report for the Law, Race and Gender Research Unit (2010), available at http://www.cls.uct.ac.za/usr/lrg/publications/IRG_BOOK_COMBINED_DEC_2010_-_FINAL_AMENDED.pdf. See further <http://www.larc.uct.ac.za/submissions> for submissions in relation to specific bills.

was argued by the state in *Tongoane* with regard to the Communal Land Rights Act – that customary law does not exist in the absence of traditional leaders. An ironic outcome of that approach is that the application of customary law is restricted to areas where traditional leaders have official jurisdiction. Thus the Traditional Courts Bill, which would have made it a criminal offence for anyone within those boundaries to fail to appear when summoned by a traditional leader, effectively restricted traditional courts to the former bantustans.⁴⁹

The Framework Act’s re-imposition of geographical zones of chiefly jurisdiction has other consequences. It locks people into ‘traditional’ identities ascribed by law, regardless of how they self-identify. The 17 million people living in the former bantustans have no choice about the traditional leadership structure to which they are subject. This has profound implications for the consensual basis of customary law and for indigenous accountability mechanisms.

The term ‘community membership’ in the cases we discuss below therefore has two quite different potential meanings. One refers to the official ‘traditional community’ boundaries set out in Government Notices issued in terms of the Bantu Authorities Act and re-imposed by the Framework Act. The other refers to self-defined communities that often exist in tension with these official boundaries.⁵⁰ As we show, which of these meanings is adopted has very material consequences.

A *Pilane*⁵¹

Pilane dealt with the right of dissent and free association in traditional communities. The applicants lived in Motlhabe Village, in the Mankwe district of the North West Province. Motlhabe is one of approximately 32 villages falling within the Bakgatla-Ba-Kgafela traditional community. The area is rich in platinum, and substantial platinum mines exist on land within the jurisdiction of the *kgosi* and ‘traditional council’. There has been much dispute within the traditional community regarding control and distribution of mining revenue.⁵²

The applicants and other members of the Motlhabe community were dissatisfied with the administration of the traditional community. There were repeated complaints about the conduct of the chief, including allegations of

⁴⁹ The Bill was withdrawn from Parliament in 2014 when the required majority of provinces failed to support it in the National Council of Provinces.

⁵⁰ The Restitution of Land Rights Act 22 of 1994 defines community to mean ‘any group of persons whose rights to land are derived from shared rules determining land held in common by such group, and includes part of any such group.’ The definition in the Interim Protection of Informal Land Rights Act 31 of 1996 is similar, also including ‘a portion of such group’ within the definition of community. The CLRA of 2004 excluded a part or portion of a group from its definition of community. Pivotal to many current disputes is that traditional leaders insist that land-holding community groups should be prohibited from owning land within the overarching tribal boundaries that exist wall-to-wall within the former Bantustans. See Department of Constitutional Development (1999) *Status Quo Report on Traditional Leadership and Institutions* and Minutes from Restitution Consultative Workshop (Eastern Cape, 9–10 March 2011) (on file with the authors).

⁵¹ *Pilane and Another v Pilane and Another* [2013] ZACC 3, 2013 (4) BCLR 431 (CC).

⁵² See sources quoted in note 5 above.

corruption.⁵³ An unpopular and unresponsive person had been statutorily appointed as headman in the village. For many years, residents of the village made repeated attempts to resolve their grievances with the officially recognised leaders of the traditional community. Those attempts were all unsuccessful.

In 2009, the applicants and other community members claimed to have seceded from the traditional community. However, the ‘secession’ was not legally effective. In December 2010, at a community meeting, officials of the provincial government advised them of the steps which they must take if they wished to pursue that option in terms of the North West Traditional Leadership and Governance Act⁵⁴ and the Framework Act.

Acting in accordance with that advice, the applicants planned a meeting to discuss taking steps to obtain independence from the Bakgatla-Ba-Kgafela and constitute themselves as a distinct traditional community – put differently, to secede. They planned a meeting for 6 February 2010 to discuss this matter. The applicants were members of the royal family of Motlhabe Village (the Kautlwale). They were the customary leaders of the community, but not recognised as such in accordance with any statute. When they called the meeting, they headed the invitation ‘Motlhabe Tribal Authority’. There is no statutory body of that name. That language was used in old-order legislation which was repealed by the Framework Act.

The respondents were the officially recognised leaders of the overarching Bakgatla-Ba-Kgafela ‘tribe’, renamed ‘traditional community’ by the Framework Act. They wished to prevent the members of the Motlhabe village community from meeting to discuss their desire and plans to secede. They applied *ex parte* for an interim interdict.

In their founding papers, the respondents’ case was that the applicants were prohibited from holding any such meeting without the authority of the respondents, and without first going through the various customary procedures for raising a grievance or dispute in the traditional community. They were perhaps justified in expecting that an interdict would be granted, as the North West High Court had repeatedly granted interdicts against those who opposed them.⁵⁵ They did not contend in their founding affidavit that the use of the name ‘Motlhabe Tribal Authority’ founded a cause of action. That complaint was raised, for the first time, in reply.

The High Court granted the *ex parte* application for an interdict, and subsequently granted a final interdict. The order prohibited the applicants (and ‘others who act through them or collaborate with them’) from:

⁵³ The chief was convicted in the Mogwase Magistrate’s Court of corruption, but his conviction was set aside on appeal to the North West High Court. The High Court found: ‘Much criticism can be levelled against the manner in which the First Appellant as the person in charge of the tribe’s money, administered it There is great suspicion that funds may have been misappropriated in the process but there is no proof beyond reasonable doubt to that effect.’ *S v Pilane and Another* [2010] ZANWHC 20 at paras 97–8.

⁵⁴ Act 2 of 2005.

⁵⁵ See the cases cited in *Pilane* (note 51 above) at fn 23.

Organising or proceeding with any meeting purporting to be a meeting of the Traditional Community or Motlhabe Tribal Authority without proper authorization by either of the respondents.

Taking any steps or conducting themselves in any manner which is contrary to the provisions of the North West Act, the Framework Act or the customs of the traditional community in Moruleng and the customary law.

Pretending or holding themselves out as a traditional authority under the name or names Bakgatla Ba Kautlwale or Bakgatla Ba Motlhabe or the traditional authority of Motlhabe or any similar name or title of whatever kind.⁵⁶

The villagers' mistake, if there was one, had been to refer in the heading of the invitation to the 'Motlhabe tribal authority'. They explained that the term was used in a non-technical sense. They did not use this language to refer to any statutory structure. In their community, they said, it was used to refer to leadership at customary law. They said they did not wish to continue to use it.

The villagers sought to appeal against the decision of the High Court. Both the High Court and the SCA refused leave to appeal. The Constitutional Court heard the appeal, and upheld it by a majority of eight to two.

The majority noted that 'statutory authority accorded to traditional leadership does not necessarily preclude or restrict the operation of customary leadership that has not been recognised by legislation'.⁵⁷ This is consistent with the approach which the Court had developed in the pre-2013 cases: customary law is reflected by the practice on the ground, not by statute. The necessary consequence of this (although the judgment does not spell it out in terms) is that the applicants were customary leaders in the village according to customary law, notwithstanding that another person had been given statutory recognition.

The majority judgment of Skweyiya J starts its analysis of the constitutional issues with a re-statement of the importance of the rights to freedom of expression, association and assembly:

It strikes me that the exercise of the right to freedom of expression can be enhanced by group association. Similarly, associative rights can be heightened by the freer transmissibility of a group's identity and purpose, expressed through its name, emblems and labels. These rights are interconnected and complementary. Political participation, actuated by the lawful exercise of these rights, can and should assist in ensuring accountability in all forms of leadership and in encouraging good governance. The judgment of my Colleagues Mogoeng CJ and Nkabinde J expresses concern that not to allow the first interdict to stand would provide an avenue for the erosion of the rule of law. I do not share these concerns. I see no reason to believe that the lawful exercise of the applicants' rights would result in chaos and disorder. Rather, there is an inherent value in allowing dissenting voices to be heard and, in doing so, permitting robust discussion which strengthens our democracy and its institutions.⁵⁸

Members of traditional communities do not forfeit those rights through that membership. They are entitled to meet, to agitate, to criticise, and to secede:

⁵⁶ Ibid at para 14.

⁵⁷ Ibid at para 44.

⁵⁸ Ibid at para 69.

The restraint on the applicants' rights is disquieting, considering the underlying dissonance within the Traditional Community and the applicants' numerous unsuccessful attempts to have this resolved. The respondents' litigious record also portrays a lack of restraint on the part of the Traditional Community's official leadership in employing legal devices to deal with challenges that should more appropriately be dealt with through engagement.⁵⁹ This could be seen as an attempt to silence criticism and secessionist agitation and, if so, would not be a situation that the law tolerates.

This situation cries out for meaningful dialogue between the parties, undertaken with open minds and in good faith. One hopes that this will produce harmonious relations within the Traditional Community. Nonetheless, it bears mentioning that it is within the rights of the members of the Traditional Community to meet to discuss secession, unless a restriction on their constitutional rights is reasonable and justifiable in an open and democratic society.⁶⁰

The minority judgment was jointly written by Mogoeng CJ and Nkabinde J. Their account of the facts, in the first two paragraphs of their judgment, explains the approach which underlies the judgment:

This application has a long and toxic history. It has its genesis in concerted efforts by the first applicant and his father over the years to assume the headmanship of the Motlhabe community. The basis for this claim was that the current lawfully appointed and recognised headman and his father were, according to the applicants, not the legitimate traditional leaders of that community. When it became apparent that none of the senior traditional leaders of the community of the Bakgatla–Ba–Kgafela in Botswana and South Africa were persuaded by the leadership claim of the first applicant, the latter chose to act as if he were the headman of Motlhabe and virtually ceased to recognise the first respondent as his traditional leader.

The failure to earn this recognition was followed by a 'unilateral declaration of independence' of the Motlhabe community from the Bakgatla–Ba–Kgafela Traditional Community which is essentially the claim for the secession of the community. It is against this background that subsequent events culminating in the respondents' application to the North West High Court, Mahikeng (High Court) to restrain the applicants from convening a meeting in 2010, should be viewed. This background also gives context to the use of the expressions 'Motlhabe Tribal Authority' and 'Kgothakgothe'.⁶¹

The minority judgment goes on to say:

Traditional leadership is a unique and fragile institution. If it is to be preserved, it should be approached with the necessary understanding and sensitivity. Courts, Parliament and the Executive would do well to treat African customary law, traditions and institutions not as an inconvenience to be tolerated but as a heritage to be nurtured and preserved for posterity, particularly in view of the many years of distortion and abuse under the apartheid regime.

⁵⁹ An audit carried out in the course of a dispute arising from allegations of financial mismanagement by Chief Nyalala Pilane revealed that during a three year period, the traditional council had paid R49 million to a single firm of attorneys. It appears that a substantial part of these community funds was used in litigation against members of the community who were attempting to challenge unilateral decision-making processes and the monopolization of the community's resources by the chief and his supporters. BDO Spencer Internal Audit Report (15 June 2012) 13 (on file with the authors).

⁶⁰ *Pilane* (note 51 above) at paras 70–71.

⁶¹ *Ibid* at paras 76–77.

Bearing in mind the need to help these fledgling institutions to rebuild and sustain themselves, threats to traditional leadership and related institutions should not be taken lightly. The institution of traditional leadership must respond and adapt to change, in harmony with the Constitution and the Bill of Rights. But courts ought not to be dismissive of these institutions when they insist on the observance of traditional governance protocols and conventions on the basis of whatever limitation they might impose on constitutional rights. Like all others, the constitutional rights the applicants seek to vindicate are not absolute. They co-exist within a maze of other rights to which expression must also be given.⁶²

These passages raise two questions: first, precisely what are the customary law and the traditional leadership which the Constitution requires to be nurtured and preserved? And second, does the need for nurturing and preservation mean that members of those communities do not have the full rights of freedom of speech, assembly and association which other South Africans have? It is a divergence on these questions which underlies the different approaches of the majority and minority judgments.

The minority would have upheld the appeal against the second and third interdicts, on the grounds that they were over-broad. But on the first interdict, they were steadfast in their view that the courts should support and protect the recognised authorities, and that constitutional rights should be limited to achieve this:

Disorderliness is on the rise in this country and traditional communities are no exception. If it were to be permissible, *the applicants' form of secession would have to be led by a legally-recognised leader of the community*. Meetings that are meant to pave the way for secession should not be clothed with authority the applicants do not enjoy. ... In addition, the convening of a general meeting of almost all the villagers in Motlhabe as well as people from neighbouring villages without any legal authority had the potential of creating factions and disorder which could make the Moruleng community ungovernable. In the circumstances, it cannot be said that the apprehension of harm was not reasonable.

We are of the view that a proper balancing of the rights implicated is necessary. *The setting aside of the first interdict will, in our view, provide an avenue for undermining legitimate traditional structures, leadership and governance and the erosion of the rule of law*. The fact that the applicants have undertaken not to repeat the use of the appellation 'Tribal Authority' in the future is, in the circumstances, insufficient because of their continued disregard for the recognised leadership. The applicants have steadfastly maintained that the leadership of the respondents lacks legitimacy in their eyes and those of the community.⁶³

It is important to recall the terms of the interdict which the minority would have upheld: they would have interdicted the applicants from 'organizing or proceeding with any meeting purporting to be a meeting of the Traditional Community or Motlhabe Tribal Authority without proper authorization by either of the respondents'. The minority would have prohibited the calling of a community meeting without the authorisation of the very people against whom the applicants had a complaint. It is difficult to avoid the conclusion that the necessary implication of the minority view is that members of traditional communities forfeit certain

⁶² Ibid at paras 78–79.

⁶³ Ibid at paras 116–118 (emphases added).

of their constitutional rights through that membership. The majority found, in robust terms, to the contrary.

B Sigcau⁶⁴

Sigcau dealt with a different, but equally contentious issue of traditional leadership: succession.⁶⁵ The Commission on Traditional Leadership Disputes and Claims was entrusted by the President with the task of establishing whether the existing Mpondo king, Mpondombini Sigcau, was the rightful incumbent in terms of customary laws. In January 2010 the Commission decided, *inter alia*, that Zanozuko Sigcau was the rightful king of the Eastern Pondo, and that Mpondombini Sigcau, the incumbent king, was not the rightful king. Mpondombini Sigcau sought to have this decision reviewed and set aside. The High Court dismissed his review application. Acting on the Commission's determination, the President issued notices in November 2010 recognising Zanozuko Sigcau as the king of the Eastern Pondo and stripping Mpondombini Sigcau of the kingship. Attempts to obtain leave to appeal to the Supreme Court of Appeal failed. Mpondombini then approached the Constitutional Court seeking leave to appeal against the High Court judgment.

The Constitutional Court unanimously granted leave to appeal, upheld the appeal, and made an order setting aside the notices issued by the President in November 2010. The appeal was ultimately decided on very narrow, technical grounds – that the President had relied on provisions of an amended version of the Framework Act, when he should have acted under the original, unamended version.⁶⁶ Nonetheless, the judgment resonates with the deeper substantive issues underlying the claim.

A key question was whether the President's recognition of Zanozuko Sigcau under the Framework Act had been valid. The judgment again reflects the Court's approach to matters of customary law, and applies it to the question of traditional authority. The Court referred to the succession dispute which had erupted in 1937 after the then *ikumkani* (king) of the amaMpondo aseQaukeni died without leaving male issue. The Court remarks that '[t]he dispute was statutorily settled when Botha Sigcau was recognised as the "paramount chief" of the Eastern Pondo in terms of the Black Administration Act. We say "statutorily settled", because it was not settled customarily.'⁶⁷

The inference seems clear: In the democratic South Africa, an apartheid-era statutory determination does not finally determine the issue of who is a traditional leader. What determines the matter is the customary determination. This is also the view which was expressed by the Chief Justice during the hearing of the matter. In response to the assertion that it was for the Commission to decide the identity of members of the royal family, Mogoeng CJ said that it was clear there

⁶⁴ *Sigcau v President of the Republic of South Africa and Others* [2013] ZACC 18, 2013 (9) BCLR 1091 (CC).

⁶⁵ The summary which follows is drawn principally from the Butterworth's Constitutional Law Reports headnote (*Sigcau v President of the Republic of South Africa and Others* 2013 (9) BCLR 1091 (CC)).

⁶⁶ *Sigcau* (note 64 above) at paras 20–28.

⁶⁷ *Ibid* at para 3.

had always been a royal family: ‘There does not have to be an Act for there to be a royal family. The royal family exists under customary law.’ Later in the hearing he said: ‘Oh come on, there is only one royal family. Everywhere. They may disagree, but there is only one royal family. And they don’t need registration to know that there is a royal family, and who the members of the royal family are.’⁶⁸

The Framework Act was enacted in 2003 in the midst of the development of the jurisprudence we discussed above. It reflects a very different approach to the issue of customary law and authority. As we have pointed out, the Act’s transitional provisions entrench disputed boundaries, and shore up illegitimate authority. If these were intended to be temporary, they have in practice become permanent.

Meanwhile, there is a large number of disputes about the identity of traditional leaders. At least 1 322 disputes have been lodged with the Commission⁶⁹ challenging the legitimacy of current incumbents and jurisdictional boundaries, on the basis of past distortion. This is more than the number of officially recognised traditional councils, which is fewer than 900. At the time of the *Sigcau* hearing, 10 years after the Commission was brought into existence, it had made findings in only 139 cases. Moreover, the Commission has so far dealt only with kingship disputes. Far from bringing finality, virtually all of the Commission’s findings in respect of kingships are being challenged in court. *Sigcau* is just one example.

In *Sigcau*, the Commission’s modus operandi was challenged by an amicus as being inconsistent with the one progressive element of the Framework Act. The core concept in the Act in relation to traditional structures is the ‘recognition’ by the President of traditional leaders and communities. The President may ‘recognise’ traditional communities, he may ‘recognise’ traditional leaders, and he may ‘recognise’ kings. But he does not appoint them. Appointment is a matter of customary law. To ‘recognise’ something is to say ‘It is there, I see it and I recognise it’ – it is not to create it. The existence of the entity is thus a pre-existing fact, which will exist if it reflects the practice on the ground in accordance with custom. It is therefore open to those affected to dispute the ‘recognition’ of something which does not exist in the reality of the re-conceptualised customary law.

This is in sharp contrast with the Native Administration Act of 1927. It made the Governor-General ‘the supreme chief of all Natives’⁷⁰ with the power to ‘recognise or appoint any person as a chief or headman in charge of a tribe or of a location’, and similarly to depose any chief or headman so recognised or appointed.⁷¹ In *Buthelezi*,⁷² the issue was whether the Governor-General was entitled to appoint a successor to a hereditary chief without giving notice to his

⁶⁸ Transcript of recording of the hearing of the Constitutional Court (on file with authors).

⁶⁹ See the Department of Traditional Affairs’ description of the Commission, available at <http://www.dta.gov.za/index.php/entities/52-commission-on-traditional-leadership-disputes-and-claims.html>.

⁷⁰ Act 38 of 1927 s 1 (NAA).

⁷¹ NAA s 2(7) (emphasis added).

⁷² *Buthelezi v Minister of Bantu Administration* 1961 (4) SA 835 (A).

son. The Appellate Division recognised the distinction between what it referred to as a ‘de facto’ hereditary chief, and a statutory chief. It held: “There is nothing in the Act which gives the son of a hereditary chief any claim whatever to the chieftainship; on the contrary, the object of the legislation appears to have been to put an end to hereditary chieftainship for the purposes of this Act.”⁷³ The word ‘recognise’ in the phrase ‘recognise or appoint’ was used ‘merely because it was apt in the case in which the Governor-General decided that the de facto hereditary chief should become the de jure chief recognised by the State.’⁷⁴ In other words, the Governor-General could choose to ‘recognise’ the chief who existed *de facto* under custom, or appoint someone else. The Framework Act by contrast does not create the option of appointment.

It is noteworthy (and somewhat ironic) that the official recognition bestowed on Kgosi Nyalala Pilane and his headman by the Framework Act was pivotal to the Chief Justice’s reasoning in the minority judgment in *Pilane*. Yet in the unanimous *Sigcau* judgment, and in remarks the Chief Justice made during that hearing, he appears to align himself with the view that customary institutions are a fact of customary life, whose existence is not brought into being by statute. But the official recognition of Kgosi Pilane – and in particular the controversial tribal boundaries he is seeking to defend – derive directly from the Bantu Authorities Act, via the Bophuthatswana Traditional Authorities Act.⁷⁵

C *Mayelane*⁷⁶

Mayelane dealt with customary marriage. A man married a first and later a second woman under Xitsonga customary law. After his death, the first wife challenged the validity of the second marriage. The Court had to decide whether

⁷³ Ibid at 841E.

⁷⁴ Ibid.

⁷⁵ Act 23 of 1978. Nyalala Pilane is not the son of the previous traditional leader of the Bakgatla in South Africa, Tidimane Pilane, but a nephew. In 1993 Tidimane sought to abdicate due to ill-health, and chose his son Merafe to succeed him. However Paramount Chief Linchwe Kgafela II, based in Mochudi (Botswana), over-rode this decision and endorsed Nyalala Pilane as chief instead. This was in the context of a dispute about whether Tidimane was asserting independence from the rest of the tribe in Botswana by making the decision that his son should succeed him. The Botswana ruler’s decision was endorsed first by President Lucas Mangope of Bophuthatswana, and then by the Premier of the North West province on the basis that the South African Bakgatla recognise the seniority of the Kgafela paramountcy in Botswana. See *Pilane v Linchwe and Another* 1995 (8) BCLR 932 (B). Linchwe’s son and successor, Paramount Chief Kgafela Kgafela III, has since sought to exercise the same power his father had, in order to depose and replace Nyalala Pilane, but has not succeeded in the South African courts. Challenges to the legitimacy of Nyalala Pilane’s appointment as traditional leader are an ongoing aspect of political contestation in the area. In late 2015 the North West Commission on Traditional Leadership Claims and Disputes reported that Nyalala Pilane was not the rightful traditional leader of the Bakgatla-Ba-Kgafela ‘according to customary law’. It recommended that he be deposed and replaced by Merafe Ramono, the son of the previous chief, Tidimane. The Commission’s report was made public only as a result of a court order sought by members of the community. The Premier of North West, Supra Mahumapelo, has however rejected the Commission’s findings and refused to depose Nyalala Pilane. Instead he intends to appoint a Commission of Judicial Enquiry to investigate the issue afresh (Notice issued by the Premier on 24 February 2016).

⁷⁶ *Mayelane v Ngwenyama and Another* [2013] ZACC 14, 2013 (4) SA 415 (CC), 2013 (8) BCLR 918 (CC).

the Recognition of Customary Marriages Act⁷⁷ or Xitsonga customary law required a husband to obtain his first wife's consent in order to enter into a further customary marriage – and if it did not, whether customary law ought to be developed to include such a rule.

The Court was unanimous as to the outcome: The second marriage was not valid, and the appeal should be upheld. The Justices differed, however, on how they reached that conclusion. A majority of six justices held that the Recognition Act did not require the consent of the first wife, that living customary law did not have a uniform rule, and that Xitsonga customary law should be developed to include the rule. Zondo J held that the matter should have been decided without the Court calling for additional evidence as to the content of the customary law. Jafta J (with Mogoeng CJ and Nkabinde J concurring) held that the matter could have been decided without developing the customary law.

The case raised the difficult question of how one is to know the content of customary law at a particular time and place. If it is 'living law', which can change in time and can differ from one community to another,⁷⁸ how does one find the law? As Langa DCJ noted in *Bhe*, '[t]he difficulty lies not so much in the acceptance of the notion of living customary law ... but in determining its content and testing it, as the court should, against the provisions of the Bill of Rights.'⁷⁹

The Court had anticipated this problem in *Alexkor*, where it held:

In 1988, the Law of Evidence Amendment Act provided for the first time that all the courts of the land were authorised to take judicial notice of indigenous law. Such law may be established by adducing evidence. It is important to note that indigenous law is not a fixed body of formally classified and easily ascertainable rules. By its very nature it evolves as the people who live by its norms change their patterns of life. ...

In applying indigenous law, it is important to bear in mind that, unlike common law, indigenous law is not written. It is a system of law that was known to the community, practised and passed on from generation to generation. ...

Without attempting to be exhaustive, we would add that indigenous law may be established by reference to writers on indigenous law and other authorities and sources, and may include the evidence of witnesses if necessary. However, caution must be exercised when dealing with textbooks and old authorities because of the tendency to view indigenous law through the prism of legal conceptions that are foreign to it. In the course of establishing indigenous law, courts may also be confronted with conflicting views on what indigenous law on a subject provides. It is not necessary for the purposes of this judgment to decide how such conflicts are to be resolved.⁸⁰

In *Mayelane* there was such a conflict. After the hearing, the Court directed the parties and *amici* to provide representations on the content of Xitsonga customary law. The affidavits which were filed were made by individuals in polygynous marriages under Xitsonga customary law; an advisor to traditional leaders; various traditional leaders; and experts who drew conclusions from available primary material. Froneman, Khampepe and Skweyiya JJ (writing for the majority) were

⁷⁷ Act 120 of 1998 (Recognition Act).

⁷⁸ This is a necessary implication of *Shilubana* (note 11 above).

⁷⁹ *Bhe* (note 17 above) at para 109.

⁸⁰ *Alexkor* (note 13 above) at paras 52–54.

not deterred by the variety of responses which the court received. They referred to the ‘richness and diversity’⁸¹ of the responses, and said that while the diversity of the responses might at first seem to represent a problem, it did not. They analysed the responses in some detail, and found:

The perspective we gain from the evidence is not one of contradiction, but of nuance and accommodation. It seems to us that one can safely say the following: (a) although not the general practice any longer, Vatsonga men have a choice whether to enter into further customary marriages; (b) when Vatsonga men decide to do so they must inform their first wife of their intention; (c) it is expected of the first wife to agree and assist in the ensuing process, leading to the further marriage; (d) if she does so, harmony is promoted between all concerned; (e) if she refuses consent, attempts are made to persuade her otherwise; (f) if that is unsuccessful, the respective families are called to play a role in resolving the problem; (g) this resolution process may result in divorce; and finally, (h) if the first wife is not informed of the impending marriage, the second union will not be recognised, but the children of the second union will not be prejudiced by this as they will still be regarded as legitimate children. It is not necessary to go further than this and it must be emphasised that, in the end, it is the function of a court to decide what the content of customary law is, as a matter of law, not fact. It does not depend on rules of evidence: a court must determine for itself how best to ascertain that content.⁸²

They then proceeded to test the customary law against the constitutional principles of equality and dignity:

Are the first wife’s rights to equality and human dignity compatible with allowing her husband to marry another woman without her consent? We think not. The potential for infringement of the dignity and equality rights of wives in polygynous marriages is undoubtedly present. First, it must be acknowledged that ‘even in idyllic pre-colonial communities, group interests were framed in favour of men and often to the grave disadvantage of women and children’.⁸³ While we must accord customary law the respect it deserves, we cannot shy away from our obligation to ensure that it develops in accordance with the normative framework of the Constitution.⁸⁴

They pointed out that where a subsequent customary marriage is entered into without the knowledge or consent of the first wife, she is unable to consider or protect her own position. She cannot take ‘an informed decision on her personal life, her sexual or reproductive health’ nor can she assess the proprietary consequences of becoming one of two wives.⁸⁵ The right to dignity includes ‘the entitlement to make choices and to take decisions’ that affect one’s life, and the more significant the decision, the greater the entitlement.⁸⁶ Accordingly, respect for human dignity requires that a husband be obliged to seek his wife’s consent prior to entering into a second marriage. Given the ‘highly personal and private’

⁸¹ *Mayelane* (note 76 above) at para 50.

⁸² *Ibid* at para 61.

⁸³ *Gumede* (note 40 above) at para 19. See also T Nhlapo ‘African Customary Law in the Interim Constitution’ in S Liebenberg (ed) *The Constitution of South Africa from a Gender Perspective* (1995) at 160 (formatted original footnote).

⁸⁴ *Mayelane* (note 76 above) at para 71.

⁸⁵ *Ibid* at para 72.

⁸⁶ *Ibid* at para 73.

nature of marriage, the Court held that ‘it would be a blatant intrusion on the dignity of one partner to introduce a new member to that union without obtaining that partner’s consent.’⁸⁷

The equality principle prevailed, and the Court ordered that the customary law of the Xitsonga should be developed ‘to require the consent of the first wife to a customary marriage for the validity of a subsequent customary marriage entered into by her husband.’⁸⁸

The search for evidence had at one level been inconclusive – it did not produce a crisp and clear answer to the question of the content of Xitsonga customary law. But it provided enough information to enable the Court to conclude that it was necessary for the customary law to be developed in order to advance women’s right to equality and dignity.

So how does one prove the content of the living customary law? The judgment lays out an array of the sorts of evidence on which reliance may be placed, but concludes with the firm assertion that ‘in the end, it is the function of a court to decide what the content of customary law is, as a matter of law, not fact. It does not depend on rules of evidence: a court must determine for itself how best to ascertain that content’.⁸⁹ This raises some difficult questions, to which we revert below.

Not long after this decision, the issue of how to determine the content of customary law (again in the context of a dispute about equality) arose in the Botswana Court of Appeal in *Ramantele v Mmusi*.⁹⁰ The case involved a dispute over the content of the Ngwaketse customary law of succession. The appellant contended for a rule which would result in the eviction from her home of the 80-year-old daughter of the deceased, in favour of her absentee nephew. It would be an outcome which, in the words of Kirby P, ‘was, on any view of the facts, manifestly unjust’.⁹¹

There were two judgments in the Court of Appeal, both of them concurred in by all of the members of the Court. Kirby P found that two outstanding characteristics of customary law are its evolutionary nature and its flexibility. He demonstrated this by reference to changes which had taken place in Botswana customary law. He pointed out that the customary law has a flexibility not found in black-letter law. This is explained by the overarching function of family councils of elders and of the customary courts, which is to achieve reconciliation and consensus, in contrast to the confrontational and adversarial processes of the common law courts.⁹² He concluded that ‘it will seldom be an easy task for the

⁸⁷ Ibid at para 74.

⁸⁸ Ibid at para 89.

⁸⁹ Ibid at para 61

⁹⁰ *Ramantele v Mmusi and Others* Court of Appeal Civil Appeal CACGB-104-12 (3 September 2013) (*‘Ramantele’*).

⁹¹ Ibid at para 6.

⁹² This is similar to the finding of the Constitutional Court in *Bbe* and *Mayelane* that the inherent flexibility of customary law provides room for consensus-seeking and the prevention and resolution, in family and clan meetings, of disputes and disagreements. *Bbe* (note 17 above) at para 45 and *Mayelane* (note 76 above) at para 25(f).

court to identify a firm and inflexible rule of customary law for the purpose of deciding upon its constitutionality or enforceability'.⁹³

In his judgment, Lesetedi JA analysed in detail the findings which had been made by the various customary courts which had considered the matter before it reached the Court of Appeal. He held as follows:

It is axiomatic to state that customary law is not static. It develops and modernizes with the times, harsh and inhumane aspects of custom being discarded as time goes on; more liberal and flexible aspects consistent with the society's changing ethos being retained and probably being continuously modified on a case by case basis or at the instance of the traditional leadership to keep pace with the times.⁹⁴

Lesetedi J-A pointed out that texts and articles record the position of a given custom as it prevailed at a particular point in the life or history of a tribal community, but not subsequently. Such material may be useful merely as reference points to ascertain what stage of development the custom had reached at that point. To determine the content of the customary law, the prevailing societal ambience of the concerned community must loom large in the enquiry: 'Contemporary records, recent case studies and oral evidence may provide a better source of ascertaining the current state of the customary law'.⁹⁵

Lesetedi J-A then enquired into whether there was any Ngwaketse customary rule of intestate inheritance at the time of the dispute, which gave the last-born son the sole right to inherit the home of the deceased parents to the exclusion of all other siblings (which had been the contention of the respondent). He relied on the findings of a 1980 socio-economic study of the Ngwaketse, which concluded that, whereas customarily the last-born received the plot of the parents, as more and more women remained unmarried it had become increasingly common that the land was transferred to them.⁹⁶ He concluded that even on the account of the customary rules prevailing three decades earlier, there could not be a universal customary law of the kind contended for by the respondent. And during the past 30 years, a lot of changes had happened: there was the constitutional value of equality, and the 'increased levelling of the power structures with more and more women heading households and participating with men as equals in the public sphere and increasingly in the private sphere, demonstrating that there is no rational and justifiable basis for sticking to the narrow norms of days gone by when such norms go against current value systems'.⁹⁷

Two aspects of this are interesting. First, there is the reliance on evidence of facts in order to determine what the law is. Second, the last part of this passage – 'there is no rational and justifiable basis for sticking to the narrow norms of days gone by when such norms go against current value systems' – is intriguing. It could mean a number of things. It could mean that the customary law is to be interpreted in the light of and consistently with current values, reflected in

⁹³ *Ramantele* (note 90 above) at para 29.

⁹⁴ *Ibid* at para 77.

⁹⁵ *Ibid*.

⁹⁶ Ø Gulbrandsen *Agro-pastoral Production and Communal Land Use: A Socio-economic Study of the Bangwaketse* (1980).

⁹⁷ *Ramantele* (note 90 above) at para 81.

the Constitution. This would be similar to the South African constitutional injunction that customary law must be developed in order to promote the spirit, purport and objects of the Bill of Rights.⁹⁸ Or it could be a finding that a rule which is not rational or justifiable is not part of customary law, because s 2 of the Botswana Customary Law Act⁹⁹ defines ‘customary law’ as ‘the customary law of that tribe or community so far as it is not incompatible with the provisions of any written law or contrary to morality, humanity or natural justice’.

IV THE WAY FORWARD

Although the number of customary law cases which have reached the Constitutional Court remains small, they have dealt with fundamental questions: land, marriage, divorce, inheritance, leadership, dissent, association. Together, the cases show that the Court has taken substantial steps in the transformation of customary law. If one looks back over the past 20 years, this may well be the most radical project (in the sense of going to the roots) that the Court has undertaken. It has gone beyond saying that apartheid was wrong, and must be reversed. It has found that we must revisit our basic notions of customary law – including what is custom, and what is law.

This is a story of a move towards constitutionalism and democratic process in customary law. It is also a story of opportunities and spaces which have opened up, sometimes quite unexpectedly.

However, this process has not been uncontested, and it will continue to be contested.

There are repeated legislative efforts to reverse the democratisation project. One sees this in the Framework Act, in the Traditional Courts Bill,¹⁰⁰ in the 2015 Traditional and Khoi-San Leadership and Governance Bill¹⁰¹ that would repeal the Framework Act, in the proposed Communal Land Bill, and in the proposed Communal Property Associations Amendment Bill. All of these measures show a desire to place greater power in the hands of traditional authorities, to reinforce their power, and to make them the holders or the owners of land and assets to which ordinary people have indigenous entitlements. Some traditional leaders have complained bitterly that their power was eroded by the Constitution and that they were marginalised by decisions taken during the early phases of our democracy.¹⁰² They now appear to have comprehensively captured the support of key people and powerful factions in government and the African National Congress.

It is remarkable that Parliament should have enacted a law that defaults to, and sets in stone, the institutions and boundaries put in place by the notorious

⁹⁸ Constitution s 39(2).

⁹⁹ Act 51 of 1969.

¹⁰⁰ B 15-2008.

¹⁰¹ B 23-2015.

¹⁰² L Ntsebeza *Democracy Compromised: Chiefs and the Politics of Land in South Africa* (2006) 256–294; B Oomen *Chiefs in South Africa: Law, Power and Culture in the Post-Apartheid Era* (2005) 87–112.

Bantu Authorities Act. The ‘checks and balances’ that were supposed to mitigate the consequences of these continuities have failed resoundingly. Where elections for the 40 percent component of traditional councils have taken place, they have been deeply flawed and in most instances out of time, despite amendments of provincial laws and the Framework Act to extend the deadline. The failure to comply with the provisions of the Act has led to much litigation in North West, where the legal status of traditional leaders has far reaching consequences for disputes over mineral resources.¹⁰³ No elections have yet been held in Limpopo. And as we have noted, the Commission on Traditional Leadership Disputes and Claims has investigated a tiny minority of the disputes lodged. When doing so it has defaulted to the very genealogical rule-bound approach that characterised the colonial and Apartheid eras.¹⁰⁴

The Framework Act, and other legislative attempts to flesh out the powers of traditional leaders within the jurisdictional boundaries it imposes (such as the Communal Land Rights Act and the Traditional Courts Bill), raise fundamental questions about the nature of customary law. A core question is whether consensual affiliation and ‘opting-in’ are inherent features of customary law, contributing to its accountability. Further, can ‘customary’ law be imposed by statute on particular parts of the country and not others, and on some South Africans, but not others, and regardless of the wishes of the people concerned.

Discussing the Black Administration Act in *Bhe*, Langa DCJ said: ‘Quite clearly the Act developed from . . . notions of separation and inequality between Europeans and Africans, and its provisions have not moved much from the “Shepstonian conception of legal segregation”’.¹⁰⁵ Yet the Framework Act, the Communal Land Rights Act and the Traditional Courts Bill embody the same notion of legal segregation, including in relation to fundamental issues such as property rights and citizenship. The Communal Land Rights Act would have enabled the Minister of Land Affairs to transfer land owned by trusts and communal property associations to larger encompassing ‘traditional communities’.¹⁰⁶ The current Minister of Rural Development and Land Reform, Mr Gugile Nkwinti, has stated his intention to transfer the ‘outer boundaries’ of all land in these areas to traditional councils.¹⁰⁷ He objects to the existence of elected ownership institutions (such as trusts and communal property associations) where traditional leaders have jurisdiction, which as already explained, is virtually wall-to-wall

¹⁰³ M de Souza ‘Justice and Legitimacy Hindered by Uncertainty: The Legal Status of Traditional Councils in North West Province’ (2014) 49 *South African Crime Quarterly* 41.

¹⁰⁴ J Peires ‘History versus Customary Law’ (2014) 49 *South African Crime Quarterly* 7.

¹⁰⁵ *Bhe* (note 17 above) at para 62, quoting from the judgment in *Ruth Matsheng v Nicholas Dhlamini and John Mhausan* 1937 NAC (N & T) 89, 91.

¹⁰⁶ Act 11 of 2004 s 5(2)(c) (struck down in *Tongoane* (note 9 above)).

¹⁰⁷ Communal Tenure Policy September 2014 distributed at the Government Land Tenure Summit (September 2014) (on file with the authors). Opening remarks made by Minister Gugile Nkwinti during the opening plenary session at Land Divided Conference (University of Cape Town, 24 March 2013) (on file with the authors).

within the former bantustans.¹⁰⁸ The Traditional Courts Bill, if enacted, would vest far-reaching punitive powers in traditional leaders over everyone living within their jurisdictional boundaries, and would criminalise a refusal to appear before an officially recognised traditional leader.

The Black Administration Act and the Bantu Authorities Act applied only to black people. They imposed a separate legal regime from that which governed other South Africans. In the Framework Act, the basis of discrimination has now purportedly shifted from race to geography. The new laws apply only in respect of the areas set apart by the Bantu Authorities Act, namely the tribal jurisdictions that made up the former bantustans. This geography is of course not racially neutral. It is built on the bones of the schedules to the 1913 and 1936 Land Acts – the original reserves, augmented by the dumping grounds added for the three and half million people who were forcibly removed from ‘white’ South Africa during the process of bantustan consolidation. The people who bore the brunt of the Land Acts and forced removals are once again subjected, by law, to ascribed tribal identities and all-powerful traditional leaders, regardless of whether they agree to this. As many ask, why would legitimate traditional leaders need laws like these, and what do they fear would happen if customary affiliation were to be voluntary and consensual?

The absurdity of the statute law governing customary institutions applying to some parts of the country and not others was raised in the National Council of Provinces by the Gauteng delegation during the discussion of the Traditional Courts Bill. They described the on-going relevance and importance of family-based customary practices and values to urban South Africans, and asked how legislation governing customary dispute resolution process could exclude large parts of the country and apply only to the former Bantustans.¹⁰⁹

There also appears to be contest within the Constitutional Court. The *Pilane* minority judgment of the Chief Justice and Justice Nkabinde (both previously judges in the North West High Court) strongly protects existing structures which are under challenge. This goes beyond the ratio of the judgment – it suffuses the language the Justices employ. The *Pilane* dissent is indignant in its tone.

Where does that leave us? One can identify some of the future battlegrounds.

First, we will have to continue to explore how to determine the content of customary law in a manner which is sympathetic to the democratic project. Customary law was previously, like international law, considered to be a matter of fact which was to be proved by the evidence of expert witnesses as to what the rules were. This was changed by the Law of Evidence Amendment Act,¹¹⁰ which provided for the first time that all courts were entitled to take judicial notice of

¹⁰⁸ The Minister’s approach received a setback following the Constitutional Court’s recent decision in *Bakgatla-Ba-Kgafela Communal Property Association v Bakgatla-Ba-Kgafela Tribal Authority and Others* [2015] ZACC 25, 2015 (6) SA 32 (CC), 2015 (10) BCLR 1139 (CC). This was a unanimous judgment of the Court, unlike *Pilane* (note 51 above). The same traditional community was the subject of both judgments. See the discussion of the case in K O’Regan ‘Tradition and Modernity: Adjudicating a Constitutional Paradox’ (2014) 6 *Constitutional Court Review* 105.

¹⁰⁹ Parliamentary Monitoring Group *Traditional Courts Bill: Legal Response to Provinces’ Proposals* Audio recording (19 February 2014).

¹¹⁰ Act 45 of 1988.

indigenous law (as they do in respect of the common law). In the words of the Court in *Shilubana*: ‘The time when customary law had to be proved as foreign law in its own land is behind us.’¹¹¹ The Constitutional Court has now crisply affirmed in *Mayelane* that: ‘Determination of customary law is a question of law, as is determination of the common law’.¹¹²

However, a difficulty arises in the determination of the content of the law. In *Alexkor*, the Court pointed out that the law may be established by adducing the evidence of witnesses.¹¹³ That must be so if the law is ‘living law’, which reflects the practice on the ground. In appropriate cases, evidence will be necessary in order to establish what the practice is. As we have noted, both the Constitutional Court and the Botswana Court of Appeal have accepted that this is the position. In *Shilubana*, the Court held:

‘Living’ customary law is not always easy to establish and it may sometimes not be possible to determine a new position with clarity. Where there is, however, a dispute over the law of a community, parties should strive to place evidence of the present practice of that community before the courts, and courts have a duty to examine the law in the context of a community and to acknowledge developments if they have occurred.¹¹⁴

And later:

Where a norm appears from tradition, and there is no indication that a contemporary development had occurred or is occurring, past practice will be sufficient to establish a rule. But where the contemporary practice of the community suggests that change has occurred, past practice alone is not enough and does not on its own establish a right with certainty Past practice will also not be decisive where the Constitution requires the development of the customary law in line with constitutional values.¹¹⁵

This outcome – that evidence of fact may be introduced in order to prove what the law is – can lead to difficult questions, as is illustrated by *Pilane*. In motion proceedings, the well-established rule (the *Plascon-Evans* rule)¹¹⁶ is that where there is a dispute of fact, the respondent’s version of the facts prevails, unless it is inherently implausible. As Justice O’Regan has pointed out, in *Pilane* there was a dispute as to whether customary law permits a person other than the officially recognised traditional leaders to call a general assembly (*kgotha kgotho*) of the community.¹¹⁷ The majority treated this as a dispute of fact, and in accordance with the usual approach, accepted the evidence on behalf of the applicants (the respondents in the High Court). But the *Plascon-Evans* rule applies to disputes of fact, not disputes of law – and so the somewhat paradoxical result of the Court’s approach was that *Plascon-Evans* was used to decide a dispute as to the content of the law. The Court expressly rejected this approach in the subsequent *Mayelane*

¹¹¹ *Shilubana* (note 11 above) at para 56.

¹¹² *Mayelane* (note 76 above) at para 47.

¹¹³ *Alexkor* (note 13 above) paras 52 and 54.

¹¹⁴ *Shilubana* (note 11 above) at para 46.

¹¹⁵ *Ibid* at para 56.

¹¹⁶ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) 620 (A) 634E–635C.

¹¹⁷ O’Regan (note 108 above).

judgment, stating explicitly that Courts must ascertain the content of customary law as a matter of law, not fact.¹¹⁸

Lawyers are accustomed to a neat and clear divide between questions of fact and questions of law. That is not so easy to achieve in respect of customary law. The same point could of course be made in respect of the courts' long-established claim that the common law develops on the basis of the 'legal convictions of the community'. How the courts determined what those convictions were, was a judicial secret. Today we are on somewhat firmer ground, as the Bill of Rights determines how the common law is to be developed.¹¹⁹

Second, the *Sigcau* judgment has invited the reopening and reconsideration of the decisions and recommendations of the Commission on Traditional Leadership Disputes and Claims. The Constitutional Court decided the case on the procedural ground that the incorrect Act had been used, and the Court did not address the substantive issue in the case. The procedural defect may apply to other decisions which were made – and it is clear that substantive challenges remain possible. As we have noted, a large number of disputes have been raised. This is particularly significant because the Commission was intended as one of the two safety valves for the Framework Act. In practice, it has defaulted to rehearsing discredited genealogies and versions of custom.

In practice, the judgment has done little to resolve the dispute on the ground. Zanozuko Sigcau continues to call himself a King and to be treated as such by government officials and key stakeholders despite the Court having found that the notices issued by the President to depose Mpondombini and appoint Zanozuko were invalid. Litigation continues.¹²⁰

Third, the 'traditional empire' is striking back at a time when there is increasing ferment about what has happened to the mineral and land rights of rural communities. There is widespread dispute over some fundamental questions: Where there are minerals in the community's land, who is entitled to the benefits of the mineral rights? Who is entitled to participate, when old order rights held by mining companies under the Mineral and Petroleum Rights Development Act¹²¹ (MPRDA) are converted into new order rights, and an element of social empowerment is required? And who is entitled to participate when new rights are granted under the MPRDA? There has been the equivalent of a new gold rush – and particularly a platinum rush – since the commencement of the MPRDA in 2004. Mining rights have been up for grabs, and this has had to be settled within a very short space of time. The dispute has emerged most visibly in the public eye in the North West – the Bafokeng,¹²² the Bapo ba Mogale,¹²³ the Bakubung ba

¹¹⁸ *Mayelane* (note 76 above) at paras 47–48.

¹¹⁹ Constitution s 39(2).

¹²⁰ See, most recently, *The Minister of Cooperative Governance and Traditional Affairs and Others v Sigcau and Others* [2015] ZAGPPHC 764.

¹²¹ Act 28 of 2002.

¹²² A Manson & BK Mbenga *Land Chiefs Mining: South Africa's North West Province since 1840* (2014) at 143–146.

¹²³ *Ibid* at 146–150

Monnakgotla,¹²⁴ and the Bakgatla-Ba-Kgafela, to whom we have already referred. They are no doubt only the most visible disputes of many.

This is likely to become the major new battleground. It will be a battle over two questions: who is entitled to the benefits of the mineral rights? And what is the nature and extent of the accountability of the leaders who have control?

These questions go to the heart of the democratising project. They raise the issues of resources and accountability. The vested interests, and the huge benefits which stand to be gained or lost, mean that we can expect vigorous disputes, which will often become violent. This comes at a time when there is widespread revulsion at the enrichment of the few at the cost of the many, and at the corrupt processes which are sometimes involved. This is a good time for these issues to be brought before the Constitutional Court, because the Court is sympathetic to the democratisation process.¹²⁵ Five years from now, the mining rights will have been settled, and much of the membership of the Court will have changed.

There is a growing dispute over the nature and content of traditional authority, and about accountability. That is of course fundamental to the democratising project. We will have to explore the meaning of s 211(1) of the Constitution: ‘The institution, status and role of traditional leadership, *according to customary law*, are recognised, *subject to the Constitution*.’ Those are two powerful qualifications of the recognition which is given. When they are taken together with the s 39(2) obligation on the courts, in developing the customary law, to promote the spirit, purport and objects of the Bill of Rights, one sees that there are real questions about the sustainability of traditional authoritarian accounts of the nature of customary authority. The Court’s approach that customary law is multi-vocal and reflects societal change means that traditional leaders’ powers are limited by the essentially democratic nature of customary law.

On the other hand, the new laws attempt to give traditional leaders unilateral law-making power. Those powers are justified as being derived from customary law. This is inconsistent with the developing jurisprudence of the Constitutional Court. It puts the powers of traditional leaders ‘according to customary law’ at centre stage. Does customary law authorise unilateral actions by traditional leaders? Or are the powers of traditional leaders restricted by substantive and procedural customary entitlements vesting in ordinary people?

Historically, this has been the subject of much litigation.¹²⁶ Litigation by individuals and groups during the last century reveals both the scale of African resistance to colonial conceptions of unilateral chiefly power, and the politically instrumental reasoning applied by the courts. Colonial and apartheid courts came down consistently on the side of the unilateral powers of chiefs.¹²⁷ Time and again the courts rejected the testimony of African witnesses as inconsistent with

¹²⁴ Ibid at 150–154.

¹²⁵ See *Bakgatla-Ba-Kgafela* (note 108 above) (Court upheld the right of the communal property association to continue with a restitution claim in the face of attempts to replace the association with a traditional leader).

¹²⁶ We are grateful to F Eberhard for a memo she wrote in 2014 drawing attention to the cases referred to below. *Memo on Consent – Case Law on the Question of Customary Decision-Making with regard to Communally Held Land* (November 2014) (on file with authors).

¹²⁷ H Klug ‘Defining the Property Rights of Others’ (1995) 35 *Journal of Legal Pluralism* 119.

their own assumptions about the despotic nature of chiefly power, which was used to justify the status of the Governor-General as ‘supreme chief’.

Thus, in the 1907 case of *Mathibe v Lieutenant-Governor* Bristowe J found:

It is hardly disputed ... that the powers exercised by chiefs ... were of a despotic character. That this despotic power included the power to remove a sub-chief at will I think cannot be doubted. ... I think, therefore, that this power has been transmitted from the Zulu chiefs to the late State President and the present Governor, as the paramount chiefs of this country. That being so, I think that the Government had the power to depose Amos Mathibe at will¹²⁸

A particularly contentious issue was whether chiefs had the power to transact land unilaterally, or were bound to consult and obtain the consent of the members of the community at a properly constituted general assembly or *pitsso*. In the 1927 case of *Rathibe v Reid* a range of witnesses including Dr Modiri Molema, Mr Sol Plaatje, Kgosi Darius Mogale, and the local Native Commissioner gave evidence that ‘according to native law and custom’ consultation and consent were required before a chief could transact land. Their evidence was corroborated by a letter from the late Basotho king Moshweshwe. The Appellate Division rejected all of this evidence. It said:

What such an astute diplomatist as Moshesh found it necessary or expedient to say under certain circumstances can hardly be taken as a sober contribution to native law and custom. There is therefore ample evidence ... that in the purchase or sale of land there is no obligation on the chief to obtain the consent of, or even to consult his people in *pitsso* assembled.¹²⁹

Another series of cases was initiated by groups of land purchasers who had clubbed together to buy particular farms, only to find their land registered as held in trust for chiefs and tribes. Their application that the title be rectified to reflect the names of the purchasers was dismissed in *Petlele v Minister for Native Affairs and Mokhatle*. Bristowe J explained:

[I]f any individual or group of persons had been allowed to hold land separately from the rest of the tribe, it would have meant the destruction of the tribal system For these reasons I feel strongly that the conclusion must be that, under pure native law and custom ... individual ownership was unknown, and the ownership was a common ownership by the whole tribe.¹³⁰

In cases about state-held ‘communal land’, as opposed to purchased land, people went to court to challenge the power of chiefs to dispossess them of land rights to specific homesteads and fields. Their evidence about past practice and intricate levels of consultation and decision-making received short shrift from the courts. In the 1954 case of *Mosii v Motseoakhumoi*, for example, a headman insisted that a chief had no right to order his removal from his homestead. The Court found: ‘It

¹²⁸ *Mathibe v Lieutenant-Governor* 1907 TS 557, 574.

¹²⁹ *Rathibe v Reid and Another* 1927 AD 74, 84.

¹³⁰ *Petlele v Minister for Native Affairs and Mokhatle* 1908 TPD 260, 271.

is common cause that tribal land belongs to the Crown and that no member of the tribe can ever acquire ownership of any land allotted to him.¹³¹

These cases are revealing in at least three different ways. First, they lay bare the explicitly political and instrumental reasoning of the judges in various cases. Second, they illustrate how the evidence of white ‘experts’ was privileged over that of African witnesses in relation to the content of customary law. And third, they are testimony to the tenacity and strong counter-narratives of African litigants and experts in disputing the version of chiefly power supported by government, and in claiming and insisting on the strength of customary land rights vesting in ordinary people.

This history illustrates the current tension between two approaches to ‘custom’: on the one hand, support for official structures born out of years of distortion; on the other hand, support for custom as developed in practice on the ground, and as litigated for decades by African people claiming that it is inherently participatory.

In cases about customary law the Court has unpacked and foregrounded the impact of invisible background rules in entrenching past distortions and current inequality. It has done this to a far greater extent than in cases dealing with other areas of law. Casting a critical light on background rules ‘unfreezes and destabilises their coded ideological content’, creating intellectual and cultural space for ‘projects of re-visioning and transformation’, as Davis and Klare put it.¹³² The project of re-visioning has entailed approaching past precedents with caution, and grappling with ‘living’ as opposed to ‘official’ customary law. These are challenging parameters that disrupt decades of intellectual capital and cross-citation among academics writing about and teaching customary law, just as they challenge lawyers and judges to grapple with unfamiliar intersections between precedent, evidence, law and fact.

It was inevitable that customary law would throw up such conundrums given how it was systematically distorted to justify segregation and subordination during colonialism and apartheid. Davis and Klare point out that it is in cases which address the legacy of apartheid that the Court has been most confident about bringing social context and the impact of discriminatory background rules into focus.¹³³

As noted earlier, Langa CJ’s analysis and explanation of the role and impact of the Black Administration Act historically is a case in point. He reviewed contextual comments made by judges in the Native Appeal Court to reveal the racist assumptions and political purposes that underlay the Act and its past interpretation by the courts.¹³⁴ In doing so he directs us to an important and fruitful focus for future research to illuminate the meaning of s 211(1) of the Constitution, which recognises traditional leaders ‘according to customary law’. As we have noted, there is much current contestation concerning the extent and nature of the powers of traditional leaders vis-à-vis indigenous accountability mechanisms, and the substantive and procedural entitlements of ordinary people.

¹³¹ *Mosii v Motseoaekhomo* 1954 (3) SA 919 (A) 923.

¹³² Davis & Klare (note 25 above) at 449.

¹³³ *Ibid* at 483.

¹³⁴ *Bhe* (note 17 above) at para 62.

Reviewing the evidence which was put before courts that adjudicated such disputes in the past, and analysing the reasoning of judgments that found in favour of autocratic versions of chiefly power, will likely reveal important pointers to the political imperatives at play, and the counter-versions of custom put forward by litigants and African experts.

V CUSTOMARY LAW – TOWARDS AMALGAM OR SEGREGATION?

Given the nature and purpose of the Black Administration Act, as explained by Langa DCJ in *Bhe*, it is extraordinary that the Framework Act (and the Traditional and Khoi-San Leadership and Governance Bill which will repeal it), defaults to and set in stone the controversial tribal identities and boundaries imposed by the companion and equally racist Bantu Authorities Act of 1951. Current and anticipated laws and policies subject those living within statutorily defined boundaries to versions of chiefly authority and customary law that prohibit opting-out and preclude landownership for anyone other than traditional leaders. Laws that ascribe tribal identity and customary law according to imposed and racially determined boundaries are inconsistent with the Constitutional conception of a unitary South African law, enunciated by the Court in *Pharmaceutical Manufacturers*¹³⁵ and elaborated in *Carmichele*.¹³⁶ It is one thing to say that in general white South Africans do not live according to customary law, whereas many black South Africans do. It is quite another to characterise customary law as primarily an adjunct of chiefly power, to impose it on everyone living only within statutorily defined boundaries, and to restrict its application to 17 million out of 54 million South Africans.

We return to the conception of indigenous law described in *Alexkor*: ‘indigenous law feeds into, nourishes, fuses with and becomes part of the amalgam of South African law’.¹³⁷ This is essentially similar to the long term role that Professor ZK Matthews envisaged for indigenous law in 1943. In his Yale thesis on Native Law¹³⁸ he asked what the future of Native Law was likely to be in the future South Africa. Notwithstanding his caveat about the problem of predicting the future role of law without knowing the future place of Africans ‘in the body politic of South Africa’ he put forward three possibilities. The first was ‘the complete disappearance of Native Law and its replacement by European law’.¹³⁹ The second was that Native Law might develop ‘as a separate substantive system of jurisprudence’. He warned however, that in a context where Native Law ‘has to contend with a system [Roman Dutch Law] that has the prestige value of being followed by the dominant group in the country, its chances of survival on

¹³⁵ *Pharmaceutical Manufacturers Association of SA and another: In re ex parte President of the Republic of South Africa and Others* [2000] ZACC 1, 2000 (2) SA 674 (CC), 2000 (3) BCLR 241 (CC).

¹³⁶ *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies intervening)* [2001] ZACC 22, 2001 (4) SA 938 (CC), 2001 (10) BCLR 995 (CC).

¹³⁷ *Alexkor* (note 13 above) at para 51.

¹³⁸ ZK Matthews *Bantu Law and Western Civilisation in South Africa: A Study in the Clash of Cultures* MA Thesis, Yale University (1934) available at <http://uir.unisa.ac.za/handle/10500/5046>.

¹³⁹ *Ibid* at 347.

the theory of parallel development are very slender'.¹⁴⁰ He went on to discuss a possible third future for Native Law 'its gradual assimilation to European law so that it will contribute its quota to what will ultimately be called not Roman Dutch law nor Native law, but South African law'.¹⁴¹

In his view, this was the only viable option for the future. Jack Simons¹⁴² tells us that a few years later Matthews served on a sub-committee of the Native Representative Council¹⁴³ which reviewed the impact of the 1927 Native Administration Act and discussed issues concerning the recognition of 'tribal law'. The committee's 1945 report said that in some instances it was appropriate to recognise tribal law, but in most circumstances the system of separate courts for Africans was wrong because 'this judicial segregation violates the principle of equality before the law, implies that Native life is static whereas in point of fact it is gradually becoming integrated with the general life of the country and it bolsters up the restrictive laws differentially affecting the Natives'.¹⁴⁴

In introducing the report in council, Matthews said that the system of separate courts gave Africans the impression they were getting a different kind of justice. He concluded that he saw no reason why the Supreme Court should not administer tribal law. 'After all, there is nothing mysterious about Native Law'.¹⁴⁵

The 'living law' doctrine embraced by the Court points to such a pragmatic amalgam of the different sources of law that people draw on in their daily lives. In practice 'living law' is not exclusively 'customary', but combines different sources or experiences of law, some of which are vernacular, and some of which derive from the Constitution or other state law. An example of this is locally negotiated solutions to the thorny problems of single women's access to residential sites in 'communal' areas.¹⁴⁶ John Comaroff tells of African magistrates in North West Province combining vernacular values and precedents with state law in their judgments in an unselfconscious way.¹⁴⁷

Barbara Oomen describes local processes of dispute resolution in Limpopo as being about 'mixing and matching rules that refer to culture, common sense, state regulations, the Constitution, precedent and a variety of other sources hardly considered contradictory'. She quotes a tribal councillor as saying: 'Actually we are just using our heads and doing something'.¹⁴⁸ Anne Hellum has defined local or living law as 'the outcome of the interplay between international law, state law, and local norms that takes place through human interaction in different historical, social and legal contexts'.¹⁴⁹

¹⁴⁰ Ibid at 352.

¹⁴¹ Ibid at 354.

¹⁴² HJ Simons in *African Women: Their Legal Status in South Africa* (1968).

¹⁴³ Together with councillors Sakwe, Champion and Xiniwe.

¹⁴⁴ Simons (note 142 above) at 61.

¹⁴⁵ Ibid.

¹⁴⁶ A Claassens 'Recent Changes in Women's Land Rights and Contested Customary Law in South Africa' (2013) 13(1) *Journal of Agrarian Change* 71.

¹⁴⁷ Personal communication (2010) (on file with the authors).

¹⁴⁸ Oomen (note 102 above) at 210.

¹⁴⁹ A Hellum *Women's Human Rights and Legal Pluralism in Africa: Mixed Norms and Identities in Infertility Management in Zimbabwe, North-South Legal Perspectives* (1999) 62.

There are inherent difficulties in the concept of a unified South African law that incorporates strong elements of customary law alongside other strands of law. The primary problem is the dominance of western and common law constructs that fail to recognise, let alone accommodate, indigenous values on their own terms. These indigenous values, which prioritise claims of need over those of exclusive ownership, and acknowledge the layered and relative nature of rights, have much to offer South Africa, not least in finding ways to foreground socio-economic rights.¹⁵⁰ To ignore and undermine them impoverishes our law, and risks alienating the majority of South Africans from the rule of law.¹⁵¹

VI CONCLUSION

This article has identified two contradictory processes. On the one hand, the Constitutional Court has elaborated a concept of living customary law that roots the content of customary law in people's practice on the ground. The Court's approach is that customary law, the appointment of traditional leaders, and the powers of traditional leaders emerge from practice on the ground, which evolves over time. This is consistent with the statement in s 211(1) of the Constitution that the 'institution, status and role of traditional leaders, *according to customary law*, are recognised, subject to the Constitution'.

On the other hand, we have a slew of legislation – past, present and promised – with a very different premise and purpose. Its premise is that the source and content of the law are determined by statute; its purpose appears to be to strengthen systems of patronage and political control. The legal authority for this approach is derived from s 211(2), which provides that 'a traditional authority that observes a system of customary law may function according to *any applicable legislation* and customs, which includes amendment to, or repeal of, that legislation of those customs'.

There are currently many disputes over who is to benefit from natural resources, and the accountability of 'traditional' power. The Traditional Courts Bill is to be reintroduced in Parliament, apparently in a revised form that has not yet been disclosed. There is a continuing and disputed attempt to confer governmental powers on traditional authorities, as a fourth tier of government. The resolution of these disputes will be determined not only by what happens in the courts, but also by what is essentially a political struggle for accountability and rural democracy. The struggles described in this article, whether over the geographical reach of customary law and chiefly power, or the place of customary law vis-à-vis common law, are fundamentally political questions, with high stakes for access to resources, and ultimately for the legitimacy and reach of law.

¹⁵⁰ SM Weeks & A Claassens 'Tensions Between Vernacular Values that Prioritise Basic Needs and State Versions of Customary Law that Contradict Them' (2011) 22(3) *Stellenbosch Law Review* 823, also published in A Liebenberg & G Quinot (eds) *Law and Poverty: Perspectives from South Africa and Beyond* (2012) 381.

¹⁵¹ M Chanock 'African Constitutionalism from the Bottom-up' Rabinowitz Lecture (University of Cape Town, 24 April 2015) (on file with the authors).

Tradition and Modernity: Adjudicating a Constitutional Paradox

Kate O'Regan*

I INTRODUCTION

Within three years, the Constitutional Court has handed down two judgments involving disputes between members of the Bakgatla-Ba-Kgafela, a community based in the Moruleng district of the North West Province, and their traditional leader, *Kgosi* Nyalala MJ Pilane. The first came before the court in *Pilane and Another v Pilane and Another*¹ and the second in *Bakgatla-Ba-Kgafela Communal Property Association v Bakgatla-Ba-Kgafela Tribal Authority and Others*.² These two cases illuminate a paradox that lies at the heart of our constitutional democracy: a paradox that inheres in the simultaneous assertion of the founding values of our Constitution – human rights, the achievement of equality, non-racialism, non-sexism and a multi-party system of democratic government³ – and the constitutional recognition of traditional systems of governance and law, based on rules of kinship, status and inherited succession.⁴

I shall explain that this paradox has two aspects, and I shall argue that these two judgments build a foundation for establishing a constitutional accommodation of at least the first aspect of this paradox, the conflict between the substantive rules of our Constitution and the substantive principles of traditional governance and customary law. The second aspect of the paradox arises from the manner in which the rules of customary law are ascertained, applied and developed, on the one hand, and the manner in which constitutional rules are ascertained, applied and developed, on the other.⁵ This aspect of the paradox is more intractable, as I shall explain.

The Bakgatla-Ba-Kgafela are a community who live in a cluster of 32 rural villages in the Moruleng district of the North West province of South Africa, not far from the border with Botswana. The first case concerned a dispute that arose when *Kgosi* Pilane, the senior traditional leader of the community, and the

* Justice Emeritus of the Constitutional Court of South Africa. This article is a substantially revised version of a speech delivered at the University of Oxford on 4 June 2013.

¹ [2013] ZACC 3, 2013 (4) BCLR 431 (CC) ('*Pilane*'). I am grateful to Adv S Cowen and Ms S Nindi, legal representatives for the Motlhabane community, who provided me with copies of the papers in the case.

² [2015] ZACC 25, 2015 (6) SA 32 (CC) ('*Bakgatla-Ba-Kgafela*').

³ Constitution s 1.

⁴ Constitution Chapter 12.

⁵ It may be that these two aspects of the paradox are similar to the distinction drawn by HLA Hart between the primary rules and secondary rules of a legal system. I have not fully explored this question in this paper. See HLA Hart *The Concept of Law* (1961).

Traditional Council of the Traditional Community (both recognised in terms of the Traditional Leadership and Governance Framework Act⁶) approached the court for an interdict to prevent members of the Bakgatla-Ba-Kgafela from convening a traditional gathering or *Kgotha Kgothe*. The meeting had been called to discuss the question whether a group of members of the Bakgatla-Ba-Kgafela should secede from the traditional community. The High Court granted the interdict and the respondents appealed to the Constitutional Court that, by a majority, upheld the appeal and overturned the interdict granted by the High Court.

The second case relates to the return of some of the ancestral lands of the Bakgatla-Ba-Kgafela under the Restitution of Land Rights Act.⁷ The community were forcibly removed from their lands during the Apartheid era and some of those lands were then included within the area of the Pilanesberg Game Reserve. Their claim for restitution of their ancestral lands was approved by the Minister of Land Affairs in 2006. Prior to the restitution of their lands, the community had taken steps to establish a communal property association in terms of the Communal Property Association Act,⁸ which would hold title to the restituted lands. However, *Kgosi* Pilane and the traditional authority did not want the land to be held by a communal property association, but in a trust. Although the communal property association (the Association) was registered provisionally, that registration was never finalised. The Association approached a court seeking an order, amongst other things, directing the Director-General of the Department of Rural Development and Land Reform to effect its permanent registration in terms of the CPA Act. The Land Claims Court issued an order in favour of the Association, but on appeal to the Supreme Court of Appeal, the court held that a provisionally registered association only exists for 12 months from the date of its provisional registration. As more than 12 months had elapsed since its provisional registration, the association no longer existed and could not seek relief before the courts. The Constitutional Court upheld the subsequent appeal, and reinstated the order made by the Land Claims Court.

The first case is interesting because it is the first time that a dispute concerning the democratic right to associate or gather has been considered by the Constitutional Court in the context of a dispute over traditional leadership and secession. The second case is interesting because it considers the role of communal property associations as the foundation for what might be understood as new forms of land tenure in our constitutional democracy.

As mentioned above, both cases shine a light on the paradox that exists between a modern, some argue post-modern, Constitution based on the principles of democracy and human rights, and a Constitution that recognises traditional systems of governance and law. A paradox of this sort is not restricted to South Africa. It has sharp parallels in constitutional democracies all over the world. For the tensions that are found in *Pilane* and *Bakgatla-Ba-Kgafela* are similar

⁶ Act 41 of 2003 (Framework Act).

⁷ Act 22 of 1994 (Restitution Act).

⁸ Act 28 of 1996 (CPA Act).

to the tensions that are rising in constitutional democracies everywhere, as the conception of citizen and citizenship that underpinned the nation state (albeit imperfectly) and the associated ideas of liberal constitutionalism, are increasingly challenged by ideas of group-based identity based on religion, culture and tradition. Examples abound. In Canada, should arbitration tribunals be permitted to apply the principles of Shar'ia law?⁹ In France, is it permissible to insist that no one may conceal their face in public places, even when they may wish to do so (or consider that they are required to do so) as a result of their religious beliefs?¹⁰ In New Zealand, how should tikanga Māori (customary law and practice) be accommodated in the legal system?¹¹ All these questions may, at some stage, raise the fundamental question asked of liberal democracies in the 21st century, in the words of Jean and John Comaroff:

What happens when a liberal democracy encounters a politics of difference that it cannot embrace ethically or ideologically within its definition of the commonweal, a politics of difference that is *not* satisfied with recognition, tolerance, or even a measure of entitlement – a politics of difference that appeals to the law or to violence to pursue its ends, among them the very terms of its citizenship?¹²

In order to analyse the approach taken in *Pilane* and *Bakgatla-Ba-Kgafela* to this paradox, I will start with a consideration of the key constitutional provisions that regulate customary law and traditional leadership. I will then turn to what must unfortunately be a very abridged history of the relationship between the state, traditional leadership and customary law in South Africa's polity. Then I shall consider briefly the contemporary role of traditional leadership in South Africa. Thirdly, I shall discuss the two judgments, and finally address two issues that underlie them, which will continue to be of signal importance for the jurisprudence on the modernity/tradition paradox in South African constitutional law. Both these questions were under consideration too, in the judgment handed down by the Constitutional Court in *Mayelane v Ngwenyama and Another*¹³ in the context of polygyny, and I shall make a few remarks about that judgment along the way, as well.

⁹ See M Boyd 'Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion' (2004), available at <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/boyd/executivesummary.pdf> (The former Attorney-General of Ontario recommended that Shar'ia law could continue to be applied in family dispute arbitrations, subject to certain conditions. After a public outcry, the recommendation was rejected.)

¹⁰ See *SAS v France* (2014) ECHR 695.

¹¹ See *Takamore v Clarke* (2012) NZSC 116 (Concerned a dispute between the pakeha life partner of Mr Takamore and his Māori whānau (extended family) relating to his burial. The Supreme Court of New Zealand decided in favour of Ms Clarke, but held that tikanga Māori (customary law and practice) was a relevant consideration in deciding the dispute, though not determinative in this case.) See also N Coates 'What does *Takamore* mean for Tikanga? – *Takamore v Clarke* [2012] NZSC 116' (2013) 2 *Maori Law Review*, available at <http://maorilawreview.co.nz/2013/02/what-does-takamore-mean-for-tikanga-takamore-v-clarke-2012-nzsc-116/>.

¹² J Comaroff & J Comaroff 'Reflections on Liberalism, Policulturalism and ID-ology: Citizenship and Difference in South Africa' (2003) 9(4) *Social Identities* 445, 447.

¹³ *Mayelane v Ngwenyama and Another* [2013] ZACC 14, 2013 (4) SA 415 (CC), 2013 (8) BCLR 918 (CC) ('*Mayelane*').

II THE STARTING POINT: THE CONSTITUTION

We should start with the Constitution. As mentioned above, the Constitution's opening clause affirms that the founding values of South Africa's constitutional democracy include human dignity, the achievement of equality, the advancement of human rights and freedoms, non-racialism and non-sexism, and universal adult suffrage, a national common voters' roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.

Yet, chapter 12 of the Constitution recognises the institution, status and role of traditional leadership 'subject to the Constitution'. It also states that national legislation may provide for a role for traditional leadership as an institution at local level on matters affecting local communities, and provides that courts must apply customary law when that law is applicable, again 'subject to the Constitution'. The system of traditional leadership is clearly not democratic in the sense contemplated by s 1. Yet, the Constitution recognises the system, albeit 'subject to the Constitution'.

The Constitution also regulates the question of culture and custom. Section 31 provides that:

- persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community –
- (a) to enjoy their culture, practice their religion and use their language; and
 - (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.¹⁴

But s 31(2) stipulates that those rights may not be exercised in a manner inconsistent with any provision of the Bill of Rights. The Constitution also regulates customary law. In particular, s 39(2) provides that when developing customary law, a court tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

Many of the rules of customary law, particularly as it regulates family relationships, have historically been based, at least to some extent, on patriarchal practices. Of itself, this fact is not remarkable. The Roman Dutch law of the family was similarly based on patriarchal relationships, although over time statutory interventions have largely stripped the common law of its patriarchal rules.¹⁵ There has been statutory amendment of some of the patriarchal elements of customary rules, although not to the same extent.

¹⁴ See also Constitution s 30 which entrenches the right to language and culture: 'Everyone has the right to use the language and participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with the Bill of Rights'.

¹⁵ See the full historical account provided in J Sinclair (assisted by J Heaton) *Law of Marriage* (1996) Vol 1, particularly Chapter 2 ('The History and Development of the Law of Husband and Wife') which describes the concepts of community of property, community of profit and loss, and the marital power which underpinned the default position on marriage in Roman-Dutch Law. All the assets and liabilities of the spouse were merged upon marriage into a joint estate administered by the husband, by virtue of his marital power. A wife was unable to enter into contracts without his consent, nor could she institute legal proceedings. Moreover, a wife had no right to support from her deceased husband's estate. See *Glazer v Glazer* NO 1963 (4) SA 694 (A). The ordinary common-law rules were fundamentally changed by statutory intervention in the last few decades of the twentieth century.

Our Constitution recognises both traditional leadership and customary or indigenous law, but ‘subject to the Constitution’. The phrase ‘subject to the Constitution’ repeated throughout chapter 12, and the qualification in ss 15, 30 and 31 of the Bill of Rights that afford the rights to associate and to regulate relationships by traditional law, but only where not ‘inconsistent with the Bill of Rights’ establishes a clear rule that the Constitution, and the values it affirms, and the rights it entrenches, may not be overridden.

III A BRIEF HISTORY OF THE ENCOUNTER BETWEEN COLONIALISM, APARTHEID AND TRADITIONAL LEADERSHIP IN SOUTH AFRICA

At the beginning of the nineteenth century, during the Napoleonic Wars, England conquered the Cape Colony and it became part of the British Empire. Not long thereafter, the process of colonial dispossession of the Nguni communities of the eastern seaboard of southern Africa began in earnest with a series of colonial wars of dispossession. By the end of the nineteenth century, nearly the whole territory of what is modern-day South Africa had come under either colonial rule or the rule of the independent Boer republics.

At the beginning of the nineteenth century, the Nguni, Sesotho and Setswana communities were divided into small polities, some loosely linked in political relationships by a monarch, others not. Systems of indigenous law were applied in the polities in different ways. According to the rules of the British Empire, functioning systems of law in colonised territories continued to apply, so both the Roman Dutch law that had been applied in the Dutch colony, as well as the systems of customary or indigenous law applied in the indigenous polities remained in force.

In addition, the process of colonial dispossession did not result in the complete destruction of the systems of traditional leadership, although of course, the colonial process did have a calamitous effect on the institution. Noel Mostert’s epic historical work, *Frontiers*,¹⁶ is one of several fine histories that recount the extraordinary courage and leadership of traditional leaders of the Eastern Cape in their struggle to maintain their systems of governance, and ways of life, in the face of the colonial onslaught. Many of the traditional leaders from the Eastern Cape ended their lives on Robben Island, the small island off Cape Town, where Nelson Mandela was famously imprisoned for so many years.

The process of colonial dispossession in what is today KwaZulu-Natal started some years later than the process in the Eastern Cape and took at least initially somewhat of a different course than it had in the Eastern Cape. A different approach to traditional leaders and customary law emerged, a system that was to become known as the ‘Shepstone system’.¹⁷ In his recent biography of Sir Theophilus Shepstone, after whom the ‘Shepstone system’ was named, Jeff Guy argues that the system that came to be called after Shepstone bore no close resemblance

¹⁶ N Mostert *Frontiers: The Epic of South Africa's Creation and the Tragedy of the Xhosa People* (1992).

¹⁷ See J Beall & M Nkonyama ‘Indigenous Institutions, Traditional Leaders and Elite Coalitions for Development: The Case of Greater Durban, South Africa’ (2009) Working Paper No 55 *Crisis States Research Centre Working Papers Series No 2*, available at <http://eprints.lse.ac.uk/28487/1/WP55.2.pdf>.

to the pattern of colonial governance established and practiced by Shepstone in the middle decades of the nineteenth century.¹⁸ Shepstone, according to Guy, had recognised the importance of ‘flexibility and personal interaction’¹⁹ and his administrative practices were based on what Guy characterises as either ‘dynamic flexibility’ or ‘opportunistic improvisation’.²⁰

There is no sharp definition of what is referred to as the Shepstone system, but it can be understood as a system of indirect colonial rule in terms of which traditional leaders were co-opted into the task of colonial government while at the same time retaining authority for the continued application of customary law although with oversight by colonial administrators. Such a system, it was thought, might remove some of the deepest hostilities to colonial rule, facilitate the task of colonial government and, importantly, not cost a lot.²¹ The system led both to the recognition of traditional leaders and their (often paid) employment as agents of the colonial state. The system was not unique to the Colony of Natal where it was introduced; it was eventually introduced throughout South Africa and is similar to systems introduced in East Africa.²² Related to this development, was the adoption, in 1891, of a codification of customary law for Natal (though excluding the Zulu Kingdom) in what was called the Natal Code of Native Law. It persists to this day, albeit in a very different form. It is the only code of customary law in South Africa. There is no equivalent for other systems of customary law in the country.

After union in 1910, the system of indirect colonial rule through the use of traditional leaders was extended throughout the country. It was given legislative force by the Native Administration Act of 1927 which provided a legislative basis for the authority of traditional leaders, but subverted that authority in some very signal ways. First, the Governor-General became the supreme Chief of all black South Africans,²³ equipped with the power to ‘recognise or appoint any person as a chief of a Black tribe’ and the power to depose any chief so appointed.²⁴ This provision was described by the Appellate Division as meaning that ‘the son of the deceased hereditary chief [has no] claim whatever to the chieftainship; on the contrary, the object of the legislation appears to have been to put an end to hereditary chieftainship.’²⁵ The powers of deposition were used by the Governor-

¹⁸ See J Guy *Theophilus Shepstone and the Forging of Natal* (2013) 502–503.

¹⁹ *Ibid* at 500.

²⁰ *Ibid* at 503.

²¹ See Guy’s account of the exchange between James Stephen, Under-Secretary of State for the Colonies and Earl Grey, Secretary of State for the Colonies, in 1847. *Ibid* at 129–33.

²² See Beall & Ngonyama (note 17 above).

²³ Natives Administration Act 38 of 1927 s 1.

²⁴ Natives Administration Act s 2(7). This power had been adopted early on. See Clause 3 of the Natal Ordinance adopted in June 1849 which provided that the Lieutenant Governor in Council was to have ‘all the power and authority, which, according to the laws, customs and usages of the native, are held and enjoyed by the supreme or paramount native chief, with full power to appoint and remove the subordinate chiefs, or other authorities among them.’ See Guy (note 18 above) at 135.

²⁵ See *Buthelezji v Minister of Bantu Administration* 1961 (4) SA 835 (A) 841. See also *Sibasa v Ratsialingwa and Hartman* 1947 (4) SA 369 (T) 387 where Roper J held that even a ‘stranger to the family in which the hereditary chieftainship lies’ or a ‘non-member’ of the tribe could be appointed a chief under s 2(7).

General and later the State President to depose traditional leaders who opposed or resisted government policies.²⁶

The Act also contained one of the most notorious provisions of Apartheid legislation, s 5.²⁷ That section empowered the Governor-General (and later the State President) ‘whenever he deemed it expedient’ to order that any ‘tribe, portion of a tribe, black community or black person shall withdraw from any place to any other place ... within the Republic and shall not at any time thereafter ... return to the place from which the withdrawal is to be made’. This provision led to many of the forced removals that were one of the hideous hallmarks of Apartheid (the Surplus People’s Project estimated that between 1960 and 1982 more than 3,5 million South Africans were forcibly removed from their homes under a range of laws including s 5.)²⁸

During the Apartheid years, the process of legislative endorsement of traditional leaders continued with the adoption of the Black Authorities Act in 1951.²⁹ This Act was famously described by Chief Albert Luthuli, the Nobel Peace laureate, as follows:

The modes of government proposed are a caricature. They are neither democratic nor African. The Act makes our chiefs, quite straightforwardly and simply, into minor puppets and agents of the Big Dictator. They are answerable to him only, never to their people. The whites have made a mockery of the kind of rule we knew. Their attempts to substitute dictatorship for what they have efficiently destroyed do not deceive us.³⁰

In the 1950s, Hendrik Verwoerd devised the policy of grand Apartheid aimed at affording constitutional autonomy to each different African group in the country: a policy which led directly to the ‘independence’ of four states within South Africa: Transkei, Ciskei, Bophuthatswana and Venda, and the establishment of several other self-governing territories, including KwaZulu-Natal, Lebowa and Gazankulu. In pursuit of its Apartheid policies, the Apartheid government rewarded chiefs who co-operated with it in various ways, and also punished chiefs who resisted.

The result of the unsavoury relationship between some chiefs and the Apartheid state was increased political dissatisfaction with chiefs, particularly in the rural areas.³¹ This dissatisfaction spilt over into widespread protests in rural areas in the 1980s, with crowds often calling ‘Phansi, makgosi, phansi!’ (Down with the chiefs!) and singing the liberation song: ‘Nako e fedile, nako ya magosi’ (The time is over, the time of the chiefs). By and large, the African National Congress was

²⁶ See D Unterhalter ‘Legitimate Expectation and the Law of Chiefs’ in C Murray & C O’Regan *No Place to Rest: Forced removals and the law in South Africa* (1990) 222, 224.

²⁷ For a full discussion, see G Marcus ‘Section 5 of the Black Administration Act: The Case of the Bakwena ba Mokgopa’ in Murray & O’Regan (note 26 above) at 12.

²⁸ Surplus People Project *Forced Removals in South Africa* (1983) Vol 1 at 5.

²⁹ Act 68 of 1951.

³⁰ Chief Albert Luthuli *Let My People Go* (1962).

³¹ See a related discussion in the minority judgment of Jafta J in *Bapedi Marota Mamone v Commission of Traditional Leadership and Others* [2014] ZACC 36, 2015 (3) BCLR 268 (CC) at para 22.

disenchanted with the role of traditional leadership and did not intend to preserve it once liberation arrived.³²

During the constitutional negotiations, the question of traditional leadership and customary law received some attention, but the outcome was the brief provisions of chapter 12 in the Constitution referred to earlier. In many ways, the mid-1990s was the nadir of the political legitimacy of traditional leaders, given the anger that had arisen concerning the collaboration between many traditional leaders and the Apartheid state.

Yet since 1994, the star of traditional leaders has been on the rise. Barbara Oomen, an anthropologist who lived and worked amongst the BaPedi, has remarked that the post-Apartheid era has seen the ‘surprising’ ‘comeback of the chiefs, long considered bureaucratized puppets of the apartheid regime.’³³ She notes that this comeback mirrors similar processes across the African continent. Moreover, it appears from Professor Oomen’s field research amongst the BaPedi that the legitimacy and acceptance of traditional leaders seems to have improved remarkably.³⁴ The reasons for the comeback are beyond the scope of this essay, but the fact of it is an important contextual marker for our understanding of the constitutional paradox.

IV THE ROLE OF TRADITIONAL LEADERS IN CONTEMPORARY SOUTH AFRICA

I now wish to turn to consider briefly the social, political and economic role of traditional leaders in contemporary South Africa. It is important to preface these remarks by acknowledging that it is impossible to provide a generalised, abstract account of the role that traditional leaders play in communities across the country. The variation from community to community is enormous; moreover, within one community the role that a traditional leader plays depends significantly on the personality and circumstances of the traditional leader at the time. Detailed anthropological studies confirm this fact.³⁵ So the remarks that follow are a hesitant outline of the role of traditional leaders, but do not seek to suggest uniformity or consistency.

First, it should be realised that approximately 16 million South Africans (that is nearly a third of the country’s population) live in rural areas that can roughly be described as being the areas of jurisdiction of traditional leaders. Secondly, senior traditional leaders are considered to be public office bearers and are paid salaries by the South African government.³⁶ Their salaries range from just over

³² See Comaroff & Comaroff (note 12 above) at 449; Beall & Nkonyama (note 17 above) at 4.

³³ B Oomen ‘McTradition in the new South Africa: Commodified Custom and Rights Talk with the Bafokeng and the Bapedi’ in F Von Benda-Beckmann, K Von Benda-Beckmann & A Griffiths (eds) *Mobile People, Mobile Law, Expanding Legal Relations in a Contracting World* (2005) 91, 94.

³⁴ *Ibid.*

³⁵ See, eg, B Oomen *Chiefs in South Africa: Law, Power and Culture in the Post-Apartheid Era* (2005).

³⁶ See Remuneration of Public Office Bearers Act 20 of 1998 s 5. For the most recent determination see *Government Gazette* 38568 of 13 March 2015. Information about the current determinations can be found on the website of the Independent Commission for the Remuneration of Public Office Bearers, www.remcommission.gov.za

R1 million that is paid annually to the approximately twelve monarchs,³⁷ to just under R200 000 for the senior traditional leaders.³⁸ Thirdly, the colonial and Apartheid legislation that recognised traditional leaders and confirmed their role and authority were not repealed until quite recently and the role that traditional leaders began to play as indirect forms of government under the Shepstone system continues, with relatively little variation, to this day.

So, as they have since colonial times, traditional leaders continue to perform important governance functions of the centralized state, some of these functions overlap with the role traditional leaders would have played before the onset of colonialism, and some are functions entirely related to the bureaucratic workings of a modern state. Perhaps the two most important 'traditional' functions traditional leaders perform today, albeit often with the participation of elders or other community members, are the determination of community disputes in traditional courts and the allocation of land. In addition to these two functions, traditional leaders execute functions arising from the working of the modern bureaucratic state: They confirm and record births, deaths and marriages; provide the necessary proof of residence required for the Financial Intelligence Centre Act,³⁹ which attempts to prevent money laundering and other forms of currency crime, and requires proof of residence to open bank accounts and obtain other financial services; they also provide proof of residence as required by the Regulation of Interception of Communications and Provision of Communication-Regulated Information Act,⁴⁰ which similarly requires proof of residence in order to obtain a mobile phone; and they assist in the processing of identity documents, passports and social grants. In sum, for many of the 16 million South Africans who live in traditional areas, traditional authorities provide a key institution in enabling their engagement with the modern state.

The power of traditional authorities in the post-Apartheid era has partly grown as a result of the weakness of local government in traditional areas. The Constitution provides for what is called colloquially 'wall-to-wall' local government⁴¹ and so local government has jurisdiction in areas that under the 1927 Native Administration Act had been administered by traditional authorities. But local government is notoriously ineffectual. By and large it has failed to provide people living in traditional areas with access to the state. And traditional leaders are filling that gap.

Of course, it is not only the failure of local government that has caused the entrenchment of the role of traditional authorities in the new constitutional era, it also arises from the deep cultural loyalties and affinities that South Africans have for traditional leadership, despite the role played by many traditional leaders during Apartheid and the colonial era. As one citizen expressed it to Barbara

³⁷ Ibid.

³⁸ Ibid.

³⁹ Act 38 of 2001.

⁴⁰ Act 70 of 2002.

⁴¹ Constitution s 151(1) stipulates that municipalities 'must be established for the whole of the territory of the Republic.' See in this regard as well Constitution s 212(1), cited above, which provides that national legislation may provide for a role for traditional leadership as an institution at local level on matters affecting local communities.

Oomen: ‘During the struggle, we’d fight like dogs with our chief but now we’re back together again.’⁴²

In many areas, not only are traditional authorities functionally important to the lives of South Africans, but they are symbolically important too. Barbara Oomen describes the investiture of the Pedi monarch, Billy Sekwati Mampuru III in December 1998. Thousands of people attended, including President Nelson Mandela, and many other national leaders, some of whom arrived by helicopter. ‘Re Busitswe’, shouted the praise singer, ‘we are being ruled again’.⁴³

It is not surprising then, given the political, economic and social importance of traditional leaders, that disputes about succession are legion, and fierce, and often interminable. Indeed, the investiture of the Pedi Monarch Billy Sekwati was immersed in controversy – a controversy that spans back more than 150 years to the controversial appointment of the legendary King Sekhukhune I of the BaPedi. Sekhukhune I was the son of Sekwati I but he fought with his brother Mampuru over their father’s inheritance.⁴⁴ He succeeded and sought to defend his kingdom against the Boers, the Swazi and the British Empire. Eventually, the BaPedi were beaten in battle. That succession battle of the mid nineteenth century had resonance still in the succession dispute that preceded the accession of Billy Sekwati to the monarchy.

What also emerges from the anthropological literature is the under-determinative quality of the indigenous rules of succession. Although in most communities, the rules are clear and uncontroversial, research suggests that the rules are rarely determinative in practice. John Comaroff estimates that 80 per cent of all cases of accession to leadership represent ‘anomalies’ given the recognised, prevailing understanding of the legal rules.⁴⁵ Oomen, in her study of the BaPedi suggests that a similar proportion obtains.⁴⁶ The process of succession thus accommodates what appear to be clear rules on the one hand (often the principle of male primogeniture) together with indeterminacy of application. Oomen argues that ‘the system of succession in Sekhukhune contains a built-in vagueness and uncertainty that allows the best candidate out of a limited pool not only to accede to the chieftaincy, but also to argue this claim in terms of customary law. It thus allows for meritocracy within an ascriptive ideology.’⁴⁷ The indeterminacy of the rules that govern the succession process often results in deep and persistent conflict, that increasingly is finding its way into civil courts.

⁴² See Oomen (note 33 above) at 94.

⁴³ Ibid at 123.

⁴⁴ Ibid at 125. See also P Delius *The Land Belongs to Us: The Pedi Polity, the Boers and the British in Nineteenth Century Transvaal* (1983). For an interesting account of the facts of the Bapedi leadership dispute, see *Bapedi Marota Mamone* (note 31 above) at paras 25–31 (minority judgment) and paras 87–92 (majority judgment).

⁴⁵ J Comaroff ‘Rules and Rulers: Political Processes in a Tswana Chiefdom’ (1978) 13(1) *Man* 1, 2.

⁴⁶ Oomen (note 33 above) at 220.

⁴⁷ Ibid.

V THE TWO CASES: *PILANE* AND *BAKGATLA-BA-KGAFELA*

And so to the two cases. As mentioned at the outset, in the first case, *Pilane*, the appellants were all residents of Motlhabe, one of the 32 villages within the jurisdiction of the Traditional Council for the Bakgatla-Ba-Kgafela community in the North West Province, of which the first respondent, *Kgosi* Nyalala Pilane, is the recognised leader. The appellants were dissatisfied with the management of the affairs of the traditional community, which is relatively speaking a wealthy one, whose resources include income derived from platinum mining and the nearby Sun City resort.⁴⁸ The appellants alleged that the wealth of the community was unevenly and unfairly allocated, so that their village remained poor while the resources were spent on those loyal to the Traditional Council and the *Kgosi*. There is also a longstanding leadership dispute in which the first appellant asserts that he is headman or *Kgosana* of Motlhabe, but that he has been denied official recognition, and that another person has been appointed *Kgosana* who should not have been appointed if customary law had been correctly applied. Lastly, the appellants asserted that the appointed *Kgosana* does not attend to the affairs of the village.

The expert evidence before the Court includes an historical account of a split in the Bakgatla community which dates back to 1870. After a horrific incident in which the Chief at the time, *Kgosi* Kgmanyane, was ‘flogged’ by Paul Kruger for refusing to make labour available for the building of a dam, Kgmanyane left the Transvaal and settled in what is now the territory of Botswana with roughly half of his followers.⁴⁹ Kgmanyane’s successor, Linchwe, briefly sought to appoint a leader, Ditlhake, to lead the remaining community. The Transvaal Boer government did not accept his choice and chose a rival, Mokae, who was endorsed by the colonial government after the Boer War. The Bakgatla-Ba-Kgafela community is today still divided into two groups, with 32 villages in the Moruleng district of the North West Province in South Africa, and 8 villages in Mochudi in the Kgatleng district of Botswana.⁵⁰

As a result, the appellants wrote to the traditional authority on 20 July 2009 on a letter headed ‘Motlhabe Tribal Authority’ stating that they had set up a separate authority, that they would be an independent tribe and no longer fall under the Bakgatla-Ba-Kgafela (the Moruleng Bakgatla). Some time afterwards, officials from the provincial directorate of local government and traditional affairs visited Motlhabe and told the appellants that in order to secede an application had to be made to the Premier in terms of the Framework Act. Acting on this advice, the appellants decided to hold a meeting (a *Kgotha Kgothe*) in their village and invited four neighbouring villages to discuss the secession. They issued a notice again in the name of the ‘Motlhabe Tribal Authority’. Four days before the planned meeting, the police called the first appellant and told him that the meeting had

⁴⁸ The Bakgatla-Ba-Kgafela maintain a website and a newsletter. See www.bbcta.net.

⁴⁹ See report of Professor BK Mbenga, submitted to Constitutional Court by the Appellants in *Pilane* which cites I Schapera *A Short History of the Tswana People* (1942) 5.

⁵⁰ See the information contained on the Bakgatla-Ba-Kgafela Traditional Authority at: www.bbcta.net.

to be cancelled. The appellant a day or two later informed the police that the meeting would be cancelled, but in any event, the respondents went to court for an interdict. The High Court granted an interdict restraining the appellants from: organising any meeting purporting to be a meeting of the traditional community or Motlhabe Tribal Authority without authorisation of the respondents; taking any steps in conflict with the Framework Act or customary law; and ‘pretending’ to be a traditional authority under the name Bakgatla-Ba-Motlhabe.

A key issue in the case was who has the right in customary law to convene a *Kgotha Kgothe*. A *Kgotha Kgothe* is a traditional gathering in which members of a traditional community meet to debate and decide on matters affecting the community, which may include an evaluation and criticism of leaders of the community.⁵¹ The appellants argued that such a meeting may be convened at either village or traditional community level by the *Kgosana* or, in the absence of a *Kgosana*, or where the *Kgosana* fails to call it, by the community itself. The respondents argued that only a *Kgosana* may call such a meeting. Two expert witnesses lined up on each side of the debate, Professor Mbenga for the appellants and Professor Bekker for the respondents.

The first noticeable aspect of the reasoning of the majority judgment (which holds for the appellants and overturns the three injunctions granted by the High Court) is that it turns on the question of whether the respondents who sought the interdicts had established a clear right to the injunctions. The first issue here is, according to customary law, who may convene a *Kgotha Kgothe*? The majority treated this as a question of fact, on the technical procedural rule applicable in motion proceedings, that facts are to be determined on the basis of the averments raised by the appellants (who were the respondents in the High Court) in their answering affidavits together with the averments of the respondents (applicants) that were not denied.⁵² This is a rule that applies to averments of fact, not law. The consequence was that the appellants’ customary law assertions were held to be correct. In reaching this conclusion, the majority did not consider whether customary law should indeed continue to be treated as a fact in our post-Apartheid constitutional democracy.

After finding that no clear right has been established for the grant of the injunction, the majority judgment turns, almost as an afterthought and certainly in an *obiter* fashion, to a brief discussion of what it calls ‘constitutional considerations’. There, the majority reasons that ‘political participation, actuated by the lawful exercise of rights [of expression, association and assembly], can and should assist in ensuring accountability in all forms of leadership and in encouraging good governance.’⁵³ The majority judgment continues by observing that the attempts by the respondent to restrain the appellants from exercising their constitutional rights to meet and express their views is ‘disquieting’, as is the respondents’ resort to litigation to ‘deal with challenges that should more appropriately be dealt with

⁵¹ See *Pilane* (note 1 above) at para 46.

⁵² *Ibid* at para 48. This applies the well-known *Plascon-Evans* rule. *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) 620 (A) 634E–635C.

⁵³ *Ibid* at para 69.

through engagement⁵⁴ which could be seen ‘as an attempt to silence criticisms and secessionist agitation’.⁵⁵ ‘[T]his situation’, says the majority, ‘cries out for meaningful dialogue between the parties, undertaken with open minds and in good faith. One hopes that this will produce harmonious relations within the Traditional Community.’⁵⁶

The minority judgment approaches the question from the perspective that the case arises out of ‘a long and toxic history’ in which the first appellant and his father had concertedly but unsuccessfully sought to assume the headmanship of the Motlhabé community.⁵⁷ And immediately the judgment then addresses the ‘constitutional considerations’ in an important passage:

[T]hreats to traditional leadership and related institutions should not be taken lightly. The institution of traditional leadership must respond and adapt to change, in harmony with the Constitution and the Bill of Rights. But courts ought not to be dismissive of these institutions when they insist on the observance of traditional governance protocols and conventions on the basis of whatever limitation they might impose on constitutional rights. Like all others, the constitutional rights the applicants seek to vindicate are not absolute.⁵⁸

The minority judgment proceeds from the assertion that the appellants were not entitled to call a *Kgotha Kgothe* in terms of customary law. In reaching this conclusion they rely on submissions made to the Constitutional Assembly by CONTRALESA (the Congress of Traditional Leaders of South Africa) which asserts that ‘one of the most important forums for decision making is the people’s assembly (*imbizo*). Each one of the authorities has power to convene *imbizo* within his area of jurisdiction.’⁵⁹ The minority ruled that in convening a *Kgotha Kgothe*, the appellants usurped the powers of the headman and the respondents.⁶⁰ And accordingly the respondents were entitled to seek an interdict. The minority concluded this discussion by observing:

[D]isorderliness is on the rise in this country and traditional communities are no exception. ... [T]he convening of a general meeting of almost all the villagers of Motlhabé, as well as people from neighbouring villages without any legal authority had the potential of creating factions and disorder which could make the Moruleng community ungovernable.⁶¹

In one sentence, the minority asserted, without reasons, that the grant of the interdict did not breach the appellants’ rights to free association and free speech.⁶²

The second case, *Bakgatla-Ba-Kgafela*, concerned a dispute regarding the manner in which land returned to the community under the Restitution Act should be held by the community. Following meetings held in many of the villages of the Bakgatla-Ba-Kgafela during 2005, the constitution of the Association was

⁵⁴ Ibid at para 71.

⁵⁵ Ibid.

⁵⁶ Ibid at para 72.

⁵⁷ Ibid at para 76.

⁵⁸ Ibid at para 79.

⁵⁹ Ibid at para 103.

⁶⁰ Ibid at para 114.

⁶¹ Ibid at paras 117–118.

⁶² Ibid at para 112.

adopted in terms of the CPA Act with the intention that the Association would become the registered owner of the returned land. The CPA Act was adopted in 1996 with the purpose of providing for statutory associations in terms of which communities might hold land. Its Preamble provides –

Whereas it is desirable that disadvantaged communities should be able to establish appropriate legal institutions through which they may acquire, hold and manage property in common;

And whereas it is necessary to ensure that such institutions are established and managed in a manner which is non-discriminatory, equitable and democratic and that such institutions be accountable to their members;

And whereas it is necessary to ensure that members of such institutions are protected against abuse of power by others.

Section 2(1)(d) of the Act explicitly contemplates that a communal property association may be approved by the Minister of Rural Development and Land Reform where a group acquiring land wishes to form an association in accordance with the provisions of the Act. The Act provides that a constitution of a communal property association must conform to five principles.⁶³ Those principles require constitutions of communal property associations to provide for –

- (a) fair and inclusive decision-making processes;
- (b) equality of membership (including no discrimination against prospective or existing members of the Association on the grounds of race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language);
- (c) democratic internal processes that ensure that all members have the right to notice of meetings, and the right to attend, speak and vote at meetings;
- (d) fair access to the property held by the association by its members; and
- (e) the principles of both accountability and transparency to be observed in relation to the committees of the association and the financial affairs of the association.

Although the Association was provisionally registered by the Department of Rural Development and Land Reform (‘the Department’) on 10 September 2007 in terms of s 5 of the CPA Act, the Association was never formally registered by the Registration Officer in terms of s 8 of the Act.

In January 2011, an official of the Department notified the community that the terms of office of the members of the Association’s committee had lapsed. Accordingly, an annual general meeting of the Association was held, attended by representatives of 29 of the 32 villages, and the constitution of the Association was re-adopted. As provided for in the CPA Act, the annual general meeting was attended by a representative of the Department⁶⁴ who prepared a report recording that the meeting had been widely advertised in all the villages, that 86 members of the community attended the meeting and that the constitution was unanimously re-adopted.⁶⁵ As the Constitutional Court noted, the report in

⁶³ CPA Act s 9.

⁶⁴ CPA Act s 7(2). See the analysis in *Bakgatla-Ba-Kgafela* (note 2 above) at paras 25–9.

⁶⁵ See *Bakgatla-Ba-Kgafela* (note 2 above) at para 10.

effect indicated that the adoption of the constitution would not be adverse to the interests of third parties.⁶⁶

When the Department failed to register the Association, the Association approached the Land Claims Court initially seeking an order directing the Department to provide a certificate of registration for the Association and interdicting *Kgosi* Pilane from ‘intimidating, interfering and influencing officials of the Department in their dealings with the Association’.⁶⁷ It subsequently amended its relief and sought a declaration that the Association had been properly established in compliance with s 8 of the CPA Act and instructing the Director-General to effect its permanent registration.

After hearing oral evidence, the Land Claims Court granted the order sought by the Association.⁶⁸ Matojane J observed that the dispute between the Association and the Tribal Authority related to the question whether the restored land should be controlled and administered by a traditional authority or by a democratically elected Association.⁶⁹

The Tribal Authority and *Kgosi* Pilane appealed to the Supreme Court of Appeal. Relying on s 5(4) of the CPA Act, that court held that the Association had only been provisionally registered, that registration had lapsed, and accordingly the Association had ceased to exist.⁷⁰

The Association then appealed to the Constitutional Court. The Constitutional Court unanimously upheld the appeal. In the course of its judgment, the Court noted that the five principles in the Communal Property Association Act described above:

[S]afeguard the interests of members of traditional communities and empower them to participate in the management of a communal property. The creation of an association introduces participatory democracy in the affairs of traditional communities. All members of the community are afforded an equal voice in matters of the association and the property it holds on behalf of the community.⁷¹

Jafta J continued by describing the CPA Act ‘as a visionary piece of legislation passed to restore the dignity of traditional communities’.⁷² He noted that it ‘served the purpose of transforming customary law practices,’⁷³ such as those that prevented women from being allocated land. Such practices, he held, were inconsistent with s 9 of the Constitution, the equality clause.

He also held that –

[T]he democratic principles set out in section 9 of the Act curb the general power of removal in terms of which traditional leaders banished people from their neighbourhoods

⁶⁶ Ibid at para 11.

⁶⁷ Ibid at para 12.

⁶⁸ See *Bakgatla-Ba-Kgafela Communal Property Association v Minister for Rural Development and Land Reform and Others* [2013] ZALCC 16.

⁶⁹ Ibid at para 38.

⁷⁰ See *Bakgatla-Ba-Kgafela Tribal Authority and Others v Bakgatla-Ba-Kgafela Communal Property Association* [2014] ZASCA 203.

⁷¹ See *Bakgatla-Ba-Kgafela* (note 2 above) at para 30.

⁷² Ibid at para 31.

⁷³ Ibid.

for political reasons and without any hearing. Before the establishment of a democratic order in this country, courts held that banishment orders issued by traditional leaders were not contrary to the principles of natural justice despite the fact that those on whom such orders applied were not given a hearing before the orders were issued. In later decisions the banishment orders issued by traditional leaders were called ‘trekpass’ orders. The traditional leader was required only to consult the tribal council before issuing the order. The case law referred to here shows that, by executive decree, traditional leaders restrained the personal freedom of members of their communities. This brought about untold suffering to those on whom the trekpass orders applied.⁷⁴

This passage, of course, refers to the appalling powers of banishment that were entrenched and extended in s 5 of the 1927 Native Administration Act discussed earlier. The power of banishment was exercised by the Governor-General, and then the State President, as well as traditional leaders.⁷⁵ It is worth adding that in an early case, the Appellate Division took the view that s 5 did not exclude the operation of the principle of *audi alteram partem*,⁷⁶ but subsequent amendment of s 5 made it clear that a person was not entitled to a hearing prior to being banished.⁷⁷

The Constitutional Court also held that the Director-General of the Department should ‘do everything permissible’ to assist a community that decides to establish a communal property association to do so.⁷⁸ The Court found that the Director-General had not acted consistently with that duty in the case of the Bakgatla-Ba-Kgafela and had instead ‘adopted a wholly inappropriate response to the Community’s legitimate request for registration.’⁷⁹ The Minister requested the Constitutional Court to refer the dispute to mediation. However, the Court refused the request, stating that there was no basis for a mediation in the case –

Once an association qualifies to be registered, the Director-General ... has no discretion but to register the association. The fact that a traditional leader or some members of the traditional community prefer a different entity to the association is not a justification for withholding registration and imposing mediation on the parties.⁸⁰

The Court added that where a traditional community, or the majority of its members ‘have chosen the democratic route contemplated in the Act, effect must be given to the will of the majority.’⁸¹

VI TWO ASPECTS TO THE PARADOX

These two cases illustrate two key aspects of the paradox between tradition and modernity which will continue to challenge courts in South Africa: the first, perhaps most obvious, aspect relates to how courts must protect and propagate

⁷⁴ Ibid at para 32 (footnotes omitted). See *Masanya v Seleka Tribal Authority and Another* 1981 (1) SA 522 (T).

⁷⁵ For a fuller discussion, see Marcus (note 27 above) at 18–20.

⁷⁶ See *Saliva v Minister of Native Affairs* 1956 (2) SA 310 (A) 318.

⁷⁷ Act 7 of 1973 s 1. See, further, Marcus (note 27 above) at 19.

⁷⁸ *Bakgatla-Ba-Kgafela* (note 2 above) at para 50.

⁷⁹ Ibid at para 51.

⁸⁰ Ibid at para 54.

⁸¹ Ibid at para 55.

the rights and values of the Constitution in the sphere of traditional leadership and law, something on which the majority and minority seem to have disagreed in *Pilane* but on which there was a unanimous agreement in *Bakgatla-Ba-Kgafela*; and the second relates to how courts should work with customary law in our constitutional democracy, given customary law's modes of functioning.

A The first aspect of paradox: Conflict between substantive constitutional rights and values and rules of customary law and traditional leadership

In *Pilane*, there appears to be a difference of emphasis and approach between the majority and minority as to how to accommodate the tensions or contradictions between constitutional rights and values and perceived rules of customary law. I cited earlier the majority judgment which, as an afterword to its conclusion on a technical basis, emphasised the importance of 'political participation, actuated by the lawful exercise of rights [of expression, association and assembly]' in 'ensuring accountability in all forms of leadership and in encouraging good governance'.⁸²

The minority on the other hand placed the emphasis differently: on the problem of disorderliness and the risk that the holding of a public meeting would foster 'ungovernability'.⁸³ The minority also noted that no rights are absolute in the South African Constitution and that it may be justifiable to limit constitutional rights to permit 'the observance of traditional governance protocols and conventions'.⁸⁴

The approach of the minority arguably gives too little weight to the Constitution's repeated and firm assertions that the institution, status and role of traditional leadership, and the rules of customary law, are recognised in our new constitutional order 'subject to the Constitution'. 'Subject to the Constitution' must mean that existing practices related to the institution of traditional leadership that limit constitutional rights may only be sustained if there are constitutionally valid reasons for sustaining them, reasons that go beyond the simple fact that they constitute practices of traditional leadership. Accordingly a court must consider whether there are other constitutionally valid considerations that outweigh the limitations of the rights in question. In the absence of such reasons, constitutional norms must take precedence over rules and practices of customary law and traditional leadership.

This approach was adopted in the unanimous judgment of the Court in *Bakgatla-Ba-Kgafela*, where, writing for the majority, Jafta J noted that customary law only 'remains in force to the extent that it is in line with the Constitution and Acts of Parliament'.⁸⁵ He described the CPA Act as a 'visionary'⁸⁶ piece of legislation passed 'to transform customary law and bring it in line with the Constitution'⁸⁷ and to extend 'the fruits of democracy to traditional communities that are still subject to customary law'.⁸⁸ This is what the Constitution itself mandates, with

⁸² See *Pilane* (note 1 above) at para 69.

⁸³ *Ibid* at paras 117–118.

⁸⁴ *Ibid* at para 79.

⁸⁵ *Ibid* at para 31.

⁸⁶ *Ibid*.

⁸⁷ *Bakgatla-Ba-Kgafela* (note 2 above) at para 33.

⁸⁸ *Ibid*.

its insistence that customary law and traditional authority are recognised ‘subject to the Constitution’.

Of course, how best to accommodate constitutional values within customary law will often give rise to disagreement. Indeed, it is that sort of disagreement that underpinned the Constitutional Court’s judgment in *Bhe and Others v Magistrate, Khayelitsha and Others*.⁸⁹ The difference between the majority and minority judgments in *Bhe*, in my view, lay in different responses to the question of how best to accommodate constitutional values in customary law. How much weight should be given to avoiding the ‘fossilisation’ customary law? And how much to the Court’s constitutional duty to protect the right not to be discriminated against on the grounds of sex? The majority took the view that, in face of a customary rule of primogeniture widely applied across the country, it was impossible for it to craft a solution that would protect gender equality without employing a statutory scheme adopted by Parliament for a temporary period, until Parliament had time to address the lacuna that would result from striking down the rule of primogeniture. The minority took the view that the Court should let new rules be developed through the living customary law and not replace customary law with a statutory framework, even temporarily. The majority’s view of the minority solution was that it would provide too weak a protection for the right to equality. In many ways, this was an intractably difficult question.⁹⁰ The disagreement in *Bhe* is a disagreement about how best to work with customary law within a constitutional framework, which raises the second aspect of our constitutional paradox, to which I now turn.

B The second aspect of the paradox: different methods of ‘working’ with law

It will be useful to preface the discussion of the second aspect of the paradox, with a consideration of the question: is the content of customary law a matter of fact or law in our legal system? The majority judgment in *Pilane* (unlike the minority) appeared to consider the question of what the relevant, applicable rules of customary law were to be a question of fact.⁹¹ It is true that customary law, like international law, has always been treated as a matter of fact to be proved by leading expert witnesses who should testify as to the rules of customary law. The position changed slightly in 1988 when the Law of Evidence Amendment Act provided that courts could take judicial notice of the rules of customary law.⁹²

⁸⁹ [2004] ZACC 17, 2005 (1) SA 580 (CC), 2005 (1) BCLR 1 (CC).

⁹⁰ Just how difficult the question was, is illustrated by SM Weeks’ empirical study of the legacy of *Bhe* in two rural villages in Mpumalanga: ‘Customary Succession and the Development of Customary Law: The *Bhe* Legacy’ in A Price & M Bishop (eds) *A Transformative Justice: Essays in Honour of Pius Langa* (2015) 215.

⁹¹ See *Pilane* (note 1 above) at para 48ff (Court reasoned that ‘The factual dispute relating to the entitlement to convene a *Kgotha Kgothe* according to customary law was not referred to oral evidence in the High Court’).

⁹² See Act 45 of 1988 s 1. See also *Alexkor Ltd and Another v Richtersveld Community and Others* [2003] ZACC 18, 2004 (5) SA 460 (CC), 2003 (12) BCLR 1301 (CC) at para 52.

Evidence is often helpful in determining the content of customary law, as the recent decision of the Eastern Cape High Court in *Premier of the Eastern Cape and Others v Ntamo and Others* illustrates.⁹³ The question was what the customary law rules were relating to the selection of headmen in the Cala district in the Eastern Cape. The undisputed expert evidence of Professor Lungisile Ntzebeza established that in Cala, the community has as a matter of customary law elected its headmen for at least the last 60 years. Headmen have thus not been selected by the royal family. The recognition of a headman by the MEC for Local Government and Traditional Affairs in the Eastern Cape of a person nominated by the royal family, but not elected by the community, was therefore set aside.

What should be emphasised, however, is that from the perspective of the Constitution, the rules of customary law remain a question of law, and not one of fact. Customary law is, as far as the Constitution is concerned, clearly law and South African law at that. Moreover, s 211(3) provides that ‘courts must apply customary law, when that law is applicable’; and s 39(2) provides that courts and other fora, when developing customary law, must do so in accordance with the spirit, purport and objects of the Constitution.

Accordingly, the view of the majority in *Mayelane*⁹⁴ seems to be preferable to that of the majority in *Pilane*. In *Mayelane*, Froneman, Khampepe and Skweyiya JJ (without reference to *Pilane*) held that the ‘[d]etermination of customary law is a question of law, as is determination of the common law’.⁹⁵ Recognising that customary law is a question of law, not fact, does not mean that evidence of both members of a community, and expert witnesses, will not be relevant in the determination of the content of customary law. The Recognition of Customary Marriages Act defines ‘customary law’ as the ‘customs and usages traditionally observed among the indigenous peoples of South Africa and which form part of the culture of those peoples’.⁹⁶ What constitutes a ‘traditionally observed’ custom will be properly a matter for evidence.⁹⁷ Nevertheless, as the majority in *Mayelane* held, once that evidence has been heard, it is the ‘function of a court to decide what the content of customary law is, as a matter of law not fact’.⁹⁸

Yet, it is precisely in determining (and developing) the content of customary law, that the excruciatingly difficult second aspect of the paradox emerges. How does a Court determine and develop the rules of customary law in a manner that is respectful and not destructive of customary law itself? In contrast to the *substantive nature* of the first aspect of the paradox, which is concerned with the conflict between the substantive values and rules of the Constitution and the substantive rules of customary law and traditional leadership, this second aspect can perhaps loosely be labelled the *systemic* aspect of the paradox.

⁹³ [2015] ZAEBHC 14, 2015 (6) SA 400 (ECB).

⁹⁴ *Mayelane* (note 13 above).

⁹⁵ *Ibid* at para 47.

⁹⁶ Act 120 of 1998 s 1.

⁹⁷ See the reasoning of the majority decision in *Mayelane* (note 13 above) at paras 47–60, and the reasoning in the minority decision at paras 97–98.

⁹⁸ *Ibid* at para 61.

It runs as deep, if not deeper than the first aspect of the paradox. It is perhaps irresoluble. Let me explain. Customary law operates differently to a legal system based on the common law and statute. Under customary law, there was, traditionally, no system of precedent, nor even a strong sense that justice lies in treating like with like. The focus of customary law dispute resolution was often consensus-seeking,⁹⁹ seeking to accommodate and reconcile differences in a manner that would reduce conflict within the community, and be broadly acceptable to all. As Professor Mbenga described it in his evidence to the Court in *Pilane*:

[R]ules are not treated as a fixed structure that regulate societal organisation with some occasional leeway for exceptions. Rather than blindly referring to rules in making a decision, the current reality of every situation is considered and the rule tested against the customary values.

Customary law thus develops incrementally, organically and unevenly, and its content varies depending on circumstance and context. So rules of customary law are open-textured and without strong predictive force, as we have seen in relation to the rules of chiefly succession, where both Oomen and Comaroff assert that the ‘accepted’ rules found application in only a small proportion of cases. Almost certainly the predictive force of rules will vary depending on the rule and on the context. The question of how and when rules vary is probably in the first place an empirical question that can only be answered by detailed study in specific communities.

An interesting question for such study would be whether the adoption of the Constitution, with its clear statements on gender equality, and the principles of openness, responsiveness and accountability as the hallmarks of governance of our new order have generated greater uncertainty in relation to the rules of customary law. It may well be that the passing of the new Constitution has ‘destabilised’ old certainties, without fully establishing new ones. A recent major study of 3 000 women in three different rural communities (Msinga in KwaZulu-Natal, Keiskammahoek in the Eastern Cape and Ramatlabama in the North-West) ‘provided clear evidence that women had a greater degree of access to land that would be expected from reading the standard literature on customary law and practices.’¹⁰⁰ When community members were asked why this might be so, many explained the change in women’s access to land by reference to ‘democracy’ and ‘women’s rights’.¹⁰¹

If the Constitution is having this effect on customary law and practice, it is neither surprising nor novel, for traditional leadership and customary law have long been infected by other modes of practice. Sometimes the effect has been less desirable. Under the colonial administration, and Apartheid, the ‘bottom up’, consensus-seeking mode of doing customary law was undermined by a new system of courts with jurisdiction to determine customary law disputes. The so-called

⁹⁹ See, *Bhe* (note 89 above) at para 81; *Mayelane* (note 13 above) at para 24(f).

¹⁰⁰ D Budlender ‘Women, Marriage and Land: Findings from a Three-site Survey’ in A Claassens & D Smythe *Marriage, Land and Custom: Essays on Law and Social Change in South Africa* (2013) 28, 47.

¹⁰¹ *Ibid* at 48.

Native Courts and Native Appeal Court developed a system of precedent in relation to the rules of customary law. The magistrates in those courts were white men who had no personal experience of the system of customary law and who, by and large, sought to interpret and apply customary law through the prism of the law with which they were familiar, common law. The jurisprudence was informed as well, in Natal, by the codification of customary law into written law. The consequence of grafting a mode of precedent-based adjudication onto customary law was to destroy the process whereby customary law developed.¹⁰² The Native Appeal Court, and other courts, insisted that customary law be applied in accord with its jurisprudence. The consequence was that the growth and development of customary law, at least in the courts, was halted. It became ‘fossilised’¹⁰³ and unresponsive to social change. The law that was developed by the courts, and codified in the Natal Code and the KwaZulu Act, has come to be referred to as ‘official’ or ‘codified’ customary law.¹⁰⁴

Nevertheless, in customary tribunals and community meetings all over the country, customary law continued and continues to shift and change. This law is not the official customary law but the so-called living customary law. The Constitutional Court has recognised on several occasions that it should, when applying customary law, seek to apply living customary law. Yet, how should the Court determine what the living customary law is given its fluidity and lack of hierarchy? Are there many living customary laws, and which is applicable? And once the court determines what the living customary law rule is, does it inevitably by the very act of determining it, render it no longer ‘living’?

As Langa DCJ acknowledged in *Bhe* –

The difficulty lies not so much in the acceptance of the notion of ‘living’ customary law, as distinct from official customary law, but in determining its content and testing it, as the Court should, against the provisions of the Bill of Rights.¹⁰⁵

The first difficulty is identifying the content of the ‘living’ customary law. Yet, as soon as a rule of ‘living’ customary law is captured in a Constitutional Court judgment, like a butterfly pinned to a board, it will no longer be ‘living’ customary law. For like the development of customary law by the Native Appeal Court, the moment of determination may well ‘fossilise’ the rules of customary law.

It is clear that the Constitutional Court is worried about this systemic aspect of the paradox and there is much more work to be done on it. Ongoing empirical work as to both the content of customary law, and its modes of functioning, will be central to this task but jurisprudential and theoretical work is required as well.

¹⁰² In this regard, see Guy’s trenchant critique of the project of codification in his biography of Shepstone, Guy (note 18 above) at 522–527. The Code, he argues, constituted ‘a complete contrast to Shepstone’s approach. ... It replaced the immediate flexibility of the oral with the remote rigidity of the written.’ Ibid at 525.

¹⁰³ See *Bhe* (note 89 above) at para 43. See also, *Gumede v President of the Republic of South Africa and Others* [2008] ZACC 23, 2009 (3) SA 152 (CC), 2009 (3) BCLR 243 (CC) at para 20.

¹⁰⁴ *Gumede* (note 103 above) at para 11.

¹⁰⁵ See *Bhe* (note 89 above) at para 109; see also *Mayelane* (note 13 above) at para 25.

VII CONCLUSION

There are two aspects to the paradox between tradition and modernity that lies at the core of our constitutional order. In addressing both, we must start from the text of the Constitution and recognise that the constitutional starting point is that customary law must be applied by the courts ‘when that law is applicable, subject to the Constitution’. If we recognise that the Constitution is now the *grundnorm* of the South African polity, as the Court did in *Bakgatla-Ba-Kgafela*, it is unlikely that we will make a material error in addressing the substantive aspect of the tradition/modernity paradox.

Much more challenging will be the management of the second or systemic aspect of the paradox. In my view, that aspect of the paradox will prove to be an endemic feature of South African constitutional law. Wherever it arises, it will require careful contextual analysis and review, to determine which remedy will best accommodate the competing concerns. Sustained empirical work on the customary living law and its response to constitutional decisions and values will be invaluable in this regard, as will thoughtful jurisprudential analysis. Nevertheless, accommodating the tension that arises between the ‘bottom up’, consensus-seeking mode of doing customary law and the ‘top-down’ assertion of constitutional rules through the mechanism of constitutional supremacy will be a persistent challenge. And one that may well give rise to disagreement amongst judges, academic commentators, and citizens, as it did in *Bhe*. Such disagreement should not perturb us. Disagreement is an important part of living in a democracy. It sharpens our understanding of intractably difficult questions and enables us to grapple with them more fully. As Justice Langa himself observed in a lecture in memory of Bram Fischer –

A judgment of a court sets the law in stone and in the process silences other voices as wrong. A dissent keeps those voices alive. The voice may be faint, but it is there for future generations to hear.¹⁰⁶

¹⁰⁶ See P Langa ‘The Fifth Bram Fischer Memorial Lecture: The Emperor’s New Clothes: Bram Fischer and the Need for Dissent’ (2007) 23 *South African Journal on Human Rights* 362, 370. See also the discussion in D Bilchitz ‘Humility, Dissent and Community: Exploring Chief Justice Langa’s Political and Judicial Philosophy’ in Price & Bishop (note 90 above) 88.

The Exceptionalism and Identity of Customary Law under the Constitution

Wilmien Wicomb*

I INTRODUCTION

In the lead essay to this symposium, Geoff Budlender and Aninka Claassens argue for the need for a comprehensive review of ‘the impact of transformative constitutionalism on the customary law’ in South Africa. They argue that the Constitutional Court’s ‘real-world’ approach to finding, interpreting and applying customary law has been a key contributor to this project.

At the same time, the authors are careful to emphasise that their exposition of customary law is not in the interest of an argument for ‘customary law exceptionalism’. This is so for two reasons: first, they argue that ‘many of the questions which arise in relation to the transformation of the customary law also apply to the transformation of the common law’.¹ Secondly, they emphasize, following Martin Chanock, that

insulation and separation of common law from customary law under apartheid and colonialism was a key component of the overarching project of racial domination ... Blindness to the self-referential privileging of ‘formal’ state law, at the expense of customary repertoires that remain strong despite decades of state distortion, has material consequences for law’s legitimacy and its reach.²

Rather, under the Constitution, customary law ‘feeds into, nourishes, fuses with and becomes part of the amalgam of South African law’.³

There is no doubt that the constitutional transformation of customary law depends on a paradigm shift in our understanding of customary law and how it fits into the South African legal system. However, I would suggest that, given the very legal-political context to which Claassens and Budlender refer, it would be premature for customary communities to argue that their law is not exceptional. That context is dominated by two realities: firstly, the discrepancy in the development of customary law and its status under the Constitution inside and outside the Constitutional Court; and secondly, the relative failure (thus far)

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¹ A Claassens & G Budlender ‘Transformative Constitutionalism and Customary Law’ (2016) 6 *Constitutional Court Review* 75, 76.

² *Ibid* at 76, n 12.

³ *Ibid* at 77. Chanock takes this position further, arguing that we should do away with any distinction between the common law and customary law. M Chanock ‘African Constitutionalism from the Bottom up’ Lecture (University of Cape Town, April 2015) (on file with the author).

of the redistribution of wealth and the eradication of inequality in post-apartheid South Africa.

That is not to deny the importance of asserting that customary law is and should be treated in many ways as equal or identical to other sources of law. In fact, I would argue that for rural communities to have the best possible chance of benefiting from what Claassens and Budlender describe as ‘the Court’s contextual approach to the realisation of rights, which foregrounds the real-life effect of poverty and inequality in people’s lives’,⁴ exceptionalism and identity of customary law within the South African legal landscape must co-exist.

In what follows, I first highlight significant moments in the development of the political narrative around customary law and traditional leadership since democracy. The frame for this discussion is the shifting understanding of customary law *vis-à-vis* traditional leadership in the Constitution between 1996 and 2013. In their essay, Claassens and Budlender briefly set out the statutory framework that was developed and its fault lines and, importantly, note that today, ‘the underlying premise of the [Traditional Leadership and Governance] Framework Act and subsequent traditional leadership laws appears to be that *customary law is an adjunct of the powers vested in officially recognised traditional leaders and councils*.’⁵ Put differently, there has been a shift from understanding the recognition of traditional leadership as a necessary consequence of the constitutional recognition of customary law systems, to customary law being viewed as an accessory to the institution of traditional leadership. This may seem like a simple or unimportant shift in emphasis. But I will argue that it has been responsible for the virtual disappearance of customary law as law.⁶ My description of these shifting power dynamics will be bookended by the *First Certification Judgment*⁷ on the one hand, and two of the Constitutional Court’s 2013 customary law judgments – *Pilane*⁸ and *Sigcau*⁹ – on the other.

Next, I set out the arguments for a version of customary law exceptionalism that can exist only in tension with its opposite, the understanding that customary law is identical to other sources of law. I will refer to some cases as examples of how this tension has played out for real communities and the legal strategies employed to manage that tension.

This article makes a prescriptive rather than a descriptive argument. I do not analyse characteristics or nature of customary law, common law or statute law, and compare these in an attempt to describe them as either identical, different or something in between. Rather, I seek to understand the strategic benefits for vulnerable communities in talking about customary law in one way or the other as they try to negotiate better lives for themselves under the Constitution.

⁴ Claassens & Budlender (note 1 above) at 78.

⁵ Ibid at 81 (my emphasis).

⁶ As Claassens and Budlender point out, it has also facilitated new levels of elite capture of resources. Ibid at 81.

⁷ *Certification of the Constitution of the Republic of South Africa, 1996* [1996] ZACC 26, 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC) (‘*First Certification Judgment*’).

⁸ *Pilane and Another v Pilane and Another* [2013] ZACC 3, 2013 (4) BCLR 431 (CC).

⁹ *Sigcau v President of the Republic of South Africa and Others* [2013] ZACC 18, 2013 (9) BCLR 1091 (CC).

II THE CONSTITUTIONAL COURT AND CUSTOMARY LAW 1996–2012

The very first time the Constitutional Court was faced with issues of customary law was, fittingly, in the *First Certification Judgment*.¹⁰ The customary law-related issues had to do with the status and function of traditional leaders – and were raised by traditional leaders themselves.

Anyone with a vague interest in the politics and jurisprudential developments around customary law in South Africa would not be surprised that the customary law space was dominated by traditional leadership issues. Today, a reference to customary law is in practice understood to be a reference to traditional leadership.¹¹

But back in 1996, this was not the case. The Restitution of Land Rights Act¹² and the Interim Protection of Informal Land Rights Act,¹³ the first two post-democratic pieces of legislation with real significance for the rights of rural communities, did not mention traditional leaders. They were simply not a significant part of how democratic rural South Africa was envisioned at the time.

It was thus not surprising that a group of traditional leaders complained to the Constitutional Court that the Final Constitution did not protect the ‘institution, status and role’ of traditional leadership as required by the Constitutional Principles. Their objections were based on two grounds: first, they argued that the Constitution merely ‘acknowledged’ their powers and functions, without ‘protecting’ it. Secondly – and significantly – they argued that *the substance of their powers and functions should not be based on national legislation but on ‘indigenous law’*.¹⁴ What they sought was a role for traditional leadership in the new democratic government.

In hindsight, the demand of traditional leaders to draw their authority from customary law rather than statute in order to ensure greater powers is deeply ironic: as we shall see, the rise of traditional leadership over the last twenty years was facilitated precisely by the statutory empowerment of these leaders and the further marginalisation of customary law, including the mechanisms of accountability it requires.

In any event, the Court disagreed that the Constitutional Principles required the express institutionalisation of governmental powers and functions for traditional

¹⁰ *First Certification Judgment* (note 7 above).

¹¹ For example, during the public hearings to the Mining and Petroleum Resources Development Amendment Bill (MPRDAB) in Parliament in 2014, communities told the responsible portfolio committee that they rejected the bill because, amongst other things, it ignored their customary rights to the land and resources and did not require mining companies or government to seek the consent of these rightsholders before entering upon the land as is required in terms of customary law. Early in 2015, President Zuma sent the bill back to the National Assembly citing four reasons. One of those reasons were that the legislature did not properly apply its mind to the fact that the MPRDAB affected customary law rights of communities. What they should have done, President Zuma advised, was consult the National House of Traditional Leaders (rather than, for example, the local communities who raised these issues in parliament). One addresses customary law by addressing traditional leaders.

¹² Act 22 of 1994 (Restitution Act).

¹³ Act 31 of 1996 (IPILRA).

¹⁴ The government of the day, it seems, felt even stronger about the limited role to be afforded to traditional leaders. The Draft White Paper of 2002 stated that ‘the Constitution entrusted to the three spheres of government all powers and functions which are governmental in nature, and assigned to traditional leadership those functions which are customary in nature’.

leaders. It found it ‘neither necessary nor desirable to make definitive statements at this stage about the precise scope of the words “institution, status and role” of traditional leadership’.¹⁵

Re-reading the *First Certification Judgement* in the current context, it is noticeable that the Court insists throughout on mentioning traditional leadership alongside customary law and its interpretation;¹⁶ never traditional leadership as a thing in itself, not rooted in and dependent on customary law for its existence. While declining to define the status of traditional leadership, for example, the Court says in the same breath, that it is equally not ‘obliged to define the manner in which indigenous law is to be interpreted’.¹⁷ In addressing the traditional leaders’ objection that their authority would not be sourced from customary law exclusively, the Court acknowledges the distortions of the past. It refers to the impact of these distortions on indigenous law as a system, however, rather than on traditional leadership per se. Finally, the Court states that the Constitutional Principles acknowledge ‘three elements of traditional African society and continuing cultural relevance’: traditional leadership, customary law and traditional monarchy.¹⁸ It concludes: ‘In our view, therefore, the NT complies with CP XIII by giving express guarantees of the continued existence of traditional leadership *and the survival of an evolving customary law*’.¹⁹

This insistence on ensuring that traditional leadership institutions are bound to their customary law roots is contained in the constitutional provisions themselves. Chapter 12, which deals with traditional institutions, recognises the function, status and role of traditional institutions *in terms of customary law*,²⁰ while a traditional authority is only recognised if ‘it observes *a system of customary law*’.²¹

Claassens and Budlender describe how the Constitutional Court established far-reaching principles between 2003 and 2008 in facilitating the transformation of customary law under the Constitution. In addition, I want to emphasize the important statements about the *status* of customary law *as law* which has emanated from the Court. In contemplating the place occupied by customary law in our constitutional system, the Court said, in *Bhe*:

Quite clearly the Constitution itself envisages a place for customary law in our legal system. Certain provisions of the Constitution put it beyond doubt that our basic law specifically requires that customary law should be accommodated, not merely tolerated, as part of South African law, provided the particular rules or provisions are not in conflict with the Constitution.²²

Langa DCJ based his confirmation of the constitutional recognition of customary law as a source of law on ss 30, 31, 39(2) and 39(3) of the Constitution. The last

¹⁵ *First Certification Judgment* (note 7 above) at para 193.

¹⁶ At the time, the Court still used the term ‘indigenous law’ rather than customary law.

¹⁷ *First Certification Judgment* (note 7 above) at para 193.

¹⁸ *Ibid* at para 195.

¹⁹ *Ibid* at para 197 (my emphasis).

²⁰ Constitution s 211(1).

²¹ Constitution s 211(2).

²² *Bhe and Others v Khayelitsha Magistrate and Others* [2004] ZACC 17, 2005 (1) SA 580 (CC), 2005 (1) BCLR 1 (CC) at para 11.

provision recognises any rights conferred by customary law, as long as these are consistent with the Bill of Rights. He continues:

Finally, section 211 protects those institutions that are unique to customary law. It follows from this that customary law must be interpreted by the courts, as first and foremost answering to the contents of the Constitution. It [customary law] is protected by and subject to the Constitution in its own right.²³

This affirms that the validity of customary law provisions must not to be tested against common law or legislation, but only against the Constitution.

Critically, the Court in *Alexkor*²⁴ and *Bhe*²⁵ recognised the status of customary law under the Constitution as an independent system of law that should be interpreted on its own terms and within its own context – with no reference to traditional leadership. The only time Deputy Chief Justice Langa mentions Chapter 12 of the Constitution, for example, is to support the idea that customary law is given full recognition and protection by the Constitution in that the Constitution even protects the institutions that are unique to it. In *Tongoane*,²⁶ the Court held that the Communal Land Rights Act,²⁷ promulgated to give effect to s 25(6) of the Constitution, was to step into a space already regulated by law, namely customary law:

[T]he field that CLARA now seeks to cover is not unoccupied. There is at present a system of law that regulates the use, occupation and administration of communal land. This system also regulates the powers and functions of traditional leaders in relation to communal land. It is this system which CLARA will repeal, replace or amend.²⁸

Glaringly absent from these pronouncements on the status, role and function of customary law under the Constitution, is any insistence on the centrality of traditional leadership. The same period of time, however, saw the narrative outside the Court take the opposite direction.

III THE POLITICAL NARRATIVE ON THE STATUS OF TRADITIONAL LEADERSHIP AND CUSTOMARY LAW 1996–2012

A Legislative and Executive Developments

In 2000, Minister Sydney Mufamadi²⁹ released a Discussion Document that sought to engage ‘the precise way in which the institution [of traditional leaders]

²³ Ibid at para 41.

²⁴ *Alexkor Ltd and Another v Richtersveld Community and Others* [2003] ZACC 18, 2004 (5) SA 460 (CC), 2003 (12) BCLR 1301 (CC) at fn 51 (held that ‘the Constitution acknowledges the originality and distinctiveness of indigenous law as an independent source of norms within the legal system.’)

²⁵ *Bhe* (note 22 above) at para 42.

²⁶ *Tongoane and Others v National Minister for Agriculture and Land Affairs and Others* [2010] ZACC 10, 2010 (6) SA 214 (CC), 2010 (8) BCLR 741 (CC).

²⁷ Act 11 of 2004 (CLRA).

²⁸ *Tongoane* (note 26 above) at para 79.

²⁹ Minister of Provincial and Local Government. Unlike today, there was no ministry dedicated to ‘traditional affairs’.

will promote constitutional democracy'.³⁰ The document asked hard questions about the accountability of unelected structures, and expressly admitted that 'the customary structures of governance of traditional leadership were put aside or transformed' by the colonial and apartheid governments.³¹

While this suggested a sensitivity to the colonial project of uncoupling traditional leadership from its source in customary law, the Discussion Document elsewhere betrays the entrenchment of that very project. The introduction announces that the Constitution 'provides...for the recognition of the status and role of the institution of traditional leadership in South Africa. *In addition*, customary law is recognised, once again subject to the Constitution'.³²

The Draft White Paper on Traditional Leadership that followed in October 2002 held that traditional leadership could only function to promote democratic governance and stability in rural areas 'if measures are taken to ensure that people in rural areas shape the character and form of the institution of traditional leadership at a local level, inform how it operates and hold it accountable'.³³ Significantly, the Draft emphasized that the institution of traditional leadership 'derives its mandate and primary authority from applicable customary laws and customary practices'.³⁴

In July 2003, the White Paper was gazetted.³⁵ It signalled an abrupt and emphatic shift in direction. Whereas previous policy documents bemoaned the distortion and thus illegitimacy of Apartheid 'bantu' authority structures, the White Paper lauds the 'developmental' functions afforded to these structures by the old regimes as having played an important role in rural development and should be encouraged to continue. While previous documents acknowledged a split in opinion as to whether traditional leaders should be accountable to the community or the government, the White Paper settles the issue: in contravention of customary law, traditional leaders would be accountable to government only.

2003 also saw the Constitutional Court establish the status of customary law under the Constitution in definitive terms, and with no reference to traditional leaders in *Alexkor*³⁶ and *Bhe*.³⁷ In the very same year, the enactment of the Traditional Leadership and Governance Framework Act³⁸ saw the changing rhetoric around traditional leadership culminate in legislation that makes the existence of custom entirely dependent on the existence of a traditional leader. The definition of 'traditional community' in the Act rests on a community

³⁰ Department of Provincial and Local Government 'A Draft Discussion Document: Towards a White Paper on Traditional Leadership and Institutions' (11 April 2001) 3, available at www.gov.za/sites/www.gov.za/files/trad_0.pdf.

³¹ *Ibid* at 14.

³² *Ibid* at 4 (my emphasis).

³³ Draft White Paper on Traditional Leadership, *Government Gazette* 23984, General Notice 2103 (29 October 2002) 4, available at http://www.gov.za/sites/www.gov.za/files/23984_1.pdf.

³⁴ *Ibid* at 19.

³⁵ White Paper on Traditional Leadership and Governance, *Government Gazette* 25438, General Notice 2336 (10 September 2003), available at <http://www.polity.org.za/article/white-paper-on-traditional-leadership-and-governance-july-2003-2003-09-30>.

³⁶ *Alexkor* (note 24 above).

³⁷ *Bhe* (note 22 above).

³⁸ Act 41 of 2003 (Framework Act).

being 'subject to a system of traditional leadership in terms of that community's customs'.³⁹

As Claassens and Budlender explain, the Framework Act subsequently became the cornerstone of other pieces of legislation that sought to further entrench and increase the powers of traditional leaders far beyond what they have under customary law, notably the Communal Land Rights Act and the Traditional Courts Bill.⁴⁰ The former was successfully challenged by four rural communities in the Constitutional Court in 2010,⁴¹ while the latter has twice been withdrawn from Parliament (in 2008 and 2013) following fierce opposition from rural constituencies (in particular women) and civil society more broadly. Parliament's failure to successfully pass legislation entrenching the power of chiefs when properly fulfilling its mandate of public participation⁴² is telling.

The pro-traditional leadership elements in the administration may have been unsuccessful in passing the desired legislation. But they have been particularly successful at solidifying the idea that the source of traditional leadership's power and mandate is statute rather than customary law. The content of customary law, in as far as that may still matter for internal arrangements, is in turn the prerogative of traditional leaders.

For example, in 2014 a community in Cala in the Eastern Cape took the provincial government to court because it confirmed the appointment of the headman of their community despite the fact that he had not been elected, as their customary law required. The Eastern Cape Traditional Leadership and Governance Act,⁴³ like the Framework Act, requires traditional leaders to be identified 'in terms of customary law'. However, their chief ignored the candidate the community had elected. He identified an entirely different person (and a member of the chief's clan) to be their headman.

In response, the government argued – without a touch of irony – that the phrase 'in terms of customary law' in the Framework and the Eastern Cape Act should be interpreted to mean 'in terms of royal blood'. In meetings with the community, officials from the Department of Cooperative Governance and Traditional Affairs and from the Premier's office repeatedly insisted that while the community may have been allowed to practise their custom before the 'new laws' (Framework Act et al) came into being, under the new legislation, customary law that is not consistent with the now official chief-centred version of custom, is

³⁹ This is particularly significant given that there are communities in many areas of South Africa whose customs do not include hereditary traditional leadership structures – these communities have, under the statute regime, been forced to adopt such hereditary leaders.

⁴⁰ B 1-2012.

⁴¹ *Tongoane* (note 26 above).

⁴² The relevant procedures to be followed by Parliament for a bill to be enacted into law are set out in ss 74–77 of the Constitution. The CLRA was found unconstitutional in *Tongoane* on the grounds of Parliament's failure to pass the Act in the National Council of Provinces as it was incorrectly tagged as a s 75 Bill. The Traditional Courts Bill was correctly tagged – but the Bill could not withstand the pressure of endless public hearings where many communities fiercely objected to it.

⁴³ Act 4 of 2005.

outlawed. Fortunately, the High Court did not share that view, and set aside the government's decision.⁴⁴

B The Politics of Law

This history raises at least two questions. How did it happen that the narrative inside and outside the Court developed in exactly opposite directions? And secondly, is there any limitation on the extent to which Parliament can change customary law through regulating it? I will shortly address the first question here, and return to the second later.

One can only speculate about why the Court and the policy- and lawmakers developed opposing understandings of what the constitutional recognition of customary law means. The Mbeki administration's political decision to recast traditional leaders as a pillar of the new South African democracy certainly played a major role. But in truth, it was a complex interplay of intentional and unintentional events.

For example, it so happened that the Constitutional Court was not faced with a single customary law dispute that related to traditional leadership until 2008 (*Shilubana*⁴⁵) and only encountered the statutory regulation of traditional leadership in 2013. Its earlier cases focused on customary law issues other than leadership (*Alexkor* and *Bbe*). It was thus free to develop principles of customary law recognition in a space where traditional leadership, and in particular the powerful statutory version of the institution, played no role.

Second, while the Court was unengaged with traditional leadership, the only area of customary law that the Constitution expressly envisioned to be regulated by the legislature, was the roles and functions of the institution of traditional leaders. Traditional leadership was quite naturally the subject of all customary law-related enquiries of the relevant Department. The pressure from the Mbeki administration from 2002 onwards to 'cleanse' customary law of any colonial or Apartheid distortions had the further effect that the focus was exclusively on the aspect *most distorted* by the previous regimes: traditional leadership, including succession. In an ironic twist, the myopic focus on eliminating distortion from traditional institutions missed the far more fundamental point: that previous regimes had successfully uncoupled traditional institutions from their roots in customary law.

Third, decades of customary law relegation to a secondary form of 'practice' – rather than law – inevitably entrenched the view that traditional leadership could not rest primarily on customary law. That was seemingly true for the officials and politicians of the new democratic government. The contradictions inherent to the 2000 Discussion Document make the point. In fact, the remarkable paradigm shift in the Constitutional Court's jurisprudence is probably more surprising than the other branches' furtherance of the colonial and apartheid narrative.

⁴⁴ *Premier of the Eastern Cape and Others v Ntamo and Others* [2015] ZAECBHC 14, 2015 (6) SA 400 (ECB).

⁴⁵ *Shilubana and Others v Nwamitwa* [2008] ZACC 9, 2009 (2) SA 66 (CC), 2008 (9) BCLR 914 (CC).

Finally, the politics of votes⁴⁶ and of resources⁴⁷ documented elsewhere undoubtedly played a significant part in the increasing transfer of power to traditional leaders.

However it happened, the political understanding of the Constitution's recognition of customary law today is that it is fundamentally about the recognition of traditional leadership. As a result, customary law has in practice not regained its status as law proper. The result is that, at least in the official view, customary law cannot be the source, limitation, or description of traditional leadership and its functions.

IV THE CONSTITUTIONAL COURT AND CUSTOMARY LAW: 2013

In this context, 2013 was a landmark year for customary law in the Constitutional Court.

In the previous Part, I highlighted two political developments of the 2000s. On the one hand, as early as 2003, the White Paper ensured that traditional leaders would be accountable to the government rather than to the communities they purport to serve. On the other, and as a result of more incremental shifts and changes, the mandate and power of traditional leaders are today perceived as being sourced in statute rather than customary law. It is ironic that, as noted earlier, in the *First Certification Judgment* traditional leaders argued that their mandate and authority should be derived from customary law and not statute. They could not have anticipated that the power and authority they would be granted by statute would extend far beyond what customary law affords them. In addition, they have the benefit of being free of community accountability: they answer to the government only.

*Pilane*⁴⁸ and *Sigcau*⁴⁹ saw the effects of this new regime constitutionally tested for the first time.

In *Pilane*, a community sought to assert its constitutionally protected political rights by holding a chief accountable and thus challenging his authority. In *Sigcau*, the issue was a dispute over who the recognised leader of a community should be – and what the community, rather than the State, had to do with it. In both cases, the Court (or at least the majority in *Pilane*) sensed that the issues before it were informed by the relationship between customary law and statute law despite none of the parties framing their cases in these terms. Arguably, the Court could not ignore the tension between custom and statute because in both cases it was faced with versions of customary law that are *more* democratic and *more* consistent with the Constitution than the statutory codification.

The facts and the law of *Pilane* are set out by Claassens and Budlender. I would only add that the approach of the two parties – the statutorily recognised

⁴⁶ See, eg, J Peires 'History versus Customary Law: Commission on Traditional Leadership: Disputes and Claims' (2014) 49 *South African Crime Quarterly* 7.

⁴⁷ See, eg, S Mswana 'Mining, Accountability and the Law in the Bakgatla-baKgafela Traditional Authority Area' (2014) 49 *South African Crime Quarterly* 21; A Claassens & B Matlala 'Platinum, Poverty and Princes in Post-apartheid South Africa' (2014) 4 *New South African Review* 113.

⁴⁸ *Pilane* (note 8 above).

⁴⁹ *Sigcau* (note 9 above).

traditional leaders on the one hand and the dissenting customary leaders on the other – illustrated the struggles of communities trying to assert customary law in a context where statutory regulation seeks to foreclose it. For Chief Pilane, the only source of authority in the traditional community context came from statute (the Framework Act and North West Traditional Leadership Act⁵⁰). Any exercise of authority not mandated by statute – whether holding a meeting, referring to yourself as an authority, discussing secession – was simply unlawful. Mmuthi Pilane, on the other hand, argued that in terms of customary law his village was justified in rejecting the imposed, unresponsive headman. Moreover, customary law gave him the authority to fill the vacuum as the legitimate headman of Motlabe village, and allowed the community to hold meetings without the knowledge of the Chief. He produced extensive community and expert evidence to prove his understanding of customary law.

The majority avoided having to deal directly with the status of customary law in deciding in favour of Mmuthi Pilane. Instead, it focussed on the constitutional issues at hand. But they could not ignore what was an obvious dilemma. Faced with a version of customary law that was more consistent with the constitutional principles that the majority sought to assert than the opposing argument relying on statute, Skweyiya J made this significant statement: '[S]tatutory authority accorded to traditional leadership does not necessarily preclude or restrict the operation of customary leadership that has not been recognised by legislation'.⁵¹

The minority judgment of Chief Justice Mogoeng and Nkabinde J, is fascinating. Apart from the obvious disdain for the applicants, their comments exhibit a complete denial of the status of customary law *as law*.⁵² They are at pains to frame the issue at hand as a 'rule of law' issue. They emphasise that, while the current headman may not be the 'legitimate' leader, he is the 'lawfully appointed' leader. Moreover, succession could only be tolerated if it was led by a 'legally recognised leader' and any meeting convened should have 'legal authority'. Every reference to 'legal' or 'lawful' is a reference to 'statute law'. Recognising anything outside statute law, the minority argues, amounts to 'the erosion of the rule of law'.⁵³ The split between the majority and the minority aptly illustrates the greater discrepancy between divergent understandings of the status of customary law inside and outside the Court.

The Court settled the *Sigcau* matter on even narrower technical grounds thereby avoiding the arguments raised in particular by the *amicus curiae* in the matter (and described by Claassens and Budlender). The approach was slightly surprising given a particularly engaging hearing in which the relationship between statute and customary law was interrogated from a number of angles.

Interestingly, in the hearing of *Sigcau*, the Chief Justice seemed to have taken an opposite view about the status of customary law than the one he expressed in *Pilane*. He insisted that the Royal Family would exist whether statute recognised

⁵⁰ Act 2 of 2005.

⁵¹ *Pilane* (note 8 above) at para 44.

⁵² *Ibid* at paras 75–78.

⁵³ *Ibid* at para 69.

it or not.⁵⁴ Perhaps the difference for Mogoeng CJ is between the recognition of the institution and its incumbent, but one can only speculate. As Claassens and Budlender record, these rich interactions during the hearings translated into the Court, ultimately reinforcing the idea that customary law retains an independent position despite the statutory regulation of traditional leadership.⁵⁵

The Court's insistence that customary law institutions and governance are not necessarily precluded by statutory regulation of those institutions and governance is ground-breaking. It suggests a dual system of traditional/customary governance. It also suggests that the Framework Act is not the last word on the governance and traditional institutions of customary communities. In fact, the implication may be that customary law is not necessarily subject to statute law, even statute law that purports to regulate it specifically.⁵⁶

Of course, the Court spent no time in thinking through the implications of a dual system. It is difficult to understand the point of having both statutory leaders who call themselves 'traditional' or 'customary', and customary leaders who are, in fact, just that. How do we justify the existence of statutory traditional leaders if there are other leaders recognised in terms of customary law as Chapter 12 of the Constitution requires? Would statutory leaders be accountable to government and customary leaders to the communities? Would they derive different powers and mandates from different sources? What would their relationship be? Both cases arose from a context where the stakes in identifying and recognising the traditional leader are particularly high because of the resources involved. What would a dual system of leadership mean for governing resources? Is the more obvious solution not to attempt a single system where the statutory regulation of customary leadership actually gives recognition and effect to living customary law?

While there are more questions than answers, the fact that the Court felt obliged to respond in some way to the continued illegitimacy of the statutory codification of living customary law is important. At the very least, it is evidence that communities can continue to assert a unique place for living customary law and its legitimate institutions (rather than those created by the state) in order to fulfil the promise of rural democracy and transformation.

V THE CASE FOR THE EXCEPTIONALISM OF LIVING CUSTOMARY LAW

A For Exceptionalism: The Discrimination against Customary Law

At least one thing is common cause between the Constitutional Court, Parliament and the executive: Customary law was the victim of racial discrimination under colonial and apartheid regimes. This discrimination took different forms. The one most cited by policy- and lawmakers, is the distortion of traditional institutions

⁵⁴ Claassens & Budlender (note 1 above) at 88.

⁵⁵ *Sigcau* (note 9 above) at para 3 ("The dispute was statutorily settled when Botha Sigcau was recognised as the "paramount chief" of the Eastern Pondo in terms of the Black Administration Act. We say 'statutorily settled', because it was not settled customarily.")

⁵⁶ Constitution s 211(3) provides: 'The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that *specifically* deals with customary law.'

– although the official narrative how and why that happened has changed quite dramatically since 2000. In any event, the Court has also acknowledged the pre-constitutional distortions of these institutions.

Much of the Court’s jurisprudence⁵⁷ describes how the discrimination and distortion stifled the development of customary law and unrooted it from the community. This aspect remains lost on the other two spheres of government who are successfully entrenching those distortions in the legislative framework they have designed.

But perhaps the most far-reaching form of discrimination was dealt with by the Court in *Alexkor*. The case raised the non-recognition of customary law property rights arising from two interrelated forms of discrimination: either the racist view that customary law is ‘uncivilised’ and therefore cannot be the source of property rights equal to common law rights; or the practical goal of barring black South Africans from owning or having rights in land and other resources. While *Alexkor* was framed by the Restitution Act, it provided for the restitution of both land and mineral rights based on the racial discrimination against customary law which precluded the Richtersveld community from exercising their rights over these resources.

The recognition of customary law rights (alongside common law and statutory rights) is provided for in s 39(3) of the Constitution. But given the historical and discriminatory non-recognition of the customary law rights, in most cases they require not only recognition, but also restoration.

Some policy documents⁵⁸ have given lip-service to restoring customary rights to resources and IPILRA at least attempted to protect such rights under the Constitution. However, in practice the discourse around customary law as a source of rights to resources equal to common and statutory law rights remains an academic exercise. Despite the continued non-recognition of customary rights, with the exception of *Alexkor*, only one other group has since used s 39(3) to assert their customary rights as I explain briefly below. That reality speaks volumes about how far our perception of the legal status of customary rights has shifted. *Alexkor* remains the only customary property rights case where the property right is asserted against the state, rather than other members of the same community.

In the classic aboriginal title case of *Mabo v Queensland (No 2)*⁵⁹ the High Court of Australia, finally rejected the Privy Council decision of *In re Southern Rhodesia*.⁶⁰ *In re Southern Rhodesia* defined the attitude of common-law courts across the Commonwealth to the recognition of customary tenure. The case rejected the validity of customary rights due to the perceived ‘lack of civilisation’ of the African populations. The Australian Court based its decision on the right to equality which had become a part of Australian law through international law:

⁵⁷ See *Alexkor* (note 24 above), *Bhe* (note 22 above) and *Shilubana* (note 45 above).

⁵⁸ See, eg, Green Paper on Land Reform *Government Gazette* 34607, General Notice 639 (16 September 2011); Policy for the Small Scale Fisheries Sector in South Africa, *Government Gazette* 35455, General Notice 474 (20 June 2012).

⁵⁹ (1992) 175 CLR 1, [1992] HCA 23.

⁶⁰ [1919] AC 211.

Whatever the justification advanced in earlier days for refusing to recognize the rights and interests in land of the indigenous inhabitants of settled colonies, an unjust and discriminatory doctrine of that kind can no longer be accepted. ... The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights. A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration.⁶¹

Our constitutional dispensation affords significant weight to equality and in particular to substantive equality as a prerequisite for transformation. Against that background, an argument in favour of taking special measures to recognise, protect and promote rights to resources arising from customary law is difficult to dismiss. It would mean strengthening the argument for the recognition of customary rights by pointing to both the historical and contemporary marginalisation of these rights – and demanding positive discrimination in order to effect change.⁶²

This approach has been tested by the traditional small scale fishing communities of South Africa. Following a Court Order handed down by the Equality Court in 2007,⁶³ the (then responsible) Minister of Environment and Tourism had to develop a policy that would grant small scale fishing communities equitable access to marine resources. That policy was finally gazetted in 2012.⁶⁴

During the tail-end of negotiations in finalising the policy, it became clear that the biggest sticking point would be where the Minister would find the fish to allocate to a newly recognised sector. The entire resource had already been divided between the commercial, recreational and subsistence sectors in terms of the existing legislation. Those sectors naturally defended their existing rights. At this point, the small scale fishing communities started to insist more explicitly that the state recognise their customary rights to access the resource.⁶⁵ Given the historical (and ongoing) denial of these customary rights, small scale fishers argued that their customary rights required special measures for protection and promotion. That would bind the responsible Minister to reallocate some of the resource to the small scale communities despite the resistance from the powerful commercial and recreational interests – and would give her the legal basis to do so. The communities' insistence paid off in part. When the Small Scale Fishing Policy was finally gazetted and the Marine Living Resources Act⁶⁶ amended to

⁶¹ Ibid at 42.

⁶² The Promotion of Equality and Prevention of Discrimination Act 4 of 2000, in its Preamble, states that:

Section 9 of the Constitution provides for the enactment of legislation to ... promote the achievement of equality; [t]his implies the advancement, by special legal and other measures, of historically disadvantaged individuals, communities and social groups who were dispossessed of their land and resources, deprived of their human dignity and who continue to endure the consequences.

⁶³ *Kenneth George and Others v Minister of Environmental Affairs and Tourism* Case no. EC 1/2005 (2 May 2007) (on file with the author).

⁶⁴ Small Scale Policy (note 58 above).

⁶⁵ It is a slightly complicated sector with not all communities able to assert customary law rights. This is in part why the argument was not made more strongly earlier in the process.

⁶⁶ Act 18 of 1998 (MLRA).

recognise this sector, it referred explicitly to the recognition of rights arising from customary law.

Regrettably, what has become clear from the attempts at implementing the new policy is that officials do not understand what customary law rights are. They cannot conceive of customary law in a sphere where traditional leadership plays no role. In fact, it seems that they agreed to the inclusion of references to customary law in the policy and legislation precisely because they thought it would have no force or effect.

Worse still, under pressure from communities insisting that the Department recognise their customary rights, it sought legal opinion in 2010 as to whether the *Alexkor* principles extended to marine resources. It came to the surprising conclusion that the implications of *Alexkor* were restricted to land rights only. The opinion failed to explain how the Court, in *Alexkor*, managed to award the restoration of mineral rights. More remarkably, however, the opinion did not refer to customary law recognition under the Constitution once, but rather based its assertions on the classic pre-constitutional case of *Van Breda*,⁶⁷ superseded years earlier by the Constitutional Court's holding in *Shilubana*.⁶⁸

Within this context, a group of customary fishing communities in the Eastern Cape defended criminal charges of attempting to fish illegally in a marine protected area on the basis that they were, in fact, fishing lawfully in terms of their customary law. They argue, in effect, for a dual system of governance of the resource. The matter reached the Mthatha High Court on appeal in November 2015 where the communities argued, in the alternative, that if the MLRA does preclude their customary rights to the resource, it is unconstitutional. They based their challenge, in part, on s 39(3).

In his judgment,⁶⁹ Mbenenge J (with Griffiths J concurring) held that the community had a 'customary right [to the marine resource] existing parallel to s 43 of the MLRA, recognised and preserved by the Constitution'.⁷⁰ The MLRA did not have 'the effect of jettisoning (and not preserving) the customary rights that have been exercised by these communities'⁷¹ because 'the validity of customary law cannot be tested with reference to common law or statutory law'.⁷² The MLRA could thus not have extinguished the community's customary rights. In conclusion, however, the Court found that in order to exercise their customary rights the communities are still required to seek the permission of the Minister in terms of the MLRA. The communities are seeking to appeal this and other aspects of the judgment.

These communities, and others like them, are arguing for the exceptionalism of their customary law systems and the rights that arise from it. These rights are exceptional within the regulatory scheme, they argue, because they are pre-

⁶⁷ *Van Breda and Others v Jacobs and Others* 1921 AD 330.

⁶⁸ *Shilubana* (note 45 above).

⁶⁹ *Gongose and Others v S; Gongose and Others v Minister of Agriculture, Forestry and Fisheries and Others* [2016] ZAECHC 1

⁷⁰ *Ibid* at para 23.

⁷¹ *Ibid* at para 37.

⁷² *Ibid* at para 47.

existing rights (never extinguished in terms of the test laid down in *Alexkor*) that deserve constitutional protection in themselves. In addition, the bearers of these rights have suffered from the racially discriminatory non-recognition of a series of regulatory frameworks that extends into the constitutional era. Thus, while the Minister has full discretion to reasonably allocate the resource to the existing sectors, his discretion is limited by the rights of customary communities which are protected by the Constitution. Their claims are based on substantive equality – to promote customary law rights to emerge as equal to common-law and statutory rights – and on the s 25 promise of the restoration of resources.⁷³

In short, the exceptionalist argument is that, while s 39(3) may recognise rights arising from common law, statute law and customary law, the latter *is different* because these rights suffered from historical discrimination. They therefore deserve special protection and promotion.

B For Exceptionalism: Customary Law as an Expression of Culture

When Langa DCJ, in *Bhe*, confirmed that the Constitution envisions customary law as a part of the South African legal system, the very first provisions he referred to were ss 30⁷⁴ and 31⁷⁵ of the Constitution. These, he said, ‘entrench respect for cultural diversity’.⁷⁶ Customary law, in other words, is an expression of the right to culture.

The Constitutional Court has never interrogated this link between customary law and the right to culture further. As far as I am aware, it has never been asked to do so. The link did emerge strongly, but somewhat inadvertently, from the campaign of small scale fishing communities for recognition discussed above. The terms of the protection and promotion of the rights of small scale fishers evolved over time from the protection of the culture and identity of ‘traditional fishers’ to the protection of the customary rights of small scale fishing communities.

There are various reasons why equating customary law and culture is problematic and even dangerous. In our current context where customary law has been relegated to something less than law, insisting that customary law is linked to the general right to cultural expression, runs the risk of reducing its status as law even further. The strategy may also emphasise ethnic and cultural difference.

⁷³ Constitution s 25(8), which reads: ‘No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1).’

⁷⁴ Constitution s 30 reads: ‘Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights.’

⁷⁵ Constitution s 31 reads:

(1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community—

(a) to enjoy their culture, practise their religion and use their language;

...

(2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.

⁷⁶ *Bhe* (note 22 above) at para 41.

And culture, we know, is often used to defend the indefensible.⁷⁷ In South Africa, the discourse around culture has become increasingly contentious and fraught with the Western-African dichotomy, real or perceived.

My interest in understanding customary law as an expression of culture (if not as a right equal to culture) lies in the possibility of linking the recognition of customary law to a constitutionally protected fundamental right. I will go no further here than acknowledging all the red flags that are legitimately raised when one employs the right to culture in this context. For the moment, however, I wish to investigate the legal possibilities for communities of indeed connecting these dots.

If customary law is understood to be part and parcel of what ss 30 and 31 protect, it would mean that any limitation of customary law must be justified under s 36(1) of the Constitution. For rights arising from customary law, this is probably not much more than a restatement of the protection already afforded in s 39(3). In reality, however, communities need all the help they can get. As we have seen, the fishing communities had to rely on the right to culture before they were able to ensure, after years of activism, protection of customary law rights already recognised by s 39(3). Even that deal remains tenuous.

The real potential of the link between customary law and the right to culture perhaps lies elsewhere. I have alluded to the question of the extent of the legislature's power to amend customary law. It is difficult to argue against the existence of that power. Indeed, our national legislative authority lies, in terms of the Constitution, exclusively with Parliament.⁷⁸

But Parliament is beholden to the Constitution. Does the Constitution allow Parliament not only to regulate or amend customary law to bring it in line with the Constitution, but to redefine customary law even where it would already pass constitutional muster? Or, if customary law is an expression of the right to culture, could it be argued that custom can only be changed by the legislature when that change is consistent with the requirements of s 36(1)? If the legislature decides, for argument's sake, that it wishes to create a uniform version of the customary law of succession whereby all traditional leadership becomes hereditary – and the custom of elected leadership is thereby abolished – is it free to do so?

The question of 'illegitimate' statute law regulating customary law arose in *Sigcau* and *Pilane*. In both, there was an attempt to assert customary law (alongside constitutional rights) in order to push back against the Framework Act's provisions. In both, it led the Court to ponder the possibility of a dual system of law regulating the customary space. If the statutory framework is so out of step with living customary law that it looks like a dual system – and the living customary law is consistent with the Constitution – is the best solution not to bring the statutory framework in line with living customary law? The potential mechanism available to the Court to achieve that end is to treat customary law as an expression of the right to culture, that is protected from unjustifiable limitations by s 36(1).

⁷⁷ See, eg, *Jezile v S (National House of Traditional Leaders and others as amici curiae)* [2015] 3 All SA 201 (WCC), 2016 (2) SA 62 (WCC) (Accused attempted to defend his kidnapping and repeated rape of a fourteen-year-old girl on the grounds that it was part of the customary practice of *ukuthmala*).

⁷⁸ Constitution s 43(a).

If, on the other hand, the Court wishes to persist in the notion of a dual system, it is faced with s 211(3) of the Constitution which makes customary law subject to a ‘statute that deals with it specifically’. In order to argue that living and legitimate customary law should survive statutory regulation in the face of s 211(3), communities will have to rely on fundamental rights that can trump the otherwise permissible regulation of traditional leadership.

Claassens and Budlender refer to the challenge that the *amicus curiae* in *Sigcau*, the Centre for Law and Society (CLS), advanced against the methodology of the Commission on Traditional Leadership Disputes. CLS argued that the Court’s insistence that customary law is a distinct legal system that must be interpreted within its own context

means that legislative enactments such as the Framework Act must not be given broad interpretations over issues that fall within the domain of custom and traditional societies. Specifically, where a rule of custom is central to the character of a traditional community, any legislation must not easily be presumed to alter the customary position. We submit that leadership is a defining feature of a traditional community. ... A traditional community whose traditional leader is not selected in accordance with that community’s customs is not a traditional community; it is something else. As such, the executive powers to impose leaders on traditional communities should not be lightly inferred.⁷⁹

CLS distinguished between what they called the ‘legislative regulation of custom’ and ‘a wholesale amendment which goes to the essence of custom’.⁸⁰ The former was permissible, the latter was not.

Whether the argument is for a dual system, or for a single system in which statute law that is inconsistent with (constitutionally sound) customary law is challengeable, or the middle ground of allowing statutory regulation rather than amendment, it hinges on customary law as being somehow exceptional. It is at the same time law and an expression of a fundamental right.

C For Exceptionalism: The International Law Protection of Indigenous and Minority Groups

The rights of indigenous peoples and of minority groups are well-developed in international law, which provides unique protections for indigenous peoples.⁸¹ For example, international law requires indigenous communities to give their free, prior and informed consent before others may develop their land.⁸² This area of law is premised directly on the exceptionalism of indigenous peoples. They are defined by their status as marginalised outsiders from the mainstream economy,

⁷⁹ *Amicus Curiae* ‘Written Submissions’ at para 14.2 (on file with the author).

⁸⁰ *Ibid* at para 14.3.

⁸¹ The key international law instruments concerning indigenous peoples’ rights remain the 1989 International Labour Organisation Convention on Indigenous and Tribal Peoples (known as ILO 169) and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) passed by the Human Rights Council on 29 June 2006. The safeguards of most international financing institutions, as well as international guidelines aimed at sustainable and human rights sensitive business practices have in recent years come to include references to the protection of indigenous peoples’ rights.

⁸² Art 10 of UNDRIP.

and as the victims of historical and ongoing discrimination. The distinct culture and way of life of indigenous groups depend on access to their land and resources.

The international law principles protecting indigenous peoples have not received much attention in South African courts. However, recent developments, partly in response to the wave of land and resource grabs on the African continent, have sought to broaden the international protections afforded to indigenous peoples to affected local communities. The African Commission on Human and Peoples' Rights, for example, in its Resolution on a Human-Rights Based Approach to Natural Resource Governance, recognised the 'disproportionate impact of human rights abuses upon the rural communities of Africa that continue to struggle to assert their customary rights of access and control of various resources, including land, minerals, forestry and fishing.'⁸³

In the context of a resource regime in South Africa and most of Africa that defines the state as the custodian of resource rights (whether minerals, marine or water resources),⁸⁴ any opportunity for communities to trump the state's absolute discretion over the allocation of these rights would be invaluable. The state's custodianship is premised on the assumption that the State will allocate rights to resources optimally in order to benefit the nation as a whole. This assumption is captured in the only limitation on the state's discretion not only to allocate but also, where necessary, to expropriate resources: The injunction to act 'in the public interest'. The South African Constitution explicitly sanctions expropriation in the public interest which includes the imperative of the equitable redistribution of resources.⁸⁵

However, in South Africa, as in the vast majority of African countries, the problem of the elite capture of the benefits of resource distribution persists. The resource curse is real. That makes it enticing to find means to ring-fence some resources for the use and benefit of marginalised and vulnerable communities against the State's absolute discretion as custodian. This can serve as a means to counter elite capture.⁸⁶

That can be achieved through the protections afforded to indigenous peoples as historically marginalised groups experiencing ongoing discrimination. Currently, international law affords indigenous peoples the exclusive right to control their land and other resources, provided the lands are inextricably tied to the perpetuation of the group's culture. The mechanism employed is the legal right to consent to any development on their land, articulated as the right to 'free,

⁸³ Res 224 of 2012, (adopted at the 51st Ordinary Session, 18 April to 2 May 2012), available at <http://www.achpr.org/sessions/51st/resolutions/224/>. See also the Food and Agricultural Organization of the United Nations *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security* (2012), available at <http://www.fao.org/docrep/016/i2801e/i2801e.pdf>. The debate about whether protections of indigenous peoples should be extended to minority groups or local communities more broadly is far from settled. However, that debate extends beyond the parameters of this paper.

⁸⁴ See, eg, *Agri South Africa v Minister for Minerals and Energy* [2013] ZACC 9, 2013 (4) SA 1 (CC), 2013 (7) BCLR 727 (CC) (Explains the state's role as custodian of mineral rights under the Mineral and Petroleum Resources Development Act 28 of 2002).

⁸⁵ Constitution s 25(2)(a).

⁸⁶ Of course, the next challenge would be to ensure that elite capture internal to such a community (by traditional leaders or others) does not happen.

prior and informed consent'. The acceptance that the historical and ongoing non-recognition of customary forms of tenure are new examples of marginalisation and discrimination, provides the opportunity for customary communities to argue for the ring-fencing of their rights to resources in the face of state custodianship.⁸⁷

In broader terms, this avenue addresses the problem of state custodianship of resources that potentially limit the customary tenure protected by the Constitution. The dilemma posed is that despite the Constitution's and international instruments' insistence on the recognition of customary property rights, these rights continue to be *treated as* 'informal' in so far as they are not regulated or recognised by statute law. Customary tenure will only be treated as 'the same' as other property rights and thus be protected if it is regulated by statute, they argue. The dilemma is that, if communities buy into that argument – if they seek 'sameness' through statutory recognition – they may waive the possibility of countering bad law and policy by insisting on protection of their existing customary rights.

The community in *Pilane* refused to take that course – they insisted on the recognition of their customary rights. The fishing communities in the Eastern Cape are taking the same course. A closed system of state regulation, whether of resources or of local governance, precludes that option. Indigenous peoples' rights – and now perhaps the rights of customary communities – are exceptional precisely because these communities retain the right to limit the absolute discretion of the state to regulate in these domains.

D Exceptionalism Depends on Identity

While there are arguably benefits for communities to continue to assert their exceptional status as practitioners of customary law, these benefits could only be effective if customary law exceptionalism *co-exists* in tension with customary law sameness.

As Claassens and Budlender point out, customary law has always been treated as exceptional – but in a derogatory way.⁸⁸ This was a cornerstone of segregation. In arguing for a new, positive form of exceptionalism, one must simultaneously eradicate the historical negative exceptionalism by insisting on customary law as a legal system identical to the common and statute law. The arguments for exceptionalism mentioned are necessary precisely because we have not achieved the equal status of customary law, customary rights and customary citizens.

Communities who assert their rights to resources based on the exceptionalism of customary law will at the same time fight for their rights as equal citizens and constitutional subjects. The need to insulate customary resource rights from extinguishment clothed as regulation, does not mean that the governance of those resources within the community can be immune from constitutional and other protections. The suggestion that a member of a traditional community is not entitled to information that affects her rights if she does not ask her traditional leader or council for it, is the kind of exceptionalism that must be eradicated.

⁸⁷ Customary fishing communities around the Mbashe river in Dwesa-Cwebe in the Eastern Cape have launched a case asserting these very rights. See *Gonggose* (note 69 above).

⁸⁸ Claassens & Budlender (note 1 above) at 78–79.

So too the practice of paying for services (such as proof of identification) that are free to urban citizens.

Moreover, the suggestion by Mogoeng CJ and Nkabinde J in their minority judgment in *Pilane* that membership of a customary community somehow means one loses constitutional protections such as freedom of association or other political rights is the worst kind of customary law exceptionalism. The assertion of customary law as the source of positive rights depends on the eradication of such negative exceptionalism.

VI CONCLUSION: THE STATUS OF CUSTOMARY LAW AND ITS CONTENT

The third customary law case of 2013, *Mayelane*,⁸⁹ is perhaps an example of how the exceptionalism and identity of customary law *vis-à-vis* other forms of law must co-exist. On the one hand, the Court insisted in that judgment on the sameness of customary law and common law, holding that '[the] determination of customary law is a question of law, as is the determination of the common law'.⁹⁰ On the other hand, it employed exceptional measures by calling for further evidence to determine the content of Xitsonga customary law, and then dealing with the contradictory evidence that was presented.

While all three cases related broadly to the interpretation of statute that purports to regulate customary law, the key distinction between *Mayelane* and the two cases I discussed is the difference between the *content* of customary law and its *status*. *Mayelane* deals with a personal law issue between two individuals. The rights in question have an effect within the customary law domain only. As such, the status of the customary law in question is not in question; the issue, rather was finding and, if necessary, developing its content.

Pilane and *Sigcau*, by contrast, speak to public law and governance issues. These issues have a bearing on the political context. They also have bearing on who is in control of the resources of the community. The issues are not confined to the rights asserted within the community's boundaries, but the right, for example, of representing the community in interactions and transactions with the outside world. The issue of the *status* of customary law *vis-à-vis* other forms of law is central.

Perhaps thinking about the status and content of customary law as separate factors in the argument for or against exceptionalism is useful. Yes, the content of customary law has moved from being something exceptional and is indeed an amalgam of various sources of law. But at the same time, that amalgam requires to be treated as exceptional in status for the emancipatory potential of customary law to be realised.

⁸⁹ *Mayelane v Ngenyama and Another* [2013] ZACC 14, 2013 (4) SA 415 (CC), 2013 (8) BCLR 918 (CC).

⁹⁰ *Ibid* at para 47.

Living Customary Law: A Truly Transformative Tool?

Rita Ozoemena*

I INTRODUCTION

The lead paper by Aninka Claassens and Geoff Budlender has projected customary law as a system that has been radically democratized in 2013.¹ The authors make insightful comments on the attributes of customary law in a democratic dispensation – not in favour of customary law exceptionalism, but, in recognition of the remarkable steps that have been taken by the Constitutional Court in creating a customary law jurisprudence.

The concept of transformative constitutionalism as espoused by Karl Klare,² has great significance in acknowledging the nature and extent of the changes envisaged for South Africa. Transformative constitutionalism, according to Klare, entails ‘a long-term project of constitutional enactment, interpretation and enforcement Transformative constitutionalism connotes an enterprise of inducing large-scale social change through nonviolent political processes grounded in law.’³

The imperative to change the South African society is largely driven by the urgent desire to make a decisive break from a past that distorted so much of the customary law. Customary law has been fossilised and ‘stonewalled’ through codification thereby subverting its nature and operation.⁴ Customary law is one of the areas where transformation has been evident and the majority of South Africans remain true to the rules, practices and processes of the system as binding on them. Further, these rules, practices and processes change according to the changing patterns of the lives of the people which is now commonly referred to

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¹ A Claassens & G Budlender ‘Transformative Constitutionalism and Customary Law’ (2013) 6 *Constitutional Court Review* 75.

² K Klare ‘Legal Culture and Transformative Constitutionalism’ (1998) 14 *South African Journal on Human Rights* 146.

³ *Ibid* at 150.

⁴ *Bhe and Others v Magistrate, Khayelitsha and Others (Commission For Gender Equality as Amicus Curiae)* [2004] ZACC 17, 2005 (1) SA 580 (CC), 2005 (1) BCLR 1 (CC) at paras 87 and 90; *Gumede v President of the Republic of South Africa and Others* [2008] ZACC 23, 2009 (3) SA 152 (CC) at para 20; *Pilane and Another v Pilane and Others* [2013] ZACC 3, 2013 (4) BCLR 431 (CC) at para 35.

as the 'living customary law'.⁵ According to Woodman, the 'living customary law' generally observed by the population of African states, is derived from customary law observed before the colonial period but developed and adapted to current circumstances.⁶ It is, therefore, safe to say that the lives of the people are constantly being transformed by their own rules and practices and equally, the rules change as the society undergoes change. Despite the grand agenda of democratizing customary law, however, there is still huge misunderstanding of the exact content of that system of law in South Africa. Froneman J, writing for the majority in *Mayelane*, said:

This Court has accepted that the Constitution's recognition of customary law as a legal system that lives side by side with the common law and legislation *requires innovation in determining its 'living' content*, as opposed to the potentially stultified version contained in past legislation and court precedent. ... In order to adjudicate Ms Mayelane's claim we must determine the content of Xitsonga customary law regarding a first wife's consent to her husband's subsequent marriage.

In 2013, the cases decided by the Constitutional Court have been indicative of the challenges that occur in the application of legislation to living law. The implication is that statutory resolution of customary issues undermines living law which is based on the rules and practices of the people in their day-to-day lives; in other words, the indirect alienation of African customary law in the lives of ordinary people which started long before the transformation agenda. The pertinent question then becomes: Does legislation render living law dormant and ineffective?

In response to Claassens and Budlender, I argue that the contested statutory resolution of customary law undermines the living customary law and the transformative project. In the first place, this reply examines the constitutional approaches to customary law issues particularly the obligation of courts to develop customary law which is intricately woven with the notion of living law. Second, I discuss the notion of living customary law as a critical tool for transformation and how the decided cases of the Constitutional Court impact on the system and practices of the majority of people.

II CONSTITUTIONAL APPROACHES TO CUSTOMARY LAW

The Constitution has been the driving force for social change and laid down the foundation of the society that South Africa desires to have. It has also resulted in a paradigm shift in legal culture. Previously, the legal culture was predominantly

⁵ The term 'living customary law' denotes the practices and rules of the people in their day-to-day lives. Fombad described 'living customary law' as the actual practice of the people. In other words, 'living customary law' makes reference to the social experiences of those living according to CM Fombad 'Gender Equality in African Customary Law: Has the Male Ultimogeniture Rule any Future in Botswana?' (2014) 52 *The Journal of Modern African Studies* 485.

⁶ G Woodman 'Legal Pluralism in Africa: The Implication of State Recognition of Customary Laws Illustrated from the Field of Land Law' in H Mostert & T Bennett (eds) *Pluralism and Development: Studies in Access to Property in Africa* (2012) 36.

⁷ *Mayelane v Ngevenyama* [2013] ZACC 14, 2013 (4) SA 415 (CC), 2013 (8) BCLR 918 (CC) at para 43 (emphasis added).

positivist, a view that Klare distinctly described as a deeply formalistic one.⁸ The conservative jurisprudence and the precision of the law was clearly evident in the early decisions of the courts in relation to customary law matters. The three *Mthembu v Letsela* judgments demonstrate the persistence of legal conservatism even after the Constitution had come into force.⁹ The judgments depict the initial approach of the courts to customary law with their strict and narrow interpretation with little attention to the changes brought about by the Constitution – particularly the prohibition of unfair discrimination in s 9 of the Constitution.¹⁰

After *Mthembu*, it was instructive to devise a technique that reflects the aspirations of the Constitution particularly in terms of the recognition of customary law (s 211) and the development of customary law (s 39(2)). The obligation to develop customary law to reflect the spirit, purport and objects of the Bill of Rights is clearly intended to achieve the transformative agenda. So, placing customary law on the same footing as common law created the space to view customary law as a system of law of equal worth and value as opposed to viewing it through the lens of the common law.

Some of the techniques adopted by the Constitutional Court, however, fall short of the design to preserve customary law. In *Bhe*,¹¹ as a result of the difficulties envisaged in determining the content of customary law, Langa DCJ replaced customary law principle with common-law rule. Two things flowed from this approach of the Court.

A Importation of Common Law Principles into Customary Law

The Constitutional Court in *Bhe* examined a number of issues regarding customary law. But the majority judgment was convinced that it was only by replacing customary law of primogeniture with the Intestate Succession Act¹² that the majority of South African could find immediate redress.¹³ Langa DCJ recognized the importance of customary law in the democratic dispensation but was wary of the notion of living law because of its indeterminate nature.¹⁴

It could be argued that this approach was a type of avoidance technique¹⁵ employed by the Court in order not to develop customary law. Ngcobo J in his minority judgment in *Bhe* stated that customary law is part of our law, hence the

⁸ Klare (note 2 above) at 168.

⁹ *Mthembu v Letsela* 1997 (2) SA 936 (T); *Mthembu v Letsela* 1998 (2) SA 675 (T); *Mthembu v Letsela* [2000] ZASCA 181, 2000 (3) SA 867 (SCA) (*Mthembu 3*) (Involves succession and disinheritance of a child born out of wedlock under customary law).

¹⁰ *Mthembu 3* (note 9 above) at paras 37 and 40; C Rautenbach 'South African Common and Customary Law of Intestate Succession: A Question of Harmonisation, Integration or Abolition' (2008) 12 *Electronic Journal of Comparative Law* 13.

¹¹ *Bhe* (note 4 above) at para 109.

¹² Act 81 of 1987.

¹³ Rautenbach (note 10 above) at 8–10.

¹⁴ *Bhe* (note 4 above) at para 109.

¹⁵ D Bilchitz 'Avoidance Remains Avoidance: Is it Desirable for Socio-economic Rights?' (2013) 5 *Constitutional Court Review* 297; K Young 'The Avoidance of Substance in Constitutional Rights' (2013) 5 *Constitutional Court Review* 233; B Ray 'Evictions, Aspirations and Avoidance' (2013) 5 *Constitutional Court Review* 173. These authors thoroughly examine the different techniques employed by the Constitutional Court in adjudicating socio-economic rights in South Africa.

need to develop the law rather than importing common-law values or principles to customary law matters.¹⁶ The fact is that common and customary law have different natures; one cannot be viewed through the eyes of the other.¹⁷

B Development of Customary Law

The development clauses of the Constitution are ss 8(3) and 39(2). Section 8(3), focusing specifically on the development of common law, provides:

...when applying the provisions of the Bill of Rights to a natural or juristic person in terms of subsection 3, a court:

- (a) In order to give effect to a right in the Bill of Rights, must apply or if necessary develop the common law to the extent that the legislation does not give effect to that right; and
- (b) May develop the rules of common law to limit the right, provided that the limitation is in accordance with section 36(1).

The reference to common law alone in s 8(3), led to the argument that it excludes customary law and institutionalises the dominant status of common law,¹⁸ a position at variance with Claassens and Budlender, who contend that the same question that arises with regard to the development of common law applies to customary law.¹⁹

The other provision relating to development of the law is s 39(2), which provides: 'when interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights'. Davis and Klare²⁰ interrogate the textual differences in the two development clauses. Particularly, they consider the use of the word 'when' as suggesting the obligation to continuously ensure harmony between the Bill of Rights and customary law. *Shilubana* is a case in point.²¹ The Court developed the customary law relating to chiefly succession to give effect to the Valoyi community's decision to recognize the gender equality principles of the Bill of Rights by installing a woman as *bosi*. The Court's approach could be viewed as incremental development of customary law, even though it was regarded as inappropriate and not reflective of the entire

¹⁶ *Bhe* (note 4 above) at para 236. See also N Ntlama 'The Application of Section 8(3) of the Constitution in the Development of Customary Law Values in South Africa's New Constitutional Dispensation' (2012) 15(1) *Potchefstroom Electronic Law Journal* 26.

¹⁷ See also *Alexkor Ltd v Richtersveld Community and Others* [2003] ZACC 18, 2004 (5) SA 460 (CC), 2003 (12) BCLR 1301 (CC) (Court stated that the validity of customary law must now be determined by reference not to common law, but to the Constitution).

¹⁸ Ntlama (note 16 above) at 32.

¹⁹ Claassens & Budlender (note 1 above) at 75.

²⁰ D Davis & K Klare 'Transformative Constitutionalism and the Common and Customary Law' (2010) 26 *South African Journal on Human Rights* 424.

²¹ *Shilubana v Nwamitwa* [2008] ZACC 9, 2009 (2) SA 66 (CC), 2008 (9) BCLR 914 (CC).

community.²² For the Court, it requires respect for the right of communities that observe systems of customary law to develop their law and if judge-made rules should be applied, they must reflect the rights and values of the Constitution.²³ By drawing on the insights gained in *Bhe* and *Shilubana*, the Constitutional Court subsequently approached customary law cases with a greater deal of caution to dispel the notion that it was imposing values foreign to those living under customary law.

III THE NOTION OF LIVING CUSTOMARY LAW

The notion of living customary law marked a paradigm shift in recognizing the need to make the distinction between versions of customary law that existed in the country. The ‘official’ customary law found in texts, legislation and court precedent depicts a past distorted by authoritarian values hence the recognition of living customary law as the type of law that best describes the day-to-day lives of the people.²⁴ It emerges *from* the people. Hamnett described it thus:

Customary law [which emerges] from what people do, or – more accurately – from what people believe they ought to do, rather than from what a class of legal specialists consider they should do or believe....The ultimate test is not, ‘what does this judge say?’ but rather, ‘what do the participants in the law regard as the rights and duties that apply to them.’²⁵

The high degree of interaction between aspects of the people’s lives is a primary contributor to customary law’s flexible nature. The Constitutional Court confirmed the notion of ‘living customary law’ in *Pilane* as follows: ‘the true nature of customary law is as a living body of law, active and dynamic, with an inherent capacity to evolve in keeping with the changing lives of the people whom it governs.’²⁶

In other words, customary law is law in its own right. Its rules and practices are not static but reflect the changing needs of the society. These principles emanating from the Constitutional Court signified the beginning of the new role of African customary law in a democratic South Africa where the living law represents the re-affirmation of the evolving requirements of the community.

The transformative project’s demand for a fundamental re-assessment is not only as a result of statutory resolution of issues of customary law which totally deny the role of social norms in eliciting compliance and obligation from the people who regard them. That view loses sight of the importance of negotiation between internal (where the people on their own explicitly recognized change) and

²² See, generally, N Ntlama ‘Equality Misplaced in the Development of the Customary law of Succession: Lessons from *Shilubana v Nwamitwa* 2009 2 SA 66 (CC)’ (2009) 20 *Stellenbosch Law Review* 333. See also D Cornell ‘The Significance of the Living Law for an Understanding of Law: Does Custom Allow for a Woman to be Hosi?’ (2009) 2 *Constitutional Court Review* 395 (Cornell examined the *Shilubana* decision and the significance of living customary law in understanding custom and law).

²³ *Mayelane* (note 7 above) at para 46.

²⁴ C Himonga & C Bosch ‘The Application of Recognition of Customary Marriages Act: Problems Solved or Just Beginning’ (2000) 17 *South African Law Journal* 306.

²⁵ I Hamnett *Chieftainship and Legitimacy: An Anthropological Study of Executive Law in Lesotho* (1975) 10 as quoted in Himonga & Bosch (note 24 above) at 316.

²⁶ *Bhe* (note 4 above) at paras 87 and 90; *Pilane* (note 4 above) at para 34.

external influences (where change was effected from outside of the community). The negotiated role these two influences play in the social construction of rights in the customary law system cannot be underestimated.²⁷

The concept of living law underpins the social formations in which the people live their lives, their ability to negotiate their values, rights and obligations.²⁸ Still, the process of negotiating these spaces for people living under customary law remains the greatest challenge. It may well be, as Claassens and Budlender argue, that a similar dynamic applies to the common law. But what is not usually taken into account is that common law did not suffer the same form of distortion in form and extent as customary law. The re-envisioning of customary law is, therefore, what makes the difference. The Constitutional Court has made authoritative comments in this regard. For example, it established that customary law

is an integral part of our law. ... [T]he Constitution acknowledges the originality and distinctiveness of indigenous law as an independent source of norms within the legal system. ... In the result, indigenous law feeds into, nourishes, fuses with and becomes part of the amalgam of South African law.²⁹

Against this background, the Constitutional Court set out to deal with three cases in 2013. The notion of living customary law is clearly entrenched. However, determining its exact content remained problematic. The most critical issue in the cases revolved around the proper balance of statutory, customary and constitutional law. The main challenge was due to the ever-changing nature of living customary law as the people change their patterns of life and the pieces of legislation regulating the conduct of the people seem to be at variance with their aspirations, particularly in light of the constitutional rights.

III JUDGE-MADE DEVELOPMENT VS DEVELOPMENT BY COMMUNITY

There is a difference between development by communities, and development by courts. Van der Westhuizen J made this distinction in *Shilubana* by expressing the circumstances under which customary law should be developed and the obligation to give effect to the transformative project.³⁰ Implicit in the court-led development of customary law is the characteristics of judge-made rules. This has fundamentally changed the manner in which courts, particularly the Constitutional Court, engage private issues such as community resource allocation and development, customary-law marriage and customary succession.

Pilane, *Mayelane* and *Sigcau* indicate the uneasy balance between living customary law and statutory legislation. In all three cases, the applicable legislation does not entirely capture all the finer details of living law which changes over time. The judges then had the task of ensuring that the constitutional rights of the parties

²⁷ L Juma 'From "Repugnancy" to "Bill of Rights": African Customary Law and Human Rights in Lesotho and South Africa' (2007) 1 *Speculum Juris* 109.

²⁸ P Abumere 'Atukhuiki among the Esans in Bendel State: A Case Study in Belief System in the Customary Law as a Means of Social Control' in Y Osibanjo & A Kalu (eds) *Towards a Restatement of Nigerian Customary Laws* (1991) 95–101.

²⁹ *Alexkor* (note 17 above) at para 51.

³⁰ *Shilubana* (note 21 above) paras 44–49.

are protected. They attempted, first, to do so by employing the mechanism of ‘political enforcement’,³¹ a term used mainly in the discussion on socio-economic rights cases. ‘Political enforcement’ relates to the protection of social rights through existing legislation and executive action. As a result of the relevance of social function and conduct to these cases, political enforcement may have been applicable. However, the relevant pieces of legislation were not helpful in protecting the rights of the applicants, but rather were in some form, a hindrance. The Court, instead, actively promoted individual rights, developing the law with wider implications for the rest of the country.

A *Mayelane*

This case decided by the Constitutional Court dealt with customary marriage. Claassens and Budlender have summarized the facts and there is no need to present them in full here. In short, Hlengani Dyson Moyana married Ms Mayelane on 1 January 1984 according to customary law. On 26 January 2008, Mr Moyana allegedly married Ms Ngwenyama. A little over a year later, Mr Moyana passed away. Both Mayelane and Ngwenyama sought to register their marriages in terms of the Recognition of Customary Marriages Act.³² Each disputed the validity of the other’s marriage. Mayelane then applied to the High Court for an order to declare her marriage valid and that of Ngwenyama null and void on the basis that she did not consent to the subsequent marriage. The issue of whether the consent of the first wife was required before a man can take another wife was the main issue that the Constitutional Court had to decide.

The two places to begin this enquiry are first, the Recognition Act, and then secondly, customary law. The Recognition Act did not specify other forms of consent for marriage save for that of the contracting parties. So, consent of the first wife was left to be determined by the Court. Expert witness and community members provided information regarding consent of the first wife in Xitsonga customary law. But the evidence failed to convince the majority that Xitsonga customary law adequately protected the first wife. And so, they developed Xitsonga customary law according to the dictates of s 39(2) of the Constitution.

The ascertainment of living law was the crux of the matter. While the notion of living customary law is well-established, determining its content remained a challenge. This was succinctly put by Langa DCJ in *Bhe*: ‘The difficulty lies not so much in the acceptance of the notion of ‘living’ customary law, as distinct from the official customary law, but in determining its content and testing it, as the Court should, against the provisions of the Bill of Rights.’³³ As rightly put by Claassens and Budlender, the Court is very much aware of the difficulties involved in determining the content of living law and the importance of adducing evidence even in the face of conflicting views.

In *Mayelane*, this conflict came to the fore. The majority judgment went to great lengths to establish the living law of the Xitsonga people. A wide range of

³¹ Bilchitz (note 15 above).

³² Act 120 of 1998 (Recognition Act).

³³ *Bhe* (note 4 above) at para 109.

individuals, traditional leaders, and experts writing on customary law adduced evidence on the issue of consent of the first wife. The issue that divided the justices in *Mayelane* was the development of Xitsonga customary law.³⁴ The minority judgment took the view that the case could have been decided without the development of Xitsonga customary law, which was done without the input of the people.³⁵ I share the views of the dissenting justices.

The Recognition Act has also failed to be the panacea it was set to be; bringing into sharp focus the matter of effecting social change in the living law context. There is no doubt that law changes circumstances. But there are limits to the effectiveness of addressing certain conduct through law – particularly in the customary law context where the norms of society change over time and it is society’s reliance on those changes as binding on them that gives the law its content, dynamism and flexibility. The inference one can draw is that ascertaining living law involves a process of engaging with the social fields that influence the people’s sense of moral and legal convictions.

B *Pilane*

Pilane raises the same issue of living customary law in the context traditional leadership and governance. The applicants in *Pilane*, were leaders in their village of Motlhabe, one of the 32 villages making up the Bakgatla-Ba-Kgafela Community, but were denied recognition in terms of the relevant statutes.³⁶ The applicants were dissatisfied with the administrative and financial governance and so, sought to pursue their secession from the greater traditional community. They described their village as poor, under-developed and deprived of the benefits of platinum mining. The respondents, as the recognized traditional authority, sought to interdict the activities of the applicants and what they alleged was its potential for confusion and disorderliness.

The origin of the dispute involves the invitations the applicants sent out for a meeting to discuss the intended independence by leaders who were not officially recognized by the Premier of the province in terms of the Traditional Leadership and Governance Framework Act.³⁷ The TLGFA does not recognize those structures that are important to the villagers of Motlhabe. One of their concerns was that a headman was imposed on them, whose leadership does not reflect the system of traditional governance under customary law and bears testimony to

³⁴ *Mayelane* (note 29 above) at para 20.

³⁵ *Ibid* at para 154.

³⁶ *Pilane* (note 4 above) at para 7

³⁷ Traditional Leadership and Governance Framework Act 41 of 2003 (TLGFA) s 2 reads:
Recognition of traditional Communities

(1) A community may be recognized as a traditional community if it–

(a) Is subject to a system of traditional leadership in terms of that community’s customs; and
(b) Observes a system of customary law.

(2)(a) the Premier of a province may, by notice in the Provincial Gazette, in accordance with provincial legislation and after consultation with the provincial house of traditional leaders in the province, the community concerned, and if applicable, the king or queen under whose authority that community would fall, recognize a community envisaged in subsection (1) as a traditional community.

the sustained imposition of statutory operation of law.³⁸ Further importation of political influences in the operation of the living customary system was evidently captured in s 19 of the North West Traditional Leadership and Governance Act:³⁹

Identification of kgosana

- (1) Bogosana of a traditional community shall be in accordance with the customary law and customs applicable in such a traditional community.
- (2) The identification of a kgosana of a traditional community shall be made by the Royal Family in accordance with its customary law and customs.
- (3) The Premier may recognize a person identified as contemplated in subsection (1) kgosana of a particular traditional Community;
- (4) The Premier shall issue a person so recognized as kgosana with a certificate of recognition.
- (5) The Premier shall issue a notice in the Gazette recognizing a kgosana and such notice shall be served on the Local House of Traditional Leaders for information. (Emphasis added).

Despite this legislation, the majority judgment held that the applicants must be allowed to dissent as a means of deepening the democratic process. Skweyiya J on behalf of the majority held that: ‘there is an inherent value in allowing dissenting voices to be heard and, in doing so, permitting robust discussion which strengthens our democracy and its institutions.’⁴⁰ This is insightful particularly in view of the opinion that traditional authorities and institutions are undemocratic. In analysing the constitutional rights the applicants should enjoy, the majority held: ‘It strikes me that the exercise of the right to freedom of expression can be enhanced by group association. Similarly, associative rights can be heightened by the freer transmissibility of a group’s identity and purpose, expressed through its name, emblems and labels.’⁴¹

Much as the Court recognized the importance and relevance of group identity, one cannot but point out the inconsistencies. The minority in their judgment shed light on the underlying issues:

The Constitution recognizes the institution of traditional leadership. Moreover, indigenous law, customary law and traditional leadership are listed as functional areas of concurrent national and provincial legislative competence and, in each, the competence is subject to the Constitution. Traditional leadership is a unique and fragile institution. If it is to be preserved, it should be approached with the necessary understanding and sensitivity. Courts, Parliament and the Executive would do well to treat African customary law, traditions and institutions not as an inconvenience to be tolerated but as a heritage to be nurtured and preserved for posterity, particularly in view of the many years of distortion and abuse under the apartheid regime.⁴²

Pierre De Vos has observed that ‘[t]his sharp disagreement in the Constitutional Court on whether to protect the rights of those who wish to express displeasure

³⁸ *Pilane* (note 4 above) at para 7.

³⁹ Act 2 of 2005 (North West Act).

⁴⁰ *Pilane* (note 4 above) at para 69.

⁴¹ *Ibid.*

⁴² *Ibid* at para 77.

with the conduct of leaders undemocratically imposed on them, suggest two radically different views of the role of traditional leadership in our democracy'.⁴³

The approach of the minority appears conservative and even angry.⁴⁴ But it also raises fundamental issues of sustainability and accountability of the traditional institution as a system that underlies the heritage of the African people and derives its force from the Constitution. Mogoeng CJ and Nkabinde J reasoned that 'the constitutional right the applicants seek are not absolute but exist with a variety of rights to which expression must also be given'⁴⁵ including the dignity of traditional institutions. The disagreements between the members of the Court regarding the protection of constitutional rights in matters relating to customary law demonstrates the challenges of the legitimization of cultural rights despite the values inherent in living law.

Mogoeng CJ and Nkabinde J also affirmed the need and importance of the institution to adapt to changes, implying that the accountability principle, to which all organs of government must adhere, extends to traditional leadership. For example, the villages making up the platinum mining belt of the country are also among the poorest in the country despite the huge revenue that should accrue to the communities. The accountability of traditional leadership in relation to governance and mineral resources is intricately linked to the political forces at play in these areas. The basic grievance of the applicants and the desire to secede from the greater Bakgtla-Ba-Kgafela community in the *Pilane* case stems from the alleged maladministration of the Motlhabe villages despite the revenue that accrues to them through mining and the hospitality industry located in the Sun City luxury hotel. The applicants alleged that the revenues derived from these sources serve only to benefit those who are loyal to the Traditional Council and the *kgosi*.⁴⁶

It is significant that the TLGFA and the North West Act prescribe how communities are recognized, how their leaders are recognized, what functions they may perform and who is responsible for convening meetings, without actually taking into account the fact that the legitimacy of the majority of Traditional Councils in South Africa (particularly in North West) are in question.⁴⁷ Furthermore, Claassens and Budlender's reference to old order and new order rights under the Mineral and Petroleum Rights Development Act⁴⁸ is indicative of the broad structural system on which many issues regarding living law and traditional leadership are based. Amongst the provinces, the North West has the greatest challenges due to the actors involved in the resource endowments of the communities: government, private companies, traditional institutions, and the people. How constitutional rights and investment rights play out leaves

⁴³ P De Vos 'Democracy v Traditional Leadership: A Delicate Ballet?' *Daily Maverick* (5 March 2013), available at <http://www.dailymaverick.co.za/opinionista/2013-03-06-democracy-vs-traditional-leadership-the-delicate-ballet/#.VwUrDEdKPfY>.

⁴⁴ Claassens & Budlender (note 1 above) at 96.

⁴⁵ *Pilane* (note 4 above) at para 79.

⁴⁶ *Ibid* at para 6.

⁴⁷ M De Souza 'Justice and Legitimacy Hindered by Uncertainty: The Legal Status of Traditional Councils in North West Province' (2014) 49 *South African Crime Quarterly* 41.

⁴⁸ Act 49 of 2002.

the traditional institution vulnerable to all kinds of manipulations. It must be remembered that the Constitution gave broad recognition to the institution of traditional leaders and customary law but left its finer details to be fleshed out by legislation. In my view, this approach complicates the situation and gives judges the opportunity to make rules that have the potential to undermine living customary law.

The requirements of legislation specific to customary law run contrary to the traditional governance system where accountability to the people is a cardinal rule of the system. This does not imply that there are no individuals who act contrary to the collective authority of the institutions. But traditional leadership's responsiveness to the will of the people remain the reason for the institution's resilience. Phatekile Holomisa affirmed this when he said that:

Imbizo is the supreme policy-making body, the Chief in-Council acts as the cabinet responsible for the implementation of policy. Another forum, whose functions are pivotal to stability, peace and respect for law and order is the court (*inkundla* or *Kgotla*)... *Inkosi* is the legislator, administrator and adjudicator. What is crucial though, is that he always acts on the advice and with the assistance of his councilors. Furthermore, power devolves from the highest authority, the king, down to the head of the family. The people's assembly, *imbizo*, has the power to nullify acts performed by the executive when it sits. Custom and tradition do not permit abuse of power and the traditional leader inclined towards authoritarianism exposes himself to rebellion and even assassination, which results in him being replaced by the next person in line to the throne.⁴⁹

This comment highlights the essence of living law in the context of traditional leadership. It also counts as a confirmation of the agitation of the applicants in the *Pilane* case where they rebelled against the leadership of their community. Skweyiya J's finding that South African democracy allows dissent gels with this approach to customary law.⁵⁰ According to Justice Skweyiya, individual freedom of expression can be enhanced through group association. That is, in effect, a recognition of living law underscored in this instance by the demand for accountability and good governance of their leaders failing which such leaders risk losing people's allegiance.⁵¹

Notwithstanding the importance of collective decision-making in traditional institutions, pockets of authoritarianism do occur. These pockets are sometimes taken as deriving from customary law because a traditional leader is involved. I argue that historical factors take precedence over living law processes and this is evident in the decisions made by the Courts regarding customary law.

I agree with Claassens and Budlender on the attempt by the new pieces of legislation such as the Traditional Courts Bill (TCB) to confer powers and authority to chiefs. Those powers are not justified as derived from customary law, if regard is had to the following statement:

⁴⁹ P Holomisa 'Balancing Law and Tradition: The TCB and its Relation to African Systems of Justice Administration' (2011) 35 *South African Crime Quarterly* 21.

⁵⁰ *Pilane* (note 4 above) at para 69.

⁵¹ S Mnisi-Weeks 'Beyond the Traditional Courts Bill: Regulating Customary Courts in line with Living Customary Law and the Constitution' (2011) 35 *South African Crime Quarterly* 31, 33.

The inconsistency between different communities (even within a single cultural group or locality) with regard to the extent of the chief's participation in the court – ranging from non-participation to active participation – makes the idea of a 'presiding officer', taken from western court systems an untenable notion to adapt and impose on all communities. We know that even if a figure akin to presiding officer exists in some communities, *when it comes to formulating and pronouncing decisions, he is generally bound by what the council and/or the community has found in hearing that case.*⁵²

The reference to the attributes of consensus and rehabilitation of customary law in contrast to the adversarial common-law courts is relevant in understanding the following comment of Mogoeng CJ and Nkabinde J:

The institution of traditional leadership must respond and adapt to change, in harmony with the Constitution and Bill of Rights. But courts ought not to be dismissive of these institutions when they insist on the observance of traditional governance protocols and conventions on the basis of whatever limitation they might impose on constitutional rights.⁵³

Put differently, the *Pilane* minority wants the Court to acknowledge the traditional governance system of customary law and its position to ensure that their processes are protected. This might appear too conservative in a liberal and constitutional democracy like ours. But it must be judged against the constitutional imperative in ss 211 and 212 of the Constitution. In South Africa, legislation applicable to customary law recreates Apartheid boundaries thereby entrenching their Apartheid-based authority.⁵⁴ What is usually not taken into account is the capacity of the community to influence the law through practice or what has been referred to as 'the prevailing societal ambience of the concerned community' which must loom large in the enquiry according to the lead authors.⁵⁵ Lesetedi J in *Ramantele* considered this manner of enquiry when he concluded that 'even on the account of the customary rules prevailing three decades earlier, there could not be a universal customary law of the kind contended for by the respondent in which an 80 year old daughter of the deceased must be evicted from her home in favour of her absentee nephew'.⁵⁶ This reflects the notion of living law which takes into account current and prevailing values at the time. It follows, therefore, that the determination of what the rule in customary law means in a modern and constitutional democracy examines what is rational and justifiable and whether it leads to justice for those seeking redress.

C Sigcau

Sigcau is an example of how customary law in a modern constitutional democracy is addressed, particularly where it is drawn from three sources of

⁵² Ibid (emphasis added).

⁵³ *Pilane* (note 4 above) at para 79.

⁵⁴ Claassens & Budlender (note 1 above) at 102.

⁵⁵ Ibid at 93.

⁵⁶ *Ramantele v Mmusi and Others* Court of Appeal Civil Appeal CACGB-104-12 (3 September 2013) at para 77.

law simultaneously.⁵⁷ In this case, there were both procedural and substantive issues but what took a higher priority was the procedure the President followed in determining the kingship of the amaMpondo. The dispute revolves around who is the rightful *ikumkani* of the amaMpondo aseQaukeni. The applicant, Justice Sigcau, claimed that he was the rightful *ikumkani* and not the fourth respondent, Zanozuko Sigcau. The President was alleged to have pronounced on the *ikumkani* and based his recognition on the amended version of the TLGFA instead of the old version which the Commission on Traditional Leadership Disputes and Claims (Nhlapo Commission)⁵⁸ had based its decision.

The origin of the dispute dates back to the epoch of resolving African traditional matters through legislation – which seems to still be the case considering the three cases under review. In this case, the rightful *ikumkani* was ‘statutorily settled’ after the death of Mandlonke when Botha Sigcau, one of his brothers, was recognized as the ‘paramount chief’ in terms of the Black Administration Act.⁵⁹ Importantly, the question was not settled in terms of customary law. The dispute re-erupted when Botha Sigcau, the father of the applicant, died. The dispute was now between the applicant and Botha Sigcau’s nephew and Zanozuko’s father – Zwelidumile Sigcau. The applicant was initially recognized as the *ikumkani*. However, the Nhlapo Commission – which was entrusted with investigating traditional leadership disputes – later reversed that finding and recommended that Zanozuko was the rightful *ikumkani*. The President eventually endorsed that finding. The applicant alleged that the Nhlapo Commission erred in their findings because according to the customary law and customs of the amaMpondo, the left hand house or *iqadi* takes precedence over the right hand house from which the fourth respondent apparently comes.

The case raised a number of issues: (a) the processes involved with the appointment of *ikumkani*; (b) the role of the Nhlapo Commission; and (c) how the executive makes decisions affecting the living law based on provisions of a statute. The underlying difficulty is this: what were supposed to be transitional provisions have now become permanent based on disputed boundaries from which the core concept of ‘recognition’ not ‘appointment’ arises. Claassens and Budlender describe recognition as follows: ‘It is there, I see it and recognize it, you don’t say, I create it’. What actually happens in practice, however, is that recognition equals appointment because of the wide authority granted by the statute. But that does not mean that the recognition is according to customary law.⁶⁰ The consequence then becomes a vicious cycle of statutory resolution of disputes even where the provisions have regard for customs and traditions of the people.

The Court in *Sigcau* did not, however, deal with these substantive issues. It decided the case based on a material difference between the provisions relating to settlement of disputes in the old Act and the amended version. Section 9 of the old

⁵⁷ *Sigcau v President, of the Republic of South Africa and Others* [2013] ZACC 18, 2013 (9) BCLR 1091 (CC).

⁵⁸ The Commission was established in terms of s 22 of the unamended TLGFA (old Act).

⁵⁹ Act 18 of 1927.

⁶⁰ *Sigcau* (note 57 above) at para 3.

Act⁶¹ requires the inference that the accession to kingship is hereditary, although not necessarily determined by the rule of primogeniture. It may, however, happen that the living customary law of the people at the time might require differently than what *Sigcau* suggests.

Therefore, in dealing with disputes arising from leadership disputes and claims, ss 25 and 26 of the old Act granted the Commission power to make decisions. The new Act, by contrast, requires that the Commission makes only recommendations and the processes involved in making those recommendations are also materially different. It is this conflict regarding when the provisions of the old Act expired and when the new Act should be used that resulted in the procedural unfairness of the President's recognition and declaration of the fourth respondent as the appropriate king of the amaMpondo aseQaukeni. Claassens and Budlender indicated the importance of re-conceptualisation of customary law as a relevant prospect since it will validate the purpose of the notion of living law which is to recognize the values and norms of the day-to-day lives of the people. Claassens⁶² has expressed the view elsewhere that the Nhlapo Commission concentrated on entrenching hierarchies of customary law which is a creation of our colonial past, rather than the substantive issues. This may be true. And given the way the Court decided *Sigcau*, these substantive issues have not been addressed in light of a proper understanding of the living customary rules and practices.

⁶¹ The section reads in relevant part:

- (1) whenever the position of a king or queen is to be filled, the following process must be followed:
 - (a) The royal family must, within a reasonable time after the need arises for the position of a king or queen to be filled, and with due regard to applicable customary law—
 - (i) Identify a person who qualifies in terms of customary law to assume the position of a king or a queen, as the case may be, after taking into account whether any of the grounds referred to in section 10(1)(a), (b) and (d) apply to that person; and
 - (ii) Through the relevant customary structure—
 - (aa) inform the President, the Premier of the Province concerned and the Minister, of the particulars of the person so identified to fill the position of a king or queen;
 - (bb) provide the president with reasons for the identification of that person as a king or a queen; and
 - (cc) give written confirmation to the President that the Premier of the province concerned and the Minister have been informed accordingly; and
 - (b) The President must, subject to subsection (3), recognize a person so identified in terms of paragraph (a)(i) as a king or a queen ...
- (2) The recognition of a person as a king or a queen in terms of subsection (1)(b) must be done by way of—
 - (a) a notice in the Gazette recognizing the person identified as king or queen; and
 - (b) the issuing of a certificate of recognition to the identified person.
- (3) Where there is evidence or an allegation that the identification of a person referred in subsection (1) was not done in accordance with customary law, customs or processes, the President—
 - (a) ...
 - (b) may refuse to issue a certificate of recognition; and
 - (c) must refer the matter back to the royal family for reconsideration and resolution where the certificate of recognition has been refused ...

⁶² Claassens' remarks were made in an interview. See P Sithole & T Mbele 'Fifteen Year Review on Traditional Leadership' (2008) 42, available at www.hsrb.ac.za/en/research-data/ktree-doc/10991.

IV HOW DO WE PROCEED?

The Constitutional Court has dealt with different aspects of customary law in the last 20 years. Its approach to the diverse issues of rules and practices of customary law has not been without contestations. The fundamental question becomes: How do we go from here, knowing what we know now? The first step is to realize that the overarching reliance on legislative precepts is creating a conundrum. The democratization project has opened up opportunities and spaces for development of customary law. It is, however, how living law is ascertained and developed in a constitutional democracy that requires a balancing act. The over-reliance on legislation can be remedied by a system of reduction which will reduce the application of legislation in determining living customary law matters as those pieces of legislation become outmoded and do not represent the prevailing values of the people at the time.

The pieces of legislation enacted to give effect to specific areas of customary law are contradictory in practice or, as Claassens and Budlender remarked, reverse the democratization project. My view is that the source of the problem is not only that specific people have gained the upper hand with the ruling party, but also the uncomfortable fact that we do not know how to command authority other than by imposition. The apartheid era pieces of legislation imposed a lot on the people and some traditional leaders were complicit in erosion of the values and norms of customary law. The consequence was the reinforcement of legal and ethnic segregation. That system also contributed to a general perception that, customary law values and norms could be readily exchanged for commonly acceptable ones.⁶³ This discrepancy is evident in the manner in which the majority in both *Bhe* and *Pilane* reverted to the use of common law principles.⁶⁴

Clearly, *Shilubana* appears to provide some direction on how to deal with ascertaining the content of customary law to involve three steps of enquiry. Van der Westhuizen J summed it up when he said:

[T]he process of determining the content of a particular customary law norm must be one informed by several factors. First, it will be necessary to consider the traditions of the community concerned. Customary law is a body of rules and norms that has developed over the centuries. An enquiry into the position under customary law will therefore invariably involve a consideration of the past practice of the community. Such a consideration also focuses the enquiry on customary law in its own setting rather than in terms of the common law paradigm [C]ourts embarking on this leg of enquiry must be cautious of historical records, because of the distorting tendency of older authorities to view customary law through legal conceptions foreign to it.⁶⁵

Surely, it will benefit the transformative agenda not only to discover fundamentals of what is custom, as suggested by Claassens and Budlender, but to critically engage with approaches of determining its content according to constitutional

⁶³ In July 2012, Phatekile Holomisa, a traditional leader and MP orally expressed this view at a seminar on the TCB.

⁶⁴ *Bhe* (note 4 above); *Pilane* (note 4 above) at paras 46–49 (In the determination of a dispute of fact regarding whose duty it is to call for a *kegotha kegothe* where the Court applied the *Plascon-Evans* rule).

⁶⁵ *Shilubana* (note 21 above) at para 44.

principles. The Constitutional Court is tasked with giving effect to the rights in the Constitution and so must be sympathetic to the transformation project. So, the current tensions regarding ownership of community land, particularly those endowed with natural/mineral resources, requires authoritative comments from the Court. Its approach thus far, ranging from imposition of common law rules as in *Bhe*, to striking down impugned legislation as noted in *Gumede*,⁶⁶ has not brought much clarity. The people of South Africa desire change in their socio-economic development as envisaged both by the Constitution and international law.⁶⁷ So, the question of actually exploring the meaning of s 211(1) of the Constitution cannot come at a better time given the need for accountability of traditional leaders regarding their roles in land allocation.

V CONCLUSION

The living customary law is instrumental to protecting the rights of both individuals and groups in a multi-cultural constitutional democracy like South Africa's. It, however, poses many challenges particularly regarding the ascertainment of its content. In our own context, the important factor is the shift from the 'official version' to 'living customary law', a notion that reflects both the constitutional principles and the transformative agenda and so, the evolving nature of living customary law. The Constitutional Court cases I have discussed rightly project living customary law as a transformative tool. To this end, living customary law has significantly changed and will in the near future continue to refine the manner in which transformation and diversity is approached in this country.

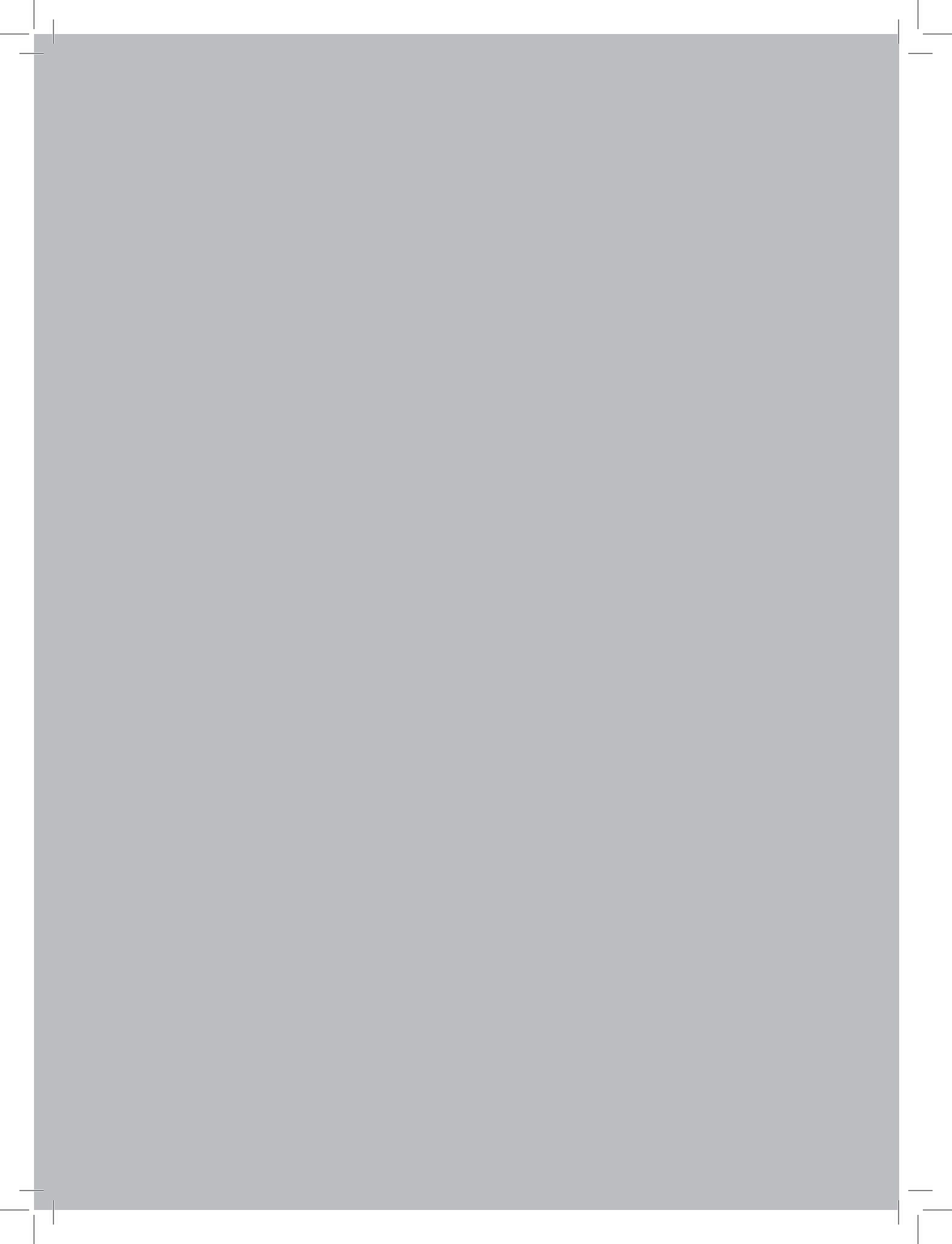
The challenge lies in the discord between legislative measures applicable to customary law and the living law, a system that is consensus-seeking, hence accountable to the people. The so-called 'despotic nature of chiefly powers' were created by 'outside powers' – and mostly through legislation – with serious influences on the entire system and its leadership. This reply has argued that legislation creates change but that in the customary law context, the effect has been far from satisfactory. The approach to solving issues in relation to African people through enactment of legislation must be re-evaluated because it is an approach that has brought destabilization of practices, values and norms and so continues to freeze norms in the past. Any re-envisioning project must acknowledge that the power lies not in a specific individual who has been given authority through pieces of legislation, but in the collective power of the community. The over-prescription on matters of customary law such as the recognition of 'traditional

⁶⁶ *Gumede* (note 4 above) (Aspects of s 7 of the Recognition of Customary Marriages Act 120 of 1998 concerning the proprietary consequences of marriages concluded before the Act came into force were held to be unconstitutional.)

⁶⁷ Parts of s 25 (property); s 26 (housing); s 27 (health care, food, water, and social security) comprise the socio-economic rights in the Constitution of South Africa of which progressive realization is expected. Art 21(1) of the African Charter on Human and Peoples Rights provides that: 'All peoples shall freely dispose of their wealth and natural resources. This shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.' And art 22(1) provides: 'All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind' and by implication, their right to development.

communities', how they should be recognized and how they should convene a meeting according to the TLGFA and the various Provincial Framework Acts is detrimental to social cohesion and the participation of the people in transformation of their practices and institutions.

Education



Procedure or Principle: The Role of Adjudication in Achieving the Right to Education

Sandra Fredman*

At first glance, the three major right to education cases in the SA Constitutional Court in 2013 yielded surprising results. In *Welkom*,¹ two pregnant learners were excluded as a result of a pregnancy policy in their respective schools. The head of the provincial education department (HOD) intervened on their behalf on the grounds that policies excluding pregnant learners were unconstitutional. The schools contested the intervention. The Constitutional Court held in favour of the schools.

In *Rivonia*,² a learner was told that the school, in an affluent part of Johannesburg, was full, and she was placed on the waiting list. The HOD, having looked at the intake of the school and its capacity, intervened on her behalf on the grounds that the school did indeed have capacity. The school contested the intervention. Again, the Court held in favour of the school.

In *KZN Liaison Committee*,³ the provincial government, having had its budget slashed, withdrew its promise of a subsidy to independent low fee schools in its area. Once more, the Court held in favour of the schools, to the extent that the first tranche of the subsidy, whose date had already fallen due, should be payable.

In all these cases, the Court stressed the importance of proper procedures, of consultation and co-operation, and chided the HOD. In the meanwhile, despite a protracted litigation campaign, large numbers of learners in the Eastern Cape are still in mud schools, in scandalous conditions, without furniture, toilets, or textbooks, while teachers remain unpaid or are paid by the local community. Provincial authorities ignore court orders and settlements remain unfulfilled, to the extent that litigators are forced to impound local government assets, such as official cars, in an attempt to achieve compliance. Even more broadly, despite a strongly worded and immediately realisable constitutional right to basic education, South Africa's educational outcomes are woeful, especially in relation to the budgetary allocation. Although we have achieved very high enrolment

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¹ *Head of Department, Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another* [2013] ZACC 25, 2014 (2) SA 228 (CC), 2013 (9) BCLR 989 (CC).

² *MEC for Education in Gauteng Province and Other v Governing Body of Rivonia Primary School and Others* [2013] ZACC 34, 2013 (6) SA 582 (CC), 2013 (12) BCLR 1365 (CC).

³ *KwaZulu-Natal Joint Liaison Committee v MEC Department of Education, KwaZulu-Natal and Others* [2013] ZACC 10, 2013 (4) SA 262 (CC), 2013 (6) BCLR 615 (CC).

figures, and parity for girls and boys at least at primary level, outcomes measures by educational attainment are some of the worst in the world. Other indicators, including gender based violence, are equally disappointing.⁴

The aims of this article are twofold. The first is to examine and critically assess the principles behind the Court's approach to these cases. Is the Court ultimately declaring that procedures are more important than substance, and that its primary role in this contested field is to ensure that a potentially unruly executive plays by the rules of the game? Is its view rather that its role is to facilitate and encourage democratic engagement, and that disputes are best addressed by judicial exhortation to key actors to co-operate in a spirit of partnership in the achievement of the constitutional mandate? Or can these cases be understood instead as furthering a reflexive law approach by facilitating experimentalism, under the wonderfully revealing title of polyarchic deliberative democracy?

The second aim of this paper is to examine more broadly the potential and limitations of the role a court can play in relation to a right, such as the right to education, which presents many difficult choices as to priorities of expenditure, and where rights of learners themselves may be in conflict with each other in conditions of resource scarcity or institutional capacity. Given that the Court is required to adjudicate the dispute in the form presented to it in the litigation, and given its limited capacity to consider the dispute in its broader context, is the Court justifiably limiting its role to insisting that proper procedures be followed and leaving substantive outcomes to other decision-makers, provided they fall within a broad ambit of rationality? Or is it a serious abdication of its judicial responsibility to insist that the right to education is respected, protected and fulfilled for each and every individual learner? The discussion below analyses each of the three cases closely, in an attempt to address both these aims simultaneously.

I *WELKOM*

The decision of the narrow majority in *Welkom* is the most difficult to decode in the light of the starkness of the facts. The case concerned the exclusion of two pregnant learners from the Welkom and Harmony schools in the Free State. Both exclusions were pursuant to pregnancy policies requiring pregnant learners to remain out of school for a defined period. The policies were extremely invasive. For example, the Welkom school policy required a learner to inform a teacher as soon as she discovered she was pregnant.⁵ Furthermore, if a learner suspected that another learner might be pregnant, this should be brought to the attention of a member of staff. Moreover, the effect on the learner's schooling was drastic. The Welkom policy provided that the learner was not permitted to return to school in the year her child was born. It explicitly provided that 'a matriculant who falls pregnant and delivers her baby in June will not be allowed to write the matric final exams. If a learner delivers a baby in December, she will only be

⁴ Transparency International *Mapping Transparency, Accountability and Integrity in Primary Education in South Africa* (2011) 40, available at http://www.un.org/en/ecosoc/newfunct/pdf/luxembourg_tisda_south_africa_report_web.pdf.

⁵ All references to the Welkom Code are taken from *Welkom* (note 1 above) at para 176.

allowed to return to school in the second January following the birth, i.e. if the baby is born in December 2008, the learner may only return in January 2010.’ The grade of the learner was irrelevant: ‘Matriculants will not enjoy preferential treatment because it is their final year at school.’ The age of the learner was also irrelevant: ‘which means that if the learner, after the leave of absence is too old to attend school at a secondary school level, recommendations for adult education will be made.’ So far as her studies are concerned, the code stated that it would be ‘the responsibility of the learner to keep up to date with the school work, and educators will assist only if they see that the said learner is doing her part.’

The Welkom code made a small gesture towards parental responsibility of the father, but one which was heavily biased against the mother. Thus the father would be given ‘leave of absence of one year to assume his parental duties’ but only if the pregnant learner could prove that the father of the unborn baby was attending Welkom High School. The Harmony code did not even go so far as to refer to male learners who are responsible for pregnancies.⁶ In both cases, male learners who were responsible for pregnancies of learners not at the same school were not held accountable in any way and permitted to continue their studies.

The Welkom code ended with the declaration that ‘this management policy does not suspend or expel a learner but ensures that learners take responsibility for their actions and make informed choices.’ However, as Khampepe J acknowledged, although in theory they are entitled to return to school, many learners simply cannot afford to add an extra year to their studies. This effect was clearly known to the schools. Khampepe J referred to statistics from Harmony which showed that two-thirds of the learners subject to the pregnancy policies before 2010 never returned to complete their secondary-school education.⁷ The Welkom code had been in effect since 2009. There is no record of how many learners had been excluded during this period.

The expulsion of pregnant learners has been an issue of growing concern among the human rights community. From her earliest report, the UN Special Rapporteur on Education, Katerina Tomasevski, consistently drew attention to the pervasiveness of the exclusion of pregnant learners from school, highlighting the practice as a breach of the right to education and non-discrimination.⁸ More recently, the Committee on the Rights of the Child, noting the pervasiveness of such practices, made it clear that ‘discrimination based on adolescent pregnancy, such as expulsion from schools, should be prohibited, and opportunities for continuous education should be ensured.’⁹ This has also been a common refrain on the part of the CEDAW Committee, which on numerous occasions has expressed concern at exclusion of pregnant learners and urged states to ensure that they are

⁶ *Welkom* (note 1 above) at para 113.

⁷ *Ibid* at para 114.

⁸ Special Rapporteur on the Right to Education *Statement to the Commission on Human Rights* (22 March – 30 April 1999, available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=2185&LangID=E>; UN Commission on Human Rights *Preliminary Report of the Special Rapporteur on the Right to Education, Ms Katarina Tomaševski* UN Doc. E/CN.4/1999/49 (1999).

⁹ Committee on the Rights of the Child *General Comment No. 15: The Right of the Child to the Enjoyment of the Highest Attainable Standard of Health (art. 24)* UN Doc. CRC/C/GC/15 (2013) at para 56.

able to stay in school.¹⁰ A particularly emphatic declaration by the Supreme Court of Colombia underlined that ‘the conversion of pregnancy ... into a ground for punishment violates fundamental rights to equality, privacy, free development of personality and to education.’¹¹ The practice has not, however, abated. According to a 2014 Report by the Centre for Reproductive Rights, mandatory pregnancy testing and expulsion of pregnant school girls continues in a number of African countries including Tanzania, Ghana, Kenya, Nigeria, Sierra Leone, Uganda and Zimbabwe.¹²

It is thus deeply disturbing to note the existence and continued endorsement of such policies in democratic South Africa.¹³ There is a high prevalence of teenage pregnancy in South Africa. A review of teenage pregnancy in South Africa published in 2013, found that approximately 30 per cent of teenagers report ‘ever having been pregnant’.¹⁴ Of the teenage girls who fall pregnant, only about a third remain in school and return after giving birth. For the majority of teenage girls, as the report points out, ‘falling pregnant has a devastating effect on their secondary schooling with consequent negative impacts on their lives.’¹⁵ A recent study found that in Limpopo province, 3 per cent of learners were pregnant, the highest figure among the provinces. Matlala, Nolte and Temane cite newspaper figures, which they regard as a reliable source, as showing that one school in Mpumalanga had as many as 70 pregnancies.¹⁶

It was in these terms that the uncle of the pregnant learner at the Welkom School wrote to the Minister of Basic Education in the Free State and pleaded for help in reinstating the learner at school. When contacted by an official in the department, the chair of the School Governing Body (SGB) defended its actions by stating that the school had not expelled the learner. Instead, it had ‘interrupted the academic progress of the learner to the benefit of all concerned.’ The Free State HOD then instructed the principal to allow the learner back to school. A

¹⁰ See, eg, CEDAW Committee *Concluding Observations: Chile* U.N. Doc. CEDAW/C/CHL/CO/5-6 (2012) at para 29(a); CEDAW Committee *Concluding Observations: Saint Lucia* U.N. Doc. CEDAW/C/LCA/6 (2006) at para 28.

¹¹ *Crisanto Arcangel Martínez Martínez y Maria Eglina Suarez Robayo v Colegio Ciudad de Cali* No. T-177814 (11 November 1998), cited by K Tomasevski ‘Girls’ Education through a Human Rights Lens: What can be Done Differently, What Can be Made Better’ (2005) 5, available at <http://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/4349.pdf>.

¹² Centre for Reproductive Rights *Submission for Half-Day of General Discussion and Draft General Recommendation on the Right to Education* (2014), available at <http://www.ohchr.org/Documents/HRBodies/CEDAW/WomensRightEducation/CenterForReproductiveRightsContribution.pdf>.

¹³ It appears that the two schools were not alone – the Measures for the Prevention and Management of Learner Pregnancy (Measures) issued by the National Department of Education in 2007 stated that no learner should be readmitted in the same year that they left school due to pregnancy: See *Welkom* (note 1 above) at para 154. But cf *Guidelines for the Consideration of Governing Bodies in Adopting a Code of Conduct for Learners* GN 776 in *Government Gazette* 18900 (15 May 1998) (stated that a learner who falls pregnant should may not be prevented from attending school). *Welkom* (note 1 above) at para 158.

¹⁴ Samantha Willan *A Review of Teenage Pregnancy in South Africa – Experiences of Schooling, and Knowledge and Access to Sexual & Reproductive Health Services* (2013), available at <http://www.rmchsa.org/wp-content/uploads/2013/08/Teenage-Pregnancy-in-South-Africa-2013.pdf>.

¹⁵ *Ibid.*

¹⁶ SF Matlala, AGW Nolte & MA Temane ‘Secondary School Teachers’ Experiences of Teaching Pregnant Learners in Limpopo Province, South Africa’ (2014) 34(4) *South African Journal of Education*.

similar chain of events and similar intransigence on the part of the Harmony SGB led to intervention by the HOD. Both schools challenged the intervention of the HOD in court. The High Court, the Supreme Court of Appeal and a majority of the Constitutional Court held in favour of the SGB. The High Court and SCA did not deal with the constitutionality of the exclusion. The Constitutional Court did so, but would only declare that the exclusion of pregnant learners was *prima facie* unconstitutional. Rather than declaring it unconstitutional as such, the Court ordered the SGBs to reconsider the policy in the light of the judgment and to meaningfully engage with the other parties.

Khampepe J (with whom Moseneke DCJ and Van der Westhuizen J concurred), spent the first 105 paragraphs of her opinion determining the respective powers of the HOD and school governing body, concluding that the Free State HOD acted unlawfully in purporting to usurp the schools' power to formulate policy, including pregnancy policies. The courts below were therefore correct to grant the interdictory relief restraining the HOD from interfering in the schools' policies: 'At all times the HOD was obliged by the rule of law and the carefully crafted partnership imposed by the South African Schools Act (Schools Act)¹⁷ to adhere to the mechanisms provided for in the statute. Otherwise, he was obliged to approach a court in order to have the allegedly unconstitutional policies set aside.'¹⁸ Although the rights of pregnant learners must be protected, promoted and fulfilled, 'this must be done lawfully.'¹⁹ Having found that the Schools Act authorises the SGB to promulgate a pregnancy policy under its powers to formulate codes of conduct, she asked what the Schools Act empowers the HOD to do when faced with what he or she regards as policies which offend the Constitution. The answer, in her view, was that

the Schools Act does *not* empower an HOD to act as if policies adopted by a school governing body do not exist. Rather, the Act obliges the HOD to engage in a comprehensive consultative process with the relevant governing body regarding the particular policies and then, if there are reasonable grounds for doing so, to take over the performance of the particular governance or policy-formulation function in terms of section 22, in order to give effect to the relevant constitutional rights and the objectives of the Schools Act. Of course, the other avenue always open to an HOD is to approach the courts for appropriate relief, for instance to obtain an urgent interdict in respect of the application of the policies or to have the policies reviewed and set aside.²⁰

Only then did she turn to consider the constitutionality of the pregnancy policies. The schools had argued that the pregnancy policies were not before the court: this was wholly a dispute about the power of the HOD to interfere with the SGB. The courts below had accepted this position. Khampepe J disagreed. Citing *Ermelo*,²¹ she was prepared to attempt to identify the actual underlying dispute

¹⁷ Act 84 of 1996.

¹⁸ *Welkom* (note 1 above) at para 105.

¹⁹ *Ibid* at para 105.

²⁰ *Ibid* at para 72.

²¹ *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* [2009] ZACC 32, 2010 (2) SA 415 (CC), 2010 (3) BCLR 177 (CC).

between the parties.²² At the same time, ‘the respondent schools have declined to make submissions on the constitutionality of the pregnancy policies, asserting that the issue has not properly been placed before this Court. We are therefore ill-placed at present to make a conclusive determination on the substantive content of the policies.’²³ Thus the Court’s consideration of the issue was limited to its power to grant equitable and fair remedies. Taking this path, she found only a prima facie violation of the learners’ rights to equality and education. The policies expressly differentiated on grounds of pregnancy; and also on the grounds of sex, by placing more onerous conditions on the pregnant learner than on the father,²⁴ but this meant that there was only presumptively unfair discrimination on grounds of pregnancy and sex. Similarly, the learners’ fundamental rights to basic education were ‘limited’²⁵ rather than breached. Again the fact that the codes obliged pregnant learners to report to the school authorities when they believe they were pregnant as well as requiring other learners to report on them only prima facie violated their rights to human dignity, privacy and bodily and psychological integrity.²⁶ Finally, the inflexibility of the policies ‘may’ violate the constitutional requirement in s 28(2) that a child’s best interests are paramount.²⁷

Her decision as to the remedy was also shaped by the fact that she was ‘very much alive to the fact that the respondent schools have not presented argument in justification of the policies’.²⁸ Thus while she was prepared to grant an order in favour of the schools that the HOD acted unlawfully, she believed that since the respondents had not made submissions justifying the constitutionality of the policies, it was ‘appropriate for this Court to refrain from making a declaration of invalidity’ of the pregnancy policy. Instead, her approach was to order the school governing bodies to review their pregnancy policies in the light of her judgement. Despite their recent intransigence (only a few paragraphs earlier, Khampepe J rebuked the SGB for threatening to ‘go to the media’ when instructed to change their policy²⁹), she continued to regard school governing bodies as ‘a democratically constituted body representative of the interests of the school community’ and therefore ‘best placed to fashion policies which take into account the needs of their schools.’³⁰ The schools were further ordered to report back to the court on ‘reasonable steps they have taken to review the pregnancy policies’.³¹ Finally she ordered meaningful engagement between the parties in order to give effect to the remedy. It was this co-operative requirement that was stressed in the concurring opinion of Froneman and Skweyiya JJ (with whom Moseneke DCJ and Van der Westhuizen J also concurred).

²² *Welkom* (note 1 above) at para 107.

²³ *Ibid* at para 110.

²⁴ *Ibid* at para 113.

²⁵ *Ibid* at para 114.

²⁶ *Ibid* at para 115.

²⁷ *Ibid* at para 116.

²⁸ *Ibid* at para 118.

²⁹ *Ibid* at para 120.

³⁰ *Ibid* at para 125.

³¹ *Ibid*.

Whereas the main judgement dealt with the dispute over the relative powers of the SGB and the HOD as if they were unrelated to the substantive issue of the constitutionality of measures excluding pregnant learners, the dissenting judgment of Zondo J (Mogoeng CJ, Jafta J and Nkabinde J concurring) viewed the two issues as integrally related. This was not simply a case of a disagreement between two rival powers. Instead, it was a question of the whether an unconstitutional policy should be regarded as valid. From this starting point, the logic looks very different. The real questions become firstly, whether the SGB ever has power to make a policy which is inconsistent with provisions of an Act of Parliament or the Constitution; secondly, whether such a policy prevails in the absence of or pending an order of the court; and thirdly, whether the HOD has the power to instruct the principal of a school not to implement a learner pregnancy policy where this will be inconsistent with an Act or the Constitution. Looked at from this direction, as Zondo J pointed out, the main judgment, like those of the High Court and the Supreme Court of Appeal, seem to imply that until a court order or the function of making a learner pregnancy policy is revoked, the SGB's policy prevails even if it is inconsistent with an Act or the Constitution. He took a different view: an SGB cannot make a policy which is unconstitutional; and therefore, where there is a conflict, the Constitution or statute prevails. In such a circumstance, the HOD clearly has power to instruct a school principal not to implement a policy which is inconsistent with an Act or the Constitution.³²

Zondo J also took a different view of the constitutionality of the pregnancy policies at issue in the case. For him, there was no question of a potential justification of the exclusion of pregnant learners. This is because, under the limitation clause in s 36(1), a right can only be limited by a law of general application. A pregnancy policy was not a law, and therefore could not legitimately be relied on to justify an intrusion of the right.³³ For Zondo J, then, there was an unequivocal breach of the pregnant learners' rights. 'The exclusion of the learner from school against her will and that of her parents as a result of her pregnancy was an unjustifiable limitation of the learner's right to a basic education and, therefore, an infringement of that right.'³⁴ From this position, it was straightforward to determine the lawfulness of the HOD's actions. Firstly, the HOD was correct to decide that the exclusion violated her rights, and therefore he was obliged under s 7(2) of the Constitution, to protect her rights by instructing the principal to allow her back to school.³⁵ Moreover, the SGB, as an organ of the State, also had an obligation to respect, protect and promote the rights entrenched in the Bill of Rights. Regardless of whether it had the power to make a learner pregnancy policy, it acted in breach of its s 7(2) obligations by violating the pregnant learners' rights.³⁶

How then can we make sense of the main and concurring judgments and their reluctance to authoritatively declare an unconstitutional policy to be unconstitutional? There are three themes that appear to run through these

³² Ibid at para 171.

³³ Ibid at para 205.

³⁴ Ibid at para 206.

³⁵ Ibid at para 207.

³⁶ Ibid at para 208.

judgments. The first, most prominent in Khampepe J's judgment, is that the Court's function is not necessarily to determine the substantive issue, but to assert the rule of law and ensure it is followed. The second, endorsed in both the main and concurring judgments, is that the essence of the Court's role is to facilitate co-operation and engagement, modelling, in Moseneke DCJ's words in *Ermelo*, the spirit of democratic co-operation for learners. The third resonates with the spirit of experimentalism set out in Chuck Sabel's work and developed in Stuart Woolman's work. While these are all laudable aims, and might well be salient in many disputes over education, the *Welkom* case pushes them to their limits. Is there a hard edge to constitutional rights in that, regardless of who has power over what, or how a dispute is presented, a court would be abdicating its duty not to assert the violation straightforwardly? Should a respondent who chooses not to put its justification for such a violation be given the benefit of the doubt, as Khampepe J would have it, or should this simply be regarded as a failure to provide adequate justification?

A The Rule of Law

As we have seen, the main thrust of Khampepe J's judgement is her insistence that the HOD can only act within the boundaries of the powers granted to him or her by the Act, or at least, by her construction of the Act. Thus, she stated: "The rule of law does not permit an organ of state to reach what may turn out to be a correct outcome by any means. On the contrary, the rule of law obliges an organ of state to use the correct legal process."³⁷ Where internal remedies are available, an organ of state must use them. "The rule of law does not authorise self-help."³⁸ For her, the rule of law required strict adherence to the mechanisms provided for in the statute. This procedural insistence was at least as important as the substantive protection of individual rights. Indeed, it arguably took priority over those rights. Thus she stated: "There is no doubt that the rights of pregnant learners to freedom from unfair discrimination and to receive education must be protected, promoted and fulfilled. But this must be done lawfully."³⁹

This, however, is problematic for at least three reasons. First, it meant, as Zondo J forcefully put it, that the pregnancy code remained valid until the SGB reconsidered it or it was set aside by a court in new proceedings brought precisely for that purpose. Given that Khampepe J had left open the possibility that the schools' actions might be justified in proper proceedings, finding only that there were prima facie breaches of the rights in question, the case did not come to a definite conclusion that the SGB's actions were unlawful. This has wide ramifications, especially for the many pregnant learners who had been excluded over the years, who deserve recompense for the breach of their fundamental rights.

Secondly, it assumes an exaggerated clarity and precision about the statutory procedure. There were clearly other ways of interpreting the statutory framework.

³⁷ Ibid at para 86.

³⁸ Ibid at para 87.

³⁹ Ibid at para 105.

As the dissenting judgment shows, the HOD as the employer of the principal of the school clearly had the power to instruct the principal to decline to follow instructions of the SGB which were unlawful. In addition, it was clear that any exclusion or expulsion had to be referred to the HOD or the MEC to determine. The decision by the HOD to follow the route he did, rather than that suggested by the Court, seems not to be unreasonable given that the dissent regarded it as valid. Moreover, the alternative approaches which the majority decision suggests, namely taking over the power of the SGB or going to court, do not necessarily deal with the issue. Again, as the dissent pointed out, this might well leave the policy intact and valid. The majority was highly dismissive of the HOD's view that these two other options were heavy handed and extreme.⁴⁰ Yet on the basis of the statutory framework, this was certainly not an unreasonable interpretation of the range of available powers.

Thirdly, there are rival understandings of the rule of law. Khampepe J assumes without question that rule of law should be regarded as following a specific view of the statutory procedure. However, the substantive breach by the SGB could equally be considered to be a violation of the rule of law. Khampepe J's response that this should be considered in separate proceedings ignores the fact that the SGB chose to frame the dispute in this way. Khampepe J made much of the fact that any potential justifications were not before the Court and therefore only a *prime facie* violation could be found. But it was open to the respondents to put their justifications before the Court. Their failure to do so should be regarded as conceding the point, rather than giving them the benefit of the doubt. Moreover, it is not clear that the SGBs themselves were following the statutory procedure as they should have done. Despite the fact that schools do not have the power to impose involuntary removal from school, the schools had presumably excluded pregnant learners for some years without referring them to the HOD. This too was a breach of the rule of the law on behalf of the SGB. All through the litigation, the SGBs claimed they had power to prescribe a 'leave of absence' for pregnant learners. Yet because the SGBs' actions were seen as an independent issue, the Court did not see them as justifying the HOD's actions. Instead, the latter was seen as resorting to 'self-help'. Looked at this way round, this is a very odd formulation. The HOD was responding to a valid request for assistance from the most vulnerable party in the dispute, the pregnant learner herself.

B Democracy and co-operation

The rule of law approach on its own does not, therefore, offer a good enough explanation of the majority judgment. A second way to understand the Court's position is from the standpoint of democracy. The main and concurring judgment are peppered with references to consultation, co-operative decision-making and

⁴⁰ Ibid at para 89. ('During oral argument counsel for the Free State HOD was questioned about his client's failure to employ the available statutory remedy in order to address the perceived problems with the pregnancy policies. In response he merely stated that reliance on section 22 would have been "too drastic" in the circumstances of this case. I fail to see how relying on section 22 would be too drastic where the Free State HOD took the view that the pregnancy policies were clearly unconstitutional.')

democracy. Strong reliance is placed on *Ermelo*, where the powerfully worded judgment urged all parties to model the spirit of democracy by engaging in co-operative partnership.⁴¹ There are several different ways in which this notion of democracy is formulated. One is a subsidiarity point: the school unit is regarded as the best place to formulate the pregnancy policy because the SGB is best acquainted with the local context. Thus, according to Khampepe J, ‘no other partner in the statutory scheme for the running of public schools is empowered, or is as well-placed as a school governing body, to formulate a pregnancy policy for a particular school (at least as a matter of first instance). In other words, this is consistent with the Schools Act’s objective of ensuring democratic governance within the public school system.’⁴² By contrast, the Minister could only promulgate general policies, which would need to be given particular form to accommodate a school’s circumstances.⁴³ A second formulation is to regard the SGB as ‘akin to a legislative authority within the public-school setting, being responsible for the formulation of certain policies and regulations, in order to guide the daily management of the school and to ensure an appropriate environment for the realisation of the right to education.’⁴⁴

A third understanding of democracy is in terms of separation of powers. Khampepe J put it this way:

[P]ublic schools are run by a partnership involving the state, parents of learners and members of the community in which the school is located. Each partner represents a particular set of relevant interests and bears corresponding rights and obligations in the provision of education services to learners. ... [T]he interactions between the partners – the checks, balances and accountability mechanisms – are closely regulated by the Act. Parliament has elected to legislate on this issue in a fair amount of detail in order to ensure the democratic and equitable realisation of the right to education. That detail must be respected by the Executive and the Judiciary.⁴⁵

For Froneman J, the emphasis is on democracy as co-operation. It is central to the concurring judgement that the HoD should have resolved the dispute through consultation and co-operation. This develops the central theme in Moseneke DCJ’s judgment in *Ermelo*.

All of these high-minded pronouncements make a good deal of sense as aspirations. However, their implications in the context of this case are not fully worked through. Whichever formulation of democracy is used, this approach does not address the classic democratic dilemma, namely, that the majority might override the rights of the minority, as in this case. Unless there is an external mediating body, the majority might triumph. Khampepe J states that in the partnership involving state, parents of learners and members of the local community, each partner represents a particular set of relevant interests. However, this assumes that each stakeholder represents a homogeneity of interests, and that in cases of disagreement, the majority should rule. What is

⁴¹ *Ermelo* (note 21 above).

⁴² *Welkom* (note 1 above) at para 66.

⁴³ *Ibid* at para 67.

⁴⁴ *Ibid* at para 63.

⁴⁵ *Ibid* at para 49.

not clear is who represents the pregnant learners. Clearly, parents and members of the local community had ignored their interests for some years. This reflects a more general pattern. Tomasevski, in her reports as UN Special Rapporteur on Education, observed that parents, teachers and community leaders in many regions tended to support the expulsion of pregnant girls from school, claiming that this upheld the moral norm prohibiting teenage sex.⁴⁶

It is for this reason that the learners turned to the 'state'. This raises the question of what interests the state represents. The reference to 'self-help' suggests that the state is defending its 'own' interests at the expense of others. Yet in this case it was defending the human rights of pregnant learners, which is precisely the function of human rights in a democracy. Similarly, regarding the SGB as the school legislature gives it legitimate authority over school affairs, subject to constitutional limits. But here too no credence is given to a conflict of interests either within the school constituency or between the school and outsiders.

The resort to subsidiarity is not a full answer either. It is true that devolving power to local decision-making has been at the centre of the transformation of education since Apartheid, with the push towards new participatory structures replacing the authoritarian Apartheid regime. However, as Motala and Lewis argue, 'there does not appear to be recognition that the representative democracy being promoted through SGBs is a system of competition for power and influence, that is, a decidedly political one.'⁴⁷ Most saliently, they argue that decentralisation of democratic governance could in practice deflect class, race and gender conflict from national or provincial arenas. For them the Schools Act and the National Norms and Standards for School Funding (NNSF) are 'conspicuously silent on class, race and gender conflict, but ignoring conflict will not make it go away. This ignoring of conflict extends to the inaccurate conception of representative democracy as a benign collaboration of local actors as partners rather than competitors for power.'⁴⁸ They also point to well documented evidence of lack of representativeness of SGBs in terms of race, class and gender.⁴⁹ Subsidiarity would certainly be relevant to operationalising the right to education of pregnant learners in the local context. But it should be seen as fleshing out the right, rather than determining whether it exists or not. Leaving SGBs with the potential of justifying a pregnancy exclusion policy is simply not sufficient.

A similar point can be made about the duty of consultation. The consultative process looks like deliberative democracy. However, the weakness of consultation is evident from the facts of the case. There was certainly some attempt at consultation, but the SGB in both cases was intransigent. Even the act of resisting the HOD's intervention on the grounds that it was outside of his powers is a symptom of the breakdown of the co-operative spirit. Clearly, cases that get as

⁴⁶ UN Commission on Human Rights *Progress Report of the Special Rapporteur on the Right to Education* E/CN.4/2000/6 (2000).

⁴⁷ S Lewis & S Motala 'Educational De/centralisation and the Quest for Equity, Democracy and Quality' in L Chisholm (ed) *Changing Class: Education and social change in post-apartheid South Africa* (2004) 121.

⁴⁸ *Ibid* at 126.

⁴⁹ *Ibid* at 127.

far as the Constitutional Court are cases where co-operation has broken down. Does an exhortation to a co-operative spirit sufficiently protect the rights of the most vulnerable, who had no voice in the initial decision? It could also be asked what the consultation was to be about. If the Court had laid down that the right had been breached, it is possible that consultation would be used to determine the means to fulfil the right. But given that the Court left open the possibility of a justification being offered by the SGB, was the function of consultation and constructive engagement aimed at reaching some compromise on the right? The school had already offered the explanation that none of the staff was trained to deal with childbirth or complications of advanced pregnancy. Would this have been an adequate justification for an exclusion which extended well after the birth of the child? The reliance on consultation makes it seem as if the outcome of the deliberation is open-ended. In the meanwhile, as the dissent points out, the policy seems to remain valid until the conclusion of the consultations.⁵⁰

It is quite possible to take an alternative but equally democratic view. The provincial and national legislatures surely have just as much legitimacy as the SGB from a democratic perspective, and the subsidiarity principle does not work where wider interests than those of the school are at issue. Moreover, the HOD (and the school) are charged by the Constitution to respect, protect and promote the rights of all. Khampepe J added an important gloss to the HOD's powers under s 7(2), stating that they had to be exercised according to the statute, whereas the dissenting judgment made it clear that all organs of state have Constitutional duties to protect. Moreover, it seems that the internal democracy within the school was not properly exercised. The majority make no mention of the point, stressed by Zondo J, that despite the requirement in s 8(1) of the Schools Act that a code be adopted 'after consultation with the learners, parents and educators of the school', such consultation seemed never to have happened.⁵¹

C Experimentalism

A third way of understanding the majority decision is based on the insights of 'experimentalism', as described by Sabel and others and extrapolated for the South African system by Stuart Woolman. On this view, compliance with human rights obligations in complex social issues necessitates problem-solving and continuing review by actors themselves.⁵² For this reason, traditional models of legal enforcement based on formal legal rules are inevitably unsuccessful because of the impossibility of devising appropriate and dynamic solutions for the wide diversity of units required to take steps to achieve human rights goals. This points to the importance of devolved decision-making. Attempts to specify solutions from above are said to stifle local initiative and forfeit the cooperation of local actors. Instead, this approach argues, the heterogeneity of organizations subject

⁵⁰ *Welkom* (note 1 above) at para 239.

⁵¹ *Ibid* at para 231.

⁵² See, further, S Fredman *Human Rights Transformed: Positive Rights and Positive Duties* (2008).

to the duties should both be recognized and cultivated in order to find creative and dynamic methods of problem solving.

Viewing the issue in this light opens up the potential to incorporate principles of deliberative democracy into local decision-making. This points us towards the solutions proposed under the label of Directly Deliberative Polyarchy (DDP).⁵³ DDP recognizes the limits of legal regulation but also rejects the view that free enterprise within the market is the only alternative. The aim is to find a democratic solution to the need for creative problem-solving both within and between units. This approach is particularly aimed at situations in which there are too many sites to monitor through centralized compliance mechanisms; or where the diversity of sites means that different means are appropriate in each case. It also aims to address situations in which the complexity of the problem to be solved requires continuous review and reflection, and where cooperation between units is necessary to achieve the desired outcome.⁵⁴

DDP harnesses the energy and knowledge of local actors by granting them autonomy to experiment with solutions of their own devised within broadly defined areas of public policy.⁵⁵ The focus is on finding ways to stimulate problem solving, encouraging organizations to identify ways in which to carry out their duties which are most appropriate to their own context. Instead of insisting on specific actions, the thrust of the compliance mechanism would be to facilitate deliberative procedures, whereby the decision-makers in an organization are able to work out the appropriate response. Deliberation is more than discussion or consultation; it aims to achieve a problem-solving dynamic where participants are ready constantly to review and revise their conclusions in the light of their exposure to their own and others' experience and perspectives. This in turn generates a greater likelihood that local norms will be developed which will be real and effective. This operates within a regulatory framework in which the role of legislation is to set general goals and to facilitate deliberation; the role of the administrative bodies is to provide the infrastructure for the exchange of information; and the role of the courts is to require decision-making to proceed in a deliberative way.⁵⁶

This approach looks promising in many respects. However, there are at least three sources of tension. The first is that, in the context of human rights, deliberation or experimentalism is not open-ended in terms of the goals to be secured. Because it is based on a human right, it is targeted at securing the exercise of the right. Secondly, deliberation must lead to action. This puts particular weight on the ability of deliberative structures to reach decisions. As Black points out, it is by no means inevitable that deliberation will lead to conclusions. Thirdly, close attention needs to be paid to the participants in the process. Internal power structures mean that potential participants do not have equal power so that the ways in which participants to deliberation are identified is crucial. This manifests

⁵³ J Cohen & C Sabel 'Directly-Deliberative Polyarchy' (1997) 3 *European Law Journal* 313.

⁵⁴ *Ibid* at 321, 334.

⁵⁵ O Gerstenberg & C Sabel 'Directly-Deliberative Polyarchy: An Institutional Ideal for Europe?' in C Joerges & R Dehousse (eds) *Good Governance in Europe's Integrated Market* (2002) 291.

⁵⁶ Cohen & Sabel (note 53 above) at 334–335.

itself too in the nature of the communication process itself. While Habermas assumes that language is an unambiguous medium of communication, Young shows that this conceals a particular view of rationality, which privileges speech that is formal and general, and values assertive and definitive approaches rather than that which is tentative or exploratory. This in turn can operate as a form of power, silencing or devaluing the speech of those who do not engage on these terms.⁵⁷ As Black concludes:

We have to recognise the possibility of forms of communication that do not correspond to the ideal of communication that Habermas posits, in which there may not be orientation to mutual understanding, to public reason, and a commitment to take on obligations arising from the interaction. ... We have to allow for manipulation by communicants, for insincerity, for lack of trust and belief in the others' motives, or quite simply for the fact that people may not be interested in communicating at all.⁵⁸

It is therefore necessary to find the right balance between external imposition of the goal to be achieved and local autonomy as to how to achieve the goal. Effective monitoring of the priorities set by local decision-makers is necessary to prevent the process becoming one of pure discretion. But at the same time, deliberation should not be stifled by tying deliberators to particular outcomes. This is further complicated by the permeability of means and ends. The interpretation of the means to achieving the right bears closely on the meaning of the right itself, so that while the right anchors deliberation, deliberation also shapes the right and the consequent duty. Similarly, the duty requires action, but action must continually be deliberatively reviewed to better achieve the right. Finally, deliberation requires equality among participants, both in their presence and their ability to present their perspective and this is a key aspect of deliberative democracy.

This discussion suggests that, in designing compliance mechanisms, it is necessary not only to understand the conditions under which a deliberative process takes place but also to affirmatively create them.⁵⁹ Unless the usual ways of reacting within the organisation are altered, it is unlikely that compliance will be achieved. Decision-making within organizations is not necessarily deliberative or democratic; in fact, it is more often autocratic or bureaucratic. Therefore, regulation should be fashioned in a way which reflexively leads to an alteration in internal structures, creating the conditions for deliberation among relevant actors, so that they can reach a mutual understanding of the goal to be reached, and the most effective means of reaching it. In particular, participants must be willing to revise their initial perceptions in the light of the discussion. There also needs to be a regular process of review, where further deliberation takes place in

⁵⁷ I Young 'Communication and the Other: Beyond Deliberative Democracy' in S Benhabib (ed) *Democracy and Difference: Contesting the Boundaries of the Political* (1996) 127–128; I Young 'Justice and Communicative Democracy' in R Gottlieb (ed) *Radical Philosophy: Tradition, Counter-Tradition, Politics* (1993) 130.

⁵⁸ J Black 'Proceduralising Regulation, Part II' (2001) 21 *Oxford Journal of Legal Studies* 33, 47.

⁵⁹ O de Schutter & S Deakin 'Reflexive Governance and the Dilemmas of Social Regulation' in O de Schutter & S Deakin (eds) *Social Rights and Market Forces: is the Open Coordination of Employment and Social Policies the Future of Social Europe* (2005) 3.

the light of experience of the workings of any given solution, with a crucial role being played by the differing perceptions of various participants. Experience has shown that this does not happen without some external triggers, in the form of incentives or sanctions. Attempts at voluntary codes have proved that, while some organizations may readily respond, others will simply ignore attempts at change which have no ultimate sanction or incentive.⁶⁰ The challenge is to find a way to establish a relationship between internal deliberation and external incentive or deterrent structures, while at the same time being responsive to different organizational dynamics.

Black explores further ways in which deliberative structures might be harnessed to achieve compliance. To enlist deliberation, which can lead to action in respect of positive duties, might require active mediation by a regulator which has the ability to overcome some of the obstacles identified above. The difficulties of communication even between participants in the same system require a regulator who is capable of translating the different languages used by participants in a way which all can understand. This is more difficult than it seems, because the blockage is not simply one of using different words as signifiers of the same concept, but of the different logical and motivational underpinnings of the discourse. For example, it is necessary to recognize non-rational forms of communication, such as storytelling and rhetoric together with 'rational' approaches. Even more important, as Black argues, if translation is to facilitate the inclusion of all those who want to deliberate, it cannot be a translation into one dominant language. Instead, it must be multiple, from the language of each to that of the others.⁶¹ The influence of the regulator's own frame of reference and 'language' should not be ignored.

Stuart Woolman has argued that the experimental approach is the best explanation of the SA Schools Act.⁶² Certainly, there is much in the majority and concurring judgments which suggests that the Court is interested in facilitating experimentalism at local level. However, the extent to which this approach can address hard edged breaches of constitutional rights is questionable. By ordering meaningful engagement, and directing the respondent schools to reconsider the exclusion in the light of the judgment, the majority gives the impression that the issue is still open ended and open for negotiation. Indeed, it clearly indicates that there could be possible justifications for the exclusions. While of course, as Khampepe J states, there could be many different ways of accommodating pregnant learners, and the school may be best equipped to determine how to do so, such experimentalism should not extend to exclusion of pregnant learners in any shape or form. This is a clear example of an organization which remains hierarchically organized. Pregnant learners as well as those who might become pregnant, have no effective voice in the deliberation. The only body in the mix which was prepared to speak for the pregnant learners, namely the HOD, was

⁶⁰ B Hepple, M Coussey & T Choudhury *Equality: A New Framework Report of the Independent Review of the Enforcement of UK Anti-Discrimination Legislation* (2000).

⁶¹ Black (note 58 above) at 51.

⁶² S Woolman *The Selfless Constitution: Experimentalism and Flourishing as Foundations of South Africa's Basic Law* (2013) 353.

rebuked for doing so. This is precisely when the role of human rights comes into its own: to insist on protection of rights when the deliberative process does not do so. In this context, therefore, the failure of the majority of the Court to clearly assert that the learners' rights had been breached, and that part of the policy was therefore void, was an abdication of its role.

This is not to say that experimentalism does not have a role to play once it is clear that pregnant learners have a right to remain at school. The duty not to interfere with the pregnant learners' rights to remain at school comes hand in hand with a positive duty to facilitate and fulfil that right by finding ways of catering for their needs. There are obvious challenges in relation to managing the health needs of the pregnant learner, and many educators are understandably anxious about having to play a role for which they have no training. A study in 2010 found that some teachers were unwilling to permit pregnant learners to remain in school, echoing the concerns expressed in *Welkom* that schools were not meant for pregnant learners and were not equipped to deal with their needs. Other schools simply ignored pregnant learners, making no attempt to cater for their needs.⁶³ There have been cases reported in local newspapers of pregnant learners giving birth on secondary school premises without the assistance of a skilled birth attendant. It is here that a duty of close co-operation between SGBs, educators and the Departmental HOD is essential to formulate workable solutions which can also be owned by the school. Studies have shown that the provision of skilled birth assistants is an affordable intervention which can reduce maternal mortality and morbidity dramatically.

The inadequacy of health care for pregnant learners at school is not, however, the only reason given by educators for the reluctance to retain pregnant learners at school. Studies have also found that some educators perceive pregnant learners to be a disturbance of the learning environment,⁶⁴ and this is backed up by Ngabazi and Shefer's research in 2013 showing that schools are intolerant of pregnant learners.⁶⁵ Some educators' negative attitude towards pregnant learners has even led them to mistreat these learners until they dropped out of school.⁶⁶ There is well established evidence that teenage pregnancy is considered morally wrong and stigmatised in South Africa.⁶⁷ One serious implication is that learners do not disclose their pregnancies to teachers, if they can help it.⁶⁸ The most recent study, carried out by Matlala et al, which examined teachers' experience of pregnant learners in three township schools in Limpopo province, found that pregnant learners' attempts to hide their pregnancies made it difficult for teachers to

⁶³ N Mpanza & D Nzima 'Attitudes of Educators towards Teenage Pregnancy' (2010) 5 *Procedia Social and Behavioural Sciences* 431.

⁶⁴ D Bhana et al 'South African Teachers' Responses to Teenage Pregnancy and Teenage Mothers in Schools' (2010) 12 *Culture, Health and Sexuality: An International Journal for Research, Intervention and Care* 871.

⁶⁵ S Ngabaza & T Shefer 'Policy Commitments vs Lived Realities of Young Pregnant Women and Mothers in School, Western Cape, South Africa' (2013) 21 *Reproductive Health Matters* 106.

⁶⁶ Mpanza & Nzima (note 63 above).

⁶⁷ S James, D Van Rooyen & J Strümpher 'Experiences of Teenage Pregnancy among Xhosa Families' (2011) 28 *Midwifery* 190.

⁶⁸ Ngabaza & Shefer (note 65 above).

discern pregnancy, and that once they did become aware, some teachers found it difficult to accept the pregnant learners in school.⁶⁹ There were some teachers who felt strongly that learners should be held accountable for their actions, for example through suspension from school. It is for this reason that, even from an experimentalist's perspective, *Welkom* should have contained a strong statement from the Court that the right to remain at school is fundamental, and the role of the relevant actors is to find ways of making this happen.

II RIVONIA

The *Rivonia* case is more complex, since it touches directly on how to achieve equity in resource allocation in the education field, particularly in relation to the quality of education. Mhlantla AJ, giving the lead judgment, began by noting the continuing disparities in accessing resources and quality education, which perpetuate socio-economic disadvantage, thereby reinforcing and entrenching historical inequity. 'The question we face as a society,' she went on 'is not whether, but how, to address this problem of uneven access to education. There are various stakeholders, a diversity of interests and competing visions. Tensions are inevitable. But disagreement is not a bad thing. It is how we manage those competing interests and the spectrum of views that is pivotal to developing a way forward.'⁷⁰

Nevertheless, here too, the dispute was presented as centrally concerned with the allocation of powers as between the SGB and the provincial education department. In this case, the learner was told that the school was full and she was placed on a waiting list. The learner's parent, having had several interactions with the school, then appealed to the HOD. Due to various administrative delays, the school year had already begun when the HOD turned his attention to the matter. He found that the school policy was to admit 120 learners to five Grade One classes, although in this case it had admitted 124. This meant that there were 25 or 24 learners per Grade One class. He took the view that there was therefore capacity to admit the learner in question and purported to overturn the school's decision to refuse the learner admission and instructed the school to admit her immediately. However, when the mother arrived at school with the learner in full school uniform, the principal refused to admit her. The next day, the Gauteng HOD purported to withdraw the principal's admission function and the Department's representatives physically placed the learner in one of the school's Grade One classrooms, seating her at an empty desk that had been installed for a learner with attention and learning difficulties.

The SGB took the dispute to court, arguing it had the sole power to determine the school's maximum capacity.⁷¹ The High Court rejected the claim, holding the power to determine the maximum capacity of a public school in Gauteng vested in the Department. The Department was empowered to intervene where

⁶⁹ S Matlala, A Nolte & M Temane 'Secondary School Teachers' Experiences of Teaching Pregnant Learners in Limpopo Province, South Africa' (2014) 34 *South African Journal of Education* 1, 5.

⁷⁰ *Rivonia* (note 2 above) at para 2.

⁷¹ *Ibid* at para 17.

necessary to ensure that children threatened with being deprived of access to schooling were accommodated. On the facts of the present case, the Court was satisfied that the Department had acted fairly and reasonably.⁷² The SCA reversed this decision, holding that the SGB, having the power of admission, necessarily includes the power to determine the capacity of the school and any powers of the HOD must be exercised in accordance with the school's admissions policy. Indeed, it went even further and held that the Department could not have the power to use the additional capacity at Rivonia Primary, because that capacity had been created through additional funds raised by the Rivonia Governing Body. 'It would be a disincentive for parents to contribute to school funds if the increased capacity created by these funds could be used to accommodate more learners than the Rivonia Governing Body wanted to admit.'⁷³ It declared that the instruction given to the principal to admit the learner, contrary to the school's admission policy, was unlawful, as was the placing of the learner in the school.

The Constitutional Court, by a majority, rejected the HOD's appeal, although on different grounds from that of the SCA. In her judgment for the majority, Mhlantla AJ (Moseneke DCJ, Bosielo AJ, Froneman J, Khampepe J, Nkabinde J and Skweyiya J concurring) reinstated the role of the Department, reflecting the clear statutory scheme giving the latter ultimate control over the implementation of admissions decisions.⁷⁴ This made it untenable to regard the Gauteng HOD as rigidly bound by a school's admission policy, which could only serve as a guide to decision-making.⁷⁵ However, although the Gauteng HOD was lawfully empowered to admit learners to Rivonia primary, the HOD had breached the requirement to act in a procedurally fair manner. The principal should have been consulted and given another opportunity to explain her refusal to admit the learner. Although she had previously been asked to give her reasons for refusing to admit the learner, the facts had changed in the intervening three months. The Court therefore declared, firstly, that the Gauteng HOD was empowered to issue an instruction to the principal of Rivonia Primary School to admit the learner in excess of the limit in its admission policy. Secondly, however, the HOD must act in a procedurally fair manner. Thirdly, in this case he did not act in a procedurally fair manner. (The school had agreed to allow the learner to remain, so this question no longer arose.)

How then can we understand this case? Here again, we see the court addressing the issue on the basis of procedure rather than substance. The underlying substantive issues are, to be fair, extremely complex. The end of Apartheid brought with it the enormous challenge of achieving equity in a school system which had been racially stratified, with dramatically inferior resources allocated to education for the black majority as compared with their white counterparts. In abolishing racially divided schooling, and making education compulsory for the first time

⁷² Ibid at para 18.

⁷³ Ibid at para 25. See *Governing Body of the Rivonia Primary School and Another v MEC for Education: Gauteng Province and Others* [2012] ZASCA 194, 2013 (1) SA 632 (SCA), [2013] 1 All SA 633 (SCA) at para 49.

⁷⁴ *Rivonia* (note 2 above) at para 52.

⁷⁵ Ibid at paras 52-57.

for South African Africans, the newly elected government nevertheless made the decision to depart from the principle that education should be free. This was despite the fact that free compulsory education is enshrined in international human rights law and had been the ANC's own declared policy during the final years of Apartheid. Instead, the State made it clear from the start that it could provide the basic minimum, but anything beyond was the responsibility of parents.⁷⁶ The result was an explicit decision to encourage public schools to supplement funds provided by the State with school fees,⁷⁷ with fee waivers for those who could not afford to pay. This was partly due to the limited availability of funds, and the desire to decentralise. But the primary reason was to deter white flight to private schools by maintaining the standards of previously white Model C schools. The Schools Act requires the SGB to 'take all reasonable measures within its means to supplement the resources supplied by the State in order to improve the quality of education provided by the school to all learners at the school'.⁷⁸ This is largely done by setting school fees. Once the SGB has approved a fee, all parents must pay. Parents may, however, apply for a full or partial exemption based on income and verified through means testing. Automatic exemptions apply to orphans and abandoned children as well as to parents receiving a poverty-linked state social grant. A school may not deny a learner admission because of their parents' failure to pay fees. However, parents can be sued by the SGB for non-payment.

This inevitably leads to inequalities between schools. Schools with higher numbers of non-fee paying learners will fare worse than schools whose parents are able to supplement the school's budget. Moreover, there are substantial variations in fee levels between schools. Schools serving more affluent communities are able to set higher fees and thereby protect and enhance their position. This is borne out by Fiske and Ladd's research. They show that, unlike other developing countries, fees have not deterred learners from attending school. However, because fees vary between schools, class has begun to replace race in determining access to the formerly white schools. Even more seriously, they conclude: 'Fees have reinforced the advantages enjoyed by the formerly white schools without at the same time increasing the resources available to schools serving historically disadvantaged students.'⁷⁹ Similarly, Motala and Sayed describe the South African public schooling system as 'characterised by a vast number of distinctly disadvantaged schools and a small pocket of highly privileged schools.'⁸⁰ This difficulty is exacerbated by the fact that fee exemptions for poor learners in non-poor schools are not compensated by extra resources for the school. Not only does this provide an incentive for SGBs to find ways to exclude poor learners; it also raises the difficult question of whether it is fair for some parents to subsidise poor learners in fee paying schools, when this is arguably the function of the

⁷⁶ Lewis & Motala (note 47 above) at 118.

⁷⁷ E Fiske & H Ladd 'Balancing Public and Private Resources for Basic Education: School Fees in Post-apartheid South Africa' in Chisholm (note 47 above) 57.

⁷⁸ Schools Act s 36(1).

⁷⁹ Fiske & Ladd (note 77 above) at 57-58.

⁸⁰ S Motala & Y Sayed "No Fee' Schools in South Africa' (August 2009) 7 *Consortium for Research on Education, Access, Transitions and Equity (Create) Policy Brief* 2.

state.⁸¹ Fiske and Ladd show that although schools have to be careful not to discriminate unlawfully against students eligible for fee exemptions, ‘there is little doubt that many schools consider a family’s likely ability to pay their fees when making admissions policies.’⁸²

Partly because of the recognition that a two tier education system had developed in South Africa, with disadvantaged schools remaining almost entirely black, government policy was changed to designate the most disadvantaged schools as no fee schools.⁸³ From 2007, the schools in the lowest two quintiles were given the opportunity to apply to the Provincial Education Department to be declared ‘no fee’ school. Because of concerns that the schools located in the middle of the table, or third quintile schools, might be squeezed through lack of fees and lack of public subsidy, provincial education departments have more recently provided schools in this category with the opportunity to be declared ‘no fee schools.’⁸⁴ No fee schools receive larger state allocations per learner, and a higher allocation for non-personnel, non-capital expenditure to compensate for lack of fee revenue. In other schools, parents may continue to apply for exemptions from fees.

While the no-fee policy has been welcomed as a pro-poor intervention, it remains the case that public schools which can bring in high levels of private income through fees attract better qualified teachers, have smaller class sizes and can offer better infrastructural resources.⁸⁵ In their 2014 quantitative study, Mestry and Ndhlovu found that although the state was making concerted efforts to achieve equity in public schooling, the policy of increasing funds for no fee schools in quintiles 1, 2 and 3 and reducing funding for quintile 4 and 5 schools has not led to the improvement of educational outcomes and learner achievement, especially for rural, poor and illiterate children.⁸⁶ They argue that the reduction of state funding in affluent schools has been more than compensated for through school fees and other fundraising initiatives. This is borne out by the study by Transparency International, which found that, despite the laudable aims behind the no fee schools policies, 40 per cent of educator respondents in their study believed that learners in no fee schools received a lower quality of education than students in other types of school.⁸⁷ Nor is the quintile system an accurate reflection of the student body. They found that some schools may be ranked as quintile 5 and receive the lowest level of funding because they are situated in an affluent area but in fact cater mainly for poor learners from outside its feeder area. Such schools are ‘in a diabolical situation: They raise school fees and then adopt a hard-line approach to granting exemptions to learners who have difficulty in

⁸¹ Ibid. See also Fiske & Ladd (note 77 above).

⁸² Fiske & Ladd (note 77 above) at 72.

⁸³ Education Laws Amendment Act 2005; 2006 National Norms and Standards

⁸⁴ R Mestry & R Ndhlovu ‘The Implications of the National Norms and Standards for School Funding Policy on Equity in South African Public Schools’ (2014) 34 *South African Journal of Education* 1, 3.

⁸⁵ Motala & Sayed (note 80 above).

⁸⁶ Mestry & Ndhlovu (note 84 above).

⁸⁷ Transparency International (note 4 above) at 41.

paying these exorbitant fees.⁸⁸ Thus, they conclude, despite the emphasis on redress and equity, the school funding provisions ‘appear to have worked thus far to the advantage of public schools patronized by middle-class and wealthy parents of all racial groups.’⁸⁹

Faced with such complex polycentric issues, what should the role of a court be? Should it be confined to procedural issues, such as insisting on the rule of law, facilitating local democracy and encouraging experimentalism, thereby devolving the decision as to substance to another decision-maker? Or should the court make the substantive decision itself? In *Rivonia*, as in *Welkom*, the procedural route was followed.

A Rule of Law

The strongest theme in *Rivonia* is, again, the rule of law. As in *Welkom*, the dispute was presented to the Court as primarily about the division of powers between the province and the SGB. This meant that the Court could focus on the statutory allocation of roles and procedures, turning the challenge into a rule of law issue. The overriding emphasis on procedural fairness takes the rule of law approach even further. There was an understandable concern to make it clear that the inappropriate behaviour by officials of the HOD in physically placing the learner in the classroom could not be condoned. Behind this too was a strong sense that the HOD should not be permitted to abuse his powers by helping friends and allies jump the queue to gain a place at a sought-after school in Johannesburg.

However, the focus on the failure to consult leaves the matter painfully in limbo. If the principal had been given a further right to be heard, what would she have legitimately added to the debate? There is no indication of which reasons should be acceptable to the HOD and which should not. Thus, had the HOD asked the principal for a further explanation, she would probably have repeated the view adopted by the SCA: the extra capacity in the school belonged to the parents who had raised the funds for it, rather than to the HOD to distribute among other learners. Would this have been a good enough reason? The SCA thought it was. The Constitutional Court gave no guidance on this. Similarly, the principal and SGB might have repeated their view that the HOD should make provision for other learners by building more schools, rather than by placing the cost of provision on themselves. They preferred to keep their privileged position as insiders to themselves. The HOD might have retorted that schools in the privileged position of Rivonia should share their bounty, at least up to a maximum class size of 26 in this case. Was the HOD’s position more acceptable than that of the school? The Court did not begin to deal with these issues. Indeed, it gave no credence to the very fundamental conflict of interests at the heart of the dispute: that the SGB will inevitably give the interests of ‘insiders’ priority over ‘outsiders’ and that unless there are extra resources, giving to some might take away from others. Thus a mere duty to give a hearing to the other side simply resurrects the underlying conflict. Moreover, given that the HOD had ultimate

⁸⁸ Mestry & Ndhlovu (note 84 above).

⁸⁹ *Ibid* at 2.

power to make the decision, the failure to give any guidance on the outcome of the consultation inevitably defaults back to the discretion of the HOD. A duty of consultation as a mere rule of law exhortation does not seem to bear the weight the Court placed on it.

B Democracy

The explanation from democracy might bear more fruit. Here the duty to consult is not simply in order to follow the procedure laid down in the statute, but to elicit greater participation and meaningful engagement between the State and individuals or other bodies. But here again, it is hard to see how mere exhortation by the Court, without any substantive guidance, will lead to a meaningful engagement when there is a fundamental conflict of interests. The dissenting judgment charts some of the acrimony between the SGB and the HOD over the admission of the learner. ('Request: Rivonia Primary provide Mrs. Cele with a reviewed number. Reply: Our instructions are that the request to review the received waiting list number was rejected with the contempt it deserves. . . . Rivonia Primary and [its governing body], will not be part of any underhand activities.')⁹⁰ The parties would not have landed up in court if they had been willing to be co-operative. To trigger further engagement, some extra affirmation by the Court of the substantive principles at stake is required.

The case also casts doubt on the utility of using local democracy to deal with issues such as this. The SGB, by definition, is accountable to its parent body and local community and will therefore make decisions to further their interests. Learners who are not admitted to the school do not have a voice in this process. The natural tendency of the SGB is to favour the 'ins' and resist attempts to incorporate the 'outs'. This is to some extent countered by the statutory allocation of responsibility for systemic issues to the provincial government. Thus the HOD has the duty under the statute to ensure that all learners have a place at school by establishing a sufficient number of schools. The HOD also has power to intervene on behalf of any individual learner. However, while every learner has a right to a place at some school, there is no provision made for equity in the quality of education. Quality is therefore dealt with by each individual school according to its available resources. So far as quality of education is concerned, therefore, the democratic process is structured in such a way as to favour the privileged. The court in *Ermelo* attempted to counter this tendency by emphasizing that, while it was primarily the responsibility of the SGB to be concerned with the interests of the school, the needs and interests of all other learners could not be ignored. 'The governing body of a public school must . . . recognise that it is entrusted with a public resource which must be managed not only in the interests of those who happen to be learners and parents at the time, but also in the interests of the broader community in which the school is located, and in the light of the values of our Constitution.'⁹¹ The *Rivonia* decision, however, fails to give any substantive guidance on the principles by which to ensure the interests of outsiders are also

⁹⁰ *Rivonia* (note 2 above) at para 115.

⁹¹ *Ermelo* (note 21 above) at para 65.

considered. If the Court cannot give clearer guidance to the decision-makers about the overall values or the issues to be considered, who can?

C Experimentalism

The third possibility canvassed in this paper is that the Court's role is to facilitate an experimental approach. Woolman argues that there has been a healthy experimentalism between national government, provinces and SGBs in the education field. He gives as an example the fee-free regime. Having seen that fees did not improve quality of schools, but constituted a major impediment to some learners, the regime was changed. As he puts it:

Reformation of the schools fee regime is a good example of a halfway decent compromise. National government was under substantial public pressure (from NGOs) to eliminate fees entirely. The provinces – without independent sources of raising revenue – asked how they were going to make up for the significant shortfall. (Many provincial departments of education and SGBs were on the same page on this issue.) The result, after much discussion between these three entities, was an agreement that only the poorest three quintiles of schools became fee free.⁹²

The difficulty with experimentalism in this case is that the focus of each party on a particular set of interests might prevent more imaginative solutions from presenting themselves. This is aggravated by the lack of capacity to think through such solutions. Experimentalism, as we have seen, requires an alteration in the usual ways of reacting within the system. This is especially the case where, as here, decision-making may leave out the very people affected by the decision (the outsiders) and where the participants are not willing to revise their initial perceptions in light of the discussion. As argued above, significant investment in the process of experimental deliberation might be required to make it really work. This might include introducing a facilitator who is capable of understanding the blockages and translating each party's position to the other. There also has to be some change in the external environment which is entrenching the conflict. In *Rivonia*, the amicus made the valuable suggestion that if the HOD wished to place more learners at the school, it should provide funding to cover their costs. This of course has been central to the problem all through, namely that no funding is forthcoming from either the province or the national government to compensate for no-fee pupils.⁹³ Unless there is some structural change, possibly in the form of different budgetary allocations, the parties might well be stuck within their existing frame of reference. The possibility of free compulsory education, where school fees are funded by taxation, could not be a solution available to local experimentalism without significant policy input from national government. Yet, as we have seen, it is the foundational principle of the right to education.

These points become even more salient when seen in the context of the wider picture that emerges from research on the functioning of local democracy in the education system. Lewis and Motala argue that decentralisation had three goals,

⁹² Woolman (note 62 above) at 353.

⁹³ It is not clear that, in this case, the learner would have been fee exempt in any event.

namely improved equity, greater democracy and better quality of education. In attempting to achieve these goals, however, the emphasis of policy and research has been on the implementation of formal rules and roles rather than substance.⁹⁴ Examining the substance rather than the form demonstrated, in their view, that none of these goals has been met, except in resource-rich contexts.⁹⁵ In particular, the dominance of the fund-raising function of SGBs builds conflict into the system, both over non-payment of fees by parents believed to be able to afford to pay, and over exemptions. 'In a situation in which a parent representative's success is measured by the ability to raise funds and balance the budget, there is little incentive to promote fee exemptions.'⁹⁶

More recent research by Transparency International casts further doubt on the ability of SGBs to carry the burden of experimentalism, except in resource-rich contexts, as in the case of *Rivonia*. Unless all schools are able to command resources to maintain quality, there will inevitably be competition for places at the better quality schools. Yet Transparency International found that only a third of SGBs interviewed indicated that their members attend regularly. There was considerable variation in the level of knowledge of and respect for rules by SGBs. School fee exemption was an area of particular concern. One in three of the SGB members interviewed considered that the rules were not known; and as many as one in four took the view that the rules were not respected. This was true too for educators: up to half of the educators interviewed believed that the rules relating to fee exemption were not known and respected.⁹⁷ Of even greater concern is the finding that only one of two parents believed that the rules for SGB elections and of the roles and responsibility of SGBs were well known and respected. Clearly, issues such as parental language, socio-economic status, education and access to information affect their level and quality of participation. Most importantly, the study notes that 'generally parents, particularly those who are poor and illiterate, lack the skills to successfully engage in decision-making processes relating to school finances and other school planning mechanisms.'⁹⁸ They conclude that there are high governance risks in the relations between schools and users.

There is no doubt that the proper role of a court in these cases is challenging. Once a dispute is presented to a court, it needs to respond. Moreover, it is limited by the parties' decision as to how to present the dispute. Here, however, by taking such a strongly procedural position without clear guidelines as to substance, the *Rivonia* Court simply kicked the ball back into play without giving enough guidance as to how the parties should move forward. As in *Welkom*, the role of human rights in this context is to provide a framework of substantive principles, which local democracy can operationalise. The fact that a dispute gets to court indicates that the deep conflicts within the local democratic system created by the statute have surfaced in a way which cannot be resolved without external

⁹⁴ Lewis & Motala (note 47 above) at 115.

⁹⁵ Ibid at 116.

⁹⁶ Ibid at 128.

⁹⁷ Transparency International (note 4 above) at 33.

⁹⁸ Ibid at 38.

guidance. It is the responsibility of the Court to provide that guidance by creating a framework of substantive principles to facilitate resolution of such conflicts.

What then should that framework be? Mhlantla AJ rightly reinstated the role of the Department.⁹⁹ She also rightly stressed that a decision to depart from a school's admission policy must be exercised reasonably and in a procedurally fair manner.¹⁰⁰ In support, she cited O'Regan J's powerful articulation in *Premier Mpumalanga* of the

interaction between two constitutional imperatives ... the need to eradicate patterns of racial discrimination and to address the consequences of past discrimination ... and the obligation of procedural fairness imposed upon the government. Both principles are based on fairness, the first on fairness of goals, or substantive and remedial fairness, and the second on fairness in action, or procedural fairness.¹⁰¹

However, although she dealt with the issue of procedural fairness, the substantive question of a reasonable exercise of power was not revisited. While acknowledging the clear value of co-operation in dealing with complex systemic issues, by itself it did not provide the substantive principles behind that co-operation.

This is not to say that the Court itself should have determined the appropriate distribution of capacity among schools. The Court noted with regret the fact that the State had failed to promulgate national norms and standards in relation to class sizes,¹⁰² thus making it difficult to determine the substantive principles by which to determine the case. Since the judgment, the government has promulgated the National Norms and Standards for School Infrastructure.¹⁰³ These provide a maximum class size of 40 learners, with a maximum of 30 for Grade R.¹⁰⁴ Equal Education, among others, has criticised this number as being too high to ensure quality of schooling for learners, and it is certainly far higher than the average class size of OECD countries.¹⁰⁵ The dispute in this case was, however, about minimum rather than maximum class size, and particularly the right of better resourced schools to keep class sizes low by employing more teachers out of SGB funds.

The Court has resolutely set its face against prescribing a minimum core to the socio-economic rights in the Constitution,¹⁰⁶ and in any event, given the contentiousness of this issue, and its broad ramifications for school budgeting, it

⁹⁹ *Rivonia* (note 2 above) at paras 52-57.

¹⁰⁰ *Ibid* at para 58.

¹⁰¹ *Premier, Mpumalanga, and Another v Executive Committee, Association of Governing Bodies of State-Aided Schools, Eastern Transvaal* [1998] ZACC 20, 1999 (2) SA 91 (CC), 1999 (2) BCLR 151 (CC) at para 1.

¹⁰² *Rivonia* (note 2 above) at para 38.

¹⁰³ South African Schools Act 84 of 1996 *Regulations Relating to Minimum Uniform Norms and Standards for Public School Infrastructure* GN R920 in *Government Gazette* 37081 (29 November 2013) reg 9(2).

¹⁰⁴ These norms echo the Charter of Basic Education drawn up by the South African Human Rights Commission, which sets the same goals for class sizes. See SAHRC *Charter of Children's Basic Education Rights* (2012), available at http://www.unicef.org/southafrica/SAF_resources_childrightsbasiceduc.pdf.

¹⁰⁵ Organisation for Economic Co-operation and Development *Education Indicators in Focus 2012/09* (2012), available at <http://www.oecd.org/edu/skills-beyond-school/EDIF%202012--N9%20FINAL.pdf>.

¹⁰⁶ See *Mazibuko and Others v City of Johannesburg and Others* [2009] ZACC 28, 2010 (4) SA 1 (CC), 2010 (3) BCLR 239 (CC).

is difficult to argue that the Court should enter into the fray and set an appropriate class size. Nevertheless, it could have signalled more strongly its rejection of the SCA's notion that requiring well-resourced schools to increase their capacity would be a disincentive to parents to raise funding. As the amicus pointed out, to the extent that relatively well-resourced schools may perceive themselves to be carrying an unfair burden, this should be considered to be a burden that the Constitution requires. This flows directly from the concurring judgment of Sachs J in *Van Heerden* when he said: "Though some members of the advantaged group may be called upon to bear a larger portion of the burden of transformation than others, they, like all other members of society, benefit from the stability, social harmony and restoration of national dignity that the achievement of equality brings."¹⁰⁷

This is particularly important in the field of education, since greater education of each individual contributes powerfully to the development of society as a whole. It is notable that in the recently promulgated Right to Education Act in India, unaided private non-faith schools are required to reserve 25% of their places for disadvantaged learners, with the State compensating them only to the level it would have paid if the learners had attended public schools.¹⁰⁸ While this is clearly not a solution a court could prescribe in the South African context, it could have required the HOD to set a clear norm for minimum class sizes at all schools, based on a reasoned assessment of the balance between quality of schooling and quantity of learners, so that there would have been a framework in place according to which disputes could be resolved in a principled manner. It could also have required a clear timetable and procedure for making decisions about which schools have spare capacity and how they should be filled, to avoid the risk of patronage and the arbitrary use of power by either the SGB or the HOD.

III *KZN JOINT LIAISON COMMITTEE*

The third education case before the Constitutional Court in 2013 was equally challenging. This time the dispute concerned the decision of the KwaZulu-Natal (KZN) Department of Education to reduce subsidies to independent schools. The facts were not in dispute. As in previous years, the MEC for KZN had granted a subsidy to independent schools for 2009 in accordance with its discretionary powers under the Schools Act.¹⁰⁹ Pursuant to this grant, the KZN Department of Education issued a notice in September 2008 setting out approximate funding for 2009. However, in May 2009, after the due date for payment of the first tranche had already passed, a further circular was sent to independent schools headed 'Reduction of budgets in the 2009/10 MTEF'. The circular stated that as part of the Province's 'turn around strategy in dealing with the current cash

¹⁰⁷ *Minister of Justice v Van Heerden* [2004] ZACC 3, 2004 (6) SA 121 (CC), 2004 (11) BCLR 1125 (CC), [2004] 12 BLLR 1181 (CC) at para 145.

¹⁰⁸ Right of Children to Free and Compulsory Education Act 35 of 2009, available at http://librarykvpattom.files.wordpress.com/2010/04/india_education_act_2009.pdf.

¹⁰⁹ Schools Act s 48.

crisis,' the recipients should 'please expect a cut not exceeding 30% in current subsidy allocation for the financial year 2009/10.' Subsidies were duly reduced by 30% for that year, the first two tranches having only been paid in June. The KZN Joint Liaison Committee, the association of independent schools in KZN brought proceedings against the provincial education department for breach of contract.

The High Court held that the original promise of a subsidy constituted a contractual obligation, but because the promise was only for an 'approximate' amount, the reduction of 30% did not constitute a breach. The Constitutional Court rejected the contractual argument.

Nevertheless, the Court found a way of deciding in favour of the schools, at least in relation to the subsidies which had already become due at the date of the revocation. It did this by casting the issue in terms of an obligation which arises from an undertaking seriously given in the expectation it would be relied on. According to Cameron J (Moseneke DCJ, Froneman J, Khampepe J, Skweyiya J and Yacoob J concurring), the undertaking in this case was seriously given, in the expectation that it would be relied on, subject only to due revocation.¹¹⁰ Moreover, while the State was not obliged to pay subsidies to independent schools, such subsidies were a legitimate way to fulfil its constitutional obligations to provide basic education. When it decided to withdraw such subsidies, particularly after the due date for payment had passed, the negative right of learners not to have their right to basic education impaired was acutely implicated.¹¹¹ Thus although the 2008 notice did not give rise to an enforceable contractual agreement, it constituted 'a publicly promulgated promise to pay.'¹¹² Once the due date for payment of a portion of the subsidy had passed, it created an obligation legally enforceable by the intended beneficiaries.¹¹³ The judgement was carefully crafted to avoid using the concept of legitimate expectation, which related to expected conduct and therefore might bind future arrangements.¹¹⁴ Rather, the obligation became binding because the date on which it was promised had already passed when it was retracted.¹¹⁵ This left the State with the discretion to vary the amounts payable for the remainder of the year. Cameron J emphasized that a government promise to pay an approximate amount of subsidies was seldom incapable of retraction or reduction, especially where, as in this case, the Department had to address the knock-on effect of the 7.5% overall budgetary cut for 2009. The letter of May 2009 therefore constituted an 'effective signal by the Department that schools henceforth could no longer rely on the undertaking in the 2008 notice.'¹¹⁶

The context of this case is more complex than it first seems. The private schools at issue were not affluent independent schools, but a group of 97 low- and

¹¹⁰ *KZN Liaison Committee* (note 3 above) at para 37.

¹¹¹ *Ibid* at para 45.

¹¹² *Ibid* at para 48.

¹¹³ *Ibid*.

¹¹⁴ The existence of substantive legitimate expectations in South African law is a matter of ongoing debate and uncertainty. See, for example, G Quinot 'The Developing Doctrine of Substantive Legitimate Expectations in South African Administrative Law' (2004) 19 *SA Public Law* 543.

¹¹⁵ *KZN Liaison Committee* (note 3 above) at para 52.

¹¹⁶ *Ibid* at para 50.

mid-fee KwaZulu-Natal independent schools. Recent research from the Centre for Development and Enterprise (CDE) shows a significant expansion in low-fee independent schooling in South Africa, as parents seek alternatives to state schools.¹¹⁷ CDE calculates that by 2010, 72% of learners at independent schools were black. Fees are low relative to high fee independent schools, although they are still higher than many poor South Africans can afford. Thus, as the CDE acknowledges, the private low-fee schooling sector is not catering to the very poor:

Low-fee schools are affordable to many more people than mid- or high-fee ones; however, they are not affordable to the poorest, low-income groups. In South Africa, less than R7 500 per annum is considered very low-fee. That is more than double what is considered low school fees in India, where ‘budget’ private schools charge annual fees.¹¹⁸

The use of private establishments to fulfil the state’s duty to provide basic education in South Africa was a deliberate policy choice at the time of transition. Faced with the enormous inequities in schooling put in place by the Apartheid regime, the newly democratic state made a conscious decision to harness private resources, whether through fee-paying state schools or subsidised private schools. The Constitution states that that it does not preclude state subsidies for independent educational institutions,¹¹⁹ and the Schools Act allows the state to grant subsidies to these schools. Subsidies from the state depend on the level of fees payable, with a greater proportion of subsidy going to the schools charging lower fees. In 2013, a school charging less than about R5 500 per annum would be eligible for a state subsidy of 60% of its school fees.¹²⁰ This represents about half the average of R11 000 spent on each learner in public schools across the provinces.¹²¹ State subsidies could in practice amount to up to half of an independent school’s income. The result is that the boundaries between state and private provision are unclear, with parents paying fees in both sectors (except at the no-fee schools), and both sectors receiving state subsidy. This overlap is reinforced by the fact that state subsidies of independent schools also come with a regulatory cost: to qualify for a subsidy, schools must have audited financial statements, and meet prescribed standards in terms of annual retention rates of learners and pass rates in external examinations. They can be subject to unannounced inspections and must have a governance and financial management plan conforming to national regulations.¹²²

The facts presented to the Court regarding KZN were by no means unusual. CDE reports that provincial education departments have been regularly remiss in notifying schools of the amount of expected subsidy for the coming school year

¹¹⁷ J Hofmeyr, J McCarthy, R Oliphant, S Schirmer & A Bernstein *Affordable Private Schools in South Africa* (2013), available at <http://www.cde.org.za/wp-content/uploads/2013/07/Affordable%20Private%20Schools%20in%20South%20Africa.pdf>.

¹¹⁸ *Ibid* at 3.

¹¹⁹ Constitution s 29(4).

¹²⁰ *National Norms and Standards School Funding* GN 890, *Government Gazette* 29179 (31 August 2006, as amended).

¹²¹ CDE (note 117 above) at 15.

¹²² NSSF (note 120 above).

in time for schools to draw up sensible budgets and set fees. Nor is it uncommon for the tranches to be paid late, or promised amounts unilaterally reduced. This can cause serious hardship for schools who have already embarked on spending commitments in reliance on the subsidies. Indeed, in 2012, an investigation was launched by the SA Human Rights Commission and Public Protector into five provinces, KZN, Limpopo, Mpumalanga, North West, and Eastern Cape, which had drastically cut subsidies.

In this case, unlike the others, the Court was prepared to find a remedy which addressed both the substantive and procedural issues. Cameron J, in a very imaginative judgment, was able to span both the concerns of the private schools that they should have a reliable budget and those of the education authority, which had to balance these demands against those of others. As we have seen, he held that the first tranche should be payable, but the remainder, with proper notice need not. Governments should be reliable, accountable and act reasonably. Reliability entailed that a government body which has made promises on which others had relied should be held to those promises to the extent of the reliance. Schools could adjust their future outlays, but could not do so in relation to the tranche that had already fallen due. Therefore, although budgetary decision-making remained with the Department, the state needed to act in a reliable manner, so that plans could be made and acted on.¹²³ Flexibility was only possible with proper warning to the affected schools. Secondly, the state was required to be accountable. Although courts should respect the effect of budget cuts, their impact should be announced as quickly as possible. Thirdly, the state should act reasonably. In the view of the Court, it might be rational, although regrettable, to vary payments promised but not yet due, since those depending on it still had a chance to adjust their behaviour. But because such adjustment was impossible in relation to a date which had already passed, it would not be rational to vary payments after their due date.¹²⁴

This is a clear rule of law position, but one grounded in the substantive recognition of the importance of the right to basic education, whether at a low fee private school or a public school. The judgment did not simply declare that the dispute should be resolved through co-operation or consultation: it recognised that the parties were not equal bargaining partners. Instead, the Court was prepared to lay down a specific and hard edged requirement, as well as clear guidance going forward.

For Zondo J, dissenting, however, this departure from the parties' stated case was unwarranted and gave rise to unacceptable uncertainty.¹²⁵ Notably, he directed much of his critique at the aspect of the judgment which required co-operation: setting the amounts payable, which were only referred to as 'approximate' in the original statement. In particular, he took issue with the majority finding that 'the 2008 notice specified exact sums and undertook to pay them approximately. That is an obligation that is coherent and legally enforceable. And the Department is

¹²³ *KZN Liaison Committee* (note 3 above) at para 63.

¹²⁴ *Ibid* at para 65.

¹²⁵ *Ibid* at para 161.

obliged to engage with the schools to find finality in complying.¹²⁶ Engagement in his view was of no avail, since the dispute would not have reached the Court had the parties been able to reach a solution through engagement. This was compounded by the majority's suggestion that if the figures agreed on were not sufficiently approximate, the applicants could return to the High Court. Resort to the High Court made little sense because the majority judgment gave no criteria by which to judge the acceptability of either party's case, short of resuscitating the contractual argument which had been rejected in the SCA and the Constitutional Court.¹²⁷

Zondo J's criticism resonates with my criticism of *Welkom* and *Rivonia*. However, the engagement ordered here is of an entirely different character from the open-ended exhortation by the Court to co-operate in *Welkom* and *Rivonia*. The engagement was required to be within the clear framework declared by the Court, namely, that the sums promised were owed after the due date. Indeed, Cameron J gave clear guidance about the meaning of 'approximate': the dictionary definition, namely 'fairly accurate but not totally precise.'¹²⁸ A cut of 30% clearly falls outside this definition: indeed, only a small adjustment would be acceptable.

Zondo J's concerns were, however, wider than this. For him, 'the main judgment unduly leans over to make a case for the applicant which the applicant neither made in its papers nor asked for and I find this extremely unfair to the respondents.'¹²⁹ Given the fact that there was no contractual claim, he held that there should be no obligation on the Department to make any payments, past or future. This contrasts starkly with Froneman J's concurrence. Froneman J took a determined stand against formalism in the law. In his view, the label attached to a claim should not be decisive when the facts were not essentially disputed and no material prejudice flows to any party whatever label is assigned.¹³⁰ Thus he would have gone further than the majority judgment, and required the province to pay the whole year's funding. Cameron J took the middle ground. He had no doubt that the case should be decided in the most just and equitable way, even though the claim of breach of contract was unsustainable. He agreed with the amicus that, although the applicant had consistently relied only on a breach of contract argument, there was sufficient evidence on record to lay the basis for a right to be paid the first tranche. There was previous precedent to this effect, and, in his view, there was no prejudice to the respondents.¹³¹

To what extent are Zondo J's concerns well founded? There is no doubt that this is a highly polycentric issue. Giving a budget to a private school might have implications for other parts of the school system. The difficulty in dealing with the polycentric consequences of the case was certainly aggravated by the fact that the parties had chosen to argue the case in contract alone, and not as an administrative law breach. This meant that the potential budgetary and other

¹²⁶ Ibid at para 75.

¹²⁷ Ibid at para 117.

¹²⁸ Ibid at para 74.

¹²⁹ Ibid at para 180.

¹³⁰ Ibid at para 79.

¹³¹ Ibid at para 68.

issues were not before the Court as they might have been under the Promotion of Administrative Justice Act (PAJA).¹³² The question before the Court was therefore whether to craft a just and equitable remedy regardless of the way the case had been presented, or to stick within the limits of the adversarial procedure and leave the parties to find other ways to sort out the problem. In determining that the Court should nevertheless craft a remedy, Cameron J's solution addresses many of the difficult polycentric issues. He was clear that without the record of budget allocation and decision-making, which would have been before the Court under a PAJA claim, it was not possible for it to consider the claim for payment for the whole 2009 school year.¹³³ However, he regarded affordability as irrelevant to the obligation that arose in respect of payments whose due date had passed. Indeed, he rejected the request by the parties to present further evidence in relation to affordability. Although affordability was a major issue in governance, this was irrelevant once the payment dates had passed. In such a case, the state was simply not entitled to retroactively reduce subsidies. This was fortified by the fact that the payment date had been laid down in the national norms which were applicable in this case.¹³⁴ Cameron J also addressed the problem which had arisen as a result of the fact that, at the behest of the applicants, the Department had added 28 newly registered independent schools to the original 97 to whom the subsidies had been granted.¹³⁵ It was partly because of the need to share the original allocation among 125 rather than 97 schools that the subsidies had been cut. Cameron J confined the polycentric implications of his decision by making the first tranche enforceable only in relation to the original 97 schools. This ensured that the Department incurred no extra liabilities.¹³⁶

Cameron J's solution is a sensitive compromise between the competing issues. Given that the Court was not blind to the polycentric implications, Froneman J's approach would have gone too far in sacrificing the unknown and unargued interests of other deserving beneficiaries and rights-holders to the interests of those who happen to present themselves at court. Zondo J's formalism would have gone too far in limiting the Court's purview to what the parties happen to present to it, regardless of the wider picture. However, Cameron J does not avoid all the polycentric implications of his finding. His insistence that budgetary implications were irrelevant for payments for which the due date had already passed ignored some important consequences. For instance, there were five provinces which had drastically cut subsidies in the same year. This could give rise to substantial liabilities on the part of provincial departments of education, which might have knock-on effects for schools in the public sector.

Even less thought has been given to the equally important question of the direct consequences of the decision for public schools. A recent report by Transparency International on basic education in South Africa highlighted the detrimental effects of pervasive delays in budget allocation in the public sector,

¹³² Act 3 of 2000.

¹³³ *KZN Liaison Committee* (note 3 above) at para 34.

¹³⁴ *Ibid* at para 70.

¹³⁵ *Ibid* at para 114.

¹³⁶ *Ibid* at para 72.

with many schools receiving their budgets late. Approximately a third of SGB members in the survey reported that schools often or sometimes receive less money from higher administrative levels than originally budgeted, and only 29% of principals interviewed reported that their school funds arrive on time.¹³⁷ This has a particular impact on poorer non-fee paying schools.¹³⁸ Frequently schools are not informed in a timely manner of delays or reductions. The disruption to public schools due to the lack of reliability, accountability and rationality is equivalent or worse than that for independent schools, particularly in relation to non-fee paying schools who do not have an alternative stream of income. On the basis of the majority judgment, it is clearly arguable that a legally enforceable claim arises in public law as soon as the due date for payment has passed, given the severely detrimental impact on learners' right to basic education.

These extra budgetary consequences do not in themselves mean that the Court should not have come to the conclusion it did. The judgment sends a strong message to public administrators about the need for timely notice if payments are likely to be late or varied. However, it would be important for the conclusion to be reached in full awareness of such consequences. A clear example of the need for more information before polycentric decisions are taken can be seen by considering the way the Court dealt with the relative costs to the state of subsidising private schools rather than providing sufficient state capacity. In his concurring judgment, Froneman J held it was not rational to impede the learners' access to education in independent schools when this would be more costly than accommodating them in the public school system. On the respondent's own view, the cost of accommodating the learners in public schools would increase the budget by at least 5% in KZN alone, as opposed to keeping them in the independent schools.¹³⁹ Even though he was proceeding on the respondents' own version, these figures should nevertheless have been subject to further scrutiny. While it may have been more costly to the public school budget, did these figures bring into account how much of that cost had been shifted to learners' families in the form of fees paid? On these bald figures, it would always be rational to subsidise private education, since the state is paying only part of the cost. A much more complex algorithm is needed which would bring into the picture how much extra it costs the learner to be at a low fee paying independent school compared to the cost born by that learner at a public school. For example it is possible that learners paying fees at that level may have been entitled to attend no-fee schools. The fact that parents might have made the choice to pay fees above the level they needed to is irrelevant to the question of whether it is more or less costly to provide subsidies to independent schools than to provide free public education of a sufficient quality, taking into account the cost to the learners as well as that to the state. This taps into a much larger global debate about the merits and demerits of low fee private schools. Indeed, the UN Special Rapporteur on Education devoted his 2015 report to arguing strenuously in favour of regarding education

¹³⁷ Transparency International (note 4 above) at 29–30.

¹³⁸ *Ibid* at 7.

¹³⁹ *KZN Liaison Committee* (note 3 above) at para 89.

as a public good, rather than a market commodity.¹⁴⁰ This brief analysis suggests that, even agreeing with Froneman J that form should not be blindly adhered to, the absence of a full examination of the budgetary issues on the record is nevertheless a serious impediment to the Court making decisions of a polycentric nature.

V CONCLUSION

All three education cases in the 2013 Constitutional Court's docket were challenging on many levels. Not least was the fact that in all three cases, the substantive issue of the rights to education and equality were not directly before the Court: in the first two, the dispute appeared as a tussle between the school governing body and the provincial education department, and in the third as a contractual claim in private law. This is no coincidence: it demonstrates that the procedures set in place to deal with the underlying disputes were not functioning either to achieve resolution or sufficiently to protect the right. The Court's overriding concern in all three cases was to constrain the executive to remain within the formal powers allotted to it, reflecting an underlying anxiety of the risk of patronage and abuse of power. Thus although the cases concerned socio-economic rights giving rise to positive duties to protect, promote and fulfil, the majority judgments tended to formulate the Court's role as the traditional function of restraining excess of power.

At the same time, at least in the first two cases, the Court was unwilling to take anything more than a tentative view of the substantive underlying rights to education and equality. Instead, it followed its established pattern of facilitating appropriate procedures for substantive decision-making by what it regarded as more accountable and democratic bodies. In *Welkom* and *Rivonia*, it saw its main function as delineating the relative roles of SGBs and the HOD, and then exhorting these bodies to reach an appropriate solution through co-operation and engagement. I have argued that this did not do enough to create a hard-edge to the rights in question. Local democracy by its nature serves the interests of insiders and majorities; it is not sufficient to leave the resolution of basic human rights to these bodies alone. Nor is it enough to expect co-operation and meaningful engagement on issues which have already triggered fundamental conflict.

Khampepe J in *Welkom* certainly went further than the lower courts in giving an indication of the potential unconstitutionality of policies excluding or suspending pregnant learners, but she stopped short of declaring the policy itself invalid. Instead, she left open the possibility that the SGB could justify continuing to exclude pregnant learners if had it good enough reasons. It is possible that on the facts, schools have taken the message and revised their pregnancy policies; but the refusal to make a declaration of invalidity gave too little credence to the rights of the most vulnerable of those involved, the pregnant learners themselves, and especially those who have been excluded in previous years. Experimentalism and

¹⁴⁰ UN Special Rapporteur on the Right to Education *Protecting the Right to Education against Commercialization* (2015), available at <http://daccess-ods.un.org/access.nsf/Get?Open&DS=A/HRC/29/30&Lang=E>.

local democracy should be confined to operationalising the right at local level, for example, by providing relevant health care support for staff and learners, not determining the existence of the right.

In *Rivonia*, the Constitutional Court's recognition of the HOD's role in addressing systemic inequalities was crucial. But the exhortation to mere consultation without any further guidance left the underlying substantive conflict intact. While the Court could not on its own determine the appropriate minimum class size or the extent to which parents should be expected to share their privilege with others, at the very least it could have required the HOD to lay down clear and defensible guidelines as to the management of extra capacity in schools, including a timeline to avoid last minute scuffles like the one in question. *KZN Liaison Committee* shows a Court willing to lay down hard-edged guidelines which balanced the needs for flexibility and reliability, although the budgetary implications should have been more openly canvassed before the Court.

It has to be acknowledged that, as these cases demonstrate, the Court's role in adjudicating disputes in this context cannot deal with some of the most intractable problems about fair distribution of resources to achieve an equal right to quality education for all. However, it is disappointing that in the one case in which a clear breach of a fundamental right had occurred, *Welkom*, the Court's concern with procedure rather than substance led it to dilute the protection it afforded to some of the most vulnerable individuals in South Africa.

Executive Heavy Handedness and the Right to Basic Education A reply to Sandra Fredman

Yana van Leeve*

I INTRODUCTION

Sandra Fredman critiques the Constitutional Court's adjudication of the right to basic education in *KZN Joint Liaison Committee*,¹ *Welkom*² and *Rivonia*.³ With the exception of *KZN Joint Liaison Committee*, she rebukes the Court for its over-emphasis on formal compliance with rules, procedures and processes at the cost of providing substantive guidance to those primarily responsible for the delivery of basic education.⁴ This paper will consider Fredman's critical concerns in relation to what she perceives as judicial formalism and in reply will examine the substantive content in the flexing of the Court's judicial muscle. In so doing, I will consider the following questions: Has the Constitutional Court missed opportunities to make substantive pronouncements on the content of the right to basic education? Do its decisions emphasising and upholding the rule of law conceal the complex and deep crisis within the education system? Has procedure trumped principle, as Fredman has argued, or is there an appropriate balance to be found?

In what follows, I argue that within the confines of the issues before the Constitutional Court in *KZN Joint Liaison Committee*, *Welkom* and *Rivonia* the Court considered the context of unequal access to quality education and the importance of basic education both as a right and a social good. However, is this recognition sufficient, or is it simply paying lip service to the Bill of Rights?

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¹ *KwaZulu-Natal Joint Liaison Committee v MEC Department of Education, KwaZulu-Natal and Others* [2013] ZACC 10, 2013 (4) SA 262 (CC), 2013 (6) BCLR 615 (CC) ('*KZN Joint Liaison Committee*').

² *Head of Department, Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another* [2013] ZACC 25, 2014 (2) SA 228 (CC), 2013 (9) BCLR 989 (CC) ('*Welkom*').

³ *MEC for Education in Gauteng Province and Others v Governing Body of Rivonia Primary School and Others* [2013] ZACC 34, 2013 (6) SA 582 (CC), 2013 (12) BCLR 1365 (CC) ('*Rivonia*').

⁴ S Fredman 'Procedure or Principle: the Role of Adjudication in Achieving the Right to Education' (2016) 6 *Constitutional Court Review* 165, 197-198.

Fredman's assessment of the majority judgment in *Welkom* invites the latter conclusion when she takes issue with what she considers to be a superficial response to the substantive rights at stake, concluding that both the majority and dissenting judgments were reluctant to 'authoritatively declare an unconstitutional policy to be unconstitutional.'⁵ Each case reveals a compromise, or balancing, between the fairness of the procedure adopted by the state — acting through provincial education departments — and the need for substantive fairness in the remedy. Each case was principally about the lawfulness of the exercise of executive action and in each instance the Court upheld the rule of law. It may be an oversimplification to consider these decisions formalistic or wanting of substantive protections since each case can be understood to affirm accountability and transparency in the exercise of public power - important substantive goals in their own right. In *KZN Joint Liaison Committee* this was affirmed by holding the state to a publically promulgated promise to perform an obligation, and in *Welkom* and *Rivonia* executive heavy-handedness was curbed even though the purpose of the executive action was intended to bring about a just result. I develop this argument below, beginning by locating the cases in the context of the competing interests that are at stake in education.

II COMPETING INTERESTS IN REALISING THE RIGHT TO EDUCATION

Each case concerns fundamental questions about control over and access to public resources in South Africa's education system. The adversaries are, most often, school governing bodies protecting their local interests, and provincial education departments responsible for administering the delivery of basic education. This tension arises in the context of a deeply unequal education system. Where personnel and non-personnel items, including items such as textbooks and stationery, are proving insufficient to guarantee a quality education to all. Indeed, the Norms and Standards for School Funding, the regulatory tool aimed at ensuring that learners from poorer homes are equitably allocated a greater portion of the non-personnel education budget, has the effect of entrenching inequality.⁶ This, because schools in wealthier areas are able to supplement the funding they receive from the state by charging fees, which are used to hire extra teachers, reduce the learner-to-teacher ratio, improve infrastructure and the availability of education inputs such as extracurricular activities, stocked libraries, science laboratories and computer centres; all essential inputs for a quality education. Whereas most schools in poorer areas of the country are entirely dependent on government for funding and are supported by a parent body with limited means of supplementing the

⁵ Ibid at 171.

⁶ National Norms and Standards for School Funding, *Government Gazette* 29179, Government Notice 869 of 2006 (31 August 2006) and Amended National Norms and Standards for School Funding, *Government Gazette* 35617, Government Notice 646 of 2012 (Norms and Standards for School Funding).

state's resources and further limited because they are prohibited from charging fees under the Norms and Standards for School Funding.⁷

Welkom and *Rivonia*, in particular, cast a light on the power struggle between the school governing bodies of relatively well-off public schools and provincial education departments.⁸ It is a power struggle that can be traced back to the amalgamation of the nineteen education administrative departments that existed under apartheid, into a single national department of education with provincial education departments and the creation of school governing bodies.

The Constitutional Court supports this reconfiguration of the education system to involve learners, parents, teachers and the state in the delivery of education. It has said that the South African Schools Act⁹ makes—

clear that public schools are run by a partnership involving school governing bodies (which represent the interests of parents and learners), principals, the relevant [Head of Department] and [Member of the Executive Council], and the [National] Minister. Those most responsible for the delivery of education are parents, teachers and the state - acting through the national and provincial departments of basic education, including through the district bureaucracy of the provincial departments. Its provisions are carefully crafted to strike a balance between the duties of these various partners in ensuring an effective education system.¹⁰

School governing bodies in particular are a relatively new innovation in the administration and delivery of education at the local school level. Their establishment arose through tough political contestation. Their roots lie on the one hand, in the grassroots community organisation that arose in black communities to advance education, despite apartheid-era suppression, and on the other, the will to retain the vast resources, skills and experience of middle class white South Africans within the public education system who enjoyed the lavish generosity of the state during apartheid.¹¹ Thus, school governing bodies embody a qualified and narrow, democratic character, elected by a closed group of parents whose children are enrolled at the school in a given year, included on the basis of language, geography or ability to pay fees. In these structures parents hold the majority, but they also include teachers, students, and the provincial education department.

School governing bodies wield great power and responsibility at the coalface of education. They bear constitutional and statutory duties to supplement the resources provided by the state in order to improve the quality of education to all learners at individual schools.¹² By extension, this includes the power to set

⁷ Ibid. See also E Rakabe 'Equitable Resourcing of Schools for Better Outcomes' in the Financial and Fiscal Commission *Submission for the Division of Revenue Technical Report 2015/2016* (2014), available at www.ffc.co.za/index.php/2-uncategorised/206-2015-16-submission-for-the-division-of-revenue.

⁸ The Bantu Education Act 47 of 1953, the Coloured Persons Education Act 47 of 1963 and the Indian Education Act 61 of 1965 created separate education departments which, although independent on paper, were controlled by the apartheid government.

⁹ Act 84 of 1996 (Schools Act).

¹⁰ *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* [2009] ZACC 32, 2010 (2) SA 415 (CC), 2010 (3) BCLR 177 (CC) ('*Ermelo*') at para 56.

¹¹ Y Sayed *Education Decentralisation in South Africa: Equity and participation in the governance of schools* (2008) 8, available online at <http://unesdoc.unesco.org/images/0017/001787/178722e.pdf>.

¹² Schools Act s 36.

compulsory uncapped fees and, concomitantly, the power to determine what a school governing body considers equitable criteria for the granting of school fee exemptions.¹³ They may lease, burden or alter immovable property belonging to the state and permit business activity on its premises, usually public property, to supplement the school fund.¹⁴ For public schools in urban well-off communities, these powers can potentially increase the budget quite substantially and have far-reaching effects. The availability of existing infrastructure, proximity to business and the social networks among the parent body make it easier for these school governing bodies to raise additional funding. In addition, school governing bodies have the power to set various policies that have the capacity to improve the quality of education in public schools including the determination of a school's language of instruction,¹⁵ its admissions criteria,¹⁶ adopting a Code of Conduct that regulates various aspects of school life including learner pregnancy,¹⁷ dress code¹⁸ and the employment of additional personnel including teachers and support staff.¹⁹

When evaluating the role or efficacy of school governing bodies one has to be alive to the differences in contexts between largely well-off communities and under-resourced communities. The former will continue to be strong advocates of independent school governing bodies with minimal state involvement, while the latter may advocate for more state intervention to develop strong independent school governing bodies that enable parents to have a meaningful voice in their children's education. Thus the interests of governing bodies purporting to represent the local needs of the socially, culturally and economically complex school communities inevitably come into tension. For under-resourced public schools in rural areas or urban townships attended almost exclusively by poor and working class black families, school governing bodies are vulnerable and unsupported.²⁰ First, the majority of these schools are required to function and respond to difficult and complex environments pervaded by poverty, unemployment, child-headed households and a lack of basic services including safe and clean sanitation and a regular supply of electricity. Second, parents from under-resourced rural communities in particular generally have lower levels of formal education than those from urban townships, and far less than those across the middle class. These realities are without a doubt an enduring legacy of Apartheid education marked by disproportionate resource allocation. Finally, most parents supporting the country's poorest schools arguably lack important skills and expertise necessary to run a school.²¹ Xaba lists some of these as unfamiliarity with the applicable policies and legislation governing school

¹³ Schools Act ss 39(1) and (2).

¹⁴ Schools Act s 36(4)(a). The school fund includes government funding, school fees and donations.

¹⁵ Schools Act s 6(2).

¹⁶ Schools Act s 5(5).

¹⁷ Schools Act s 8. See also *Welkom* (note 2 above) at para 57.

¹⁸ *Radebe and Others v Principal of Leseding Technical School and Others* [2013] ZAFSHC 11.

¹⁹ Schools Act s 20(4) and (5).

²⁰ M Xaba 'The Possible Cause of School Governance Challenges in South Africa' (2011) 31 *South African Journal of Education* 201, 204–208.

²¹ *Ibid* at 203. See also Fredman (note 4 above) at 188.

administration and difficulties in drafting, managing and implementing a budget, particularly for schools that manage and control their own budgets in terms of s 21 of the Schools Act. Moreover, principals often dominate the operation of the governing body and alienate less experienced or perceptibly less knowledgeable members.²² Without sufficient support from education districts on how to draft and implement the policies discussed above, participate in decision-making, draft and evaluate budgets and how to hold the school management team as well as teachers accountable, school governance is weakened. Moreover, the struggle to supplement the resources of the state is a major impediment to achieving quality education. In these circumstances, more intervention from district departments in particular is appropriate and indeed required.

By contrast, well-resourced public schools, supported by an educated and skilled parent body willing and able to double or triple the state's resources, argue for greater independence and control of public resources to enable more effective local school governance and quality to flourish. More often than not, it is these governing bodies, with a limited and narrow democratic legitimacy, that essentially seek to capture public resources for the benefit of a particular group of already advantaged children. It is these school governing bodies that have reached the Constitutional Court in opposition to state functionaries. These school governing bodies have a material interest in maintaining control of the schools and are able to draw on their resources, networks and expertise to assert themselves against any public authority that encroaches upon their terrain.

III SUBSTANCE OVER FORM IN *WELKOM* AND *RIVONIA*

Welkom and *Rivonia*, heard within one month of each other, highlight the complexity involved in balancing central authority and administration with local, devolved control over education.

Both cases were instituted by the school governing bodies of fairly affluent schools that had been handled robustly by provincial education authorities. Both concerned the respective powers of the school governing body and the Head of Department of Education in the province and in both cases, the Court ruled in favour of the schools on the lawfulness of the exercise of state intervention powers, but endorsed the purposes for which the state was intervening. Legality and administrative justice arose pointedly and called for a resolution from the Court, but so too did the question of access to quality education, which was the substantive issue in *Rivonia*, and unfair discrimination on the listed ground of pregnancy, the issue in *Welkom*. Fredman lucidly explains the shortcomings of the Court's overriding concern with reigning in the exercise of executive powers within the formal confines of the law at the expense of seriously wrestling with, and pronouncing on, the underlying issues the cases presented.²³

The pregnancy policies in *Welkom* were 'extremely invasive'; they required female learners to report their pregnancy to a teacher and encouraged, if not obliged, fellow students to report on each other if they suspected that a student

²² Xaba (note 20 above) at 201.

²³ Fredman (note 4 above) at 166–190.

was pregnant. Even more extraordinary was the exclusionary effect of the policies, which prohibited a school-going teen mother from returning to school within the year of the child's birth.²⁴ However, at issue in the proceedings before the courts was the exercise of administrative power and the principle of legality in the context of an instruction to a principal of a public school, by the Free State Provincial Head of Department, to ignore the pregnancy policies adopted by the school governing body.²⁵ The power of the school governing body to adopt a pregnancy policy was not seriously disputed.²⁶ The principal, the learners, parents and teachers as well as the department were thus bound by it, regardless of its offensive consequences. Raising a collateral challenge in the Supreme Court of Appeal, the Head of Department impugned the validity of the school governing body's policy on the ground that it prevented learners from attending school. While the Department accepted the power of the school governing body to adopt a pregnancy policy it contended that this did not include the power to adopt a policy that, in its opinion, offended the Constitution and the rights of learners.²⁷ It was therefore entitled to instruct the principals to ignore the governing bodies' policies.

But, relying on *Oudekraal Estates (Pty) Ltd v City of Cape Town & Others*,²⁸ the Supreme Court of Appeal rejected this argument. It found that the Head of Department was not entitled to raise a collateral challenge because he was not directly affected by the pregnancy policy.²⁹ If the policy itself were subject to collateral challenge the learners themselves had to raise it.³⁰ However, the learners were unrepresented and did not participate in the proceedings. Instead they had sought relief from the Department in the face of an obstinate school governing body. Where else were they to turn in those circumstances? The Supreme Court of Appeal's answer was that the learners had to turn to the courts. It did not give significance to the underlying relationship between the Department, to whom the learners turned, and the purported capacity within which it was acting, that is in the interests of vulnerable learners who were actively prevented from attending school as a result of pregnancy. The school's interference with the learners' rights to education was not sufficiently considered. Instead, the Supreme Court of Appeal

²⁴ *Welkom* (note 2 above) at para 6. See also Fredman (note 4 above) at 166–169 (Summary of facts).

²⁵ *The Head of Department: Department of Education, Free State Province v Welkom High School and Harmony High School* [2012] ZACSCA 150, 2012 (6) SA 525 (SCA) ('*Welkom SCA*') at para 1 and *Welkom* at para 1.

²⁶ *Welkom* (note 2 above) at paras 80–82.

²⁷ *Welkom SCA* (note 25 above) at para 16.

²⁸ [2004] ZASCA 48, 2004 (4) SA 222 (SCA) at para 32, quoted in *Welkom SCA* (note 25 above) at para 13:

When construed against the background of principles underlying the rule of law a statute will generally not be interpreted to mean that a subject is compelled to perform or refrain from performing an act in the absence of a lawful basis for that compulsion. It is in those cases – where the *subject is sought to be coerced* by a public authority into compliance with an unlawful administrative *act* – that the subject may be entitled to ignore the unlawful act with impunity and justify his conduct by raising what has come to be known as a 'defensive' or a 'collateral' challenge to the validity of the administrative act.

²⁹ *Welkom SCA* (note 25 above) at para 14.

³⁰ In *Tasima (Pty) Ltd v Department of Transport and Others* [2015] ZASCA 200, [2016] 1 All SA 456 (SCA) at para 26, Brand JA endorsed the view expressed by Cameron J in *KZN Joint Liaison Committee* that the defence of a collateral challenge is not available to organs of state.

held that the Head of Department ought to have launched a counter-challenge, in separate proceedings, which had been initially intended but not pursued.³¹ On this narrow procedural basis the Supreme Court of Appeal did not engage with the substance of the policy and dismissed the Department's appeal. It found that the Department had acted beyond the scope of its powers by instructing the principal to ignore the lawfully and properly adopted pregnancy policies.

In contrast, the Constitutional Court's acknowledgement that the governing bodies' policies were *prima facie* unconstitutional is a significant shift from the opinion of the Supreme Court of Appeal and indeed that of the High Court, which held that the issue was 'really not the unlawfulness of the pregnancy policies adopted and implemented, but rather the lawfulness of the instruction given.'³² Based on an inference Zondo J makes in his dissenting judgment, Fredman suggests that the 'internal democracy within the school was not properly exercised' when the pregnancy policies were adopted. However, as pointed out by Khampepe J in the main judgment, the Head of Department did not purport to rely on his supervisory powers to remedy any defect in the policies themselves. Instead, it appears that he meekly sought to impugn the validity of the policies as a justification for exercising a power he did not have – a defence that, on the *Oudekraal* principle, was not available to him as a public authority. Although the Court upheld the judgment of the Supreme Court of Appeal, it ordered that the policies be reviewed in a process of meaningful engagement and, in exercising its supervisory powers, instructed the parties to file affidavits setting out their processes of engagement as well as provide copies of the reviewed pregnancy policies to the Court.³³

This, Fredman submits, was not enough. However, she admits that the order for meaningful engagement can be understood as an attempt to strike an appropriate balance between the unlawfulness of the Department's conduct, the democratic duty to engage reasonably and with appropriate deference to the school governing body and the importance of upholding the rule of law. I agree with Fredman that the school governing body's pregnancy policy patently disregarded fundamental rights. But, is it fair to say that the substantive relief was insufficient?³⁴ Is it true that the Court was primarily occupied by the 'correct legal process' that the Department ought to have followed? Fredman contends that this 'arguably took priority' over the substantive rights in issue. But does the Court's recognition that the policies could be constitutionally impugned not give sufficient regard to the underlying issues? Could its *prima facie* finding on the unconstitutionality of the pregnancy policies be taken to adumbrate the lawfulness of the policies, particularly in light of its order that the governing bodies review the policies? Is this a sufficient deterrent to school governing bodies that flout fundamental rights? The reach of *Welkom*, particularly as it pertains to the rights of female learners, is yet to be tested, and the outcome of meaningful engagement aimed at

³¹ Ibid at para 20.

³² *Welkom High School and Another v Head of Department, Free State and Another* 2011 (4) SA 531 (FB) at para 56; Fredman (note 4 above) at 176; *Welkom* (note 2 above) at paras 80–82 and 231.

³³ *Welkom* (note 2 above) at paras 7 and 128.

³⁴ Fredman (note 4 above) at 176.

reviewing the policies is not yet known. However, as Fredman asserts, the Court's decision is not an overriding victory for the schools, for, while it declared the conduct of the Department unlawful, it also implicitly endorsed the Department's conduct in seeking to protect the individual constitutional rights of the learners in question.

The ultimate outcome of *Rivonia* is similarly contested because it, too, implicitly endorsed the object of the Department's unlawful conduct (equitable access to education) and so sought to strike a balance in the fairness of the procedure and the substance of the remedy. Rivonia Primary School, located in an affluent suburb of Johannesburg, refused to admit a grade one learner on the basis that the school had reached its capacity for the year, that being 124 learners for the grade providing a ratio of 24 learners to one classroom. With the provincial average at 37 learners per classroom, Rivonia Primary offered amongst the lowest class sizes in the province.³⁵ Moreover, through the fees of its relatively wealthy parent body, the school was able to employ 22 additional teachers (double the post provisioning provided by the Department) as well as construct additional infrastructure, including additional classrooms.

In contrast to Rivonia Primary, the majority of South Africa's learners attend school in under-resourced, unhealthy and unsafe environments which deprive students of their right to quality education.³⁶ It is not difficult to empathise with a parent's insistence that their child be admitted to a public school that is able to provide a quality education. When the principal was adamant that there was no place for the grade one learner, her mother approached the Gauteng Provincial Head of Department for a remedy. This sparked a robust exchange between the Department and the principal. Eventually the Head of Department revoked the principal's admissions function, summarily established an interim committee to take over the admissions capacity of the school's governing body who admitted the young learner to the school.³⁷ The Supreme Court of Appeal vividly describes how two officials, accompanied by a security guard, walked from classroom to classroom and eventually placed the little grade one child in a desk that had been installed for a learner with attention and learning disabilities.³⁸ The conduct of the Department was indeed heavy-handed.

As in *Welkom*, the issues turned on the principle of legality and the capacity of the Department to override a school governing body's admissions policy. While Fredman does make a distinction in the degree of executive heavy-handedness exercised in *Rivonia* and *Welkom*, with the former acting like a bull in a China shop compared to the latter's more appropriate attempts to engage the principals prior to taking the impugned action, both involved unlawful executive conduct. The respective Heads of Department acted unlawfully by instructing the principals

³⁵ *Governing Body of the Rivonia Primary School and Another v MEC for Education: Gauteng Province and Others* [2012] ZASCA 194, 2013 (1) SA 632 (SCA) at para 6 (*Rivonia SCA*).

³⁶ National Education Evaluation and Development Unit *National Report* (2013) 51 available at <http://cdn.mg.co.za/content/documents/2015/04/15/needureport2013.pdf>; C Abdoll & C Barberton *Mud to bricks: A review of school infrastructure spending and delivery* (2014) 1–3, available at http://www.pulp.up.ac.za/pdf/2014_04/2014_04.pdf.

³⁷ *Rivonia SCA* (note 35 above) at paras 9–21.

³⁸ *Ibid* at para 20.

to ignore the governing body policies, instead, they were obliged to challenge the offending policies in a court of law before directly invoking the Constitution in light of their opinion.³⁹

In setting out the power of the school governing body to determine its admissions policy, the Supreme Court of Appeal placed significant weight on supplementary financial contributions made by parents to improve the quality of education provided for by the school, which in turn afforded them the right to impose restrictions on access to the school with little to no regard for the broader barriers of access to quality education. The Supreme Court of Appeal went on to say that ‘governing bodies ... have a mandate – indeed, an obligation – to raise additional funds through the active involvement of parents, who in return for their financial contributions are given a direct and meaningful say in school governance and the employment of school funds.’⁴⁰ This remark is indicative of deference to the local, devolved but qualified democratic school model. It risks condoning contracting, or buying out of the broader public interest concerns and potentially ignores the reality that those who are able to invest more in school education, through school fees and skills, are part of the causes of inequality in the education system and therefore play a role in protecting and promoting the right to basic education for all. The consequence of this line of reasoning similarly disregards the horizontality in the application of the Bill of Rights and at a minimum does not explore the consequences of private individuals, other than public institutions, negatively interfering in fundamental rights, in particular the rights to equality and basic education. Moreover, there is arguably no legal basis to find that an ability to pay fees affords an entitlement to greater control over public school resources. The Supreme Court of Appeal’s logic for this reasoning seems to be that it ‘would operate as a disincentive for parents to contribute by way of fees and fundraising to improve quality education of their schools’ if the increased capacity created by these funds could be used to accommodate more learners than the Rivonia school governing body wanted to admit.⁴¹ While that may be true, the raising of funds, for one school, cannot be posited by the Supreme Court of Appeal as *ipso facto* a positive social outcome. Fees do bring additional resources to that one school, but they also exclude people and generate massive educational inequity. Even more fundamental to the risk of this line of reasoning is the implication that the right to democratic participation, in a public institution as important as schools, can be bought and that those who can pay more are ‘more equal than others’. If such a right exists, as seems evident in the

³⁹ Under the principle of subsidiarity, the higher norm should be involved only where the more local or concrete norm does not avail. The subsidiarity principle is most commonly used in the application of the Constitution. See *Mazibuko and Others v City of Johannesburg and Others* [2013] ZACC 28, 2013 (6) SA 249 (CC) at para 73 (Formulated the principle as ‘where legislation has been enacted to give effect to a right, a litigant should rely on that legislation in order to give effect to the right or alternatively challenge the legislation as being inconsistent with the Constitution.’) See also *My Vote Counts v Speaker of the National Assembly and Others* [2015] ZACC 31 at paras 44–66 (Comprehensive analysis of the application of the principle).

⁴⁰ *Rivonia SCA* (note 35 above) at para 30.

⁴¹ *Ibid* at para 49.

architecture of the Schools Act, then fees should not play a role in determining its scope.

As in *Welkom*, the Constitutional Court approached *Rivonia* differently to the Supreme Court of Appeal. Its characterisation of *Rivonia* as an example of ‘radically unequal distribution of resources’ and ongoing ‘disparities in accessing resources and quality education’ is an about-turn to that of the Supreme Court of Appeal. It accepted that a governing body has the power to determine its admissions policy.⁴² But it went on to hold that this is not an untrammelled power. It may be exercised ‘subject to provincial intervention’ and must be exercised in the context of the restitutionary nature of education as a mechanism through which to achieve redress.⁴³ In this regard, s 5 of the Schools Act provides that an admissions policy of a public school is subject to the Schools Act and any applicable provincial law. Thus provincial departments are empowered to pass regulations that govern the content of school governing body policy related to admissions and clearly defines their power to implement the policies subject to the broader provisions contained in the Schools Act, provincial legislation and the Constitution. In this way, the Court clarified that provincial authorities do perform functions at the local, school level. Governing bodies, particularly those in affluent schools, cannot ‘buy out’ of the broader social need through school fees, as was implied by the Supreme Court of Appeal. Thus the Court softly reprimanded the *Rivonia* school governing body for failing to protect the interests of the learner and initially requesting that she be placed in a different primary school.⁴⁴

In a unanimous judgment penned by Moseneke DCJ, the Constitutional Court took a step further in clarifying provincial education departments’ powers to inform the substantive content of individual school admissions policies. It found that the Head of Department and the Member of the Executive Council have the powers to place an unplaced learner in a public school, determine enrolment capacity, and to declare that a school has reached that capacity. An interpretation to the contrary would risk nullifying their obligation to ensure that all students have a school to attend. In addition, the Court ordered the Member of the Executive Council for Education to determine feeder zones for the Gauteng Province. While the consequences of this judgment are yet to be fully explored, it does confirm the primacy of the Constitution’s vision for equitable access to quality education for and identifies wealthier public schools as a resource to further that aim.⁴⁵

In addition, this case is illustrative of the ongoing power struggle between provincial education departments and governing bodies over the control of public schools and highlights the important responsibility of national and provincial education departments to regulate in a manner that facilitates equitable access to quality education and clarifies ambiguities in the power sharing architecture of the Schools Act between provincial education department and governing bodies.

⁴² *Rivonia* (note 3 above) at para 40.

⁴³ *Ibid* at para 41.

⁴⁴ *Ibid* at para 76.

⁴⁵ *Federation of Governing Bodies for South African Schools (FEDSAS) v Member of the Executive Council for Education, Gauteng and Another* [2016] ZACC 14 at paras 43–47.

The question of upholding the rule of law is as important as responding to the underlying substantive issue. Two other Constitutional Court cases illustrate this point more eloquently. First, O'Regan J explains in *Premier, Mpumalanga, and Another v Executive Committee, Association of State-Aided Schools, Eastern Transvaal* that '[b]oth principles are based on fairness, the first on fairness of goals, or substantive and remedial fairness, and the second on fairness in action, or procedural fairness. A characteristic of our transition has been the common understanding that both need to be honoured.'⁴⁶

This was also the approach adopted in *Ermelo*, a case concerning the power of the school governing body to determine the language policy.⁴⁷ Since its inception, Hoërskool Ermelo, a well-resourced school with an 'enviable academic record', was exclusively Afrikaans. Over the years its learner numbers began to dwindle, even though the population of the surrounding community was growing. Thus, while the classrooms at Ermelo were emptying, surrounding schools were filled in excess of their capacity. In search of space, the Department approached the school requesting it to admit 27 grade eight learners who could not be accommodated at any of the English medium schools because they were filled to the brim. The governing body of Hoërskool Ermelo refused to accommodate the learners on the basis that it was exclusively Afrikaans. After repeated requests by the Department, it concluded that, given the school's excess classroom space and its refusal to alter its language policy in order to facilitate the admission of the grade eight learners, who were without a school, the governing body was acting unreasonably.⁴⁸ Without consulting the governing body, teachers, learners or parents at the school, the Head of Department unilaterally revoked the power of the governing body to determine its language policy and established an interim body which summarily adopted a policy of dual medium of instruction, teaching in English and Afrikaans. The Head of Department relied on s 25(1) of the Schools Act which permits summary intervention where a dysfunctional governing body has failed to perform one or more of its functions. The section allows the Head of Department to temporarily intervene and assist an ailing governing body. However, there was no evidence that the Hoërskool Ermelo governing body was dysfunctional or that it had failed to perform any of its functions. Quite the opposite was true, as it was an active, well run and effective governing body. As the Court held, '[t]hat the [Head of Department] did not like its language policy [could not] be equated with the governing body having ceased to function or having failed to adopt one.'⁴⁹ By failing to invoke s 33 of the Constitution or the Promotion of Administrative Justice Act 3 of 2000, Moseneke DCJ, for a unanimous Court, found that the Head of Department acted unlawfully and in violation of the principle of legality.

In coming to this conclusion the Court gave substantive content to the right to education. It interpreted factors relevant to the manner in which school governing bodies and provincial authorities must exercise their powers when giving effect

⁴⁶ [1998] ZACC 20, 1999 (2) SA 91 (CC) at para 1 (*Premier, Mpumalanga*).

⁴⁷ *Ibid* at paras 39–40.

⁴⁸ *Ibid* at para 21.

⁴⁹ *Ibid* at para 85.

to the constitutional right providing for the right to learn in the language of one's choice.⁵⁰

When interpreting s 29(2) of the Constitution, the Court listed factors relevant to determining when it is 'reasonably practicable' to learn in a language of one's choice, including the availability of and accessibility to public schools, enrolment levels, the medium of instruction the governing body has adopted, the language choices learners and their parents make and the curriculum options offered.⁵¹ Although not directly pertinent to the findings of the Court, the Court also reflected on the unequal provisioning of resources to schools during apartheid, asserting that 'the Constitution ardently demands that this social unevenness be addressed by a radical transformation of society as a whole and of public education in particular.'⁵² This background was relevant to the reasonableness inquiry, and it concluded that 'the reasonableness standard built into s 29(2)(a) imposes a context-sensitive understanding of each claim for education in a language of choice.'⁵³

The Court accepted that '[o]rdinarily, the representatives of parents of learners and of the local community are better qualified to determine the medium best suited to impart education and all the formative, utilitarian and cultural goodness that come with it.'⁵⁴ This affirms the value of democratic participation in local schools; nevertheless, this power must be exercised subject to the Constitution and its exercise must be balanced against the need for historical redress and the equal entitlement of everyone to an education. However, the Court seemed to uncritically assume the democratic character of the school governing body without considering whether it may be playing a sectarian role on behalf of a section of the local community defined by language boundaries and indirectly by race and social class. Can a school governing body ever legitimately purport to represent the school community when it is made up of the 'local community' and protects the interests of both insiders and outsiders?⁵⁵ How much deference can be afforded to school governing bodies where a policy has an exclusionary effect? Surely this is where the obligation of provincial departments to limit the power of school governing bodies and govern the content of the governing body policies through regulations authorised under the Schools Act arises sharply?

In the absence of regulations, the Head of Department has a broad power to intervene in the affairs of a school governing body, which the Court said must be exercised 'meticulously' and cannot be exercised with a heavy-hand.⁵⁶ It then went on to consider factors that would inform whether there are reasonable grounds to intervene in the affairs of a school governing body, including the nature of the function exercised by the school governing body, the purpose for which the function was revoked in light of the best interests of actual and potential learners,

⁵⁰ Constitution s 29(2).

⁵¹ *Ermelo* (note 10 above) at para 52.

⁵² *Ibid* at para 47.

⁵³ *Ibid* at para 52.

⁵⁴ *Ibid* at para 57.

⁵⁵ See Fredman (note 4 above) at 186.

⁵⁶ *Ermelo* (note 10 above) at para 73.

the views of the governing body and the likely impact on the well-being of the school.⁵⁷

Ermelo does provide a relatively strong statement as to what the substance of the right to education must consist of and the consequent obligations of governing bodies. The judgments of *Welkom* and *Rivonia* appear to focus more on the ‘fairness in action’ and less on the ‘fairness in goals’, as O’Regan J put it in *Premier, Mpumalanga*. The Court’s reluctance to delve beyond a *prima facie* recognition of the substantive issues in these cases could be said to be out of kilter with its earlier decision in *Ermelo*. This could be attributed to the fact that in both *Welkom* and *Rivonia* the learners were re-admitted or admitted to the schools by the time the cases reached the super appellate level, leaving it open to the Court to dispose of the cases narrowly, without having to confront the live substantive issue. In this regard, if the learners themselves had participated in the proceedings as parties or *amici*, this might have persuaded the Court to assert their rights more straightforwardly.

However, weaving through all three cases the Court’s message is clear and was foreshadowed by Khampepe J’s opening statement in *Welkom* that ‘[s]tate functionaries, no matter how well-intentioned, may only do what the law empowers them to do.’⁵⁸ There is little that can be faulted in the Court expecting the state to respect the law and act within its confines. This is particularly relevant in the context of provincial education departments which do not comply with court orders, and which fail to deliver on statutory obligations to deliver learning materials, fix schools, provide transport or to pay teachers on time. The challenge is to assert the rule of law in a way that ensures fairness in both the procedure and in the outcome.

Judgments that reinforce the rule of law are singularly important. We need a government that acts within its powers in order to properly reap the real long-term gains of responsive and accountable government that has as its goal equal education. As *Ermelo* shows, it is still possible for a Court to check public power, where there have been transgressions, as well as to appropriately address underlying issues. Both *Welkom* and *Rivonia* illustrate a need for provincial education departments to develop regulations that resolve disputes quickly, in the best interests of learners, and without the need for protracted litigation that is harmful to the learners involved and antithetical to a supportive learning environment. As democratically elected structures, provincial education departments have an obligation to resolve the ambiguities that may arise in the power-sharing architecture of the Schools Act, to strike a balance between the schools’ individual needs and the public interest.

IV A TWIST

The last of the three cases, *KZN Joint Liaison Committee*, though handed down first in the year of review, is an outlier. It shows that the Court is willing to push the limits of the law as far as necessary to guarantee public accountability. But the

⁵⁷ *Ibid* at para 74.

⁵⁸ *Welkom* (note 2 above) at para 1.

facts of the case, turning on the exercise of public power, highlight a completely different issue, not squarely before the Court: privatisation in education.

The dispute arose from a subsidy that the MEC for Education in KwaZulu-Natal allocated to independent schools in accordance with the Schools Act and the Amended Norms and Standards for School Funding.⁵⁹ In 2008 the MEC provided independent schools with an approximate allocation for the upcoming 2009/10 financial year. Schools budgeted for the following year on the basis of the allocation. However, by 2009, after the date of payment had fallen due, the Department issued a further circular indicating that the schools should expect a reduction of their subsidy allocation. The subsidies eventually paid were 30 per cent less than those set out in the initial 2008 notice.⁶⁰ The effect of the Department's dilatoriness in payment and unilateral conduct prejudiced the budgeting, planning and administration of the schools given the sudden shortfall in their budgets as a result of the Department's unanticipated reduction in the subsidy upon which the schools were dependent for their survival.

The applicant, an association of independent schools, approached the High Court to enforce the 2008 notice. In the Constitutional Court, Cameron J for the majority found for reasons of rationality, reliance and accountability, that 'a public official who lawfully promises to pay specified amounts to named recipients cannot unilaterally diminish the amounts to be paid after the due date for their payment had passed.'⁶¹ The majority judgment reasoned that, while the state is not obliged to subsidise independent schools, when it does elect to do so, it acts in accordance with its constitutional and statutory obligations to realise the right to basic education for learners. Significantly, the majority held that the right to a basic education applies to all learners, including those at independent schools. A failure to fulfil a promise to pay, once the due date for payment passes, negatively impedes the right to basic education for learners in independent schools, qualifying for a state subsidy. The majority held that, prior to the due date, an undertaking to pay subsidies of an approximate amount may be reduced or even revoked but once the due date passes, 'a publically promulgated promise to pay' becomes legally enforceable.⁶²

Hoexter argues that the majority judgment 'illustrates a definite willingness to overcome procedural obstacles in the way of a *deserving applicant* that is seeking to enforce its rights against a public body.'⁶³ It was not seriously disputed that the Association comprised of 'impoverished institutions' some of which would be forced to close if they did not receive the state subsidy. If closed, learners would have to be accommodated in public schools where the financial burden on the

⁵⁹ Schools Act s 48.

⁶⁰ *KZN Joint Liaison Committee* (note 1 above) at para 7.

⁶¹ *Ibid* at para 52.

⁶² *Ibid* at para 48.

⁶³ C Hoexter 'The Enforcement of an Official Promise: Form, Substance and the Constitutional Court' (2015) *South African Law Journal* 207, 215 (emphasis added).

state would be greater.⁶⁴ Thus, the Court accepted that independent schools are a 'saving on the public purse'.⁶⁵

This 'win' for substance over form does not fully capture the nuances of the role that independent schools play in our schooling system. There is a growing body of evidence demonstrating that independent schools, particularly low to middle-income fee schools, are not necessarily more effective or efficient than public, state schools, nor do they necessarily increase the quality of education or improve outcomes.⁶⁶ The two biggest costs in education are salaries and infrastructure, line items that are completely subsidised in the public education system.⁶⁷ Indeed, independent schools aimed at the low fee market often struggle to maintain public school levels of expenditure in these critical areas.⁶⁸ Moreover, reducing the wage bill means lower teacher salaries, a higher teacher turnover, employing less qualified and skilled teachers or, worse, employing people with no teaching qualifications at all. These threats to education are not merely speculative but are apparent in low fee schools currently and even advocated as strategies to improve their viability.⁶⁹ This is described as a 'no-frills' education by the Centre for Development and Enterprise, where the range of subjects, extra-curricular activities and access to vital learning tools such as science and computer equipment is kept to an absolute minimum. The only way low-fee independent schools can be viable is by compromising the quality of education to learners. This is not what the Constitution envisages. This form of private schooling should not too readily be regarded as a 'saving' on the public purse given the consequences of a poor education for the individual and society. Moreover, there are further social costs as these schools potentially take teachers out of the public education system and remove parents from public school communities who may have a greater capacity to contribute to school governing bodies. Among the qualifications for public funding to independent schools is that they do not compete with nearby public schools of equivalent quality that are not overcrowded.⁷⁰ But this seems to ignore the problem as subsidies may address overcrowding without resolving the need for access to adequate schools directly, in a way that benefits everyone.

It is worth emphasising that education is perhaps the primary vehicle by which economically disadvantaged and marginalised people can lift themselves out of

⁶⁴ *KZN Joint Liaison Committee* (note 1 above) at para 18. Cameron J accepted that 'to accommodate the applicant's schools' learners in public schools would be 17 times as expensive.' No evidence as to the total revenue raised for education in KwaZulu-Natal, its national allocation relative to other provinces, nor a breakdown of its spending was tendered. Notably, clause 54 of the Amended Norms and Standards for School Funding (note 6 above) also assumes this fiscal point without evidence of what the saving may include.

⁶⁵ *KZN Joint Liaison Committee* (note 1 above) at para 40.

⁶⁶ I Macpherson, S Robertson & G Waldorf (eds) *Education, Privatisation and Social Justice: Case Studies from Africa, South Asia and South East Asia* (2014).

⁶⁷ Centre for Development Enterprise *The Financial Viability of Low-Fee Private Schools in South Africa* (2015) 11, available at <http://www.cde.org.za/wp-content/uploads/2015/07/INVESTING-IN-POTENTIALFull-Report.pdf>.

⁶⁸ *Ibid* at 8 and 18.

⁶⁹ *Ibid* at 11; Macpherson, Robertson & Waldorf (note 66 above).

⁷⁰ Clause 176(g) of the Amended Norms and Standards for School Funding (note 6 above).

poverty and participate meaningfully in society.⁷¹ Yet, today in South Africa, millions of students and teachers are doomed to education in under-resourced, unhealthy and unsafe environments that deprive students of their right to quality and equal education. Education enhances democracy, equal opportunity and poverty alleviation. It is a social good that is impoverished by a conception of education as an individualised commodity. Macpherson notes that, ‘monetising access to education is a seeming entrenchment of parents’ viewing education as a human-capital formation, that is, instrumentally as a means to an economic end.’⁷² Some local commentators have also expressed concern with the state’s school funding model as a factor contributing towards growing inequality.⁷³ Through school fees, parents are able to ‘top up’ the resources of the state to such a degree that learners within the same schooling system experience a completely different education in relation to the availability of material resources such as infrastructure and learning materials, extra-mural enrichment and access to the best teachers.

The Constitutional Court in *KZN Joint Liaison Committee* handed the independent schools a life jacket and advanced the right to basic education for their learners. In an unacknowledged development of the common law, the Court compelled the state to comply with its publicly promulgated promise to pay on the grounds of rationality.⁷⁴ In so doing, it sidestepped the Promotion of Administrative Justice Act⁷⁵ and s 33 of the Constitution by invoking the common law directly, an argument not raised by the applicants themselves.⁷⁶ It stretched the limits of the law to find a substantive solution for the applicant in upholding the rule of law, and found a way to address the fairness in action to achieve a substantive remedy for learners and the schools.

V CONCLUSION

Each case reviewed in this paper centred on the tension between the local needs of individual schools and the greater demands for quality education that exist in South Africa. At the forefront was the rule of law. The characterisation of the cases in this way may have potentially skewed the Court’s substantive interpretation of the right to basic education. That the affected learners in *Welkom* and *Rivonia* were admitted or readmitted before judgment may have narrowed the live issues before the Court, as would the absence of learners as litigants seeking an effective remedy to vindicate their rights. This may have been one factor influencing the Court to focus on procedural fairness concerns rather than substantive outcome.

⁷¹ Y Dwane at Founding Affidavit, *Equal Education and Others v Minister of Basic Education and Others* 81/2012 (ECB) at para 34.

⁷² Macpherson, Robertson & Waldorf (note 66 above) at 282.

⁷³ See Sayed (note 11 above) at 8 and S Wilson ‘Taming the Constitution: Rights and Reform in the South African Education System’ (2004) 20 *South African Law Journal* 426–7.

⁷⁴ M Murcott ‘A Future for the Doctrine of Substantive Legitimate Expectation? The Implications of *KwaZulu-Natal Joint Liaison Committee v MEC for Education, KwaZulu-Natal*’ (2015) 18 *Potchefstroom Electronic Law Review* 3133, 3145–3147.

⁷⁵ Act 3 of 2000.

⁷⁶ The *amicus curiae*, the Centre for Child Law (represented by the Legal Resources Centre), made submissions on the state’s public law duties not to reduce promised subsidies.

But, maladministration and executive heavy-handedness *do* pose a threat to the realisation of the right to education, a threat which is substantive at its core. They undermine the right to education, achievement of equality and are the antithesis of an open, accountable and democratic state.⁷⁷

In each of the three cases the Court emphasised the importance of meaningful engagement between the four key participants in education delivery: learners, parents, teachers and the state. The Court has shown that it is prepared to play a role in advancing this purpose of the Schools Act. The order for meaningful engagement is the clearest manifestation of this intent. But both *Rivonia* and *KZN Joint Liaison Committee* remarked on the importance of consultation. Put into action, meaningful engagement may be the most appropriate remedy to deal with systemic challenges that currently threaten the public education system. Regulations that govern and limit the powers of governing bodies to exclude learners could obviate the need to litigate by offering effective mechanisms through which to resolve these impasses. In that regard, assessing whether the entire legal framework is sufficient to realise the constitutional right to basic education must be interrogated, as must education departments' failure to sufficiently legislate to protect learners from discrimination and exclusion. School governing bodies represent an innovative and unique organising feature for the improvement of education delivery. However, under-resourced schools require substantial and reliable central state support, as do better resourced schools which potentially play a critical role in furthering access to quality education for all. This undoubtedly places the state at the centre of the cleavage of inequality. *Rivonia* in particular has highlighted this tension and *Welkom* reminds us that there are indeed other areas that require state intervention, such as discrimination.

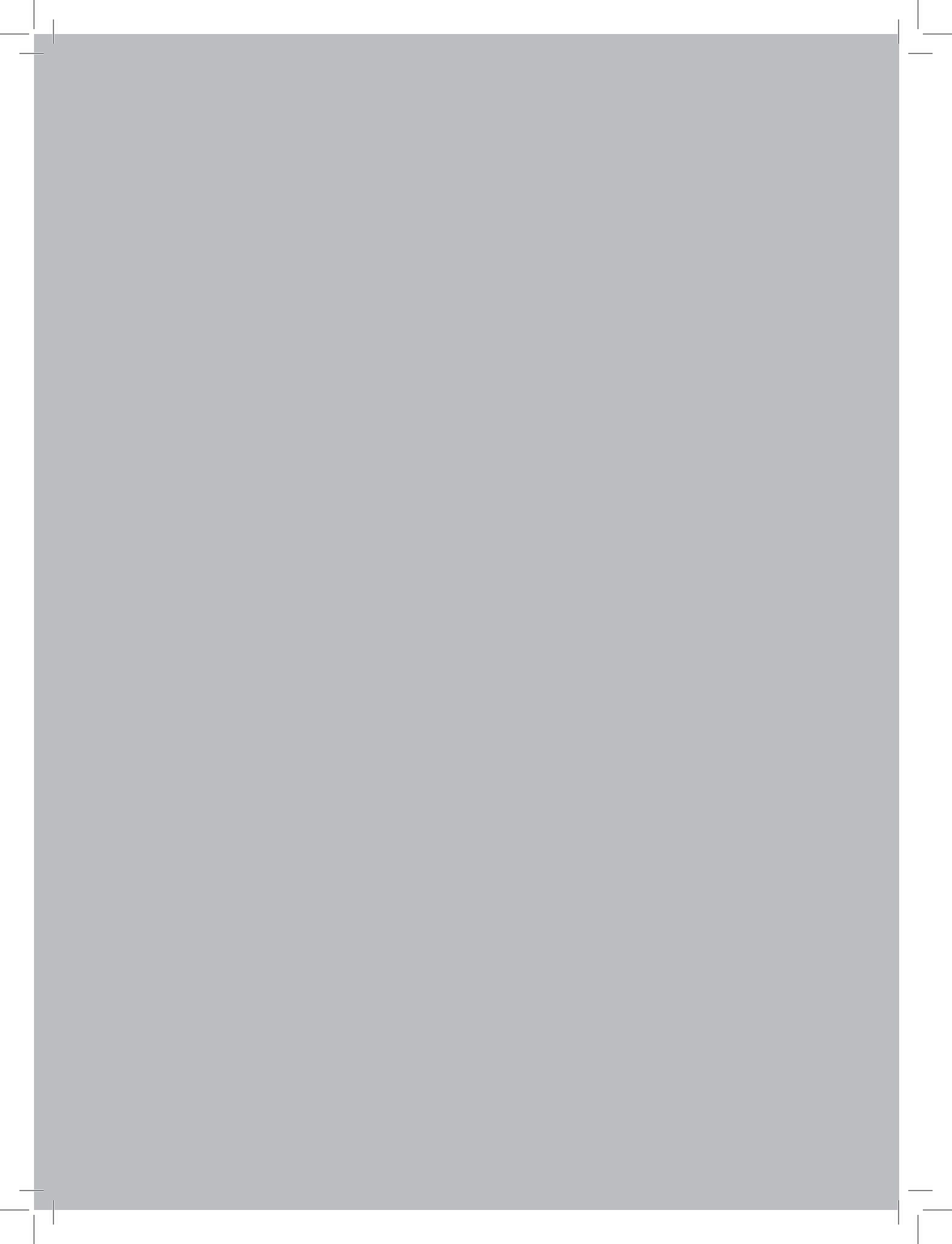
It is indeed the role of the state to lead and to intervene in the delivery of basic education where necessary in order to uphold fundamental rights, but this must be done appropriately. The Constitution entrusts public officials to act lawfully, it does not require perfection.⁷⁸ Thus when public officials, who are required to act in accordance with the law and the Constitution, flout the law, they must be subject to its correction.⁷⁹ This does not eclipse substantive interpretation of the right to education, as the rule of law and the principle of legality are equally fundamental to the right to education and the meaningful enforcement of this right.

⁷⁷ *South African Association of Personal Injury Lawyers v Heath and Others* [2000] ZACC 22, 2001 (1) SA 883 (CC) at para 4.

⁷⁸ *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd* [2014] ZACC 6, 2014 (3) SA 481 (CC) at para 88.

⁷⁹ *Ibid.*

Case Comments



Domestic Enforcement of International Judicial Decisions against Foreign States in South Africa: *Government of the Republic of Zimbabwe v Fick*

Hannah Woolaver*

The decision of the Constitutional Court in the case of *Government of the Republic of Zimbabwe v Fick and Others*¹ concerned the possibility of enforcing a decision of the Tribunal of the Southern African Development Community² (SADC Tribunal) against the Government of Zimbabwe in South Africa. The SADC Tribunal decision in issue was *Mike Campbell (Pvt) Limited and Others v The Republic of Zimbabwe*,³ which examined the legality of the policy of government expropriation of farms in Zimbabwe. The decision of the South African Constitutional Court raises several important questions concerning the enforcement of international judicial decisions in South Africa.

In short, the Constitutional Court held that South Africa was obliged by its treaty obligations as a member of SADC to enforce the decision of the SADC Tribunal against Zimbabwe in South African domestic courts. The Court did so by developing the common-law doctrine of enforcement of ‘foreign judgments’ to include those of the SADC Tribunal. Secondly, the Court held that in this case Zimbabwe was not protected by the immunity from civil jurisdiction and enforcement usually accorded to foreign states by both international and South African domestic law. On both of these issues the Court’s decision is a controversial reading of the relevant provisions of domestic and international law,

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¹ *Government of the Republic of Zimbabwe v Fick and Others* [2013] ZACC 22, 2013 (5) SA 325 (CC) (‘*Fick*’).

² SADC was established by the Treaty of the Southern African Development Community (1993) 32 *International Legal Materials* 116. The SADC Tribunal was established in 2000 by virtue of the Protocol on Tribunal in the Southern African Development Community, which entered into force on 14 August 2011 (SADC Protocol), available at http://www.sadc.int/files/1413/5292/8369/Protocol_on_the_Tribunal_and_Rules_thereof2000.pdf. The Protocol became part of the SADC Treaty in the Agreement Amending the Treaty of the Southern African Development Community, adopted 14 August 2001, available at http://www.sadc.int/files/3413/5410/3897/Agreement_Amending_the_Treaty_-_2001.pdf.

³ *Mike Campbell (Pvt) Limited and Others v The Republic of Zimbabwe* [2008] SADCT 2 (28 November 2008) (‘*Campbell*’).

as it arguably runs counter to important international legal rules on treaty consent and immunity of foreign states.

This comment will examine the enforceability of the orders of the Tribunal and the immunity of the Government of Zimbabwe under both international and domestic law. The analysis will proceed in three parts. First, the background to the decision is set out. Secondly, the enforceability of the decision of the SADC Tribunal in the domestic courts of South Africa is assessed. It will be argued, contrary to the conclusion of the Constitutional Court, that the SADC Tribunal Protocol adopts the same approach as that seen in widespread treaty practice and does *not* oblige the enforcement of decisions of the Tribunal in all SADC member states, but rather only in the domestic courts of those states that are party to the decision in question. Thus, South Africa was not bound by the SADC Tribunal Protocol to enforce the *Campbell* decision against Zimbabwe in South African domestic courts. In light of this conclusion, an alternative solution is suggested, proposing that South African courts should develop a common-law doctrine specifically enabling the domestic enforcement of decisions of international tribunals to which South Africa is bound in international law. Finally, it will be argued that Zimbabwe's right to immunity, protected by both customary international law and South African domestic law, was violated by the execution of the Tribunal's award against Zimbabwean property in South Africa.

The decision of the Constitutional Court can be welcomed as establishing a mechanism to enforce the decisions of the SADC Tribunal against states that refuse to comply with their binding international obligations. As such, it provides a possible new tool to enforce decisions of international courts against recalcitrant states, seeking to buttress the international rule of law. We must be cautious, however, in our assessment of the Court's decision. While the Court is primarily responsible for interpreting South African domestic law for the South African context, when interpreting international treaties such as the SADC Tribunal Protocol, it is also interpreting the rights and obligations of all states parties to the treaty. In this regard, the Court must operate carefully to ensure that it strictly respects the terms of the agreement of the states in question.

The international legal rules on treaty interpretation and the principle of comity between states require that the Court not interpret such treaties more expansively than the text of the agreement allows – otherwise, it will impose duties on foreign states to which they did not consent, in violation of international law. Such action, disregarding the limits of international law, threatens an important foundation for friendly cooperation between nations in the region and around the world. By enforcing an interpretation of the SADC Tribunal Protocol that cannot be supported by the text of an international treaty, therefore, the Court risks undermining the very international rule of law that it was seeking to protect. The alternative common-law rule proposed here would be better suited to support the desirable aims of the Constitutional Court, while respecting the boundaries of international law regulating the domestic enforcement of international judicial decisions against foreign states.

I BACKGROUND

In the *Campbell* case, a group of farmers who had been dispossessed of their land by the Zimbabwean government applied for relief in the form of compensation or restitution before the SADC Tribunal. The Tribunal found that the dispossession violated provisions of the SADC Treaty, and therefore awarded judgment in favour of the farmers.⁴ It held that Zimbabwe was obliged to pay compensation to the farmers who had been forced off their farms.⁵ Zimbabwe refused to comply with the Tribunal's decision, leading the farmers to bring another application to the Tribunal for enforcement of the original order as well as a costs award against the government of Zimbabwe. The Tribunal made another order against the Zimbabwean government, including a costs order in favour of the farmers.⁶ Nonetheless, Zimbabwe failed to comply with the orders of the Tribunal.⁷

As a result of non-compliance by the Government of Zimbabwe, the farmers sought alternative methods of enforcement of the order against the Government. Most relevant for our purposes, they turned to the domestic courts of South Africa to enforce the costs order against Zimbabwe and sought a judicial order to attach Zimbabwean government property located in South Africa to satisfy the costs owed to them. An application was brought to the High Court, which found in favour of the farmers.⁸ This decision was upheld by the Supreme Court of Appeal (SCA), denying the appeal of the Government of Zimbabwe.⁹ The High Court and the SCA held that the SADC decision could be enforced in South Africa as a 'foreign judgment', both giving short shrift to the international legal issues concerning enforceability of international judgments against foreign states in South Africa's domestic courts. In a mere two sentences, the SCA held that Zimbabwe had consented to the enforceability of decisions of the SADC Tribunal in all SADC member states, and had waived any immunity from which it might otherwise have benefited, by virtue of its consent to the SADC Protocol.¹⁰

Thereafter, the Zimbabwean Government appealed for the case to be heard by the Constitutional Court and argued that the orders could not be enforced in South African courts for three reasons. First, the Tribunal Protocol had not been approved by the South African Parliament, as required by s 231(2) of the South African Constitution.¹¹ Secondly, a decision of an international tribunal does not qualify as a 'foreign judgment', and therefore is not subject to domestic enforcement in South Africa according to either legislation or the common law. Finally, it was argued that the enforcement of the costs order and its execution against Zimbabwean governmental property in South Africa violated the state immunity accorded to Zimbabwe both under international law and under South

⁴ Ibid at sections VI–VII.

⁵ Ibid at section VII.

⁶ See *Fick* (note 1 above) at para 3.

⁷ Ibid.

⁸ *Government of the Republic of Zimbabwe v Fick and Others* [2011] ZAGPPHC 76 (*'Fick High Court'*).

⁹ *Government of the Republic of Zimbabwe v Fick and Others* [2012] ZASCA 122 (*'Fick SCA'*).

¹⁰ Ibid at para 44.

¹¹ Constitution of the Republic of South Africa, 1996.

Africa's Foreign States Immunities Act.¹² The Constitutional Court rejected the appeal on all issues.

II THE OBLIGATION TO ENFORCE THE *CAMPBELL* JUDGMENT IN SOUTH AFRICAN DOMESTIC COURTS

In order to assess whether South Africa was obliged to enforce the decision of the SADC Tribunal against Zimbabwe, the first question is whether the SADC Tribunal Protocol obliges all SADC member states to enforce all decisions of the SADC Tribunal in their domestic courts, or rather only the states that are party to the dispute in question. Crucially, South Africa was not a party to the decision of the SADC Tribunal in the *Campbell* case. The only state party in that case was Zimbabwe.

It must be emphasised that this form of enforcement – enforcement of decisions of international courts and tribunals against a state in the domestic courts of a third state – is not common.¹³ Indeed, international courts' constitutive treaties generally do not even impose an obligation on states that are parties to a dispute to make the Tribunal's decision directly enforceable in its domestic courts.¹⁴ States have generally shown themselves unwilling to consent to such obligations of enforcement, and since there is no mandatory jurisdiction of international courts under international law,¹⁵ states are bound to enforce the decisions of international courts only to the extent that they agree do so. The fundamental principle of treaty consent in international law means that states are bound only by those obligations to which they agree in an international treaty.¹⁶ While decisions of international tribunals are generally given binding force vis-à-vis the parties to the dispute in the constituent instrument, the question of enforcement is usually left to the discretion of each such party.

It is even less common for the constituent instruments of international tribunals to impose an obligation that decisions of the tribunal be enforced in the domestic courts of a third state – that is, in the domestic courts of a state that is not a party to the dispute in question. If the decision of the international tribunal is not binding on the state in which enforcement is sought (which is generally the case with third states), there is in fact no international legal obligation to be enforced

¹² ME O'Connell 'The Prospects of Enforcing Monetary Judgments of the International Court of Justice: A Study of Nicaragua's Judgment against the United States' (1990) 404 *Scholarly Works*, available at http://scholarship.law.ndu.edu/law_faculty_scholarship/404 (Discussion of the absence of compulsory domestic enforcement of decisions of international tribunals, especially the International Court of Justice, and possible ways of developing mechanisms to ensure such enforcement.).

¹³ See ME O'Connell 'The Prospects of Enforcing Monetary Judgments of the International Court of Justice: A Study of Nicaragua's Judgment against the United States' (1990) 404 *Scholarly Works*, available at http://scholarship.law.ndu.edu/law_faculty_scholarship/404 (Discussion of the absence of compulsory domestic enforcement of decisions of international tribunals, especially the International Court of Justice, and possible ways of developing mechanisms to ensure such enforcement.).

¹⁴ See section II.A.1 below.

¹⁵ Eg, *Status of Eastern Carelia*, PCIJ, Ser B no 5 (1923) 27; *Ambatielos Claim (Greece v United Kingdom)* (1956) XII Reports of International Arbitral Awards 83, 103. See further J Crawford *Brownlie's Principles of Public International Law* (2012) 8–9.

¹⁶ See art 34 of the Vienna Convention on the Law of Treaties (1969)(Vienna Convention) and *SS Lotus (France v Turkey)*, PCIJ, Ser A no 10 (1927) 18 ('[T]he rules of law binding upon States ... emanate from their own free will.').

by the courts of the third state. Furthermore, states are even more reluctant to allow the domestic courts of other states to enforce decisions of international tribunals against them than they are to consent to such enforcement by their own courts.¹⁷ There are therefore very few treaties in which an obligation on third states to enforce decisions of international tribunals is provided for.

If the treaty governing the international tribunal in question does not permit or oblige third states to enforce its decisions in their domestic courts, as most do not, then such domestic enforcement against a foreign state constitutes a violation of the foreign state's rights under international law. In particular, it contravenes the fundamental principle of treaty consent mentioned above, as the foreign state has not given its consent in international law to enforcement of its international obligations in the domestic courts of a third state. Such enforcement therefore also violates the prohibition against the intervention of foreign states, which constitutes customary international law and is enshrined in art 2(7) of the Charter of the United Nations (UN Charter).¹⁸ Finally, such enforcement may well also violate the immunity from domestic jurisdiction and enforcement which foreign states enjoy under customary international law.¹⁹

In order to determine whether decisions of a particular international tribunal are enforceable in the domestic courts of states parties to the decision, or also in the domestic courts of third states, we must examine to what the member states of the international court have agreed. The binding nature of the decisions of the international court in question and possible methods of enforcement depend on the text of the constitutive instrument establishing the court; that is, they depend on what states have agreed to in the treaty in question. Therefore, in order to establish whether South Africa was bound to enforce the decision of the SADC Tribunal in the *Campbell* case, the content of the SADC Tribunal Protocol is decisive.

A Enforcement of Decisions of International Tribunals in Foreign Domestic Courts

1 General Practice

Before examining the text of the SADC Protocol to determine whether it enables the enforcement of its decisions in all SADC member states, it is useful to examine how other international courts and tribunals have approached the issue of enforcement of their decisions. In the first place, which states are normally bound by decisions of international courts; and secondly, does the treaty prescribe methods of enforcement, and if so, what are they? The general treaty practice provides a starting-point from which to examine the provisions in the SADC Protocol. The general practice is not binding in itself, and would be binding only if agreed upon. However, if the treaty practice shows that a particular approach

¹⁷ See O'Connell (note 13 above)(Discussion of this issue in the context of the International Court of Justice).

¹⁸ Charter of the United Nations (1945); *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (1986) *International Court of Justice Reports* 14 at para 202 ('*Military and Paramilitary Activities*').

¹⁹ See section III below for discussion of this issue.

to these two questions is widespread or perhaps even ubiquitous, this would assist us in interpreting the enforcement mechanism established in the SADC Protocol.

When we examine the relevant treaty practice, there is indeed a common approach to the enforceability of decisions of international courts and tribunals. The general practice evidenced in these treaties is that decisions of international courts and tribunals bind only the states parties to the case and, if any provision for enforceability in domestic courts is made, are enforceable only in the domestic courts of the parties to the decision. Treaties in which third states are bound to enforce decisions of international tribunals in their domestic courts are the rare exception to this general practice; in fact, such provisions are only found in relation to the specialist regimes of international investment and commercial arbitration agreements. As put by Rosenne, 'in international law the separation of the adjudicative from the post-adjudicative phase is a fundamental postulate of the whole theory of judicial settlement ... this leads to the consequence that enforcement partakes of the quality of an entirely new dispute to be regulated by political means'.²⁰

I begin by examining the enforcement mechanism of the International Court of Justice (ICJ), the judicial organ of the United Nations. Article 59 of the ICJ Statute clearly states that its decisions are binding only on the parties to the case: 'The decision of the Court has no binding force except between the parties and in respect of that particular case.'²¹ States parties are obliged to carry out the decisions of the ICJ made against them, but no provision is made specifying particular methods of domestic enforcement, whether through domestic courts or otherwise. In the case of non-compliance, the issue can be referred to the Security Council of the United Nations, which can impose sanctions for non-compliance. This is set out in art 94 of the UN Charter:

1. Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.
2. If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to give effect to the judgment.²²

Therefore, decisions of the ICJ are neither binding on third states, nor are they enforceable in the domestic courts of states not party to the decisions of the court. As put by O'Connell, 'the state representatives who drafted the Statute of the Court would not be surprised by the ICJ's inaction in the area of enforcement, which they envisioned to be a non-judicial function best left to the Security Council'.²³ Whether ICJ decisions are directly enforceable even in the domestic

²⁰ S Rosenne *The International Court of Justice: An Essay in Political and Legal Theory* (1957) 102.

²¹ Art 59 of the Statute of the International Court of Justice (1945) 33 *United Nation Treaty Series* 993 (ICJ Statute).

²² Art 94 of the UN Charter.

²³ O'Connell (note 13 above) at 901.

courts of the states parties to the decision will depend on the constitutional rules of the state in question.²⁴

Echoing the pattern established in the ICJ Statute, the European Convention on Human Rights (ECHR) declares that the ‘High Contracting Parties undertake to abide by the final judgment of the Court in any case in which they are parties’.²⁵ The only method of enforcement specified in the treaty is referral to the Committee of Ministers. Thus, ECHR member states are bound by decisions to which they are parties, but undertake no obligation to enforce such decisions; nor do they bind themselves to enforce decisions in cases to which they are not parties.

The Inter-American Court of Human Rights adopts this same approach in its constitutive treaty. Article 68(1) of the American Convention on Human Rights (ACHR) binds states ‘to comply with the judgment of the Court in any case to which they are parties’.²⁶ The Inter-American system does, however, go one step beyond the ECHR system in terms of the required method of enforcement by states parties to a decision of the court: in cases where the court has ordered monetary compensation, these damages are enforceable in the domestic institutions of the country against whom the damages are made. This is set out in art 68(2): ‘That part of the judgment that stipulates compensatory damages may be executed in the country concerned in accordance with domestic procedure governing the execution of judgments against the state.’ Therefore, states parties to a decision are obliged to make them enforceable in their domestic courts according to domestic procedure. However, as with the other examples examined above, states not party to the decision are not under any obligation of enforcement.

The international judicial institutions of the African Union also adhere to the pattern established above. The decisions of both the African Court of Justice and the African Court of Human and Peoples’ Rights bind only states that were parties to the particular case. The Protocols of both courts impose no obligation to enforce these decisions in the domestic courts of states that are bound by the decision. The only method of enforcement specified is referral to the Assembly of the African Union if the parties fail to comply with the judgment of the Court of Justice or Human Rights.²⁷ Identical provisions are made in the newly merged

²⁴ The US Supreme Court, for example, has recently held that decisions of the ICJ that are binding on the USA, that is, decisions to which it was a party, are not directly enforceable in US domestic courts without implementation through domestic legislation. *Medellin v Texas* 552 *US* 491 (2008). See also *Socobelge v Greece* (1951) *International Law Reports* 3 (One of the very few decisions addressing the direct enforceability of decisions of the ICJ or Permanent Court of International Justice (PCIJ). The Belgian court in that case held that the decision of the PCIJ was not directly enforceable without domestic implementation by the Belgian government).

²⁵ Art 46(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) 213 *United Nation Treaty Series* 222.

²⁶ American Convention on Human Rights (1978) 1144 *United Nation Treaty Series* 123.

²⁷ See arts 37 and 52 of the Protocol of the Court of Justice of the African Union 2003, available at <http://www.refworld.org/docid/4937ee0e2.html>; art 29–31 of the Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights 1998, OAU Doc OAU/LEG/EXP/AFCHPR/PROT (III).

African Court of Justice and Human Rights (ACJHR).²⁸ Art 46 of the Protocol on the Statute of the ACJHR provides:

1. The decision of the Court shall be binding on the parties.
2. Subject to the provisions of paragraph 3, Article 41 of the present Statute, the judgment of the Court is final.
3. The parties shall comply with the judgment made by the Court in any dispute to which they are parties within the time stipulated by the Court and shall guarantee its execution.
4. Where a party has failed to comply with a judgment, the Court shall refer the matter to the Assembly, which shall decide upon measures to be taken to give effect to that judgment.
5. The Assembly may impose sanctions by virtue of paragraph 2 of Article 23 of the Constitutive Act.

As put by one commentator, 'the Statute does not envisage using national courts to enforce judgments of the African Court of Justice and Human Rights; that is the responsibility of the Assembly of Heads of State and Government'.²⁹ Consequently, in drafting these instruments, member states of the African Union chose not to make decisions of any of these judicial institutions binding on member states that were not party to the decisions of the court in question, or to make these decisions enforceable in the domestic courts of those third states. Rather, they followed the treaty practice of binding only states parties to the decisions, and leaving the method of enforcement up to the discretion of those states parties.

As a final example, this approach is adopted in the dispute settlement system of the World Trade Organisation (WTO). According to the Dispute Settlement Understanding of the WTO (DSU),³⁰ decisions of a panel or the Appellate Body apply only to the states that are parties to the dispute. Art 19(1) of the DSU states:

Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement. In addition to its recommendations, the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendations.

The DSU defines a 'Member concerned' as 'the party to the dispute to which the panel or Appellate Body recommendations are directed'. Therefore, no obligation of enforcement is imposed on states that are not parties to the dispute in question.

²⁸ Protocol on the Statute of the African Court of Justice and Human Rights 2008, available at <http://www.refworld.org/docid/4937f0ac2.html>.

²⁹ RF Oppong 'Enforcing Judgments of the SADC Tribunal in the Domestic Courts of Member States' 2010 *Monitoring Regional Integration in Southern Africa Yearbook* 115, 118.

³⁰ Understanding on Rules and Procedures Governing the Settlement of Disputes 1994 (DSU), available at https://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm.

2 *The Exception to the Rule: International Investment and Commercial Arbitration Agreements*

It is only in the case of international commercial and investment arbitration agreements that states have departed from the general practice set out above. These are the only instances where decisions of an international tribunal are given binding force vis-à-vis all member states, not just parties to the dispute, and these decisions are made enforceable in the domestic courts of all member states. This distinct approach is clearly indicated in the text of the relevant international arbitration instruments.³¹

This international arbitration-specific approach applies to both ‘ICSID disputes’ and ‘non-ICSID disputes’. The former category, which concerns disputes arising from international investment treaties, is governed by the International Convention on the Settlement of Investment Disputes between States and Nationals of other States (ICSID Convention).³² The binding nature and enforceability of ICSID arbitral awards are dealt with in s 6 of chapter IV of the Convention. The first of these articles, art 53, begins with the familiar statement that ICSID awards bind the parties to the dispute. Article 53(1) states:

The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention.

After this, however, the ICSID Convention diverges sharply from the practice of the other international tribunals assessed above. Article 54(1) of the ICSID Convention explicitly provides that investment arbitration decisions made under the Convention are binding on all member states to the Convention. In addition, the monetary awards of these decisions are made enforceable in the domestic courts of all ICSID Convention member states, not just in the domestic courts of the parties to the dispute. Article 54(1) provides:

Each Contracting state shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. A Contracting state with a federal constitution may enforce such an award in and through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state.

There is therefore a clear distinction between arts 53 and 54. While the primary obligation contained in the arbitral award binds only the parties to the dispute (art 53), *all member states of the ICSID Convention* are bound to recognise and enforce ICSID awards through their domestic courts (art 54).³³ Accordingly, the party in whose favour an ICSID award is given can seek to enforce that award

³¹ See CH Schreuer, L Malintoppi, A Reinisch & A Sinclair *The ICSID Convention: A Commentary* (2nd Edition, 2009) for analysis of the relevant articles of the ICSID Convention cited below.

³² ICSID Convention (1965) 575 *United Nation Treaty Series* 159.

³³ See A Broches ‘The Convention on the Settlement of Investment Disputes between States and Nationals of Other States’ (1972) 136 *Recueil des Cours* 331, 399–400.

against the losing party in the domestic courts of any state that is a party to the ICSID Convention, whether the winning or losing party is a state, individual, or corporation.³⁴

It is clear, then, that states have agreed to an unusually strong method of enforcement of monetary awards made by international investment arbitral tribunals, making such decisions automatically binding and enforceable in the domestic courts of the more than 150 states that are party to the ICSID Convention. Indeed, this novel approach was debated during the drafting of the Convention. As recounted by Schreurer:

[T]he idea to make awards enforceable in third States that were unconnected to the arbitration ran into some opposition. Compromise suggestions were made to treat awards in third States like foreign rather than domestic judgments or to allow third States to refuse recognition and enforcement on the ground that the award was contrary to the local *ordre public*. Eventually, these suggestions were voted down and the full enforceability of awards in all States parties to the Convention was preserved.³⁵

If the domestic courts of any state party to the ICSID Convention fail to recognise and enforce an ICSID award, this would constitute a violation of its international legal obligation under art 54 of the treaty.³⁶ In essence, therefore, the ICSID investment arbitral award becomes an executory title which the winning party can take to any state that is a party to the ICSID Convention for execution against the losing party's assets located in the territory of that state.³⁷

In relation to non-ICSID arbitration, states parties to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards have also consented to this strong method of enforcement for international arbitral awards made within the remit of this treaty.³⁸ As in the ICSID Convention, the text of art III of the New York Convention clearly and explicitly makes international arbitral awards to which the Convention applies enforceable in the domestic courts of any state party to the New York Convention:

Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

This approach is echoed in the UNCITRAL Model Law on International Commercial Arbitration, a non-binding instrument drafted to encourage

³⁴ See Schreurer, Malintoppi, Reinisch & Sinclair (note 31 above) 1123–1124: The obligation to recognize and enforce awards applies to all States parties to the ICSID Convention. It applies not just to the State party to the proceedings and to the State whose national was a party to the proceedings. By contrast, art 53 refers to the obligations of the parties only.

³⁵ Ibid at 1124.

³⁶ Ibid.

³⁷ See GR Delaume 'ICSID Arbitration in Practice' (1984) 2 *International Tax and Business Law* 58, 74.

³⁸ New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) (New York Convention).

harmonization in the domestic laws implementing international commercial arbitration rules.³⁹ Article 35(1) states:

An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this article and article 36.

Therefore, both international commercial and investment arbitral awards are, contrary to the general practice in public international law, enforceable in the domestic courts of all member states to the main international arbitral treaty regimes. As these member states include all major trading states in the world, this creates a strong web of enforcement for such arbitral awards.

The exceptional nature of the enforcement mechanism created in the international investment and commercial arbitration sphere is recognised by both states and academic commentators. As recently put by Van Harten and Loughlin:

The internationalized system of award enforcement gives investment arbitration a coercive force beyond that of other forms of international adjudication in the public sphere. No human rights treaty allowing individual damages claims authorizes the enforcement of awards by domestic courts. Even judgments of the ICJ, although binding on states that consent to the Court's jurisdiction, can be enforced only by the UN Security Council; a successful state therefore is dependent on the support of a majority of Security Council members, including the five permanent members, to obtain enforcement. Under investment treaties, by contrast, a successful investor can seek enforcement against assets of the respondent state in the courts of as many as 165 states.⁴⁰

In fact, these exceptionally strong mechanisms, allowing for nearly global forum-shopping for enforcement of international investment arbitral awards, are the distinctive feature of this regime. In the Commentary on the ICSID Convention art 54 is described as 'one of the most important provisions of the Convention ... [and] a distinctive feature of the ICSID Convention'.⁴¹ As discussed above, other instruments governing international dispute settlement do not cover enforcement but leave this issue to domestic laws or applicable treaties. This has led to the huge popularity of this regime with investors, and the proliferation of thousands of bilateral investment treaties including reference either to ICSID or New York Convention arbitration.⁴² This ability to enforce decisions of international arbitral tribunals in the domestic courts of states that are not party to the decisions is therefore a unique feature of this regime, which sets it apart from all other international judicial institutions.

³⁹ United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration 1985, with amendments as adopted in 2006, available at http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf.

⁴⁰ G Van Harten & M Loughlin 'Investment Treaty Arbitration as a Species of Global Administrative Law' (2006) 17(1) *European Journal of International Law* 121, 135.

⁴¹ Schreurer, Malintoppi, Reinisch & Sinclair (note 31 above) at 1117.

⁴² See Van Harten & Loughlin (note 40 above) at 135–140.

3 *Conclusions on the General Treaty Practice*

In all of the examples apart from the international investment context, the same pattern is evident: the decisions of the international court bind only the states that are party to the case, and the method of executing the binding decision is left to them.⁴³ In some cases, instances of non-compliance can be referred to another organ of the international organisation in question, which can impose sanctions if it so chooses. Thus, states that are not party to the decisions of these various international courts are not bound by those decisions in international law. In addition, in none of the examples does the treaty impose an obligation for decisions of the international tribunal to be enforced by the domestic courts of states that are not bound by the decision of the international court in question (eg, those who are member states of the international court but not parties to the particular dispute). Providing for decisions of international tribunals to be binding on states not party to the case, and enforceable in their domestic courts, would be a significant departure from this widespread practice. One would therefore expect such a departure to be clearly indicated in the treaty text, as it is in the text of the international investment dispute settlement mechanisms.

The predominant approach can be seen in all of the major public international law tribunals, including international human rights tribunals. These institutions include those whose jurisdiction is limited to disputes brought by states, as well as those that provide for access of individuals to the court alongside states, as the SADC Tribunal did at the time of the *Campbell* case.⁴⁴ In addition, this approach is adopted across both global and regional international tribunals. Given the similarities in personal and subject-matter jurisdiction, this practice is directly comparable and relevant to that under the SADC Tribunal Protocol, as shall be discussed below.

B Enforcement of Decisions of the SADC Tribunal in South Africa

The provision of the SADC Protocol governing the enforcement of its decisions is art 32, which provides:

1. The law and rules of civil procedure for the registration of enforcement of foreign judgements in force in the territory of the State in which the judgement is to be enforced shall govern enforcement.
2. States and institutions of the Community shall take forthwith all measures necessary to ensure execution of decisions of the Tribunal.
3. Decisions of the Tribunal shall be binding upon the parties to the dispute in respect of that particular case and enforceable within the territories of the States concerned.
4. Any failure by a State to comply with a decision of the Tribunal may be referred to the Tribunal by any party concerned.

⁴³ With the exception of awards of monetary compensation in the case of the Inter-American system, discussed above.

⁴⁴ The jurisdiction of the SADC Tribunal was subsequently limited to complaints brought by other member states. Article 33 of the new Protocol on the Tribunal in the Southern African Development Community (2014). See also N Fritz 'Quiet Death of an Important SADC Institution' (29 August 2014) *Mail & Guardian*, available at <http://mg.co.za/article/2014-08-29-quiet-death-of-an-important-sadc-institution>.

5. If the Tribunal establishes the existence of such failure, it shall report its finding to the Summit for the latter to take appropriate action.

In *Fick* the Constitutional Court held that this provision imposes an international legal obligation on South Africa to enforce all decisions of the SADC Tribunal in its domestic courts.⁴⁵ According to the Court, this included an international legal obligation to enforce domestically even those decisions of the Tribunal to which it was not party. It can be seen that this interpretation of the SADC Protocol gives decisions of the SADC Tribunal much wider binding scope and enforceability than in the treaties regulating the public international law and international human rights tribunals set out in the previous section.

In order to enforce the decision of the SADC Tribunal against Zimbabwe in South Africa, the Constitutional Court was required to identify the domestic legal basis on which decisions of an international tribunal not binding for South Africa might be enforced within its territory. The Court first rejected the possibility of enforcement on the basis of the Enforcement Act,⁴⁶ as a decision of an international tribunal could not be said to constitute a ‘judgment [...] given in any country outside the Republic which the Minister has for the purposes of this Act designated by notice in the *Gazette*’.⁴⁷ The Court therefore turned to the common-law rules on enforcement of foreign judgments.⁴⁸ As with the legislation, the Court held that the common law, as it stood, allowed only for the enforcement of orders by the domestic courts of foreign states, rather than decisions of international courts.⁴⁹ Again, therefore, this did not facilitate the enforcement of decisions of the SADC Tribunal. The Constitutional Court next asked whether the common law on enforcement of foreign judgments could be developed to enable the enforcement of the decisions of the SADC Tribunal. In particular, the Court examined whether the common-law definition of a ‘foreign court’ could be expanded to include decisions of the Tribunal. To this, the Court answered in the affirmative. In fact, it held that it was under an obligation in international law to enforce this decision of the SADC Tribunal despite South Africa’s not being a party to the dispute in question.⁵⁰

While the reasoning of the Court is not always clear, this obligation stemmed, it seems, from art 32 of the Tribunal Protocol, when applied in light of ss 39(1)(b) and 233 of the Constitution. In particular, the Court relied on art 32(2) and (3) to make two key findings: first, that SADC member states were under an international legal obligation to enforce all decisions of the SADC Tribunal in their domestic courts, and that this obligation was therefore binding on South Africa at international level; and secondly, that South Africa was bound to

⁴⁵ *Fick* (note 1 above) at para 59.

⁴⁶ Enforcement of Foreign Civil Judgments Act 32 of 1988 (Enforcement Act).

⁴⁷ See s 2(1) of the Enforcement Act.

⁴⁸ *Fick* (note 1 above) at para 58.

⁴⁹ *Ibid* at paras 51–53. See also *Purser v Sales, Purser and Another v Sales and Another* [2000] ZASCA 45, 2001 (3) SA 445 (SCA).

⁵⁰ *Fick* (note 1 above) at paras 54–70.

develop the common law in line with this international legal obligation, by virtue of s 39(1)(b) of the Constitution.⁵¹ As put by the Court:

Article 32 imposes a duty upon member states, including South Africa, to take all execution-facilitating measures, such as the development of the common-law principles on the enforcement of foreign judgments, to ‘ensure execution of decisions of the Tribunal’ [art 32(2)]. It also gives binding force to the decisions of the Tribunal on the parties *including the affected member states*, paves the way and provides for the enforceability of the Tribunal’s decisions within the territories of member states [art 32(3)]. South Africa has essentially bound itself to do whatever is legally permissible to deal with any attempt by any Member State to undermine and subvert the authority of the Tribunal and its decisions as well as the obligations under the Amended Treaty. Added to this are our own constitutional obligations to honour our international agreements and give practical expression to them [ss 39(1)(b) and 233 Constitution], particularly when the rights provided for in those agreements, such as the Amended Treaty, similar to those provided for in our Bill of Rights, are sought to be vindicated. We are also enjoined by our Constitution to develop the common law in line with the spirit, purport and objects of the Bill of Rights.⁵²

The alleged existence of an international legal obligation on South Africa to enforce all decisions of the SADC Tribunal domestically was therefore of central importance to the Court’s development of the common law to allow for the enforcement of the *Campbell* decision.

The Court then reasoned that, since South Africa was bound in international law to enforce the *Campbell* decision according to art 32 of the SADC Protocol, the constitutional right of access to court required enforcement of the Tribunal’s decision. This was held to be particularly so since the farmers had no judicial remedy available to them in Zimbabwe.⁵³ This confirmed the Court’s earlier case law, which had held that development of the common law according to the ‘spirit, purport, and object of the Bill of Rights’ includes consideration of international law.⁵⁴ Since the obligation to enforce decisions of the SADC Tribunal was consistent with the constitutional right of access to court, the binding international legal obligation had to be given domestic force, through s 39(1)(b) of the Constitution, by developing the common law to include decisions of the Tribunal within the domestically enforceable category of ‘foreign judgments’.

Throughout its reasoning, the Court repeatedly relied on the supposed existence of an international legal obligation on South Africa to enforce decisions

⁵¹ Ibid.

⁵² *Fick* (note 1 above) at para 59 (my emphasis).

⁵³ Ibid at paras 67–68:

South Africa’s obligation to develop the common law [is] a measure necessary to execute the Tribunal’s decision. ... A construction of the Amended Treaty, as well as the right of access to courts ... enjoins our courts to be inclined to recognize the right of access to our courts to register and enforce the Tribunal’s decision. This will ... be achieved by extending the meaning of ‘foreign court’ to the Tribunal. The need to do so is even more pronounced since Zimbabwe, against which an order sanctioned by the Treaty was made by the Tribunal, does, in terms of its Constitution, den[ies] the aggrieved farmers access to domestic courts and compensation for expropriated land. Of importance also is the fact that a further resort to the Tribunal was necessitated by Zimbabwe’s refusal to comply with the decision of the Tribunal.

⁵⁴ See, eg, the use of international law to develop the common law in *Carmichele v Minister of Safety and Security* [2001] ZACC 22, 2001 (4) SA 938 (CC).

of the SADC Tribunal to which it was not a party as central to the ultimate decision to enforce the *Campbell* award.⁵⁵ The Court cited variously art 32(2), 32(3) or simply art 32 of the SADC Protocol in general as the source of the obligation on all SADC member states to enforce decisions of the Tribunal. According to the Constitutional Court, by binding themselves to the SADC Tribunal Protocol, SADC member states have consented to a system of enforcement as powerful as that in the ICSID Convention, allowing successful claimants to enforce awards by the SADC Tribunal in the domestic courts of any SADC member state in which the losing party may have assets.

It is argued, however, that contrary to the decision of the Constitutional Court, the text of the Tribunal Protocol, when properly interpreted, does not support the existence of an obligation on all SADC member states to enforce all decisions of the Tribunal. Instead, an alternative interpretation shall be advanced: that the SADC Protocol confines the internationally binding force of the decisions of the Tribunal only to states that are parties to the decision in question, and that there is therefore only an international obligation on those states parties to enforce the Tribunal decision in its domestic courts. If this interpretation is correct, it would mean that there is no international obligation on South Africa to enforce decisions of the Tribunal to which it was not a party, therefore undermining the Constitutional Court's justification for the domestic enforcement of the *Campbell* judgment. This alternative interpretation, substantiated below, is consistent with the general practice repeatedly adopted in the treaties establishing international human rights and other tribunals discussed in the previous section.

The text of art 32 of the SADC Protocol closely mirrors those of the public international law and international human rights tribunals set out above. As set out in art 32(3), the binding force of the decisions of the SADC Tribunal is confined to the parties to the dispute, echoing art 94 of the ICJ Statute, art 46(1) of the ECHR, art 68(1) of the ACHR, art 46 of the ACJHR and art 19(1) of the DSU. In addition, art 32(3) of the SADC Protocol obliges those states parties to the decision to make the judgment in question directly enforceable in their domestic courts. Therefore, in art 32(3), SADC member states have consented to a system very similar to that of the Inter-American Court of Human Rights, making decisions of the Tribunal binding and enforceable in the domestic courts of states parties to the decision, but not in the courts of other SADC member states. There is no indication in art 32(3) that states other than the parties to Tribunal's decision are bound by it.⁵⁶

It is true that art 32(2) requires member states to take all necessary measures to ensure the execution of decisions of the Tribunal. However, as there is no provision in the Protocol binding SADC states to enforce decisions of the Tribunal to which they are not party, art 32(2) is most logically interpreted to require member states to take those measures necessary to ensure the execution of those decisions which they are actually bound in international law by art 32(3) to follow and

⁵⁵ See *Fick* (note 1 above) at para 69.

⁵⁶ The SCA had held, in contrast, that art 32(3) 'renders decisions of the Tribunal enforceable in the territories of all member states', contrary to the text of that provision. *Fick SCA* (note 9 above) at para 44.

enforce domestically – ie, the decisions of the Tribunal to which they are a party. While the Court seems to interpret art 32(2) to extend the binding character of all decisions of the Tribunal to all SADC member states, and to require them to enforce all such decisions in their domestic courts, this is not a reasonable interpretation of the provision. Such a reading of art 32(2) runs contrary to the text of art 32(3), which confines the international obligation to enforce decisions of the Tribunal to states parties to the dispute.

Finally, art 32(1) provides that enforcement will take place according to that state's own domestic law. As with art 32(2), the text does not provide a justification for finding that the obligation to enforce decisions of the Tribunal, so clearly delineated to parties of those decisions in art 32(3), is extended to all SADC member states.⁵⁷ This is why the Court is unable to identify precisely which provision of the SADC Protocol imposes an international obligation on all SADC member states to enforce all decisions of the Tribunal in their domestic courts. In fact, one cannot point to any of the articles to ground such an obligation. Unlike the exceptional system set up in relation to international investment arbitration, there is no explicit obligation imposed on states not party to a Tribunal decision to recognise or enforce that decision.

To put the same point differently, in art 32(2) the Tribunal Protocol merely imposes an obligation on member states to 'take all measures necessary to ensure execution of decisions of the Tribunal'. It does not contain an explicit obligation analogous to that in art 54(1) of the ICSID Convention, clearly binding all member states to enforce all awards regardless of whether they were parties to the decision. Since art 32(1) provides that domestic enforcement of SADC Tribunal judgments will be governed by the domestic procedures in force in the state party in question, the Constitutional Court is correct to hold that this requires SADC member states to adapt their domestic law to ensure that execution of Tribunal judgments is possible according to domestic procedure. But the question that the Constitutional Court has avoided is *which* decisions of the Tribunal South Africa is bound to enforce – the exact issue dealt with in art 32(3). Article 32(3) makes it undeniably clear that, like all other public international law and international human rights tribunals, a SADC member state is obliged to enforce only decisions to which it is a party.⁵⁸ Treaty provisions must be interpreted in their context,⁵⁹ which means that art 32(2) must be interpreted so as to be consistent with the rest of art 32, including art 32(3).

Comparison with the provisions of other public international law and international human rights tribunals assists us in interpreting the provisions in the SADC Protocol, as this indicates the approach to the binding nature and

⁵⁷ See Oppong (note 29 above) for an analysis generally supportive of this interpretation.

⁵⁸ Of course, even if South Africa was in fact bound at international level by the Protocol to enforce all decisions of the SADC Tribunal, that would not make those decisions automatically enforceable in South Africa's domestic courts. One would then need to consider whether that treaty obligation had been properly transformed into domestic law, as required by s 231(4) of the Constitution. As put by Oppong (ibid at 29): 'A national court, such as the South African High Court, which gives effect to a community judgment without regard to these international law implementation provisions, arguably acts unconstitutionally.'

⁵⁹ Art 31(1) of the Vienna Convention.

enforcement of international judicial decisions with which states are familiar and have routinely chosen to consent in similar situations. As the text of the SADC Protocol reflects this well-established pattern, one must question the correctness of an interpretation that runs counter to this approach. Had SADC member states sought to bind all members to the domestic enforcement of all Tribunal decisions, one can presume that such a radical and unusual provision would have been clearly accounted for either in the art 32(3), the article detailing the scope of the obligation of enforcement, or in a separate provision setting this out clearly, as done in the case of investment arbitration, rather than hidden in the ambiguous wording of art 32(2). The correct interpretation of art 32 therefore indicates that parties to the SADC Tribunal Protocol, like member states of the Inter-American Court of Human Rights, have gone one step beyond member states of the ICJ or ECHR by specifying that decisions of the SADC Tribunal are enforceable by domestic courts of parties to the case, but have not taken the further step of providing for their enforceability in all member states.

Insisting that the Court adhere to the scope of the obligations clearly undertaken by the states parties to the SADC Tribunal Protocol is no mere formalism. When interpreting provisions of an international treaty, the Court must be aware of its role as a representative of only one among several states parties to the treaty, all of whom are formally equal in international law.⁶⁰ The role of legal interpreter in such non-hierarchical treaty relationships requires a certain degree of humility and respect for the legal text, as the text of the treaty is the best evidence of what the treaty parties have agreed. Departure from the text leads to imposition of international obligations on foreign states to which they have not consented, contrary to the fundamental rule of international law that states are bound only by treaty provisions to which they consent. This interpretative role can be distinguished from that when the Court is solely interpreting South African domestic law or the Constitution, which affects the legal rights of South African authorities only.⁶¹ The unilateral imposition of new obligations on other states parties, even if this is done through the guise of ‘interpretation’, violates the principle of consent, which is a rule of customary international law. Customary international law states that ‘a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose’.⁶² Since s 232 of the Constitution makes customary international law directly applicable in South

⁶⁰ See art 2(1) of the UN Charter: ‘The Organization is based on the principle of the sovereign equality of all its Members.’ See also, *Military and Paramilitary Activities* (note 18 above) at 106; Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, GA Res.2625(XXV) UN Doc A/RES/25/2625 (1970).

⁶¹ See M Bishop & J Brickhill “‘In the Beginning was the Word’: The Role of Text in the Interpretation of Statutes” (2012) 129 *South African Law Journal* 681 (Account of the Constitutional Court’s approach to textual interpretation of domestic statutes.)

⁶² Art 31(1) of the Vienna Convention, which is accepted as constituting customary international law, see, eg, *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Jurisdiction and Admissibility No 2)* (1995) International Court of Justice Reports 6, 18; *Restrictions to the Death Penalty* case (1984) 23 *International Law Materials* 320, 341.

Africa, the Court is obliged by South African domestic law to adopt this approach to treaty interpretation. And since art 32(3) of the SADC Protocol is the only explicit provision dealing with the scope of the binding force of SADC Tribunal decisions and the obligation to enforce those decisions, art 32(1) and 32(2) cannot expand the scope of these international obligations to all SADC member states without more clearly providing for this.

This respect for the parties' agreement is paramount, even in the case of human rights obligations. As put by Lord Bingham in the context of determining the extent of obligations in the Refugee Convention:⁶³

As a human rights instrument the [Refugee] Convention should not be given a narrow or restricted interpretation. Nonetheless, the starting point of the construction exercise must be the text of the Convention itself ... because it expresses what the parties to it have agreed. The parties to an international convention are not to be treated as having agreed something they did not agree, unless it is clear by necessary implication from the text or from uniform acceptance by states that they would have agreed or have subsequently done so.

In relation to art 32 of the SADC Tribunal Protocol, it is not clear by necessary implication that states have agreed to be bound to enforce all decisions of the SADC Tribunal in their domestic courts, and not only those to which they are a party; indeed, the explicit text of the treaty indicates to the contrary. Furthermore, such an obligation cannot be supported by the uniform acceptance by states. In fact, the widespread treaty practice indicates states parties would not have agreed to such a radical form of enforcement without making clear provision.

Moreover, the category of 'foreign judgments' is not well suited for use to enforce decisions of international tribunals.⁶⁴ First, there is the question of which decisions of international tribunals will be included in this new common-law doctrine. There does not seem to be any logical reason to restrict this new expansion of the category of foreign judgments to decisions of the SADC Tribunal, but the Court does not address this crucial issue. It creates incoherence in South Africa's domestic law to have a common law doctrine providing for the enforcement of decisions of the SADC Tribunal only, without similar provision for other international tribunals to which South Africa is a party. Secondly, the characteristics of international judicial decisions are in many ways distinct from decisions of foreign domestic courts, requiring distinct common-law rules to be developed for each category of decision. A primary distinction between the two is that international courts' decisions often constitute binding international obligations for the enforcing state, which decisions of foreign courts never are. As such, the discretion that a domestic court has not to enforce the decision of a foreign court for public policy reasons needs to be reevaluated in the case of decisions of international courts binding on the state.⁶⁵ Finally, as discussed in

⁶³ United Nations Convention on the Status of Refugees (1951) 189 *United Nations Treaty Series* 137.

⁶⁴ See O'Connell (note 13 above) at 917 and E de Wet 'The Case of *Government of the Republic of Zimbabwe v Louis Karel Fick*: A First Step Towards Developing a Doctrine on the Status of International Judgments within the Domestic Legal Order' (2014) 17 *Potchefstroom Electronic Review* 554.

⁶⁵ See De Wet (note 64 above).

the following section, enforcement of decisions of international courts against foreign states often runs headlong into the barrier of foreign states' immunities from domestic civil jurisdiction. Clear rules are therefore needed to indicate what provisions of treaties regulating international tribunals will be considered to constitute a waiver of such immunities. These characteristics of international judicial decisions must be specifically accounted for in order to make any South African rules enabling their enforcement workable.

A modification of the holding of the Constitutional Court is therefore proposed that would serve the laudable aim of contributing to the enforcement of international law, while respecting the boundaries of the text to which SADC member states have consented. Rather than expanding the category of enforceable 'foreign judgments' to include all decisions of the SADC Tribunal, with no consideration of decisions of other international courts, the Constitutional Court should instead have developed a specific common-law doctrine enabling the enforcement of all decisions of international tribunals to which South Africa was bound in international law and those which South Africa was internationally obliged to enforce. This would be justified on the basis of the constitutional provisions noted by the Court, namely ss 231, 233 and 39(1) of the Constitution, but would not fall foul of the sovereign rights of other states by establishing an enforcement system against other states to which they had not consented.

This approach would have several advantages over that employed by the Court. Rather than arbitrarily selecting decisions of the SADC Tribunal to be enforced as foreign judgments, leaving unclear the domestic enforceability of decisions of all other international tribunals, the category of international judicial decisions to be enforced by the proposed rule would be easily delineated. Such a development of the common law would enable the direct enforcement of, *inter alia*, decisions of the ICJ, the African Union's judicial institutions, and the SADC Tribunal in cases in which South Africa was a party to the dispute, and by which South Africa was therefore bound. It would also allow the enforcement of international arbitral decisions made under ICSID and the New York Convention, both in decisions where South Africa was and was not a party, since, as noted above, all member states of these conventions are under an international legal obligation to recognise and enforce such awards. It would also accommodate any future establishment of an international court joined by South Africa whose constitutive treaty included enforcement provisions similar to that of the ICSID Tribunals. Such a rule would therefore serve South Africa well for the future, establishing it as a responsible member of the international community, committed to the international rule of law, while also respectful of the international legal rights of foreign states.

III IMMUNITY FROM CIVIL JURISDICTION AND EXECUTION IN SOUTH AFRICA

In *Campbell*⁶⁶ the Government of Zimbabwe also claimed that, according to international law and South African domestic law in the FSIA, it benefited from

⁶⁶ *Campbell* (note 3 above).

immunity from jurisdiction and execution barring the enforcement of the costs order of the Tribunal by South African domestic courts. The Constitutional Court, however, held that by consenting to the jurisdiction of the SADC Tribunal in the Tribunal Protocol, Zimbabwe had effectively waived the immunity from South African domestic jurisdiction to which it would normally be entitled.⁶⁷ This analysis is a problematic interpretation of the Tribunal Protocol and the relevant South African legislation.

A Scope of State Immunity in South African and International Law

State immunity from civil jurisdiction of foreign states is a long-standing feature of international law. It is often criticised on the basis that it perpetuates impunity, preventing enforcement of violations of international law.⁶⁸ However, it is recognised by states as a corollary of the fundamental principle of sovereign equality and an important rule of customary international law,⁶⁹ and has recently been reaffirmed as such by the ICJ:⁷⁰

[T]he rule of State immunity occupies an important place in international law and international relations. It derives from the principle of sovereign equality of States, which, as Article 2, paragraph 1, of the Charter of the United Nations makes clear, is one of the fundamental principles of the international legal order. This principle has to be viewed with the principle that each State possesses sovereignty over its own territory and that there flows from that sovereignty the jurisdiction of the State over events and persons within that territory. Exceptions to the immunity of the State represent a departure from the principle of sovereign equality.⁷¹

Given the significance of this rule, it is carefully guarded by states.⁷² Thus, limitations on state immunity cannot easily be presumed.

While state immunity was in the past recognised to be absolute, practice in the late twentieth century began to shift towards the restriction of state immunity. This practice maintains immunity for sovereign acts of states (*acts jure imperii*), but removes immunity in relation to states' non-sovereign acts, such as commercial or private acts (*acts jure gestionis*).⁷³ An early recognition of this changing trend can be seen in the decisions of the English courts from the 1970s onwards.⁷⁴ This

⁶⁷ See *Fick* (note 1 above) para 35.

⁶⁸ See, eg, L McGregor 'Torture and State Immunity: Deflecting Impunity, Distorting Sovereignty' (2008) 18 *European Journal of International Law* 903.

⁶⁹ See Crawford (note 15 above) chapter 22 at fn 4 for citations of several national and international court decisions reaffirming the customary status of state immunity.

⁷⁰ See *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening)* (2012) International Court of Justice Reports 99 at paras 53–57.

⁷¹ *Ibid* at para 57.

⁷² See International Law Commission Draft 'Articles on Jurisdictional Immunities of States and Their Property with Commentaries (1991)' (1999) 2 *International Law Commission Yearbook* 149.

⁷³ Arts 5 and 10–17 of the United Nations Convention on Jurisdictional Immunities of States and Their Property, UN GA Res 59/38, Annex (2004).

⁷⁴ Eg, *Trendlex Trading Corporation v The Central Bank of Nigeria* [1977] QB 529; *I Congreso del Partido* [1983] 1 AC 244.

practice has spread to encompass the majority of states,⁷⁵ having been adopted in the United Nations Convention on Jurisdictional Immunities of States and their Property,⁷⁶ the European Convention,⁷⁷ and the draft Inter-American Convention on Jurisdictional Immunity of States.⁷⁸ As such, the rule of restrictive immunity is part of customary international law.⁷⁹

In line with the existing customary international law (which is directly applicable in South African domestic law unless contrary to legislation or the Constitution), South Africa has adopted the restricted form of State immunity in the FSIA. As provided in s 2(1) of the FSIA, '[a] foreign state shall be immune from the jurisdiction of the courts of the Republic except as provided in this Act or in any proclamation issued thereunder'. Exceptions are made in relation to, *inter alia*, states' commercial transactions⁸⁰ and contracts of employment.⁸¹ Immunity from jurisdiction therefore applies unless the claim in question falls into one of the specific statutory exceptions.

In addition to the immunity from jurisdiction, the FSIA provides immunity from enforcement against governmental property of foreign states. Section 14(1)(b) of the Act states:

- [T]he property of a foreign state shall not be subject to any process—
- (i) for its attachment in order to found jurisdiction;
 - (ii) for the enforcement of a judgment or an arbitration award; or
 - (iii) in an action in rem, for its attachment or sale.

Therefore, even if the claim against a foreign state falls within the exceptions to the general immunity from jurisdiction, according to s 14(1)(b) of the FSIA the property of the foreign state remains immune from processes of enforcement by the South African courts as long as it does not concern state property used for commercial purposes.⁸²

Immunity, as a sovereign right of a state, can be waived by that state. Accordingly, the FSIA provides for the possibility of waiver of both immunity from jurisdiction and immunity from enforcement. First, s 3 states that a state is not immune from jurisdiction of South African courts where it expressly waives its immunity, or it has implicitly done so by instituting or intervening in proceedings in a South African court, unless such intervention was only for the purpose of claiming or

⁷⁵ See, eg, US Foreign States Immunities Act, 28 *USC* § 1604; UK State Immunity Act 1978, s 1; South African Foreign State Immunities Act 87 of 1981; *Fang v Jian Zemin* (2006) 141 *International Law Review* 702, 717 and *Jones v Saudi Arabia* [2007] 1 AC 270.

⁷⁶ United Nations Convention on Jurisdictional Immunities of States and their Property (note 73 above).

⁷⁷ European Convention on State Immunity 1972 *European Treaty Series* 74.

⁷⁸ Inter-American Draft Convention on Jurisdictional Immunity of States (1983) 22(2) *International Legal Materials* 292.

⁷⁹ See discussion in Crawford (note 15 above) at 490.

⁸⁰ FSIA s 4.

⁸¹ FSIA s 5.

⁸² FSIA s 14(3).

asserting immunity.⁸³ Secondly, the FSIA has a separate provision applying to waiver of immunity from enforcement. S 14(2) specifies that a state may consent to the subjection of its property to domestic processes for the enforcement of a judgment, but this must be in writing. In addition, this section emphasises that a waiver of immunity from jurisdiction does not constitute a waiver of immunity from enforcement. Even if immunity from jurisdiction is waived by the state, immunity from enforcement must be waived separately in writing.⁸⁴

None of the exceptions to state immunity in the FSIA applies to the claims in question in the *Fick* case. The claims relate to the use of state authority by the government of Zimbabwe to expropriate farms owned by the farmers as part of a land redistribution policy. This constitutes an exercise of governmental authority, an act *jure imperii*, rather than a commercial or private act. Thus, both the FSIA and customary international law grant immunity from the domestic jurisdiction of South African courts to these actions and at the same time the costs order, unless this immunity has been waived by Zimbabwe. Similarly, the property owned by the Government of Zimbabwe located in Cape Town that was subject to the writ of execution authorizing the attachment and sale thereof to enforce the costs order by the High Court was, in principle, protected by immunity from enforcement in s 14(1)(b) of the FSIA. In order to suspend such immunity from enforcement a separate waiver by written consent of the Government of Zimbabwe was required, unless the property was used for commercial purposes.

The Constitutional Court held that the Government of Zimbabwe had effectively waived its immunity, enabling the seizure of the Zimbabwean property to satisfy the costs order in the *Campbell* case. In the following section, this finding is examined, and the Court's rejection of Zimbabwe's claim to immunity is questioned.⁸⁵

⁸³ FSIA s 3:

(1) A foreign state shall not be immune from the jurisdiction of the courts of the Republic in proceedings in respect of which the foreign state has expressly waived its immunity or is in terms of subsection (3) deemed to have waived its immunity. ...

(3) A foreign state shall be deemed to have waived its immunity –

(a) if it has instituted the proceedings; or

(b) subject to the provisions of subsection (4), if it has intervened or taken any step in the proceedings.

(4) Subsection (3)(b) shall not apply to intervention or any step taken for the purpose only of –

(a) claiming immunity; or

(b) asserting an interest in property in circumstances such that the foreign state would have been entitled to immunity if the proceedings had been brought against it.

⁸⁴ Section 14(2) of the FSIA:

Subsection (1) shall not prevent the giving of any relief or the issue of any process with the written consent of the foreign state concerned, and any such consent, which may be contained in a prior agreement, may be expressed so as to apply to a limited extent or generally, but a mere waiver of a foreign state's immunity from the jurisdiction of the courts of the Republic shall not be regarded as a consent for the purposes of this subsection.

⁸⁵ Even commentators who support a general right in international law of third States to assist in the enforcement of international judicial decisions concede that this does not supplant rules on state immunity: see O'Connell (note 13 above) at 931–939.

B Did the Government of Zimbabwe Waive its Immunity?

In principle, according to the FSIA provisions and South Africa's customary international law obligations, the acts and property of the Zimbabwean government at issue in the *Fick* case enjoy immunity from jurisdiction and enforcement. This was not questioned by the Constitutional Court. Instead, the Court held, in four short paragraphs,⁸⁶ that the Zimbabwean government had, by consenting to the jurisdiction of the SADC Tribunal, effectively waived its immunity before South African courts. One must, however, question whether this interpretation can be sustained by a proper reading of the SADC Tribunal Protocol and the FSIA.⁸⁷

Section 14(2) of the FSIA requires the foreign state to waive both its immunity from jurisdiction and immunity from enforcement separately – the waiver of the former cannot impliedly waive the latter. Notwithstanding that the Constitutional Court does not draw this distinction in the judgment, I shall first examine whether the SADC Tribunal Protocol can be said to support the Court's view that immunity from jurisdiction has been waived, and then turn to the question of immunity from enforcement.

The Court justified its holding that the Government of Zimbabwe had waived its immunity from the jurisdiction of the domestic courts of South Africa by again relying on art 32 of the SADC Tribunal Protocol. As put by the Court:

Zimbabwe contends that none of the exceptions to sovereign immunity applies to it in this matter. This cannot be correct. Article 32 of the Tribunal Protocol imposes an obligation on member states to take all steps necessary to facilitate the enforcement of judgments and orders of the Tribunal. It also makes these decisions binding and enforceable 'within the territories of the States concerned'. ... Subject to compliance with the law on the enforcement of foreign judgments in force in South Africa, Zimbabwe is duty-bound to act in accordance with the provisions of art 32. ... In sum, Zimbabwe's agreement to be bound by the Tribunal Protocol, including art 32, constitutes an express waiver in terms of s 3(1) of the Immunities Act. It is a waiver by Zimbabwe of its right to rely on its sovereign immunity from the jurisdiction of South African courts to register and enforce decisions of the Tribunal made against it.⁸⁸

According to the Court, the effect of art 32 is that all SADC member states consented to the enforcement of the decisions of the Tribunal in the domestic courts of all other SADC member states, and thus agreed to waive any immunities preventing such enforcement.

The Court does not specify which particular provision of art 32 it considers to constitute the waiver of immunity from jurisdiction. It seems, however, that it is primarily art 32(2) and (3) that are relied on. Upon examination, however, these provisions cannot be said to be a waiver of immunity from jurisdiction. Article 32(2) says that '[s]tates and institutions of the [c]ommunity shall take forthwith all measures necessary to ensure execution of decisions of the Tribunal'. This does not constitute an express (as required by s 3 of the FSIA) waiver of immunity from jurisdiction of foreign states; to constitute an express waiver one would

⁸⁶ See *Fick* (note 1 above) at paras 32–35.

⁸⁷ Cf De Wet (note 64 above) at 64.

⁸⁸ *Fick* (note 1 above) at paras 33–35.

at least expect explicit mention of the principle of immunity. As argued in the section above, this provision is correctly read as an obligation to take the measures necessary to ensure execution of the decisions of the Tribunal that are binding on the member states, which is elaborated in art 32(3), confining that obligation to decisions to which the state is a party. Given the importance of state immunity, and how protective governments are of their right to immunity, such a generally phrased provision is not sufficiently clear and explicit to indicate that SADC member states have intended to agree to a waiver of immunity.

We must therefore turn to art 32(3) to see if that perhaps provides the waiver required. This provision states that '[d]ecisions of the Tribunal shall be binding upon the parties to the disputes in respect of the particular case and enforceable within the territories of the States concerned'. Again, there is nothing in the language used to indicate that it constitutes an express or implicit waiver of immunity. To borrow the language of Lord Bingham quoted above, a waiver of immunity is neither a necessary implication from the treaty text, nor is such a waiver supported by the uniform practice of states. In fact, the practice of at least one of the treaty parties (Zimbabwe) clearly rejects such an interpretation.

This interpretation of art 32(3) is bolstered by the rest of art 32. In particular, art 32(1) states that 'the law and rules of civil procedure for the registration and enforcement of foreign judgments in force in the territory of the State in which the judgment is to be enforced shall govern enforcement'. This necessarily brings us back to the domestic law of South Africa on the enforcement of foreign judgments, and in particular the FSIA. The 'law and rules of civil procedure for the registration and enforcement of foreign judgments in force in the territory of the State', as are required to be applied by art 32(1), include the guarantee of state immunity from jurisdiction in the FSIA. As with art 32(2), it cannot be said, therefore, that art 32(3) constitutes a waiver of immunity from jurisdiction, as required by s 3 of the FSIA.

A similar provision to art 32(1) can be found in art 55 of the ICSID which states that nothing in the treaty 'shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution'. As put by Schreuer:

Art. 55 refers to the law in force in any Contracting State. But it is clear that in a particular case only the law in force in the State where execution is sought can be relevant. ... Art. 55 provides that Art. 54 shall not be construed as derogating from the relevant law in force. Derogation from the law that is not in force in the forum State would not be possible. It follows that a State against which execution is attempted can rely only on the law concerning immunity from execution in force in the State where enforcement is sought.⁸⁹

Article 55 of the ICSID is narrower than art 32(1) of the SADC Protocol, by retaining only protection for immunity from execution. Article 32(1) of the SADC Protocol requires respect for all civil procedure concerning enforcement of foreign judgments in force in the state, which in South Africa includes respect

⁸⁹ Schreuer, Malintoppi, Reinisch & Sinclair (note 31 above) at 1155.

for both immunity from jurisdiction and execution. Fortuitously, this level of protection mirrors customary international law.

To conclude, it is not possible to identify a provision in art 32 of the SADC Tribunal Protocol that can fairly be said to provide for a waiver of immunity from jurisdiction of the domestic courts of foreign states to enforce SADC Tribunal judgments.⁹⁰ Consistent with the existing global treaty practice on enforcement of judgments of international tribunals, the SADC member states have *not* consented to their subjection to the jurisdiction of foreign domestic courts to execute SADC Tribunal judgments. In view of this, the general immunity from jurisdiction provided to foreign states in s 2 of the FSIA must properly apply to the Government of Zimbabwe in this instance.

Finally, it must be remembered that a separate waiver of immunity is required by the FSIA to allow execution of an order against state-owned property. Section 14(2) specifically states that a waiver of immunity from jurisdiction cannot also act as a waiver of immunity from execution: two separate, explicit waivers are required. Thus, even if one of the provisions of art 32 did constitute a waiver of immunity from jurisdiction, an additional provision would have to be found to allow the sale against the Zimbabwean property to enforce the cost order in favour of the farmers.

The practice under the ICSID Tribunal is again informative in this regard. Even in the case of the awards regulated by the ICSID regime, which creates the most powerful domestic enforcement mechanism existing in international law, the right of immunity from execution remains a barrier to the implementation of decisions against states. The clear consent to domestic enforcement in all ICSID member states in art 54(1) of the ICSID is considered to constitute a waiver of the state's right to immunity from the jurisdiction of foreign states. However, as art 55 of the ICSID makes clear, this does not also act as a waiver of the right to immunity from execution, as required by customary international law.⁹¹ Schreuer notes:

Article 55 only applies to immunity from execution. It does not apply to immunity from jurisdiction. The question of immunity from jurisdiction does not arise in the context of the Convention Article 55, by its own terms, refers to execution but not to recognition. Therefore, State immunity cannot be used to thwart proceedings for the recognition of an award. In addition, State immunity does not affect the *res judicata* effect of an award once it has been recognized . . . State immunity only comes into play when concrete

⁹⁰ See Oppong (note 29 above) at 126: Most [SADC] community judgments will probably be against sovereign states. It is therefore troubling that the treaties are silent on the issue of state immunity from enforcement actions at the national level. States often enjoy exemption from execution against their assets in their own territory or elsewhere. Thus, national law on this issue will be highly relevant regarding enforcement actions brought by individual judgment creditors. A successful claim of immunity from execution will rob an individual of the benefits of a community judgment.

⁹¹ See art 55 of the ICSID: 'Nothing in Article 54 shall be construed as derogations from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution.'

measures of execution are taken to enforce the award's pecuniary obligations, typically after recognition has been granted.⁹²

Thus, while states parties to ICSID arbitral awards can be subjected to the jurisdiction of the courts of any ICSID member state to enforce the award, the property of that state remains immune from the execution of such awards unless there has been an additional waiver or this property is used for commercial rather than sovereign purposes.⁹³

The same is true in the instant case for the government of Zimbabwe. Since art 32(1) makes enforcement dependent on the domestic law of the parties, the requirement in the FSIA of a separate waiver of immunity from execution, reflecting customary international law, remains a barrier to enforcement. The Constitutional Court does not address this separate waiver requirement, nor identify which provision might constitute such a waiver. Instead, it simply states that consent to enforcement in the domestic jurisdiction of all SADC member states allows execution against the Zimbabwean property in question. An earlier decision of the High Court had held that only two of the properties listed and owned by the government of Zimbabwe in South Africa were used for commercial purposes, therefore allowing attachment of those two properties for execution of the *Campbell* decision, and retaining the immunity of the others.⁹⁴ Given the disputed status of the properties in question, the finding on immunity from execution should have been addressed at the appellate level; no such discussion took place in the decision of the Constitutional Court or the Supreme Court of Appeal. Instead, both courts seemed to ignore the separate immunity from execution guaranteed by customary international law and South African domestic law. Without a finding on this issue, we are left in the default position of the validity of Zimbabwe's immunity from execution.

The recognition that the government of Zimbabwe retains the right to immunity from the domestic jurisdiction of South African courts does not negate Zimbabwe's responsibility to satisfy its international obligations in the decision of the SADC Tribunal. The SADC Tribunal Protocol clearly binds states parties to comply with the decisions of the Tribunal. Zimbabwe thus remains bound in international law to compensate those whose farms were held to have been expropriated unlawfully. As held in the ICSID arbitral decision in *MINE v Guinea*:

State immunity may well afford a legal defense to forcible execution, but it provides neither argument nor excuse for failing to comply with an award. In fact, the issue of State immunity from forcible execution of an award will typically arise if the State party refuses

⁹² Schreurer, Malintoppi, Reinisch & Sinclair (note 31 above) at 1153.

⁹³ See *ibid* at 1152–1185; F Baetens 'Enforcement of Arbitral Awards: "To ICSID or Not to ICSID" is Not the Question', in IA Laird & TJ Weiler (eds) *Investment Treaty Arbitration and International Law* (5th Volume 2012) 211–228 and V Nmehielle 'Enforcing Arbitration Awards under the International Convention for the Settlement of Investment Disputes (ICSID Convention)' (2001) 7 *Annual Survey of International and Comparative Law* 21, 31.

⁹⁴ *Republic of Zimbabwe v Sheriff Wynberg North and Others* [2010] ZAGPJHC 118.

to comply with its treaty obligations. Non-compliance by a State constitutes a violation by that State of its international obligations and will attract its own sanctions.⁹⁵

Therefore, Zimbabwe retains its international responsibility for its failure to comply with its binding international obligations. The respect for Zimbabwe's right to immunity would simply avoid South Africa's own violation of international law.

IV CONCLUSION

By upholding the enforcement of the order of the SADC Tribunal against the Government of Zimbabwe in the domestic courts of South Africa, the Constitutional Court intended to combat the perception that Africa is 'a continent which has little regard for human rights, the rule of law and good governance'.⁹⁶ In doing so, the judgment demonstrated the flexibility of the South African common law to accommodate the enforcement of judgments of international tribunals, potentially creating a mechanism to fight impunity for violations of international law. When seen in light of the recent affirmation of South Africa's universal jurisdiction over international crimes, the Constitutional Court has shown itself to be an active participant in the global effort to uphold the international rule of law.

The Court's willingness to develop the common law to accommodate the enforcement of decisions of international courts is laudable. It is notoriously difficult to ensure enforcement of international legal obligations, and any potential route to enforcement should be welcomed. The non-enforcement of international judicial decisions threatens the legitimacy and stability of the international legal system as a whole.⁹⁷ However, the approach adopted by the Court is not a desirable method of achieving this aim.

The Court's noble aspirations must not cloud the legal entitlements that South Africa owes to other members of the international community. By interpreting the SADC Tribunal Protocol more expansively than the text allows, and seemingly ignoring customary international guarantees of immunity implemented in South African domestic legislation, the Constitutional Court puts South Africa in violation of its international obligations. Fundamental principles of treaty consent and sovereign immunity must be respected by the Constitutional Court. The Court must be mindful not to violate the very international rule of law that it seeks to promote, and undermine prospects for fruitful and peaceful cooperation between nations, by ignoring the obligations South Africa owes to its neighbours in the region and beyond.

It has been argued above that instead of choosing to enforce an unclear category of decisions of the SADC Tribunal as 'foreign judgments', resulting in piecemeal enforcement of international decisions, South African courts could and

⁹⁵ *MINE v Guinea*, Interim Order No 1 on Guinea's Application for Stay of Enforcement of the Award (12 August 1988) 41 *International Centre for Settlement of Investment Disputes Reports* 111 at para 25.

⁹⁶ *Fick* (note 1 above) at para 1.

⁹⁷ See O Schachter 'The Enforcement of International Judicial and Arbitral Decisions' (1960) 54 *American Journal of International Law* 1, 5–6.

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should develop a common-law doctrine enabling direct enforcement of decisions of international courts to which South Africa is bound, or which South Africa is bound to enforce, in international law. Such a doctrine would be better suited to the character of international court decisions, which are in many ways dissimilar from decisions of foreign courts, and could be developed to account properly for significant barriers to implementation such as the immunity of foreign states. Such a doctrine would allow South Africa to play a leading role in enforcing international law, while respecting the lawful boundaries of such enforcement.

Search and Seizure without Warrant

Alistair Price*

I INTRODUCTION

2014 saw the publication of two Constitutional Court judgments in the law reports concerning warrantless inspections¹ of businesses and businesspeople suspected of wrongdoing by industry regulators: *Gaertner and Others v Minister of Finance and Others*² and *Estate Agency Affairs Board v Auction Alliance (Pty) Ltd and Others*.³ In each, the Court unanimously declared the empowering statutory provisions relied upon by inspectors to be an unconstitutional violation of privacy. This comment explains the significance of these decisions.

II CONTEXT

Section 14 of the Constitution provides for a general right to privacy as well as particular rights not to have one's person, home or property searched, nor one's possessions seized, nor the privacy of one's communications infringed. The boundaries of this protection continue to be litigated in a variety of contexts. This should not be surprising. After all, the Constitutional Court has described the right to privacy as 'amorphous and elusive',⁴ 'much debated',⁵ and 'uniquely elastic'.⁶ The Court has also remarked that '[t]he academic literature on privacy demonstrates the considerable difficulty over the definitional nature and scope of the right'.⁷ Similar challenges abroad are revealed by comparative constitutional investigations, which show that 'privacy is rarely defined in fixed terms; rather it is seen as a fluid concept constantly extending its frontiers to face new demands

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¹ Following the Constitutional Court in *Magajane*, I assume that 'inspections' constitute 'searches' limiting the right to privacy. *Magajane v Chairperson, North West Gambling Board and Others* [2006] ZACC 8, 2006 (5) SA 250 (CC), 2006 (10) BCLR 1133 (CC), 2006 (2) SACR 447 (CC) ('*Magajane*') at para 59. I therefore use the terms 'inspections' and 'searches' interchangeably.

² [2013] ZACC 38, 2014 (1) SA 442 (CC), 2014 (1) BCLR 38 (CC) ('*Gaertner*').

³ [2014] ZACC 3, 2014 (3) SA 106 (CC), 2014 (4) BCLR 373 (CC) ('*Auction Alliance*').

⁴ *Bernstein v Bester NO and Others* [1996] ZACC 2, 1996 (2) SA 751 (CC), 1996 (4) BCLR 449 (CC) ('*Bernstein*') at para 65.

⁵ *S v Jordan and Others* [2002] ZACC 22, 2002 (6) SA 642 (CC), 2002 (11) BCLR 1117 (CC) at para 76.

⁶ *Ibid* at note 35, citing AL Allen *Uneasy Access: Privacy for Women in a Free Society* (1998).

⁷ *NM and Others v Smith and Others* [2007] ZACC 6, 2007 (5) SA 250 (CC), 2007 (7) BCLR 751 (CC) at para 32. The South African experience is not unique. For example, the European Court of Human Rights has held that the 'concept of private life', contained in art 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), is 'not susceptible of exhaustive definition'. *Pretty v United Kingdom* (2002) 35 ECHR 1 at para 61.

and the challenges of changing contexts.⁸ Historical and comparative legal and ethnographical research has revealed striking cultural and temporal variation in societal attitudes about the scope of privacy: ‘the sense of what must be kept “private”, of what must be hidden before the eyes of others, seems to differ strangely from society to society ... [and] over time’.⁹

Nonetheless, the Constitutional Court has made progress in defining the right. Drawing on United States and Canadian legal experience, it has held that the scope of privacy in South Africa turns on the idea of a legitimate or reasonable expectation of privacy.¹⁰ When a legitimate expectation of privacy is frustrated, the limitation must be justifiable in terms of s 36 of the Constitution: it must serve a sufficiently valuable public purpose in a proportionate manner in terms of a law of general application. Drawing on German law, the Court has adopted the idea of a ‘spectrum’ or ‘continuum’ of privacy protection, visualizable as a set of ‘concentric circles’, starting from an intimate core of personal matters and spaces, where limitations of privacy can be justified only exceptionally, circling out ever more widely as we come to interact with others and the public, where limitations on privacy become progressively easier to justify.¹¹ The Court has also explicitly linked privacy to dignity, but has nonetheless confirmed that juristic persons have privacy rights, albeit of lesser intensity than those of natural persons.¹²

Further doctrinal development is likely to prove useful. In particular, it would be helpful to distinguish between ‘intrusions’ and ‘publications’ (or ‘disclosures’) as different modes of limiting privacy, which may but need not be suffered simultaneously.¹³ In addition, the Court ought to distinguish between the following three interests in privacy, which again may but need not be limited simultaneously. The first is *locational* privacy, which ‘refers to an agent’s enjoyment of spaces from which others may be excluded, and within which the agent’s activities are not readily monitored without his or her knowledge and consent’.¹⁴

⁸ MJC Espinosa ‘Privacy’ in M Rosenfeld & A Sajó *The Oxford Handbook of Comparative Constitutional Law* (2012) 966, 969. Espinosa remarks that ‘[i]n Japan, where web personal open diaries are popular, what is regarded as ‘most intimate’ in Western culture is often made public’. Ibid at note 11.

⁹ JQ Whitman ‘The Two Western Cultures of Privacy: Dignity Versus Liberty’ (2003) 113 *Yale Law Journal* 1151, 1153–1154, 1160–1161 (Mentions the historical examples, inter alia, of nude bathing in the Seine and defecation in public in Ephesus. Whitman argues that ‘two different cultures of privacy’ and, accordingly, ‘two significantly different laws of privacy’ exist in the United States and continental Europe, the former with ‘liberty’ and ‘freedom from intrusions by the state’ at its core, the latter revolving around ‘dignity’ and ‘rights to be shielded against unwanted public exposure’.) See also A Westin *Privacy and Freedom* (1967) (Explains that not only humans desire privacy.)

¹⁰ *Bernstein* (note 4 above) at para 75.

¹¹ Ibid at para 77; *Mistry v Interim National Medical and Dental Council of South Africa* [1998] ZACC 10, 1998 (4) SA 1127 (CC), 1998 (7) BCLR 880 (CC) (‘*Mistry*’) at para 27.

¹² *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In Re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* [2000] ZACC 12, 2001 (1) SA 545 (CC), 2000 (10) BCLR 1079 (CC) (‘*Hyundai*’) at para 18.

¹³ J Morgan ‘Privacy, Confidentiality and Horizontal Effect: “Hello” Trouble’ (2003) 62 *Cambridge Law Journal* 444, 445 (‘These are frequently related, but should be kept distinct.’) See J Neethling & JM Potgieter *Law of Delict* (7th Edition, 2015) 371–372 (Distinguishes ‘intrusion’ and ‘disclosure’.)

¹⁴ WA Edmundson ‘Privacy’ in MP Golding & WA Edmundson (eds) *The Blackwell Guide to the Philosophy of Law and Legal Theory* (2005) 271, 272. An example is gaining access to another’s home without permission or lawful authority.

The second is *informational* privacy, which ‘has to do with one’s control over access to information about oneself, and not with physical seclusion *per se*.¹⁵ The third is *decisional* privacy, where ‘what is at issue is the right to *do* something [full stop], as contrasted to the right to do it in seclusion, or the right to do it without the world knowing.’¹⁶ Merely drawing these distinctions cannot resolve disputes. But their explanatory power will help to focus legal debates about what is valuable about privacy, in its various manifestations, and what is lost when a legitimate expectation of privacy is sacrificed for competing, worthwhile ends, such as freedom of expression, crime prevention, national security, lawful collection of taxes, or the effective regulation of gambling, distribution of medicines, or the real estate industry.

Inspections or searches of one’s home, person, vehicle or business premises, and seizures of one’s possessions, have grave potential to limit both locational and informational privacy by way of intrusion and publication. Such invasions of rights must be authorised by law. In turn, the authorising law must comply with the constitutional right to privacy. In a nutshell, it must be a necessary and proportionate means to achieve an important public purpose. In general, there is no justification for foregoing the need to obtain a warrant issued by an independent authority in advance of the invasion of another’s private sphere. Having to secure a warrant is a widely-accepted safeguard against abuse of public power.¹⁷ Although the statutory prerequisites for obtaining warrants vary in their details, the basic idea is that the warrant-issuing authority must be persuaded beforehand that an invasion of another’s private sphere is justified in the circumstances. A typical justification is a reasonable suspicion that the target of the operation has committed, or is committing, a criminal offence combined with a reasonable belief that evidence of the offence is likely to be obtained by way of a surprise search.

Persons subjected to warranted operations may later challenge their lawfulness on a range of grounds. For instance, the empowering legislation may itself unjustifiably limit the right to privacy. The application for a warrant might fail to comply with statutory requirements properly interpreted to promote the spirit, purport and objects of the Bill of Rights. The independent authority who issued the warrant might not have exercised her discretion judicially. The terms of the warrant might be defective – perhaps overbroad, unduly vague, or otherwise not reasonably intelligible. Or the search and seizure operation itself might have transgressed legal limits set by the warrant, legislation, and/or constitutional

¹⁵ Ibid. An example is reading or publishing another’s medical records without permission or lawful authority. Data protection laws, like the Protection of Personal Information Act 4 of 2013, are arguably designed to protect, inter alia, the right to informational privacy. See also I Currie & J de Waal *The Bill of Rights Handbook* (6th Edition, 2013) 302–304; A Roos ‘Data Protection: Explaining the International Backdrop and Evaluating the Current South African Position’ (2007) 124 *South African Law Journal* 402.

¹⁶ Edmundson (note 14 above) at 272. An example is criminally prohibiting the use of contraceptives or forms of consensual, adult sex.

¹⁷ *Magajane* (note 1 above) at para 74. For example, s 21 of the Criminal Procedure Act 51 of 1977 (‘CPA’) and s 29 of the National Prosecuting Authority Act 32 of 1998 require warrants for the exercise of certain search and seizure powers.

principle.¹⁸ If a court upholds one or more of these challenges, it may respond in a variety of ways depending on the circumstances. A statute, warrant, and/or a given operation may be declared invalid for want of consistency with the right to privacy. A delictual award for wrongful or malicious attachment of goods may be made.¹⁹ If a public authority is in possession of unlawfully-seized items, their immediate return may be ordered.²⁰ Alternatively a court might order their temporary preservation by an independent person for limited purposes, or leave it to a later trial court to decide whether admitting evidence obtained during the operation would render a criminal trial unfair in terms of s 35(5) of the Constitution.²¹

III THREE EXCEPTIONS TO THE WARRANT REQUIREMENT

Although the right to privacy generally requires a warrant, ‘the law recognises that there will be limited circumstances in which the need of the State to protect the public interest compels an exception to the warrant requirement.’²² In such cases, legislation authorising a warrantless search ‘must provide constitutionally adequate substitute for a warrant.’²³ At least three exceptions may be identified. The first is where the target of the search *consents*.²⁴ Although the idea that a constitutional right may be waived has been criticised,²⁵ clearly one may freely consent to a search and seizure operation just as one may freely consent to being photographed in the nude. A second exception applies in situations of demonstrable *urgency*. For example, s 22(b) of the Criminal Procedure Act authorises a police officer to invade another’s private sphere without obtaining a warrant if she believes on reasonable grounds both that a search warrant would have been issued had she applied for one in terms of s 21(1) the Act and that the delay in obtaining a warrant would have defeated the object of the search.

Both *Gaertner* and *Auction Alliance* concerned a third exception, which may for present purposes be described as ‘regulatory inspections of commercial

¹⁸ Prominent challenges along these lines in the democratic era include *Hyundai* (note 12 above); *Powell NO and Others v Van der Merwe NO and Others* [2004] ZASCA 25, 2005 (5) SA 62 (SCA) (‘*Powell*’) and *Thint (Pty) Ltd v National Director of Public Prosecutions and Others*; *Zuma v National Director of Public Prosecutions and Others* [2008] ZACC 13, 2009 (1) SA 1 (CC) (‘*Thint*’). One must therefore distinguish between challenges to the constitutionality of an empowering provision on its face and challenges to the application of the provision in a given case. In the latter class of cases, the right to privacy may be implicated alongside other rights, such as rights to just administrative action and a fair trial.

¹⁹ See for example *Neethling & Potgieter* (note 13 above) 368.

²⁰ As in *Powell* (note 18 above).

²¹ See *Thint* (note 18 above) at paras 216–224.

²² *Magajane* (note 1 above) at para 75.

²³ *Ibid* at para 77. The statutory scheme must (i) ensure that the searched person is informed of the legality and properly-defined scope of the search and (ii) limit the searcher’s discretion as to its time, place, and scope.

²⁴ See, eg, CPA s 22(a).

²⁵ See, eg, S Woolman ‘Category Mistakes and the Waiver of Constitutional Rights: A Response to Deeksha Bhana on *Barkhuizen*’ (2008) 125 *South African Law Journal* 10.

premises'.²⁶ This somewhat illusive exception has been expressed in a variety of ways by our courts and it is worth examining the judicial formulations closely. In *Mistry v Interim Medical and Dental Council of South Africa and Others*, Sachs J referred on behalf of a unanimous Court to 'periodic inspections' and 'warrantless regulatory inspection', stating that

[i]n the case of any regulated enterprise, the proprietor's expectation of privacy with respect to the premises, equipment, materials and records must be attenuated by the obligation to comply with reasonable regulations and to tolerate the administrative inspections that are an inseparable part of an effective regime of regulation.²⁷

In the case of a 'periodic regulatory inspection', he remarked, 'a requirement of a prior warrant might be nonsensical in that it would be likely to frustrate the State objectives behind the search'.²⁸ Referring to foreign law, he observed that '[t]he issue of whether warrants should be required for regulatory searches as well as investigatory ones has divided US judges',²⁹ and cited the following dictum:

The greater latitude to conduct warrantless inspections of commercial property reflects the fact that the expectation of privacy that the owner of commercial property enjoys in such property differs significantly from the sanctity accorded an individual's home, and that this privacy interest may, in certain circumstances, be adequately protected by regulatory schemes authorising warrantless inspections.³⁰

The *Mistry* Court did not have to define this third exception in greater detail, however. The primary issue was whether s 28(1) of the Medicines and Related Substances Control Act,³¹ which granted wide powers of warrantless search and seizure to inspectors as part of a scheme to regulate medicines, was consistent with the right to privacy in s 13 of the interim Constitution. The provision was struck down on the basis that it

gives the inspectors *carte blanche* to enter any place, including private dwellings, where they reasonably suspect medicines to be, and then to inspect documents which may be of the most intimate kind. The extent of the invasion of [privacy] is substantially disproportionate to its public purpose; the section is clearly overbroad in its reach.³²

Whatever the exact scope of the third exception might be, the challenged statutory powers clearly did not fall within it.

The Court next considered the third exception in *Magajane v Chairperson, North West Gambling Board*,³³ where it again unanimously (per Van der Westhuizen J) declared invalid statutory powers of search and seizure without warrant. On this occasion, the unconstitutional provisions purportedly authorised coercive, warrantless invasions on the basis of a suspicion of criminally illegal gambling

²⁶ *Magajane* (note 1 above) at para 51 (Draws on American and Canadian jurisprudence.)

²⁷ *Mistry* (note 11 above) at paras 27, 28 and 35.

²⁸ *Ibid* at para 29.

²⁹ *Ibid* at para 29 n 52.

³⁰ *Ibid* at para 28 n 50, citing *Donovan, Secretary of Labor v Dewey et al* (1981) 452 US 594, 598–599.

³¹ Act 101 of 1965.

³² *Mistry* (note 11 above) at para 30.

³³ *Magajane* (note 1 above).

on unlicensed premises.³⁴ Once more, the legislation was held to limit the right to privacy unjustifiably due to overbreadth: although it served to prevent illegal, unlicensed gambling, it authorised inspections aimed at collecting evidence of criminal activity on the basis of a mere suspicion, rather than a reasonable suspicion; seizable items and searchable premises were defined very widely, potentially including private homes; and it conferred too much discretion on inspectors, failing to guide searchers and the searched as to the limits of a search. A scheme requiring a warrant for inspections of unlicensed premises would be a less restrictive or better tailored means to the same valuable end.³⁵

A key premise in the Court's reasoning is its adoption of a distinction 'between compliance and enforcement',³⁶ for which it cites several Canadian sources including the following:

One of the most common problems present in the context of administrative or regulatory searches is the movement of regulatory activity between what is commonly called 'compliance' and 'enforcement'. The former is generally seen as *the random, overarching supervision of an industry at large, with particular actors within the industry 'targeted' without particular regard to any pre-existing objective save the integrity of the scheme of regulation in general.* Enforcement, however, is generally used to describe the notion that, *at some point in the process, the focus moves from the integrity of the scheme of regulation in general to a focused investigation of a particular actor under that regime, often with a view to quasi-penal consequences.* The trend in the cases has been towards a position that was more generous to inspectors involved in compliance than it was to regulatory investigators involved in enforcement. The position looked to the need to ensure that compliance was not hobbled by unnecessary limits on the unavoidable randomness of inspection powers.³⁷

Van der Westhuizen J nuances the distinction by recognising that

[n]ot every case will be amenable to such a clear distinction between compliance and enforcement and some cases involving enforcement might not be characterised as those in which the inspectors intend to obtain evidence for criminal prosecution.³⁸

Nonetheless, because the statutory provisions in question authorised warrantless inspections of unlicensed premises based on a suspicion of criminally-illegal gambling, and envisaged the collection of evidence for criminal prosecution, they undoubtedly involved 'enforcement, not compliance'.³⁹ Therefore, as had been the case in *Mistry*, the challenged legislation could not fall within the scope of the third exception to the warrant requirement applying to 'regulatory inspections

³⁴ Section 65(1) and (2) of the North West Gambling Act 2 of 2001.

³⁵ *Magajane* (note 1 above) at paras 78–96.

³⁶ *Ibid* at para 70.

³⁷ D Hutchison et al *Search and Seizure in Canada* (2005) Vol 1 5-30.7–5-30.8 (emphasis added), cited in *Magajane* (note 1 above) at para 57 n 66.

³⁸ *Magajane* (note 1 above) at para 70.

³⁹ *Ibid* at para 84. See also *ibid* at para 85 (Court held that '[a] search aimed at criminal prosecution constitutes a significantly greater intrusion than a regulatory inspection aimed at compliance'.) Interestingly, the Constitutional Court had previously gestured towards just this distinction in *First National Bank. First National Bank of SA Ltd t/a Westbank v Commissioner, South African Revenue Services and Another* [2002] ZACC 5, 2002 (4) SA 786 (CC) at para 15 (Stating, with reference to the Customs and Excise Act 91 of 1964, that '[t]he Commissioner ... verifies compliance [(a)] through routine examinations and inspections and [(b)] through action precipitated by suspected evasion.')

of commercial premises' aimed at promoting 'compliance' with a scheme of regulation in the public interest.

IV DEVELOPMENTS IN *GAERTNER* AND *AUCTION ALLIANCE*

In both *Gaertner* and *Auction Alliance*, the Court again declared invalid statutory provisions authorising search and seizure operations without warrants against juristic persons participating in regulated industries on the basis of suspected contravention of the law. In *Gaertner*, South African Revenue Service (SARS) officials conducted a warrantless search in terms of s 4 of the Customs and Excise Act⁴⁰ of the licensed commercial premises of a company importing and distributing frozen foodstuffs as well as the home of one of its directors on the basis of a suspicion of tax fraud. In *Auction Alliance*, inspectors of the Estate Agency Affairs Board attempted a warrantless search of the business premises of an auctioneering company in terms of s 32A of the Estate Agency Affairs Act⁴¹ and s 45B of the Financial Intelligence Centre Act.⁴² The company was suspected of 'gross and wide-ranging violations' of both Acts.⁴³ In both cases all the litigants came to agree that the power-conferring statutes unjustifiably violated constitutional privacy, but disagreed about 'the reasons for and thus the extent of the invalidity'⁴⁴ as well as the appropriate remedy. In both cases, therefore, the Court was called upon to reconsider the scope of the third exception to the general requirement of a warrant.

The High Court judgment in *Gaertner* had valiantly attempted to provide more precise content to the third exception and the compliance/enforcement distinction.⁴⁵ Rogers J did so by distinguishing between 'routine' and 'non-routine' (or 'targeted') searches, the difference essentially being one of motive or purpose. A 'non-routine' search is one motivated by a suspected contravention of the law (i.e. is suspicion-based), whereas a 'routine' search is any other search⁴⁶ – in particular, those 'aimed at ensuring that all industry participants comply with their statutory duties'.⁴⁷ Clearly Rogers J sought to associate routine searches with compliance and non-routine searches with enforcement. In regulated industries, he held, warrantless routine searches or inspections of registered

⁴⁰ Act 91 of 1964.

⁴¹ Act 112 of 1976.

⁴² Act 38 of 2001.

⁴³ *Auction Alliance* (note 3 above) at para 8.

⁴⁴ *Gaertner and Others v Minister of Finance and Others* [2013] ZAWCHC 54, 2013 (4) SA 87 (WCC), 2013 (6) BCLR 672 (WCC) ('*Gaertner HC*') at para 14; *Auction Alliance* (note 3 above) at para 2.

⁴⁵ *Gaertner HC* (note 44 above). This was necessary, Rogers J held, in order to determine the appropriate remedy as well as desirable 'in order that the lawmaker may know what needs to be addressed in remedial legislation. If the court were only to identify the most obvious objection to the impugned provisions, an amended provision might face another challenge on grounds left undecided in the first case. This process could repeat itself several times.' *Ibid* at para 79.

⁴⁶ *Ibid* at paras 81 and 83. To quote, a non-routine or targeted search is one 'where the premises are selected (targeted) for search because of a suspicion or belief that material will be found there showing or helping to show that there has been a contravention of the Act.'

⁴⁷ *Ibid* at para 83.

persons and licensed premises are a justifiable limit on the right to privacy.⁴⁸ In contrast, warrantless non-routine searches (ie those motivated by a suspected contravention of law) are more problematic. Warrantless non-routine searches of unregistered persons or unlicensed premises, especially of private dwellings, unjustifiably violate privacy.⁴⁹ However, warrantless non-routine searches or inspections of registered persons and licensed premises may be constitutionally acceptable, provided the invasion ‘relates to the business’ in question.⁵⁰ On the way to this conclusion, Rogers J explicitly contrasted his approach with that of Canadian law, where the warrant requirement in regulated industries is triggered in narrower circumstances, namely ‘where the predominant purpose of a search is to determine *penal* liability’.⁵¹ As remedy, Rogers J declared provisions of the Customs and Excise Act prospectively invalid to the extent that they transgressed these constitutional lines. The order was suspended for 18 months, during which time a detailed, interim regime was read into the Act to empower SARS officials to promote compliance and enforce tax legislation consistently with the right to privacy.⁵²

Although the Constitutional Court in *Gaertner* (per Madlanga J) unanimously confirmed the High Court’s declaration of invalidity, it did not approve all of the reasoning of Rogers J. In particular, the Court expressed reluctance to adopt the distinction between ‘routine’ and ‘non-routine’ searches ‘in these proceedings’ or ‘in this judgment’,⁵³ in part because Parliament was at that very moment considering draft amendments to the relevant tax legislation. Earlier the Court had cited SARS’s argument that the distinction is impractical: if during a routine inspection anything suspicious arises, it necessarily becomes ‘non-routine’ at which point it must stop in its tracks till a warrant is obtained.⁵⁴ Instead the Court limited itself to the reasoning in *Magajane*:

Provisions that more closely resemble traditional criminal law require closer scrutiny. The distinction will often be between compliance and enforcement. Inspections aimed

⁴⁸ Ibid (‘By participating in a regulated field the participant can reasonably be assumed to accept that he must tolerate routine random intrusions aimed at ensuring that all participants comply with their statutory duties. By contrast, the participant does not, by engaging in the regulated activity, expect to become the target of violations of his privacy on the grounds of what might be baseless suspicion of non-compliance. In common with all other subjects, he is entitled to say that if state officials wish to enter his premises because of a suspected contravention of the law, they must not do so without satisfying a judicial officer, by some criterion such as reasonable suspicion or a belief on reasonable grounds, that there is justification to invade the target’s premises.’) See also *ibid* at paras 86–87.

⁴⁹ Ibid at para 85.

⁵⁰ Ibid at para 103.

⁵¹ Ibid at para 90 (emphasis added), citing *Le Comité Paritaire de L’industrie de la Chemise & Another v Potash* [1994] 2 SCR 406 at paras 13 and 91–93. Criminal wrongdoing, of course, is merely one kind of legal ‘contravention’.

⁵² There had been no need to suspend the declarations of invalidity in *Mistry* (note 11 above) and *Magajane* (note 1 above), nor to read in temporary regimes, as in the contexts of those cases no lacuna in the law was created by an immediate declaration of invalidity. In *Mistry* a new statutory scheme was already on the statute books (see para 39), whereas in *Magajane* inspectors and police officers retained sufficient statutory powers to enforce gambling laws (see para 99).

⁵³ *Gaertner* (note 2 above) at para 75.

⁵⁴ Ibid at para 32.

at compliance are unlike criminal searches and are likely to limit the right to privacy to a lesser extent. Searches aimed at enforcement are akin to criminal searches, especially if there are penal sanctions under the regulatory provision or if the target may be charged criminally. Enforcement searches of this nature – as was the case here – are generally more invasive and involve a greater limitation of the right to privacy.⁵⁵

Once again, the scope of the third exception to the warrant requirement did not need to be defined with greater precision. A declaration of invalidity was amply justified on the narrow basis that the impugned statutory provisions authorised warrantless searches of even private dwellings at any time of day or night, with use of coercive force, even in the absence of a reasonable suspicion of an offence or other contravention of law, while providing little to no guidance to searchers and searched alike as to the limits of the invasion.⁵⁶ This simpler reasoning generated a simpler remedy. The Court read into s 4(4) of the Customs and Excise Act a rule that, save in situations of urgency,⁵⁷ no private residence may be entered without a warrant issued by a judicial officer on the basis of an affidavit grounding a reasonable suspicion of a contravention of the Act, a likelihood that a search will yield information pertaining to the contravention, and the reasonable necessity of a search.

The Court in *Auction Alliance* (per Cameron J) also declined to adopt the routine/non-routine distinction ‘now’, describing it as ‘inapposite and possibly misleading’, for the additional reason that ‘it does not fully cohere with the distinction *Magajane* drew between searches undertaken for enforcement as opposed to those undertaken to supervise compliance.’⁵⁸ The Court was unwilling to decide the case by applying a blanket constitutional rule that warrantless non-routine, suspicion-based searches unjustifiably violate privacy. The challenged provisions of the Estate Agency Affairs Act and Financial Intelligence Centre Act could be struck down as overbroad on the more limited basis that they authorised warrantless searches, in the absence of consent or urgency, triggered by a suspicion of criminal activity as well as warrantless searches of private homes. As in *Gaertner*, the declaration applied only prospectively, but was suspended while a temporary scheme was read into both statutes, requiring warrants on a similar basis in both categories of case.

V ASSESSMENT

The reluctance of the Constitutional Court in *Gaertner* and *Auction Alliance* to provide greater content to the third exception to the warrant requirement, and

⁵⁵ Ibid at para 65 (references omitted). The Court defines ‘compliance’ as ‘[t]he supervision of an industry at large, without particular regard to any pre-existing objective, except to ensure the integrity of the scheme of regulation in general.’ Ibid at fn 49. ‘Enforcement’ is defined as ‘[a] focused investigation under a regulatory scheme, often with a view to penal or quasi-penal consequences’. Ibid at fn 50. The Court also made reference to ‘random inspections’ aimed at ‘testing compliance with statutory regulation’ and ‘regulatory inspections aimed at advancing the general welfare of the public’. Ibid at paras 60, 70.

⁵⁶ Ibid at paras 43–74.

⁵⁷ Closely analogous to those provided for in CPA s 22(b).

⁵⁸ *Auction Alliance* (note 3 above) at paras 64–65.

its preference for a more modest, incremental strategy,⁵⁹ is a good illustration of institutional dialogue between judiciary and legislature – a process that others have analysed as constitutional negotiation⁶⁰ or even experimentalism.⁶¹ This approach is defensible because it promotes comity among state institutions, respecting the democratic and institutional strengths of the legislature and executive. In the context of protecting privacy during regulatory inspections of commercial premises, it also leaves space for justifiable variation among industries. It may be inappropriate to lay down a general constitutional rule applicable to all cases in every regulated industry.⁶² But as with all open-textured laws, a price is paid in terms of predictability and the consequent lack of guidance for law-makers, officials seeking to enforce and promote compliance with regulatory schemes, and private persons subjected to invasion.

One should not over-exaggerate the last-mentioned difficulty, however. On the one hand, the Court has clearly laid down that warrantless inspections or search operations, in the absence of consent or demonstrable urgency, in private dwellings and/or based on a suspicion of criminal wrongdoing constitute an unjustifiable violation of the right to privacy of natural and juristic persons alike. On the other hand, warrantless inspections aimed at promoting industry-wide compliance with a scheme of regulation and not based on any particular suspicion that the inspected party has contravened a law (whether criminal or otherwise) constitute a justifiable limit on privacy. In between those extremes, the constitutional line has not yet been finally drawn. Nonetheless the Court has provided direction even in this grey area. In *Auction Alliance* it refused to accept that all warrantless, non-urgent, suspicion-based searches are unconstitutional.⁶³ (Of course, those searches that involve invading a private home or based on a suspicion of criminal activity are.) It also explicitly distinguished between searches based on ‘individualised suspicion’ and those based on ‘generalised risk factors’,⁶⁴ presumably in response to the Board’s argument that the Court should not ‘foreclose the possibility of future legislation that may authorise warrantless searches when regulators employ a risk-based approach to industry-level administrative oversight.’⁶⁵ Accordingly, Cameron J remarked in passing that ‘[u]nder the *Magajane* [compliance/enforcement] dichotomy a warrant may well

⁵⁹ Ibid at para 66 (‘drawing this line at suspicion of a criminal offence, while leaving alone targeted suspicion concerning other forms of serious civil but non-criminal infractions, may reflect only an approximation of the constitutional standard’).

⁶⁰ G Webber *The Negotiable Constitution* (2012) (Argues, *inter alia*, that ‘[t]he legislature is situated as a key constitutional actor tasked with completing the specification of rights’ and that constitutionalism ‘is open to being re-negotiated by legislation struggling with the very moral-political questions left underdetermined at the constitutional level.’)

⁶¹ S Woolman *The Selfless Constitution: Experimentalism and Flourishing as Foundations of South Africa’s Basic Law* (2013).

⁶² As recognized by Rogers J in *Gaertner HC* (note 44 above) at para 91.

⁶³ *Auction Alliance* (note 3 above) at para 62.

⁶⁴ Ibid.

⁶⁵ Ibid at para 23.

not be necessary for compliance searches motivated by an assessment of general risk factors'.⁶⁶ Parliament has already started to consider these matters.⁶⁷

V PRESERVATION ORDERS

Where a constitutional right has been infringed or threatened, the court 'may grant appropriate relief', 'must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its invalidity', and in addition 'may make any order that is just and equitable'.⁶⁸ A remedy will be appropriate, just and equitable only if it effectively vindicates the right in question.⁶⁹ Accordingly, where public officials seize items during the course of an unlawful search, in what circumstances is it appropriate for a court to refuse to order their immediate return to the victim of the unlawful seizure?⁷⁰ When is it appropriate for a court instead to order their 'preservation' by a trustworthy independent party, such as the registrar of the High Court,⁷¹ pending an upcoming legal process such as a criminal trial? In *Thint (Pty) Ltd v National Director of Public Prosecutions*, the Constitutional Court (per Langa CJ) considered this question and made certain *obiter dicta* remarks relating to unlawful search and seizure operations in terms of warrants issued under s 29 of the National Prosecuting Authority Act:⁷²

[T]he ordinary rule should be that when a court finds a s 29 warrant to be unlawful, it will preserve the evidence so that the trial court can apply its s 35(5) discretion to the question whether the evidence should be admitted or not [at the subsequent criminal trial]. ... [I]t is only if an applicant can identify specific items the seizure of which constitutes a serious breach of privacy that affects the inner core of the personal or intimate sphere, or where there has been particularly egregious conduct in the execution of the warrant, that a preservation order should not be granted.⁷³

The Court doubted the view that prompt return of all items seized is the 'default remedy for an unlawful search and seizure',⁷⁴ observing instead that preservation 'will frequently be a just and equitable remedy'.⁷⁵ This is because – save in cases

⁶⁶ Ibid at para 64.

⁶⁷ In relation to customs tax, for example, see s 12(2) and chapters 33 and 34 of the Customs Control Act 31 of 2014 (assented to 21 July 2014) which is not yet in force.

⁶⁸ See respectively Constitution ss 38, 172(1)(a) and 172(1)(b).

⁶⁹ *Fose v Minister of Safety and Security* [1997] ZACC 6, 1997 (3) SA 786 (CC), 1997 (7) BCLR 851 (CC) at para 69.

⁷⁰ An example is *Mistry* (note 11 above) at paras 43–44.

⁷¹ See *National Director of Public Prosecutions and Others v Zuma and Another* [2007] ZASCA 137, 2008 (1) SACR 258 (SCA) (Minority judgment would have required the registrar to make and retain copies of all items seized by the state, to return originals to the applicants, and to keep the copies accessible, safe and intact under seal until the state permitted their return, the conclusion of criminal proceedings against the applicants, or the date the state decided not to institute such proceedings. The order would have been subject to any future court order, the lawful execution of any search warrant obtained in the future, and the duty of the applicants or registrar to comply with any lawful subpoena issued in the future. Finally, the order would have directed the state not to take any steps to obtain access to any of the retained or returned items, unless they gave the applicants reasonable notice.)

⁷² Act 32 of 1998.

⁷³ *Thint* (note 18 above) at para 223 (reference omitted).

⁷⁴ Ibid at para 218.

⁷⁵ Ibid at para 219.

where a particular item's seizure grossly infringed privacy or in cases of other egregious conduct – a preservation order will limit privacy only minimally, and the need for immediate relief will be outweighed by other important public purposes and constitutional rights, including the public interest in prosecuting serious crime, the need to discourage delaying preliminary litigation thereby assisting in the conclusion of criminal trials without unreasonable delay, as well as the desirability for criminal trial courts to take primary responsibility for trial fairness in general and the fairness of admitting unconstitutionally-obtained evidence in particular.⁷⁶

The issue arose for decision in *Auction Alliance*,⁷⁷ because pending determination of the appeal the parties had agreed to allow KPMG, an independent auditing and accounting firm, to copy and preserve all the data on Auction Alliance's computer servers. Having reached the conclusion that the challenged statutory powers of search and seizure were indeed inconsistent with the right to privacy, the question arose whether KPMG should be ordered to return the preserved material to Auction Alliance immediately or whether KPMG should be ordered to retain the material in order to give officials an opportunity to apply afresh for a warrant in terms of the new scheme read into the Estate Agency Affairs Act and Financial Intelligence Centre Act. The Court held that the latter order, persisting for only 30 days, was just and equitable in the circumstances:

Auction Alliance has not earned a prize or bonus by showing the provisions it contested fall short of the Constitution. What Auction Alliance is entitled to is effective relief. It secures that relief when the Board's proposed search of its premises is adjudicated in accordance with the Constitution, as the court will order here.⁷⁸

For the reasons explained by Langa CJ in *Thint*,⁷⁹ this balanced approach to remedying unlawful seizures is welcome. Furthermore, South Africa has no strict exclusionary rule prohibiting the admission of unlawfully obtained evidence. Undoubtedly, a firm exclusionary rule – whether given effect indirectly at the conclusion of preliminary litigation or directly by a subsequent trial court – would provide a strong incentive to officials to comply with constitutional and other legal requirements. But such incentives are already adequately created by the fact, mentioned by Langa CJ, that preservation orders will not be granted in cases of 'egregious conduct' during a search or where a specific item's seizure grossly infringed privacy,⁸⁰ as well as by the trial court's discretion to exclude unlawfully-obtained evidence in terms of s 35(5) of the Constitution in order to preserve trial

⁷⁶ Ibid at paras 219–224. See also *National Director of Public Prosecutions v King* [2010] ZASCA 8, 2010 (2) SACR 146 (SCA), 2010 (7) BCLR 656 (SCA) at para 5.

⁷⁷ See also *Mistry* (note 11 above) at paras 43–44 (Court refused to order immediate return of items unlawfully seized that remained in official possession.) The question did not arise in *Magajane* as the seized items had earlier been returned to the applicant following the withdrawal of criminal charges. *Magajane* (note 1 above). It also did not arise in *Gaertner* where SARS officials agreed to return or destroy everything taken. *Gaertner* (note 2 above) at paras 8–9, 108 and 114.

⁷⁸ *Auction Alliance* (note 3 above) at para 69 (references omitted). The Court also remarked that officials should not be penalised for acting in terms of statutory provisions that are later declared unconstitutional.

⁷⁹ See notes 73–76 above.

⁸⁰ *Thint* (note 18 above) at para 223.

fairness and the sound administration of justice. Where, for example, a search is carried out in bad faith, or with reckless disregard for statutory requirements or fundamental rights such as legal professional privilege,⁸¹ or in an insulting or high-handed manner smacking of ‘rampant triumphalism’,⁸² our courts should not hesitate to order prompt return of unlawfully-seized items possibly combined with a punitive costs order.

⁸¹ See, eg, *Craig Smith and Associates v Minister of Home Affairs and Others* [2014] ZAWCHC 127, 2015 (1) BCLR 81 (WCC).

⁸² See, eg, *Pretoria Portland Cement Company Ltd and Another v Competition Commission and Others* [2002] ZASCA 63, 2003 (2) SA 385 (SCA) at para 66.

AllPay Remedy: Dissecting the Constitutional Court's Approach to Organs of State

Meghan Finn*

In its *AllPay Remedy* judgment¹ the Constitutional Court wrestled with the state's flawed decision to award an enormous tender to a private entity for the administration of social grants. A unanimous judgment by Froneman J found that when an entity – even a private one – performs a function that is fundamentally public in nature, it can be regarded as an organ of state and thus is unable to 'walk away'² from its constitutional duties. The Court thus affirmed a broad understanding of organs of state based on the definition in s 239 of the (Final) Constitution of the Republic of South Africa, 1996.

In this note I examine the basis for this finding. *AllPay Remedy* is a laudable judgment, not least because the corporation in question had taken on and was fulfilling express constitutional obligations that would otherwise be borne by a department of state. However, the judgment leaves theoretical gaps. Specifically, it continues the jurisprudential trend of characterising an entity either as (i) an organ of state, and therefore bound by positive and prospective obligations; or (ii) as a purely private body with only negative horizontal obligations. I argue that this jurisprudential trend risks bloating our conception of organs of state.

In Part I of this note I set out the context of the case and outline the decisions of the Constitutional Court in *AllPay Merits*³ and *AllPay Remedy*. Part II focuses more narrowly on the definition of an organ of state, and the portions of *AllPay Remedy* that consider the constitutional obligations of the private entity. Part III then looks at how this aspect of *AllPay Remedy* has been interpreted by two subsequent High Court judgments. Finally, Part IV considers and ultimately

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¹ *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others (No 2)* [2014] ZACC 12, 2014 (4) SA 179 (CC), 2014 (6) BCLR 641 (CC) (*AllPay Remedy*).

² *Ibid* at para 66.

³ *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others* [2013] ZACC 42, 2014 (1) SA 604 (CC), 2014 (6) BCLR 641 (CC) (*AllPay Merits*).

rejects the proposal made by Sonnekus that the Constitutional Court should instead have used the common-law mechanism of *negotiorum gestio* for establishing the private entity's ongoing obligations.

I CONTEXT AND EARLIER JUDGMENTS

The Constitution protects the right to access social security.⁴ Social grants are critical for alleviating poverty and are a key mechanism of distributive justice. Currently, between fifteen and sixteen million people in South Africa depend on social grants.⁵ Social assistance under apartheid was disjointed,⁶ with fractures in the social assistance system exacerbated by extreme poverty. Under our constitutional framework administrative law has bolstered the system of social assistance, serving as an important tool for ensuring that the right to social assistance is vindicated.⁷

But the social grant system remains beset by a number of difficulties.⁸ One of the main concerns of SASSA, the South African Social Security Agency mandated to administer social security nationally, has been the risk of fraud or theft in accessing grants.

In April 2011 SASSA published an invitation to tender for the administration of the system of social assistance nationally. Core to the tender was the ability of an entity to provide a system that could verify the identity of recipients and thus minimise social-grant fraud. Most of the tender documents initially indicated only a preference that this verification should occur through biometric processes, which identify a person on the basis of distinguishable biological traits such as fingerprints and voices. However, certain later tender documents indicated that biometric verification was in fact a necessary condition for the award. Cash Paymaster Services (Pty) Ltd and AllPay Consolidated Investment Holdings (Pty) Ltd were among the private bodies that bid for the tender. SASSA ultimately awarded Cash Paymaster the tender, albeit through a somewhat contentious scoring process.

AllPay was aggrieved by this decision. It challenged the award on a number of bases, and was successful in the North Gauteng High Court.⁹ Matojane J found that, taken cumulatively, irregularities in the tender process vitiated the award of the tender. However, the court emphasised the importance of a just and equitable remedy that would ensure the continued provision of social grants to claimants.

⁴ Constitution s 27(1)(c).

⁵ *AllPay Merits* (note 3 above) at para 1. See also National Treasury *Budget Review* (2014) 89, available at <http://www.treasury.gov.za/documents/national%20budget/2014/review/FullReview.pdf>.

⁶ C Plasket 'Administrative Justice and Social Assistance' (2003) 120 *South African Law Journal* 495.

⁷ See, eg, MEC, *Department of Welfare, Eastern Cape v Kate* [2006] ZASCA 49, 2006 (4) SA 478 (SCA) (Written by Nugent JA who wrote the *AllPay* judgment for the Supreme Court of Appeal); and *Kate v MEC for the Department of Welfare, Eastern Cape* [2004] ZAECHC 25, 2005 (1) SA 141 (SE) (Written by Froneman J).

⁸ See, eg, the factual matrix in *Permanent Secretary, Department of Welfare, Eastern Cape, and Another v Ngxuzo and Others* [2001] ZASCA 85, 2001 (4) SA 1184 (SCA).

⁹ *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* [2012] ZAGPPHC 185.

As a result, it declined to set aside the invalid tender award for fear of disrupting the provision of social grants.

AllPay's appeal to the Supreme Court of Appeal met with less success.¹⁰ Nugent JA emphasised that a tender process need not be flawless in order to meet the requirements imposed by administrative law. On the contrary, '[i]t would be gravely prejudicial to the public interest if the law were to invalidate public contracts for inconsequential irregularities'.¹¹ In the court's view, the tender award was not invalid. On the question of remedy, the court noted that even if the award were problematic, it ought not to be set aside because the outcome – the ultimate award to Cash Paymaster – would be the same.¹²

AllPay then appealed to the Constitutional Court. In *AllPay Merits*¹³ the Constitutional Court disagreed strongly with the judgment of the Supreme Court of Appeal, not only in its analysis of the facts but also, and more crucially, in its theoretical approach. The Constitutional Court took particular issue with Nugent JA's characterisation of an inconsequential irregularity, finding that this categorisation fundamentally conflates the test for irregularities with the consequences of those irregularities. Any assessment of the lawfulness and fairness of a tendering process must occur separately from an assessment of the outcome. Inevitability of outcome is simply not a factor for determining the validity of an administrative decision.¹⁴ A defective process cannot be ameliorated by a post-facto determination that if the process had been fair, the outcome would be unaltered. Rather, process formalities warrant compliance because they ensure fairness, bolster the likelihood of better decisions and guard against corruption.¹⁵ The correct legal approach, found the Constitutional Court, is to determine whether there was material compliance with the legal requirements in light of their purposes.¹⁶

As a test, this jettisons a consequentialist assessment in favour of a purposive one. This is laudable for a number of reasons, not least that, particularly within the bounds of a legal system that prioritises the rule of law and accountability, process carries both intrinsic and instrumental value. It is not only the outcomes produced by a legal action that we care about, but also the reasons and doctrines that underpin those outcomes.

The Constitutional Court asserted that the starting point for evaluating tendering processes is s 217 of the Constitution¹⁷ read with the national legislation governing procurement and administrative law respectively. On the particular

¹⁰ *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency, and Others* [2013] ZASCA 29, 2013 (4) SA 557 (SCA).

¹¹ *Ibid* at para 21.

¹² *Ibid* at para 105.

¹³ *AllPay Merits* (note 3 above).

¹⁴ *Ibid* at para 23.

¹⁵ *Ibid* at para 27.

¹⁶ *Ibid* at para 30.

¹⁷ Constitution s 217(1) provides:

When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.

grounds of review put forward by AllPay, the Court found that the award of the tender was invalid for two prime reasons. First, SASSA's failure to assess Cash Paymaster's BEE partners amounted to privileging formal compliance over substantive empowerment. This was not only fatally defective, but amounted to a mockery of the goal of equality.¹⁸ Secondly, the Constitutional Court found that the original bid documents had been altered by a notice issued by SASSA which seemed to set biometric verification as a necessary condition rather than a preferred attribute of bids. This change affected the scoring, and spawned uncertainty and vagueness regarding the tender requirements.¹⁹ In turn, vagueness may render the process procedurally unfair, because parties affected by the process do not have clarity on the case they are required to meet.²⁰

The Court found the tender award invalid. But, it said, whether a tender is invalid is conceptually and practically distinct from whether that invalid tender should then be set aside. And, although the Court found it had enough information before it to determine the first question, it deferred to a later hearing its determination of the second question: what would be just and equitable to order,²¹ and particularly whether the tender ought to be set aside. The Court ordered the parties to provide more information and argument on these issues.

The *AllPay Remedy* judgment is centrally concerned with that second question of a just and equitable remedy. The Court had to weigh the importance of ensuring that social-grant claimants are protected maximally against the need to vindicate the rule of law (including by rectifying incorrect administrative decisions).

The initial assumption of Froneman J in *AllPay Remedy* is that constitutionally defective administrative action ought to be corrected and reversed.²² The judgment framed this as a 'corrective principle', operative at various levels.²³ The first level is simply to remedy the very defects that impelled the declaration of invalidity. The second level is that the public good should be prioritised, which means that a just and equitable remedy must account not only for the particular circumstances and parties in the case but also for the precedent that will be set for future procurement cases.²⁴

Froneman J declined, however, to take up the invitation by Corruption Watch, a friend of the Court in the matter, to provide a general formulation for when, and on what grounds, the corrective principle may be departed from. Instead, he pointed out that a general formulation may be undesirable given that

¹⁸ *AllPay Remedy* (note 1 above) at para 55.

¹⁹ *AllPay Merits* (note 3 above) at para 79.

²⁰ *Ibid* at para 88.

²¹ In terms of Constitution s 172.

²² *AllPay Remedy* (note 1 above) at paras 29–30. It should be noted, however, that although the starting normative assumption is that invalid conduct should be rectified, the principle is that, until a court actually sets aside invalid administrative action, the action cannot simply be ignored as invalid. Moreover, even invalid administrative actions may have factual, if not legal, effects. See *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* [2004] ZASCA 48, 2004 (6) SA 222 (SCA) at para 31; *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd* [2014] ZACC 6, 2014 (3) SA 481 (CC) at paras 100–102.

²³ *AllPay Remedy* (note 1 above) at para 32.

²⁴ *Ibid*.

the corrective principle should not be applied uniformly.²⁵ This is somewhat unfortunate. It is true that rigid articulations may breed undue formalism, and context-sensitivity is certainly important, not least when engaging in complex areas of law. Nevertheless, a principled and clear approach on how to balance competing constitutional interests is indubitably beneficial. Simply delineating the corrective principle to different levels falls short of providing this.

What *AllPay Remedy* did prioritise was the need to hedge against the risk that payments of social grants to beneficiaries would be disrupted. In what seemed to be a pragmatic move, the Court neither set aside the award with immediate effect nor did it decline to alter the award at all, in the manner of the High Court. Instead, the Court declared the contract between SASSA and Cash Paymaster invalid but suspended the operation of this declaration of invalidity. In the meanwhile, the Court ordered a rerun of the tender for an extended period of five years, with SASSA continuing to exercise authority over the ultimate award of the tender under the new process. In terms of the Court's order, SASSA could also opt not to award the tender. Finally, the Court ordered SASSA to ensure that the new bid documents effectively prevented the interruption of the payment of social grants.²⁶

II ORGANS OF STATE AND THE OBLIGATIONS OF JURISTIC PERSONS

That is the background of *AllPay Remedy*. But this note focuses on a more discrete finding of the Court: that because Cash Paymaster performed a fundamentally public function, the administration of the social grants system, it was an organ of state. Before outlining the Court's reasoning, I should flag that this finding is both courageous and compelling. It does, however, raise some doctrinal difficulties. The nub of these difficulties is that the judgment does not explore when it would be more principled to impose obligations on private bodies because those bodies are part of the vertical relationship between subject and state, and when instead such bodies bear obligations because of the horizontal application of constitutional rights.

A Defining Organs of State

It is helpful here to provide a brief account of the definition of an organ of state in general, before focusing attention on *AllPay Remedy*'s application of that definition.

In contemporary society, private entities perform many roles that were historically taken on by the state. South African constitutional and administrative law is developing to accommodate this fact, both in an expansive understanding of what constitutes a public function or power and by casting the definitional ambit of 'organ of state' broadly.

²⁵ Ibid at para 34.

²⁶ It falls outside the scope of this note to discuss developments and subsequent litigation on the matter following the Constitutional Court judgment.

Before the Final Constitution, South African courts typically adopted a narrow approach to both of these questions. For the most part, under the Interim Constitution²⁷ the courts used the control test to determine whether an entity constitutes an organ of state.²⁸ Van Dijkhorst J set out the test in *Cost Cutters*:²⁹

By control I do not mean inspection or supervision in respect of the quality of [a functionary's] services, but the right to prescribe what the function is and how it is to be performed. [A functionary] must be part of the government apparatus. ... ['Organ of state'] must be limited to institutions which are an intrinsic part of government ... – national, provincial, regional, and local – and those institutions outside the public service which are controlled by the State – ie where the majority of the members of the controlling body are appointed by the State or where the functions of that body and their exercise [are] prescribed to such an extent that it is effectively in control. In short, the test is whether the State is in control.

The *Cost Cutters* definition, with its emphasis on control, was applied in a number of later cases,³⁰ sometimes with a degree of flexibility.³¹ However, because only entities subject to close governmental control were defined as organs of state under the *Cost Cutters* test, even entities that were created by the government would not qualify if they fell outside its strict control. This was problematic: by focusing on those entities that had forged institutional links to the government, the test elevated form over substance. The *Cost Cutters* test also meant that entities would have lesser obligations if the government merely relaxed its control over them, and incentivised the state to outsource its functions to formally private entities.³²

Because of its emphasis on the bonds of governmental control, the *Cost Cutters* test reflected an anachronistic view of the modern state.³³ The test did not cater for the changing nature of public power, and failed to accommodate the fact that

²⁷ Constitution of the Republic of South Africa, Act 200 of 1993 (Interim Constitution).

²⁸ The *locus classicus* is *Directory Advertising Cost Cutters v Minister of Posts, Telecommunications and Broadcasting and Others* 1996 (3) SA 800 (T) ('*Cost Cutters*'), although the Constitutional Court also applied the test in *Hoffman v South African Airways* [2000] ZACC 17, 2001 (1) SA 1 (CC) at para 23. Other examples of the application of the test, predominantly under the Interim Constitution, include *Oostelike Gauteng Diensteraad v Transvaal Munisipale Pensioenfonds en 'n Ander* 1997 (8) BCLR 1066 (T) ('*Oostelike Gauteng Diensteraad*') and further cases cited by C Hoexter *Administrative Law in South Africa* (2nd Edition, 2012) at 161–163. The origins of the test are in Canadian constitutional jurisprudence. The Canadian Charter does not apply to private actors, and in a series of judgments the Canadian Supreme Court established that the Charter is applicable only to entities that fall under the government's control.

²⁹ *Cost Cutters* (note 28 above) at 810F–H.

³⁰ See note 28 above, and especially *Mistry v Interim National Medical and Dental Council of South Africa and Others* 1997 (7) BCLR 933 (D) and *Korf v Health Professions Council of South Africa* 2000 (1) SA 1171 (T), 2000 (3) BCLR 309 (T).

³¹ See, eg, the approach of Cameron J in *Oostelike Gauteng Diensteraad* (note 28 above) and the approach of Jordaan AJ in *Esack and Another v Commission on Gender Equality* 2001 (1) SA 1299 (W), 2000 (7) BCLR 737 (W) as discussed by C Plasket in *The Fundamental Right to Just Administrative Action: Judicial Review of Administrative Action in the Democratic South Africa* (PhD Thesis, Rhodes University, 2002) at 117–118.

³² S Woolman 'Application' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, 2006) Chapter 31 at 31-104.

³³ Plasket (note 31 above) at 118.

important state functions can be performed by private entities. In *Mittalsteel*, a later judgment of the Supreme Court of Appeal, Conradie JA observed:

In an era in which privatisation of public services and utilities has become commonplace, bodies may perform what is traditionally a government function without being subject to control by any of the spheres of government and may therefore, despite their independence from control, properly be classified as public bodies.³⁴

The Final Constitution itself moves away from strict governmental control as the defining feature of whether an entity is an organ of state. Section 239 defines an organ of state as:

- (a) any department of state or administration in the national, provincial or local sphere of government; or
- (b) any other functionary or institution—
 - (i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or
 - (ii) exercising a public power or performing a public function in terms of any legislation, but does not include a court or judicial officer.

It is helpful to note up front that our Constitution, by this definition, recognises that entities other than those strictly in government may be organs of state. Section 8 of the Constitution further provides that the Bill of Rights binds all organs of state.

Given the breadth of the definition of an ‘organ of state’ in the Final Constitution, a number of important cases have departed from the control test.³⁵ The Constitutional Court’s judgment in *AAA Investments* affirms a broad understanding of the definition: in our constitutional framework, an entity need not be part of the government for the Constitution as a whole to be binding on it.³⁶ The wording of the Constitution is now the starting point for determining whether an entity is an organ of state.

When considering when a private entity constitutes an organ of state, courts have tended to treat the s 239(b) test as involving two legs: (1) is the power or function public; and (2) is it authorised by the Constitution or legislation? In answering the first leg of the test, courts have drawn on our fairly rich jurisprudence on publicness. Once this is satisfied, courts then look to the source of the power.

The Supreme Court of Appeal has sometimes taken a more restrictive approach, most significantly in *Calibre Clinical Consultants*,³⁷ handed down after the judgment of the Constitutional Court in *AAA Investments* but before *AllPay Remedy*. *Calibre Clinical Consultants* dealt with a review of a decision made by a bargaining council

³⁴ *Mittalsteel South Africa Ltd (formerly Iscor Ltd) v Hlatshwayo* [2006] ZASCA 93, 2007 (1) SA 66 (SCA) (*‘Mittalsteel’*) at para 22.

³⁵ See, eg, *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and Another* [2006] ZACC 9, 2007 (1) SA 343 (CC) (*‘AAA Investments’*); *Minister of Education, Western Cape, and Others v Governing Body, Mikro Primary School* [2005] ZASCA 66, 2006 (1) SA 1 (SCA) at para 20; *Greater Johannesburg Transitional Metropolitan Council v Eskom* [1999] ZASCA 95, 2000 (1) SA 866 (SCA) at paras 12–13; and *Mittalsteel* (note 34 above).

³⁶ *AAA Investments* (note 35 above) at para 41.

³⁷ *Calibre Clinical Consultants (Pty) Ltd and Another v National Bargaining Council for the Road Freight Industry and Another* [2010] ZASCA 94, 2010 (5) SA 457 (SCA) (*‘Calibre Clinical Consultants’*).

when procuring services for an AIDS programme and wellness fund. The Supreme Court of Appeal found that the bargaining council was not exercising a public power, and so its decisions were not subject to constitutional accountability, nor could it be said to be acting as an organ of state.³⁸

B Cash Paymaster's Constitutional Obligations

Having briefly traversed the conceptual landscape, I now turn to consider *AllPay Remedy's* finding that, for the purposes of the administration of the social grant system, Cash Paymaster was an organ of state. Froneman J began by describing SASSA's own obligations to act, eventually, as the single agent for the national administration of social assistance, and to ensure the effective use of funds for payment to claimants in the realisation of the right to social security. The judgment noted that organs of state 'have obligations that extend beyond the merely contractual'.³⁹ It was uncontentious that SASSA, the body tasked in legislation with, and created for the purpose of, administering the social assistance system, is an organ of state. SASSA was thus obliged to respect, protect, promote and fulfil the rights in the Bill of Rights, as s 7(2) of the Constitution requires. SASSA also could not avoid these duties or shrug off accountability by outsourcing some of its functions.

But the judgment found that Cash Paymaster (the entity awarded the tender), too, was an organ of state. Froneman J started by citing *Mittalsteel* for the point that the control test, set out in *Cost Cutters*, is no longer determinative of whether an entity is an organ of state.⁴⁰ And in Cash Paymaster's case, the control test was not only non-determinative, but not of any assistance at all: the state could not be said to be in control of Cash Paymaster. Instead of focusing on control, the first leg of the s 239 definition of an organ of state asks whether the function the entity performs is public in character. And Cash Paymaster, the Court found, was performing a fundamentally public function, the administration of the social-grant system:⁴¹

It plays a unique and central role as the gatekeeper of the right to social security and effectively controls beneficiaries' access to social assistance. For all practical purposes it is not only the face, but also the operational arm, of the 'administration in the national . . . sphere of government', insofar as the payment of social grants is concerned.⁴²

In *AllPay Remedy* the Court hinged Cash Paymaster's organ-of-state characterisation on the fundamentally public function it performed. In controlling recipients' access to grants, Cash Paymaster gave effect to a right in the Bill of Rights. This function was so fundamentally public in character that it satisfied the first leg

³⁸ See Hoexter's criticism of the judgment for failing to account for the important role that bargaining councils play, the element of coercion present in that the collective agreement extended to an entire industry, the compulsory nature of the collected funds and the strong public interest in the programmes that were being procured: Hoexter (note 28 above) at 209.

³⁹ *AllPay Remedy* (note 1 above) at para 49.

⁴⁰ *Ibid* at para 52.

⁴¹ *Ibid*.

⁴² *Ibid* at para 55.

of the constitutional definition. Of course, the Court's reasoning on this point need not be limited to the realisation of rights in the Bill of Rights. It could also be extended to other functions that vindicate clear public-law rights⁴³ or that fall within the core mandate of the state.

The second leg of the organ of state test in s 239(b) is that the function must be performed in terms of legislation. The Court found that Cash Paymaster satisfied this leg too. It performed this function both in terms of the Constitution and, more particularly, in terms of legislation, for s 4(2)(a) of the South African Social Security Agency Act⁴⁴ provides that SASSA may enter into an agreement with another entity for payment to beneficiaries.

So, the Court concluded, Cash Paymaster was an organ of state, at least in respect of its role in administering the system of social grants. On signing the contract, Cash Paymaster became accountable to the public, and subject to public scrutiny. This extended to Cash Paymaster's commercial practice, at least insofar as this was dependent on the performance of the public function.⁴⁵

The Court then discussed the contractual relationship between Cash Paymaster and SASSA. Both the original bid documents and the contract the parties concluded after the award of the tender included constitutional obligations. Usually, if the basis for a contract's formation is found to be invalid, the contract too falls away,⁴⁶ and in *AllPay Merits* the Court had found that the tender award – which was the underlying reason for the contract – was invalid. But although this would generally mean that the contract would fall away, the Court opted to suspend the declaration of invalidity. This meant that the contract continued to operate and 'Cash Paymaster stay[ed] bound to its contractual and constitutional obligations'.⁴⁷

But, held the Court, Cash Paymaster had these obligations not just because of the contractual terms. Public accountability, too, required it to continue to perform these functions, even in the absence of valid contractual terms:

During the existence of the contract, these obligations stem from the contract it concluded. But even after the dissolution of the contract, and before the appointment of another service provider, Cash Paymaster will have constitutional obligations.⁴⁸

⁴³ In *Joseph and Others v City of Johannesburg and Others* [2009] ZACC 30, 2010 (4) SA 55 (CC) (Constitutional Court recognised a public-law right to electricity notwithstanding that no such right is expressed in the Bill of Rights.)

⁴⁴ Act 9 of 2004.

⁴⁵ F ka Mdumbe 'The Meaning of "Organ of State" in the South African Constitution' (2005) 20 *Southern African Public Law* 28 (Contends that an entity may be an organ of state in certain contexts or for certain purposes without being an organ of state more globally.)

⁴⁶ D Hutchison & F du Bois 'Contracts in General' in F du Bois (ed) *Wille's Principles of South African Law* (9th Edition, 2007) 733, 738.

⁴⁷ *AllPay Remedy* (note 1 above) at para 63.

⁴⁸ *Ibid* at para 64. Cf the view of the Supreme Court of Appeal in *Government of the Republic of South Africa v Thabiso Chemicals (Pty) Ltd* [2008] ZASCA 112, 2009 (1) SA 163 (SCA) at para 18 that once a tender is awarded, the parties' relationship is governed by the principles of contract law, and not at all by administrative law. This approach seems in tension with the court's own earlier judgment in *Logbro Properties CC v Bedderson NO and Others* [2002] ZASCA 135, 2003 (2) SA 460 (SCA) at para 8 that principles of administrative law continue to govern even a contractual relationship.

In these passages the judgment seems to want to have it both ways, and I worry that it conflates Cash Paymaster's contractual duties with its constitutional ones. It is true, as the Supreme Court of Appeal has observed, that it can be hard 'to determine where the line is to be drawn between, on the one hand, [an organ of state's] public duties of fairness and on the other its contractual obligations, or indeed the extent to which the two may overlap, if at all'.⁴⁹ Nevertheless, because *AllPay Remedy* does not demarcate where the entity is bound because it is an organ of state and where because of the contract, it is difficult to distil clear principles to guide courts and other litigants.

Section 8(2) of the Constitution provides that the Bill of Rights binds organs of state and also natural and juristic persons, to the extent that the relevant provision is applicable. After affirming Cash Paymaster's constitutional and contractual obligations, the Court briefly turned to examine horizontality. It cited *Juma Masjid*,⁵⁰ a case about a private trust's obligation not to interfere with the right to education of learners who were attending a public school on private land owned by the trust. That judgment is a more recent treatment of private actors' obligations to realise rights. In it, the unanimous Constitutional Court noted that s 8(2) of the Constitution does not attempt to obstruct the autonomy of private actors. Rather, the subsection simply requires that private actors not interfere with others' rights.⁵¹ Arguably, *Juma Masjid* holds that s 8(2) imposes negative, rather than positive, obligations.

In *AllPay Remedy* the Court emphasised that because Cash Paymaster's autonomy would not be hampered by the imposition of obligations, this reason to be reluctant to impose obligations on it did not apply. This, the Court said, was because Cash Paymaster agreed to its contractual obligations, and then performed under that contract for a period of time. This meant that social grant claimants became 'increasingly dependent' on Cash Paymaster to fulfil its constitutional obligations.⁵² Autonomy, articulated by the Court in *Juma Masjid* as a reason against imposing horizontal obligations, therefore was not pertinent to Cash Paymaster's case. Cash Paymaster then 'cannot simply walk away: it has the constitutional obligation to ensure that a workable payment system remains in place until a new one is operational'.⁵³ The Court later supported this point by citing academic articles that motivate for *private*, not public, entities to assume socio-economic obligations.⁵⁴

This is intriguing. Why would the Court discuss the possibility of Cash Paymaster's having horizontal obligations when it had already held that, for the purposes of the administration of a system for payment of social grants, Cash Paymaster was an organ of state? As an organ of state, Cash Paymaster would be bound by virtue of *vertical* rather than *horizontal* application.

⁴⁹ *Transnet Ltd t/a National Ports Authority v Owner of MV Snow Crystal* [2008] ZASCA 27, 2008 (4) SA 111 (SCA) at para 21.

⁵⁰ *Governing Body of the Juma Masjid Primary School and Others v Essay NO and Others* [2011] ZACC 13, 2011 (8) BCLR 761 (CC) (*Juma Masjid*).

⁵¹ *Ibid* at para 58, cited in *AllPay Remedy* (note 1 above) at para 65.

⁵² *AllPay Remedy* (note 1 above) at para 66.

⁵³ *Ibid*.

⁵⁴ *AllPay Remedy* (note 1 above) at para 67.

The Court's reasoning here is a little opaque. It seems to run together Cash Paymaster's vertical and horizontal obligations, making it difficult to delineate when the entity has obligations because it is an organ of state (by virtue of the fundamentally public function that it performs) and when it has obligations because of the horizontal application of the Constitution. Unfortunately, the judgment is simply under-theorised on these questions.

Why does this matter? First, it is a problem of taxonomy, in turn important for knowing the basis on which we hold entities accountable. Secondly, classification as an organ of state has important consequences, not least for the entity that has been cast as such an organ.⁵⁵ Most obviously for Cash Paymaster, it now has positive and prospective obligations to continue to pay out social grants, and the benefit it derives from the unlawful tender is subject to public – and the Court's – scrutiny.

III RECENT JUDICIAL APPROACHES TO *ALLPAY* REMEDY

AllPay Remedy has already rippled into developing jurisprudence⁵⁶ and theoretical work. In this section I briefly consider two High Court judgments that distinguished the Constitutional Court's findings, and a proposal by Sonnekus that the Court ought to have grounded Cash Paymaster's obligations in the common law rather than the Constitution.

A Netcare Hospitals: Devolution of Functions

In *Netcare Hospitals*,⁵⁷ the applicant approached the High Court seeking to interdict KPMG Services (Pty) Ltd from acting as a service provider for the Competition Commission's market inquiry into the private healthcare industry. Matojane J (who delivered the judgment of the High Court in *AllPay*) considered whether in providing services to the Competition Commission, KPMG constituted an organ of state. He dismissed the argument to this effect on a few bases.

First, KPMG was not exercising a power or performing a function in terms of legislation, and so the second leg of the organ-of-state test was not satisfied.

⁵⁵ For further discussion, see M Finn 'Organs of State: An Anatomy' (2015) 31 *South African Journal on Human Rights* 631.

⁵⁶ Decisions that have relied on *AllPay* Merits include *Mogale City Municipality v Fidelity Security Services (Pty) Ltd and Others* [2014] ZASCA 172, 2015 (5) SA 590 (SCA); *Superintendent-General: North West Department of Education and Another v African Paper Products (Pty) Ltd and Others* [2014] ZANWHC 29; *Minister of Safety and Security and Another v Weitz* [2014] ZAECGHC 85; *Autozone Retail and Distribution (Pty) Ltd v National Commissioner of Police NO and Others* [2014] ZAGPJHC 224; *Eden Security Services CC and Others v Cape Peninsula University of Technology and Others* [2014] ZAWCHC 148; *Nucon Roads and Civils (Pty) Ltd v MEC for Department of Public Works, Roads and Transport: NW Province and Others* [2014] ZANWHC 19; *United Democratic Movement and Others v Tlakula and Another* [2014] ZAEC 5; 2015 (5) BCLR 597 (Elect Ct); *Rodpaul Construction CC t/a Rods Construction v eThekweni Municipality and Others* [2014] ZAKZDHC 18; and *Mphumo v Limpopo Provincial Liquor Board and Another* [2014] ZAGPPHC 272. Most interestingly, see the interpretation of *AllPay* Merits provided by Plasket J in *Joubert Galpin Searle Inc and Others v Road Accident Fund and Others* [2014] ZAECPEHC 19, 2014 (4) SA 148 (ECP) at paras 80–88.

⁵⁷ *Netcare Hospitals (Pty) Ltd v KPMG Services (Pty) Ltd and Another* [2014] ZAGPJHC 186, [2014] 4 All SA 241 (GJ).

Indeed, Matojane J found that this matter differed from *AllPay Remedy* because no fundamentally public function was being performed at all.⁵⁸ More importantly, KPMG's expert involvement in the inquiry did not take over the Competition Commission's core functions, and so its provision of services did not 'devolve the constitutional function of the Commission to KPMG and make KPMG an organ of state for purposes of the healthcare inquiry'.⁵⁹ Rather, the relevant Competition Commission panel was required to draw independent conclusions based on evidence presented by KPMG.

This judgment sheds some light on the first leg of the organ-of-state test, at least as far as private entities are concerned, because Matojane J seems to consider more than simply whether the function is public. He asks the further question whether there has been some kind of *devolution of power* to a private entity and away from the public entity that would ordinarily perform the function.

B Khaya Projects: Distinguishing without Distinction

AllPay Remedy was also relevant in a recent judgment handed down by the Western Cape Division of the High Court, *City of Cape Town v Khaya Projects and Others*.⁶⁰ The City concluded a contract with Peer Africa, the second respondent in the matter, for the development of a housing project in an informal settlement. Peer Africa then issued a construction tender, which it awarded to Khaya Projects, the first respondent. The first two respondents concluded a contract to this effect, to which the City was not party and which did not incorporate explicit constitutional or public-law duties.

Extensive defects in the construction led to a dispute between the first two respondents. In an application for declaratory relief, the City argued that Khaya Projects had failed to fulfil its constitutional obligations regarding the right of access to housing. The City contended that Khaya Projects was obliged to do so by virtue of horizontal application of the Bill of Rights but also, drawing on *AllPay Remedy*, because Khaya Projects occupied a similar position to Cash Paymaster.

The High Court disagreed. Mantame J found that the obligations imposed by s 26 of the Constitution had to be borne by the state, and could not be shifted to private entities.⁶¹ *AllPay Remedy* was distinguishable, the Court found, because there the relevant contract had expressly incorporated constitutional obligations.

The High Court's judgment in this matter is unfortunate. It seems predicated on an assumption that the sole source of Cash Paymaster's obligations in *AllPay Remedy* was the contract to which it agreed autonomously. Absent this, the implication is, there are no grounds – either through vertical or horizontal application – for holding a nominally private entity accountable for the positive realisation of rights. But *AllPay Remedy* is not authority for that point. On the

⁵⁸ Ibid at para 68.

⁵⁹ Ibid at para 71.

⁶⁰ *City of Cape Town v Khaya Projects (Pty) Ltd and Others* [2014] ZAWCHC 167, 2015 (1) SA 421 (WCC).

⁶¹ Ibid at para 36.

contrary, it serves as precedent for holding private entities to constitutional obligations *qua* organs of state.

IV *NEGOTIORUM GESTIO*: AN ALTERNATIVE APPROACH?

As regards academic engagement with *AllPay Remedy*, I focus on the argument put forward by Sonnekus that a better approach would have been for the Constitutional Court to find the contract void *ab initio*.⁶² Rather than suspending the declaration of its invalidity or otherwise sourcing Cash Paymaster's obligations in the Constitution itself, the Court ought to have employed the *negotiorum gestio* action to reach a fair and equitable solution. Sonnekus argues that this secures the rights of social-grant recipients as it ensures the continued administration of the social assistance system, and relies on an existing doctrinal construction in the common law.⁶³

The *negotiorum gestio* is an action available to a person, the *negotiorum gestor*, who voluntarily takes care of the affairs of another person, the *dominus negotii*. The *negotiorum gestor* may then seek compensation so long as (1) the *dominus negotii*'s affairs were administered in a reasonable way; (2) the *negotiorum gestor*'s intention was to benefit the *dominus* rather than to derive a benefit for herself; and (3) the *dominus* was not aware of the *negotiorum gestor*'s intervention and so cannot be said to have consented to it.⁶⁴ A classic example is that if X puts out a fire in Y's house while Y is away and expends money to do so, then X can claim for compensation under the action. Although not strictly an enrichment action,⁶⁵ the claim shares some characteristics with enrichment claims. Its availability is underpinned by the importance of justice in compensating actions driven by concern for another's wellbeing.⁶⁶

Sonnekus argues that the *negotiorum gestio* action is apposite here. Once the tender award is declared invalid, the inevitable result is that the contract between Cash Paymaster and SASSA is void *ab initio*. Although the Constitutional Court ordered the suspension of this invalidity, the Constitution itself does not provide for the possibility of finding constitutional invalidity and then also ordering that the invalid contract continue, says Sonnekus. An alternative ground for Cash Paymaster's continuing obligations must be found.

He suggests the action of *negotiorum gestio* for this. Absent a valid contract giving rise to its obligations, Cash Paymaster was acting on behalf of SASSA, much like the *negotiorum gestor* acts on behalf of the *dominus*. And if Cash Paymaster's intervention were to be abandoned too early and to the detriment of SASSA, then

⁶² J Sonnekus 'Procurement Contracts and Underlying Principles of the Law – No Special Dispensation for Organs of State (Part 1 – The Principles)' and 'Procurement Contracts and Underlying Principles of the Law – No Special Dispensation for Organs of State (Part 2 – Developing the Common Law, Consequences and Remedies)' (2014) *Tydskrif vir die Suid-Afrikaanse Reg / Journal of South African Law* 320 and 536.

⁶³ *Ibid.*

⁶⁴ D Visser 'Unjustified Enrichment' in Du Bois (note 46 above) 1041, 1072–1073.

⁶⁵ *Ibid.*

⁶⁶ See H Dagan 'In Defense of the Good Samaritan' (1999) 97 *Michigan Law Review* 1152 (Dagan argues that the law of restitution can serve as an instrument for encouraging beneficial interventions and altruism.)

the principle of acting on behalf of the *dominus* would be undermined. Rather than ‘clutching . . . to so-called “constitutional obligations”’,⁶⁷ the *negotiorum gestio* could – and should – have been used by the Constitutional Court to establish continuous and prospective obligations on Cash Paymaster.

Unfortunately, Sonnekus fails to make a persuasive case. It is central that the *negotiorum gestio* action is available when the driving intention is to benefit the *dominus*. But Sonnekus is at pains elsewhere in his article to emphasise that Cash Paymaster only took on its contractual obligations in the first place for its own profit, and fulminates against the Constitutional Court for failing to account for this. His argument for the use of the *negotiorum gestio* action therefore does not sit well with his invective against the Constitutional Court for inhibiting the business practices of earnings-driven enterprises.⁶⁸

Further, the *negotiorum gestio* action is not used to impose prospective obligations. Rather, it only allows for compensation to be claimed for acts that have already occurred. Indeed, this is implicit in the final requirement of the action: that the *dominus* was unaware of the intervention and did not consent to it. Put differently, nothing in the structure of the action provides for *obligations* to be imposed. It only allows for the *negotiorum gestor* to be compensated for having done something.

Sonnekus thus argues for an application of the *negotiorum gestio* action in an entirely novel way that he does not justify. The Constitutional Court was correct to look to the Constitution (rather than distorted applications of common-law actions) when determining the prospective obligations of Cash Paymaster.

V CONCLUSION

This note has engaged with the Constitutional Court’s finding in *AllPay Remedy* that Cash Paymaster, a corporation administering the system of social grants, was an organ of state. The finding raises important doctrinal questions. The Constitutional Court has, for the most part, declined to develop a rich theory of horizontality and instead has broadened its understanding of what is capable of being an ‘organ of state’. But even ‘purely’ private entities that are not organs of state can bear important duties by virtue of horizontality. In *AAA Investments* Yacoob J observes that ‘any finding that [an] entity does not fall within this category [of organs of state] may not of itself have the consequence that the Bill of Rights is not applicable to it’.⁶⁹ The Court’s aversion to providing a rich theory of horizontality has resulted in an absence of clear theorising on the bounds and character of horizontality in our jurisprudence.

Nevertheless, Cash Paymaster’s role in the system for paying social grants is an exemplary instance of when a seemingly private entity can constitute an organ of

⁶⁷ Sonnekus (note 62 above) at 549.

⁶⁸ *Ibid* at 553:

Commercial reality prescribes that the calculated possibility of profit was originally at the heart of the legitimate commercial interest of [Cash Paymaster] (and all competing parties) in the tender bid to provide the service on behalf of SASSA for the agreed period of five years. Nobody was invited to partake in the original tender for the love of the matter or out of an over-enlarged empathy for philanthropy.

⁶⁹ *AAA Investments* (note 35 above) at para 29.

state. The Constitution sets out the right to access social assistance. Paying social grants fulfils the correlative obligation of this right. And, because social grants protect and empower vulnerable individuals and families, they also are important for distributive justice. *AllPay Remedy* is correct, then, that the administration of the social assistance system goes to the core of how we conceive of the state.⁷⁰ Because there is a single route to access social grants, beneficiaries would not be able to receive their grants were Cash Paymaster simply to cease performing its functions. Cash Paymaster, then, can be said to be performing its functions directly on behalf of a governmental department, and to the exclusion of that department. In *AllPay Remedy* the Constitutional Court therefore rightly recognised the extent to which public power can be wielded by private entities. In this note I have argued, however, that our understanding of organs of state would benefit from more theorising and, ultimately, a more robust taxonomy.

⁷⁰ See AC Aman Jr 'Administrative Law for a New Century' in M Taggart (ed) *The Province of Administrative Law* (1997) 100.

Minister of Justice and Constitutional Development and Another v Masingili and Others

*Anél du Toit**

I INTRODUCTION

Four persons were convicted of robbery with aggravated circumstances in the Magistrate's Court following an armed robbery during which two of the accused (accused 3 and 4) had entered a shop and threatened the owner with a knife. Accused 1 and 2 were similarly convicted although they did not take part in the actual robbery. Accused 1 acted as a scout prior to the robbery and accused 2 was the driver of the car in which all four accused left the scene of the crime.

The four accused were subsequently sentenced in terms of the Criminal Law Amendment (Minimum Sentencing) Act¹ read with s 1(1)(b) of the Criminal Procedure Act.² Section 1(1)(b) provides that

aggravating circumstances', in relation to—

...

(b) robbery or attempted robbery, means—

- (i) the wielding of a fire-arm or any other dangerous weapon;
- (ii) the infliction of grievous bodily harm; or
- (iii) a threat to inflict grievous bodily harm,

by the offender or an accomplice on the occasion when the offence is committed, whether before or during or after the commission of the offence

All of the accused appealed to the High Court against their convictions and sentences, where the convictions of accused 2 and 3 were upheld. However, the court found that the position of accused 1 and 2, as accomplices, required further consideration. The evidence led showed that accused 1 and 2 acted in concert as far as the committing of the robbery was concerned. However, it did not appear to the court that the state had proved in the court *a quo* that they had *dolus* or intention with respect to the use of the knife, the aggravating factor in this matter. The question now arose whether the phrase '*or an accomplice*' as it appears in the definition of aggravating circumstances in s 1(1)(b) of the CPA created strict

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¹ Act 105 of 1997. Section 51, read with Part 2 of Schedule II of the Act, provides for the following prescribed minimum sentences upon conviction for robbery with aggravating circumstances: 15 years for a first offender; 20 years for a second offender; and 25 years for a third or subsequent offender.

² Act 51 of 1977 (CPA).

liability, being liability in the absence of culpability, in respect of the offence of robbery with aggravating circumstances.³

The High Court concluded that the targeted phrase indeed resulted in strict liability in such circumstances. The court interpreted the phrase to mean that an accomplice to a robbery may be found guilty of the crime with aggravating circumstances if aggravating circumstances were present, even if such accomplice had no intent with regard to the existence of the aggravating circumstances. Given this reading of the provision, the court held that the phrase ‘*or an accomplice*’ included in s 1(1)(b) would unjustifiably lead to the arbitrary deprivation of freedom in violation of s 12(1)(a) of the Constitution. Furthermore, the court found s 1(1)(b) to infringe unjustifiably upon s 35(3)(h) of the Constitution because an accused could be convicted of robbery with aggravated circumstances even where reasonable doubt existed as to his guilt. Section 1(1)(b) of the CPA was declared inconsistent with the Constitution and consequently invalid.⁴

The Minister of Justice and Constitutional Development and the National Director of Public Prosecutions (NDPP) appealed against the High Court’s decision. In *Minister of Justice and Constitutional Development and Another v Masingili and Others*⁵, the Constitutional Court, in terms of s 167(5) of the Constitution, was faced with the question of whether the High Court’s declaration of invalidity should be confirmed.⁶ It declined to do so. The appeal was successful and the Court found in favour of the Minister and the NDPP and the matter was remitted to the High Court.

The Court found that the High Court incorrectly targeted the phrase ‘*or an accomplice*’ because the liability of accomplices is governed by common law and not by s 1(1)(b) of the CPA. As such, there was no cause for the High Court to raise a constitutional concern with respect to the CPA. As was recognized by the Court, the matter could have been dispensed with at this point. However, it proceeded to also pronounce on the High Court’s underlying constitutional concern regarding the possibility that an accomplice may be found guilty of robbery with aggravating circumstances in the absence of any intent as to the aggravating circumstances, thereby creating strict liability.

The Court first found that a conviction for robbery with aggravating circumstances in the absence of proof of intent did not infringe upon s 12(1)(a) which protects the right of an individual not to be deprived of his freedom arbitrarily or without just cause. That section has been held to require a rational connection between the deprivation of freedom and the purpose of such a deprivation.⁷ The Court referred to its earlier decisions in *S v Thebus and Another*⁸ and *S v Coetzee*⁹ and concluded that the enhanced penal jurisdiction created by

³ *S v Masingili and Others* [2013] ZAWCHC 59, 2013 (2) SACR 67 (WCC) (‘*S v Masingili*’) at paras 4–5.

⁴ *Ibid* at paras 40, 50, 54–62.

⁵ [2013] ZACC 41, 2014 (1) BCLR 101 (CC), 2014 (1) SACR 437 (CC) (‘*Masingili*’).

⁶ The hearing of the appeal in the High Court was suspended pending the Constitutional Court’s decision.

⁷ See *Smuts v De Lange NO and Others* [1998] ZACC 6, 1998 (3) SA 785 (CC), 1998 (7) BCLR 779 (CC) at para 23.

⁸ [2003] ZACC 12, 2003 (6) SA 505 (CC), 2003 (10) BCLR 1100 (CC) at para 34.

⁹ [1997] ZACC 2, 1997 (3) SA 527 (CC), 1997 (4) BCLR 437 (CC) (‘*Coetzee*’) at para 177.

s 1(1)(b) was not arbitrary. It was not manifestly inappropriate and constituted a rational tool in achieving the constitutionally permissible end of combatting violent crime. Furthermore, the culpability established for robbery fulfilled the requirement of just cause and the requirement of culpability was therefore not abandoned.¹⁰

With regard to the presumption of innocence, the Court rejected the argument that a conviction for robbery with aggravating circumstances in the absence of proof of intent with regard to the aggravating circumstances violated s 35(3)(h) of the Constitution. It would not constitute a conviction where one of the elements of the crime, culpability, has not been proven, thereby resulting in a conviction where reasonable doubt still exists.¹¹ The Court contended essentially that intent with regard to aggravated circumstances is not an element of the offence of robbery with aggravated circumstances.¹²

Much of the Court's decision rested on its evaluation of the nature of the offence of robbery with aggravating circumstances and, specifically, the proposition that robbery with aggravating circumstances is not an offence distinct from the common law offence of robbery but is merely a form of robbery. The aggravating circumstances component does not in itself create an offence or impose liability. Its significance is that: (1) it is relevant for sentencing as it attracts a minimum sentence in terms of the Minimum Sentencing Act ranging between 15 to 25 years¹³ unless substantial and compelling circumstances justify a lesser sentence; (2) the right to prosecute robbery with aggravating circumstances does not prescribe; and (3) it is more difficult for a person charged with robbery with aggravated circumstances to be granted bail than it is for a person charged with robbery.¹⁴

In this note, I will first examine this central line of argument and then turn to address the Court's specific findings as to accomplice liability.

¹⁰ *Masingili* (note 5 above) at paras 50–53.

¹¹ See, eg, *R v Vaillancourt* [1987] 2 SCR 636, 655 (Dickson J found that 'what offends the presumption of innocence is the fact that an accused may be convicted despite the existence of a reasonable doubt on an essential element of the offence, and I do not think that it matters whether this results from the existence of a reverse onus provision or from the elimination of the need to prove an essential element?') See also the decisions of the Constitutional Court with regard to reverse onus clauses in *S v Bhulwana*; *S v Gwadiso* [1995] ZACC 11, 1996 (1) SA 388 (CC), 1995 (12) BCLR 1579 (CC); *S v Coetzee*; *S v Nisele* [1997] ZACC 14, 1997 (2) SACR 740 (CC), 1997 (11) BCLR 1543 (CC); *S v Mello* [1998] ZACC 7, 1998 (3) SA 712 (CC), 1998 (7) BCLR 908 (CC); and *S v Mbatha*; *S v Prinsloo* [1996] ZACC 1, 1996 (2) SA 464 (CC).

¹² *Masingili* (note 5 above) at paras 57–58.

¹³ It should further be noted that the longer minimum sentences of 20 years for a second offence or 25 years for a third offence and higher, as prescribed by s 51(2)(a) of the Minimum Sentencing Act, cannot be triggered by a previous conviction for robbery, but only by an offence listed in Part 2 of Schedule II, including robbery with aggravating circumstances. See, eg, *S v Qwabe* 2012 (1) SACR 347 (WCC) at para 26.

¹⁴ *Masingili* (note 5 above) at paras 16–17.

II THE NATURE OF ROBBERY WITH AGGRAVATING CIRCUMSTANCES

A The proposition that robbery with aggravating circumstances is not a separate offence

What does s 1(1) do? The *Masingili* Court found that s 1(1)(b) merely provides a definition of aggravating circumstances in relation to the common law offence of robbery. The court relied on the decision of Cameron JA in *S v Legoa*¹⁵ and the earlier decision of the Appellate Division in *S v Moloto*¹⁶ to conclude that robbery with aggravating circumstances is not a new offence but simply a form of robbery with more serious consequences for sentencing. Furthermore, the finding in *Legoa* that aggravating circumstances should be established at conviction stage concerned considerations of fairness and practicality and did not mean that robbery with aggravating circumstances is a separate offence from mere robbery.¹⁷

This proposition has elicited some animated criticism from the authors of the *Commentary on the Criminal Procedure Act* who argue that the *Masingili* Court, in relying on this proposition in support of its findings with regard to culpability, constitutionality and liability of accomplices, did not remain faithful to the spirit and thrust of the Constitution by allowing form and technicality to trump constitutional substance.¹⁸ Although s 1(1)(b) did not create a new offence in the technical sense, there can be no doubt that the cumulative effect of s 1(1)(b) and the Minimum Sentencing Act is to create a separate and more serious ‘criminal status’. This status results in substantially more serious consequences for an accused which include prescribed minimum sentencing and also extends, as stated by the court itself in *Masingili*, to the aspects of prescription and bail.¹⁹

Support for the contention of an elevated criminal status can be found in *S v Isaacs and Another*²⁰ where Yekiso J rejected the argument that no onus attached to the proof of aggravated circumstances. He held that the State carried the onus to prove the existence of aggravated circumstances prior to conviction in light of the presumption of innocence and the significant impact of aggravating circumstances on the length of the sentence imposed by the court.²¹

While I accept that robbery with aggravated circumstances is not an entirely new or separate offence, it is my view that it is a distinct offence from robbery because of the elevated criminal status and the serious potential consequences within the criminal justice system. Just as robbery is a form of theft, but a distinct offence due to the additional requirement of violence, robbery with aggravated circumstances is a form of robbery, but a distinct offence due to the requirement of the use of a fire-arm or dangerous weapon, the infliction of grievous bodily harm or threat of doing so. This to my mind requires the state not only to prove the existence of these circumstances, as decided in *Isaacs*, but also that a person

¹⁵ [2002] ZASCA 122 (*‘Legoa’*) at paras 17–18.

¹⁶ 1982 (1) SA 844 (A) 850C.

¹⁷ *Masingili* (note 5 above) at paras 32–33.

¹⁸ E du Toit et al *Commentary on the Criminal Procedure Act* (2014) DEF 4.

¹⁹ *Ibid.*

²⁰ [2008] ZAWCHC 241, 2007 (1) SACR 43 (C) (*‘Isaacs’*).

²¹ *Ibid* at paras 37–38.

had intent with regard to the use of the weapon or the infliction of grievous bodily harm.

B Robbery with aggravating circumstances and the question of dolus or intent

The Court in *Masingili*, however, held that s 1(1)(b) does not specifically require intent. Aggravating circumstances are established objectively and the intent of an accused as to aggravating circumstances does not form part of the enquiry. Robbery with aggravating circumstances is merely a form of robbery which is defined as the theft of property by unlawfully and intentionally using violence or threats of violence to take the property. Intent is therefore required as an element of the crime of robbery, together with theft of property, through violence or threats of violence and unlawfulness. In order to be convicted of robbery with aggravated circumstances proof of intent to commit robbery will suffice. Aggravating circumstances are simply a manifestation of the inherent violence of the crime of robbery. As such, the requirement of proof of intent to commit robbery satisfies the general prohibition against strict liability.²² Finally, the Court held that its finding as to the nature of robbery with aggravating circumstances did not neglect the common law and constitutional concept of culpability and specifically the requirement of intent or *dolus*.²³

These findings require further examination, in light of the principles underlying the requirement of culpability and also the Court's own pronouncements in this regard such as in the following paragraph:

The corollary to the idea that individuals should be held accountable for the choices they make is that ordinarily individuals should not be held accountable for choices they did not make. The *dolus* required is the ground for an accused's personal blameworthiness arising from his or her unlawful conduct. Not only the fact of an accused's blameworthiness but also its degree is relevant. The relative gravity of punishment must reflect the gravity of the offence.²⁴

Culpability is a requirement for criminal liability. It encompasses personal blameworthiness. The fact that a perpetrator has committed an unlawful act which complies with the definitional elements of the crime is not sufficient. There must be grounds for blaming the perpetrator personally for such unlawful conduct. The focus is on the perpetrator's personal ability and knowledge as opposed to the requirements of conduct and unlawfulness where the focus is on the act performed.

Culpability in the form of *dolus* or intention is required for most crimes. This comprises cognitive and conative elements. Cognitively, the perpetrator must have knowledge of the act, the elements of the crime and of its unlawfulness. The conative element requires that the perpetrator directs his will towards a certain act. Intention may take the form of *dolus directus*, where the perpetrator directs his

²² *Masingili* (note 5 above) at paras 34, 35 and 48.

²³ *Ibid* at paras 35 and 42.

²⁴ *Ibid* at para 38.

will to the prohibited act or result as his goal, *dolus indirectus* where the perpetrator knows that he can only attain his goal if the prohibited act or result materialises, or *dolus eventualis* where the perpetrator foresees the possibility of the conduct and its unlawfulness and reconciles himself with that possibility.²⁵

The test in respect of intention is purely subjective and requires a court to determine the state of mind of the particular perpetrator when he committed the act. In the absence of direct evidence of intention, for example resulting from a confession, the court may rely on indirect proof of intention inferred from evidence concerning the specific circumstances of the matter and the perpetrator's conduct. However, despite such inferential reasoning and the consideration of objective factors, such as objective probabilities and human experience, the test remains subjective. The court must consider all the circumstances of the case and endeavour to place itself in the shoes of the perpetrator at the time of the commission of the act and try to ascertain what the perpetrator's state of mind was at that moment.²⁶

The *Masingili* Court discussed the constitutional importance of culpability with reference to the decision in *Coetzee* where O'Regan J confirmed culpability or fault as a requirement for criminal liability and described it as lying at the heart of our law rather than being an incidental aspect of criminal law.²⁷ Following an examination of the application of strict liability in the US, England, Australia and Canada, O'Regan J concluded the following:

The striking degree of correspondence between different legal systems in relation to an element of fault in order to establish criminal liability reflects a fundamental principle of democratic societies: as a general rule people who are not at fault should not be deprived of their freedom by the State.

There appears to be a contradiction between the notion that a person should not be held criminally liable for choices they did not make and the *Masingili* Court's view that participation and intention to commit a robbery is a valid threshold for a conviction of robbery with aggravating circumstances. The finding that once a person actively and culpably chooses to participate in an inherently violent unlawful activity, namely robbery, they may be held accountable for all the unforeseen consequences of this choice is of specific concern.²⁸ It is reminiscent strongly of the old doctrine of *versari in re illicita*²⁹, a form of strict liability in terms of which, before 1962, a person could be held criminally liable for all the consequences of illegal activity including unintended consequences.³⁰ This

²⁵ *Masingili* (note 5 above) at paras 36–37.

²⁶ CR Snyman, *Criminal Law* (6th Edition, 2014) 184.

²⁷ *Coetzee* (note 9 above) at 439B and 440 to 442H. See also the judgment of Kentridge AJ ibid at 414F.

²⁸ *Masingili* (note 5 above) at paras 54 and 56.

²⁹ The full maxim *versari in re illicita imputantur omnia quae sequuntur ex delicto* can be translated as 'all the consequences of an illegal act are imputed to the person who performed the act'. See JM Burchell *Principles of Criminal Law* (3rd Edition, 2005) 544.

³⁰ See Du Toit (note 18 above) DEF 5 and WA Joubert *Law of South Africa* (2nd Edition, 2010) Vol 6 at para 108.

principle was firmly rejected by the Appellate Division in *S v Bernardus* as being in conflict with the basic principle of requiring culpability for criminal liability.³¹

The Court's reliance on the contention that robbery with aggravated circumstances is a manifestation of the 'inherent violence' of robbery in support of the contention that intent to rob is sufficient to support a conviction of robbery with aggravated circumstances is also questionable. Any violence or threat of violence would suffice to constitute the offence of robbery and, as such, the 'inherent violence' may be very slight in degree and not necessarily cause injury. Also, it is not essential that a victim should have suffered actual fear for a threat to amount to robbery.³² This is clearly distinct from the use of a fire-arm or dangerous weapon, the inflicting of grievous bodily harm or the threat of such as specified in s 1(1)(b). I would argue that the latter elements are as distinct from robbery, and its required element of violence, as robbery is from theft, thereby necessitating proof of intent with regard to the aggravating circumstances in order to meet the requirement of culpability.

The decision of the United States Supreme Court in *Rosemond v United States* is, in my view, instructive with regard to the principle of personal blameworthiness and the notion that persons should be held accountable for their choices only.³³ The case concerned a charge of aiding and abetting the offence of carrying a gun in connection with a drug trafficking crime following an incident where a firearm was discharged during the course of a drug deal. The court stated the general principle that the requirement of intent would be fulfilled where a person actively participates in a crime with full knowledge of the circumstances constituting the offence. Within the context of the facts of the case, the accomplice would therefore be held criminally liable for the offence charged if he is an active participant in a drug transaction and knows that one of the other participants involved in the drug transaction is carrying the gun.³⁴ Importantly the court found that this knowledge must have been gained well in advance of the commission of the crime so as to enable him to make the relevant legal or moral choice. Specifically, the court stated the following:

A defendant manifests that greater intent, and incurs the greater liability of § 924(c), when he chooses to participate in a drug transaction knowing it will involve a firearm; but he makes no such choice when that knowledge comes too late for him to be reasonably able to act upon it.³⁵

Some may argue that the circumstances of *Masingili* can be distinguished from the situation in *Rosemond* due to the fact that drug trafficking and drug trafficking with the use of a weapon can be clearly distinguished as two separate crimes by the relevant American legislation whereas s 1(1)(b) of the CPA read with the Minimum Sentencing Act does not create a separate offence. This, in my view, is unconvincing. To hold a person criminally liable with regard to aggravating

³¹ 1965 (3) SA 287 (A) 296 F. See also *S v Van der Mescht* 1962 (1) SA 521 (A) 530H.

³² See Snyman (note 26 above) at 508–510 and Burchell (note 29 above) at 820.

³³ 572 US (2014) ('*Rosemond*').

³⁴ *Ibid* at 12–13.

³⁵ *Ibid* at 16.

circumstances with the resulting enhanced consequences in the absence of knowledge of those aggravating circumstances negates that person's ability to make a legal and moral choice and act upon this choice as was stated in *Rosemond*. Absent this choice, such a holding falls short of the very foundation of the principle of culpability, namely, personal blameworthiness. This short-coming cannot be brushed over superficially or justified by a finding that robbery with aggravating circumstances, although clearly distinct, does not constitute a separate offence. This would indeed prioritise formality over constitutional substance as is argued by the authors of the *Commentary on the Criminal Procedure Act*.³⁶

C 'Aggravating circumstances' specifically relevant to sentencing

The Court in *Masingili* held that s 1(1)(b) of the CPA was specifically relevant to sentencing. The fact that the State did not prove intent of an accomplice with regard to aggravating circumstances becomes a factor to be taken into account in the application of the Minimum Sentencing Act and may constitute substantial and compelling justification for a court to impose a lesser sentence. In this regard, the Court referred to the earlier decision in *S v Dodo*³⁷ where it found that s 12(1) (a) of the Constitution required that sentencing take into account the nature and seriousness of the act itself, but also relevant personal and other circumstances.³⁸

However, the Court acknowledged that a lack of intent with regard to aggravating circumstances would not always result in a lesser sentence due to the principle of judicial discretion in sentencing. A firm rule in this regard would defeat the purpose of s 1(1)(b) of the CPA, read with the Minimum Sentencing Act, namely to direct courts to impose harsher sentences for robbery with aggravating circumstances.³⁹

The Court's reliance on the test of substantial and compelling circumstances in terms of the Minimum Sentencing Act as somehow filling any void left by the absence of a requirement of intent for aggravated circumstances is unconvincing. My view is specifically informed by the established principle of sentencing discretion considered alongside the limited powers of courts of appeal to interfere with a sentence imposed by a lower court. The latter was summarised by the Court in *Bogaards v S* as follows:

An appellate court's power to interfere with sentences imposed by courts below is circumscribed. It can only do so where there has been an irregularity that results in a failure of justice; the court below misdirected itself to such an extent that its decision on sentence is vitiated; or the sentence is so disproportionate or shocking that no reasonable court could have imposed it.⁴⁰

It is difficult to comprehend how an appeal court may readily find a sentence imposed in terms of the Minimum Sentencing Act to meet these stringent requirements when the *Masingili* Court held, in spite of its reference to the decision

³⁶ See Du Toit (note 18 above).

³⁷ [2001] ZACC 16, 2001 (3) SA 382 (CC), 2001 (5) BCLR 423 (CC) at para 37.

³⁸ *Masingili* (note 5 above) at paras 43–46.

³⁹ *Ibid* at para 47.

⁴⁰ [2012] ZACC 23, 2013 (1) SACR 1 (CC), 2012 (12) BCLR 1261 (CC) at para 41.

in *Dodo*, that a lack of intent with regard to aggravating circumstances would not as a general rule necessitate a lesser sentence than the prescribed minimum. This is exacerbated by the court's failure to provide any indication or guidelines as to how such a discretion could be exercised, thereby leaving the principle of sentencing discretion well and truly intact.

I also have further concerns based on my experience of criminal practice in our lower courts. It may happen that no evidence was led during the trial as to the knowledge or intent of an accomplice with regard to aggravated circumstances, either by the state which, according to the *Masingili* Court bears no onus in this regard, or by the accomplice, who of course has the right to remain silent and may refuse to testify. In these circumstances, it would be difficult to introduce evidence of a lack of intent or knowledge regarding the aggravating circumstances for the first time during sentencing. A statement from the bar would carry little weight, which would mean that the accomplice would have to testify. In my experience, the testimony offered would be vulnerable to questions concerning the veracity thereof given that such claims were not raised prior to conviction.

Also, there is the possibility that many accomplices convicted of robbery with aggravating circumstances following a trial where no evidence was led as to their intent with regard to aggravating circumstances may exploit the sentencing discretion by claiming that they had no knowledge or intent regarding aggravating circumstances. There simply would not be anything in the record of proceedings to rebut such a claim. This could have, in the long term, a detrimental impact on the effect of such claims in the adjudication of whether substantial and compelling circumstances are present to justify a lesser sentence than the prescribed minimum. This may in turn lead to the untenable situation that an accomplice who wants to allege a lack of intent is forced to testify during the trial in order for such a claim to have any real effect during sentencing.

Finally, the reliance on the Minimum Sentencing Act does not alleviate the other dire consequences relating to bail and prescription which forms part of the enhanced criminal status as is discussed above.

III THE NATURE OF ACCOMPLICE LIABILITY

A Accomplice liability in terms of s 1(1)(b) of the CPA?

The Court in *Masingili* found that the High Court's decision of invalidity could be rejected on the narrow ground that s 1(1)(b) does not create liability. Instead, the liability of an accomplice is governed by common law. This finding is again strongly reliant on the Court's pivotal proposition that robbery with aggravating circumstances is not a separate offence as discussed.

In order to arrive at this proposition, the Court considered the legislative history of s 1(1)(b).⁴¹ The insertion of the phrase '*or an accomplice*' in 1959 followed two decisions of the Appellate Division which pointed to an apparent loophole in the provision that preceded s 1(1)(b).⁴² The flaw was that a person could only be

⁴¹ *Masingili* (note 5 above) at paras 19–24.

⁴² *R v Siselane* 1959 (2) SA 448 (A) 451A–445A and *R v Cain* 1959 (3) SA 376 (A) 381A–C.

found guilty of robbery with aggravating circumstances if he instigated or made himself a party to the aggravating circumstances and not in the mirror-image case where the aggravating circumstances arose in the course of a robbery to which he was a party. According to the Court, the notion that s 1(1)(b) created accomplice liability and meant that an accomplice to a robbery is guilty of robbery with aggravating circumstances - even if he did not instigate or make himself party to the aggravating circumstances or have intent as to the aggravating circumstances - resulted from the later decision of the Appellate Division in *S v Dhlamini and Another*.⁴³ The Court found this decision to be incorrect and, consequently, found that the High Court's targeting of the phrase '*or an accomplice*' was also incorrect. Accomplice liability is governed by common law. The targeted phrase is therefore irrelevant to the concern that an accomplice could be found guilty of robbery with aggravating circumstances without having intended the aggravating circumstances as, according to the Court, an accomplice could be so liable in terms of common law in the absence of that phrase from s 1(1)(b).⁴⁴

I do not agree that the court in *Dhlamini* in fact found that s 1(1)(b) of the CPA created accomplice liability. Rather, this decision is an example of a pervasive problem in decisions regarding accomplices, and specifically the liability of accomplices, which arises from the confusion between accomplices and persons acting with common purpose, otherwise referred to as perpetrators or co-perpetrators.⁴⁵ While Holmes JA referred in *Dhlamini* to the liability of accomplices, it appears from his explanation and description of the relevant factual scenario that he was in fact referring to the liability of co-perpetrators who acted with common purpose.⁴⁶

According to Snyman, this confusion arises easily due to the popular use of the term accomplice as denoting anyone involved in the commission of a crime other than the main perpetrator.⁴⁷ Its technical meaning though denotes a person who does not satisfy all the requirements for liability contained in the definition of the crime or who does not qualify for liability in terms of the principles relating to

⁴³ 1974 (1) SA 90 (A) ('*Dhlamini*').

⁴⁴ *Masingili* (note 5 above) at paras 25–26.

⁴⁵ See, for example, the decision of the SCA in *S v Kimberley* [2005] ZASCA 78, 2005 (2) SACR 669 (SCA) where Zulman JA referred (at 42C) to the confusion between what is termed an *accomplice proper* as opposed to a person acting in the execution or furtherance of a common purpose, therefore a perpetrator or co-perpetrator.

⁴⁶ *Dhlamini* (note 43 above) at 94B. A person involved in the commission of a crime is a *perpetrator* if his conduct, the circumstances and his culpability are such that it complies in all respects with the definition of the crime and all the requirements for liability are fulfilled or he acted together with one or more persons and the conduct required for conviction is attributed to him as a result of common purpose shared with these persons. Where two or more persons act together and all comply with these two elements, they are *co-perpetrators*. They are all equally liable and the enquiry as to who was a principle perpetrator is irrelevant. Their liability is based on their own acts and culpability and is, therefore, not accessory in nature (as it is with accomplices). The crucial requirement for a finding of common purpose is that all those involved must have had the necessary intention to commit the offence. The liability of a member of a common purpose depends on his own culpability or intention. See *S v Malinga* 1963 (1) SA 692 (A) 694F and *S v Memani* 1990 (2) SACR 4 (Tka) 7B. See also Snyman (note 26 above) at 253 and 256; Joubert (note 30 above) at para 124.

⁴⁷ Snyman (note 26 above) at 273. See also Joubert (note 30 above) at paras 115 and 117.

common purpose, but who nevertheless unlawfully and intentionally furthers its commission by somebody else.⁴⁸

In *S v Williams*, Joubert JA described the important difference between perpetrators and accomplices as follows:⁴⁹

An accomplice's liability is accessory in nature. There can be no mention of an accomplice without a perpetrator or co-perpetrators who commit the crime. A perpetrator complies in all respects with the definition of a crime. Where co-perpetrators commit a crime together, each one complies with the requirements of the definition of the crime. An accomplice, on the other hand, is neither a perpetrator nor a co-perpetrator since he does not have the *actus reus* of the perpetrator. An accomplice consciously reconciles himself with the commission of the crime by the perpetrator or co-perpetrators through consciously providing the perpetrator or co-perpetrators through with the opportunity, means or information which assists in the commission of the crime.

The authors of the *Commentary on the Criminal Procedure Act* take the opposite view that s 1(1)(b) and specifically the phrase 'or an accomplice' does create a form of liability that even exceeds strict liability if it is interpreted to mean that an accomplice proper may be held liable in the absence of fault and for the conduct of others where he does not act in common purpose with other persons. The fact that robbery with aggravating circumstances is not a separate crime is a technicality which cannot detract from the substantive consequences of such a charge.⁵⁰

B Accomplice liability in terms of common law

If one accepts the *Masingili* Court's finding that s 1(1)(b) does not create liability and that an accomplice's liability is governed by common law, the question remains: Can an accomplice be held criminally liable for robbery with aggravating circumstances in terms of the common law in the absence of proof of intention on the part of the accomplice as to the aggravating circumstances? The Court in *Masingili* described the nature of common law accomplice liability as follows:

An accomplice is someone whose actions do not satisfy all the requirements for criminal liability in the definition of an offence, but who nonetheless intentionally furthers the commission of a crime by someone else who does comply with all the requirements (perpetrator). The intent required for accomplice liability is to further the specific crime

⁴⁸ Snyman (note 26 above) at 258.

⁴⁹ 1980 (1) SA 60 (A) 63A (my translation). The original reads:

'n Medepligtige se aanspreeklikheid is aksessories van aard sodat daar geen sprake van 'n medepligtige kan wees sonder 'n dader of mededaders wat die misdaad pleeg nie. 'n Dader voldoen aan al die vereistes van die betrokke misdaadomskriving. Waar mededaders saam die misdaad pleeg, voldoen elke mededader aan al die vereistes van die betrokke misdaadomskriving. Daarenteen is 'n medepligtige nie 'n dader of mededader nie aangesien die dader se *actus reus* by hom ontbreek. 'n Medepligtige vereenselwig hom bewustelik met die pleging van die misdaad deur die dader of mededaders deurdat hy bewustelik behulpsaam is by die pleging van die misdaad of deurdat hy bewustelik die dader of mededaders die geleentheid, die middele of the inligting verskaf wat die pleging van die misdaad bevorder.

⁵⁰ Compare notes 11 and 15 above.

committed by the perpetrator. Upon conviction, an accomplice may receive the same sentence as a perpetrator.⁵¹

The intention required for accomplice liability in terms of common law is therefore that the accomplice must have the intention to further the specific crime committed by the perpetrator, whether with *dolus directus* or *dolus eventualis*. This begs the question: Does the phrase ‘specific crime’ denote only separate crimes or does the phrase also denote different or distinct forms of the same offence?

As discussed, the *Masingili* Court held the relevant specific crime in a case of robbery with aggravating circumstances to be simply robbery based on the central contention that robbery with aggravating circumstances is not a separate crime from robbery as stated by Cameron JA in *Legoa*.⁵² However, Cameron JA also stated in *Legoa*, that while the offences created by the Minimum Sentencing Act are not new offences, they are specific forms of existing offences.⁵³

Robbery with aggravating circumstances may not be a separate offence in the technical sense, but it is, in my view, sufficiently specific and distinguishable from robbery as to require intention with regard to the elements specific to the offence, namely the aggravating circumstances, in order to fulfil the requirement of intent for accomplice liability in terms of common law. As robbery is a specific form of theft and therefore requires proof of intent as to the additional element of violence, so is robbery with aggravating circumstances. It is a crime specific and distinct enough from robbery to require proof of intent with regard to the aggravating circumstances of using a fire-arm or dangerous weapon or inflicting serious bodily harm or threatening to do so.

This position, I would argue, is again supported by the decision of the US Supreme Court in *Rosemond* as discussed within the context of culpability. It simply does not make sense to argue that an accomplice’s choice and personal blameworthiness is cut off at the point where he forms the intention to commit robbery, as opposed to theft. Such a contention would clearly infringe upon the right not to be deprived of one’s freedom arbitrarily or without just cause. The level of culpability of an accomplice proper to robbery is manifestly disproportionate to the potential sentence following a conviction for robbery with aggravated circumstances. It would also infringe unjustifiably upon the presumption of innocence as such an accomplice may be convicted of the offence of robbery with aggravated circumstances where doubt as to his or her culpability exists.

IV CONCLUSION

The Court in *Masingili* found that the convictions of accused 1, the scout, and accused 2, the getaway driver, on charges of robbery with aggravating should stand regardless of the fact that the state did not prove that they had any intention with regard to the aggravating circumstance, namely, the use of the knife. The Court stated the following:

⁵¹ *Masingili* (note 5 above) at para 21.

⁵² *Ibid* at para 22.

⁵³ *Legoa* (note 15 above).

In this matter Ms Masingili and Mr Volo's convictions would stand, as by scouting and driving the getaway vehicle they intentionally furthered the commission of the armed robbery by the other two respondents. It would not matter that they did not wield the knife themselves.⁵⁴

Accused 1 and 2 were accomplices to robbery, not co-perpetrators or persons proven to share a common purpose with the perpetrators who conducted the armed robbery. The fact is that there was no evidence that accused 1 and 2 intentionally furthered the commission of an armed robbery. The state proved only that they intentionally furthered the commission of a robbery. Whether they wielded the knife themselves was indeed irrelevant. However, their intent with regard to the wielding of the knife cannot be deemed as similarly irrelevant.

Such a finding, based on the perfunctory contention that robbery with aggravating circumstances is technically not a separate offence from robbery, is inconsistent with basic tenets of criminal and constitutional law. It constitutes an over simplification of criminal liability, culpability and the requirement of intent, the consequences of which cannot simply be redressed during sentencing procedures.

⁵⁴ *Masingili* (note 5 above) at para 22.

A False Start in the Development of Class Action Law: *Mukaddam and Others v Pioneer Food (Pty) Ltd and Others*

Georgina Jephson*

I INTRODUCTION

Section 38 of the Constitution significantly altered the South African laws governing standing. Section 38(c) permits a person to approach a court to assert their constitutional rights as a member, or in the interests, of a group or class of persons. The introduction of class actions in through s 38 affords those with limited access to justice, and those with claims too small to institute on an individual basis, the opportunity to have their claims adjudicated in court.

Despite the introduction of the broader rules of standing in the Constitution, there has been little use of the class action mechanism in our courts. In the absence of legislation governing class actions (as recommended by the South African Law Commission),¹ the courts are developing the law of class actions.

In *Mukaddam and Others v Pioneer Food (Pty) Ltd and Others*, the Constitutional Court considered class actions in South Africa for the first time in an application for class certification.² The Court decided the appeal on a very narrow basis: it confirmed that the test for certification is the interests of justice and that prior certification is a requirement in non-constitutional class actions, where claims are not based on the alleged infringement of a constitutional right.

Despite the Court's acknowledgement that class actions are an important mechanism to enhance access to justice, its failure to engage with substantive issues and to pronounce finally on class certification undermines the applicability and usefulness of the judgment. *Mukaddam* does not address many aspects of class action litigation, placing the burden on the lower courts to engage with and develop class action law.

In this article, I discuss *Mukaddam* and its implications for class actions in South Africa. Part II briefly describes class actions and their place in South African law pre-*Mukaddam*. In Part III, I address the general nature of standing under s 38 of the Constitution. Part IV sets out the background to *Mukaddam*,

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¹ South African Law Reform Commission *The Recognition of Class Actions and Public Interest Actions in South African Law* (1998) Project 88, available at http://www.justice.gov.za/salrc/reports/r_prj88_classact_1998aug.pdf.

² [2013] ZACC 23, 2013 (5) SA 89 (CC), 2013 (10) BCLR 1135 (CC).

which dealt with a cartel that illegally increased the price of bread. Part V deals with the Constitutional Court's decision in *Mukaddam*. In Part VI I take a critical look at this decision in light of the development of the law of class actions in South Africa.

II CLASS ACTIONS IN SOUTH AFRICAN LAW

A class action is a procedural mechanism which allows the claims (or parts of claims) of a number of persons to be brought against the same defendant/s in a single law suit. One (or more) class representatives institutes an action on their own behalf, as well as on behalf of the other class members who have a claim arising out of the same or a similar alleged cause of action. The class representative's claim shares common questions of law and fact with the claims of the other class members. Only the class representatives are a party to the action and the other members of the class are described and identified in the class definition.³

When a class action is instituted, the identity of all other members of the class may not be known to the class representative. Accordingly, due process requires that adequate notice be given to all potential members of the class so that they are aware of the class action and that they may be bound by the outcome of the class action. The form and content of such notice will vary, depending on the nature of the class action and the position of the members of the class in society.⁴

In addition to informing potential class members of the class action, the notice to the class must include information about how a class member can include or exclude herself from the action, thereby indicating whether she agrees to be bound by any judgment on common issues relating to the class. The way in which class members are bound by a judgment in a class action depends on whether it is an opt-in or opt-out class action. An opt-in class action is one where only those members of the class who specifically 'opt-in', or indicate (in a prescribed manner, for example, by contacting the legal representatives of the class) that they will be bound by any judgment in the class action. In an opt-out class action, all class members are bound by any judgment unless they specifically opt-out of being bound thereby. The class definition will determine who falls within the class. It is therefore crucial that persons are able to determine objectively whether they fall within the class with reference to the class definition.⁵

A judgment in a class action does not elevate class members to the status of parties to the action. However, class members are bound by any court order made in respect of the common issues, be it in their favour or not. Unless class

³ R Mulheron *The Class Action in Common Law Legal Systems: A Comparative Perspective* (2004) 3 quoted by Wallis JA in *Children's Resource Centre Trust and Others v Pioneer Food (Pty) Ltd and Others* [2012] ZASCA 182, 2013 (2) SA 213 (SCA) ('*Children's Resource Centre*') at para 16.

⁴ C Loots 'Standing, Ripeness and Mootness' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, 2008) 7-7. See also SALC *Report on Class Actions* (note 1 above) (Recommends that the requirements for giving notice to the class be included in an Act governing class actions and public interest litigation).

⁵ See, generally, SALC *Report on Class Actions* (note 1 above) (SALC recommended that the court should have the discretion to make an order in respect of the binding effect of a judgment on the members of the class.)

members exercise their right to opt-in or out of a class action, they are precluded from approaching a court to adjudicate the same cause of action on an individual basis.⁶

South African law is familiar with the concept of a number of plaintiffs joining an action to pursue claims against one or more defendants on the basis that their claims share common issues of law and fact.⁷ The notion of a representative plaintiff is also familiar, as curators and/or guardians are empowered to represent persons of certain categories in litigation.

However, the concept of persons benefitting from and being bound by a judgment in a matter to which they have not been formally joined has been (until fairly recently) a relatively foreign one to South African law. The representative action of English law, a procedure of courts of equity, which is the predecessor to the modern class action, was received into many Anglo-American legal systems. However, as the law of equity never became part of South African law, the representative action was never received into South African law in the pre-constitutional dispensation.⁸

III STANDING IN SOUTH AFRICAN COURTS

Prior to the enactment of the Constitution, only persons who had a personal interest in a matter and who had been adversely affected by an alleged wrong had standing to approach a court for relief.⁹ The common law rules of standing only accommodated the adjudication of private disputes between persons who were

⁶ Loots (note 4 above) at 7-7. See also SALC *Report on Class Actions* (note 1 above).

⁷ Rule 10 of the Uniform Rules of Court allows for both plaintiffs and defendants to be joined to proceedings involving the same cause of action.

⁸ Loots (note 4 above) at 7-7. Class actions have, however, been a part of many jurisdictions (including the United States of America, Canada, Australia, Sweden and India) for decades. The United States of America is considered to be the country of origin of the modern class action. It introduced Federal Rule 23(a) of the Federal Rules of Civil Procedure in the 1940's. It provides:

One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

- (1) the class is so numerous that joinder of all members is impracticable;
- (2) there are questions of law or fact common to the class;
- (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
- (4) the representative parties will fairly and adequately protect the interests of the class.

⁹ But see *Wood and Others v Ondwana Tribal Authority and Another* 1975 (2) SA 294 (A) (The Appellate Division sanctioned the only exception to this rule. The court allowed a group of church leaders to seek an interdict on behalf of a large group of persons who were in fear of being illegally arrested, tried and put to death for their political affiliations. An early example of public litigation during apartheid South Africa, the court ensured that the decision had very limited application to matters involving violations of life, liberty or physical integrity only to ensure that it could not be used as a precedent to relax the traditional common law rules of standing.) See, generally, Loots (note 4 above) at 7-2 to 7-3.

directly affected by the alleged wrong.¹⁰ In her discussion about the old order rules governing standing, O'Regan J in *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* noted that:

Existing common law rules of standing have often developed in the context of private litigation. As a general rule, private litigation is concerned with the determination of a dispute between two individuals, in which relief will be specific and, often, retrospective, in that it applies to a set of past events. Such litigation will generally not directly affect people who are not parties to the litigation. In such cases, the plaintiff is both the victim of the harm and the beneficiary of the relief.¹¹

Section 38¹² of the Constitution introduced significant changes to the common law rules of standing by allowing litigants to institute proceedings on behalf of a group or class of persons (s 38(c)) and in the public interest (s 38(d)). Litigation in the public interest has become a popular way of asserting rights in the last twenty years, but there has been significantly less use of the class action mechanism as a tool to place disputes before a court.

It is noteworthy that two (relatively) recent pieces of legislation include provisions which echo s 38(c) of the Constitution. Section 4 of the Consumer Protection Act¹³ and s 157 of the Companies Act¹⁴ allow persons to approach the relevant court or tribunal, panel or commission 'as a member of, or in the interest of, a group of class of affected persons'.

Relatively soon after the promulgation of the Final Constitution, the South African Law Commission (SALC) published a working paper entitled *Recognition of Class Actions and Public Interest Actions in South African Law* (SALC Report on Class Actions).¹⁵ The primary recommendation made by the SALC was that legislation should be introduced to outline the principles underlying public interest actions

¹⁰ The only exception to this rule was sanctioned by the Appellate Division in *Wood and Others v Ondamma Tribal Authority and Another* 1975 (2) SA 294 (A). The court allowed a group of church leaders to seek an interdict on behalf of a large group of persons who were in fear of being illegally arrested, tried and put to death for their political affiliations. An early example of public litigation during apartheid South Africa, the court ensured that the decision had very limited application to matters involving violations of life, liberty or physical integrity only to ensure that it could not be used as a precedent to relax the traditional common law rules of standing. See generally Loots (note 4 above) at 7-2 to 7-3.

¹¹ *Ferreira v Levin No and Others; Vryenhoek and Others v Powell NO and Others* [1995] ZACC 13, 1996 (1) SA 984 (CC) ('*Ferreira v Levin*') at para 229.

¹² Constitution s 38 provides in full:

Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are –

- (a) anyone acting in their own interest;
- (b) anyone acting on behalf of another person who cannot act in their own name;
- (c) anyone acting as a member of, or in the interests of, a group or class of persons;
- (d) anyone acting in the public interest; and
- (e) an association acting in the interest of its members.

¹³ Act 68 of 2008.

¹⁴ Act 71 of 2008.

¹⁵ SALC Report on Class Actions (note 1 above).

and class actions,¹⁶ ‘to ensure a balance between the opening of the doors of access to justice to the masses and flooding the gates with inappropriate or vexatious litigation.’¹⁷ The SALC also recommended that (based on the accepted practice in other jurisdictions including Canada and the United States of America)¹⁸ a class representative is required to obtain class certification: a preliminary application to court for leave to institute an action as a class action.¹⁹

Parliament has not promulgated any legislation to govern class actions,²⁰ but the SALC *Report on Class Actions* provided a broad starting point for the development of class action law; its recommendations have been relied upon by practitioners and the courts in litigating and adjudicating class actions to date.²¹

Section 38(c) of the Constitution allows class actions where there is an alleged infringement of a constitutional right; it does not *prima facie* sanction non-constitutional class actions. The High Court and Supreme Court of Appeal have engaged with class actions falling directly within the ambit of s 38(c) of the Constitution,²² but in *Mukaddam* the Constitutional Court considered a certification application in which the class members’ claim was not based exclusively on an alleged constitutional breach.

IV THE BREAD CLASS ACTION: BACKGROUND

The applications for class certification in the bread class action arose out of various investigations carried out by the Competition Commission into an alleged

¹⁶ The rationale for introducing legislation for class actions is to bring class actions into non-constitutional areas of the law. *Ibid* at 3.1.1.

¹⁷ *Ibid* at para 3.5.1.

¹⁸ For a detailed discussion of the rationale for prior certification, see the decision of Wallis JA in *Children’s Resource Centre* (note 3 above) at para 24.

¹⁹ SALC *Report on Class Actions* (note 1 above) at para 5.5.

²⁰ This failure occurred despite the SALC’s concern that, in the absence of legislation, the development of class actions would be left to the courts which may take place haphazardly or not at all. In *Children’s Resource Centre*, the SCA noted that:

The South African Law Commission, in line with many other jurisdictions to which we have been referred, proposed that the procedures applicable to class actions be prescribed by statute, and to that end prepared a draft Bill. However, Parliament has not yet acted on its recommendations or those of a judicial commission of enquiry which made a similar recommendation. Academic voices over many years have likewise not been heard. *Children’s Resource Centre* (note 3 above) at para 15.

²¹ For example, the SALC recommended a list of factors that must be present for class certification. These are discussed briefly below under the heading ‘The test for certification’.

²² See *Beukes v Krugersdorp Transitional Local Council and Another* 1996 (3) SA 467 (W)(High Court allowed a ratepayer to act in his own interest, as well as in the interest of other ratepayers with a similar complaint to his, in a constitutional challenge to the levying of different taxes according to the area in which ratepayers resided); *Maluleke v MEC, Health and Welfare, Northern Province* 1999 (4) SA 367 (T)(High Court refused to allow a pensioner to act in the interest of other pensioners who were similarly affected by a decision to suspend the payment of old age pensions on the basis that a constitutional right had not been infringed); *Ngxuzza v Secretary, Department of Welfare, Eastern Cape Provincial Government* 2001 (2) SA 609 (E)(‘*Ngxuzza I*’)(Faced with a similar issue to that which was raised in *Maluleke* regarding a decision to suspend the payment of social welfare grants, the High Court found that there had been an infringement of the right to just administrative action and accordingly allowed the applicants to act on behalf of a class of persons similarly affected by the decision in terms of s 38(c) of the Constitution); and *Permanent Secretary, Department of Welfare, Eastern Cape and Another v Ngxuzza and Others* [2001] ZASCA 85, 2001 (4) SA 1184 (SCA)(‘*Ngxuzza II*’)(the SCA upheld the High Court’s decision in *Ngxuzza I* and overturned the decision in *Maluleke*).

bread cartel in the Western Cape. The investigations resulted in the discovery that three bread producers (Pioneer Foods (Pty) Ltd, Tiger Consumer Brands Ltd and Premier Foods Limited) (producers) had agreed to fix the selling price of bread in the province. This amounted to anti-competitive behaviour in violation of the Competition Act.²³

In November 2010, two separate applications for class certification were launched in the Western Cape High Court: one application sought to certify an opt-out class of the consumers of bread in the Western Cape who were affected by the fixing of bread prices (consumer class), and the other sought to certify an opt-in class of the independent distributors of bread who were affected by the fixing of discounts they would receive from the bread producers (distributor class).²⁴ The distributors purchased bread from the producers, and sold it to informal traders from whom consumers bought their bread. The applicants in both applications indicated that, should the classes be certified, they would pursue claims for the payment of damages allegedly suffered as a result of the producers' conduct, acting as representatives of the broader class of plaintiffs who had similar causes of action.

The High Court dismissed both applications for class certification.²⁵ The SCA referred the opt-out consumer class certification application back to the High Court for adjudication,²⁶ and it dismissed the opt-in distributor class appeal.²⁷ Both appeals were heard by the same panel of five judges. The judgments were delivered on the same day and the reasoning in them was the same, except in respect of the certification of an opt-in class action.²⁸

V APPLICATION FOR CLASS CERTIFICATION IN THE CONSTITUTIONAL COURT

As already discussed, prior to the Bread class actions, the High Courts and Supreme Court of Appeal had considered certification applications in constitutional

²³ Act 89 of 1998.

²⁴ The applications were brought on an urgent basis because the s 65 Certificates (which the Competition Act requires to be filed with the Registrar of the court in which proceedings are instituted pursuant to findings made or agreements reached in proceedings before the Competition Commission or Tribunal) were received just prior to the date on which the claims for damages would have prescribed. The two applications were heard together in the High Court and one judgment was handed down.

²⁵ *The Trustees for the time being of the Children's Resource Centre Trust and Others v Pioneer Foods (Pty) Ltd and Others* Case no 25302/10 (Unreported decision of the Western Cape High Court).

²⁶ *Children's Resource Centre* (note 3 above) at paras 90-91. The consumers subsequently brought a new application for certification of the class. However, the case was further delayed by an application by Premier Foods claiming that the s 65 certificate the Competition Commission had issued was invalid because it had participated in the Commission's corporate leniency programme. That argument was upheld by the SCA. See *Premier Foods v Manojm NO* [2015] ZASCA 159, 2016 (1) SA 445 (SCA), [2016] 1 All SA 40 (SCA). The case was settled just before it was due to be heard in the Constitutional Court, clearing the way for the second certification application to be heard in the High Court.

²⁷ *Mukkaddam and Others v Pioneer Food (Pty) Ltd & Others* [2012] ZASCA 183, 2013 (2) SA 254 (SCA) (*Mukkaddam SCA*) at para 15.

²⁸ *Ibid* at para 4 (Nugent JA refers to and adopts the standard for certification laid down in *Children's Resource Centre* (note 3 above).)

class actions. When certification proceedings in *Mukaddam* were launched, neither the common law nor legislation made provision for the certification of non-constitutional class actions not based on the alleged infringement of a fundamental right in the Bill of Rights.

The applicants in *Mukaddam* indicated that, should certification be granted, they would represent the class in pursuing damages claims based on three alternative causes of action: a violation of s 22 of the Constitution,²⁹ anti-competitive behaviour in terms of the Competition Act, and delict.

The Court pronounced on two issues relating to class actions: the test for certification, and when prior certification is a requirement. In a separate judgment, Froneman J made some important observations regarding the certifying court's analysis of the class representatives' *prima facie* case.

The Court, per Jafta J, ultimately upheld the appeal against the SCA's decision and referred the distributor certification application back to the High Court for adjudication, in light of its judgment.³⁰

A The Test for Certification

The Court analysed the relationship between the right of access to justice in s 34 of the Constitution³¹ and the inherent power given to courts to protect and regulate their own process in s 173 of the Constitution.³² The right of access to justice is of fundamental importance in our democratic order, as '[i]t is not only a cornerstone of the democratic architecture but also a vehicle through which the protection of the Constitution itself may be achieved.'³³ But, the guarantee of access to a competent court to have a dispute resolved does not include the right to choose the process to be adopted in placing a dispute before a particular court.³⁴ In exercising the right under s 34 of the Constitution, litigants are required to comply with the court's rules and procedures which enable it to adjudicate a dispute. The rules of court must facilitate (and not hinder) access to courts.³⁵

In addition to the right to protect and regulate their own process, s 173 empowers the courts to develop the common law where necessary, taking into account the interests of justice. Jafta J found that, as the guiding principle in the

²⁹ Constitution s 22 provides: 'Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.' The SCA in *Children's Resource Centre* found that s 22 of the Constitution guarantees a citizen the right to choose their trade or profession, but not the right to succeed once having done so. The claim based on s 22 of the Constitution was accordingly not vigorously pursued in argument before the Constitutional Court. *Children's Resource Centre* (note 3 above).

³⁰ *Mukaddam* (note 2 above) at para 56.

³¹ Constitution s 34 provides: 'Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.'

³² Constitution s 173 provides: 'The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common-law, taking into account the interests of justice.'

³³ *Mukaddam* (note 2 above) at para 29.

³⁴ *Ibid* at para 1.

³⁵ *Ibid* at paras 31-32.

exercise of powers in s 173 of the Constitution is the interests of justice,³⁶ the test to determine whether to certify a class is, also, the interests of justice.³⁶

In *Children's Resource Centre Trust*³⁷ (the SCA's judgment in the consumer class appeal), Wallis JA set out and discussed a list of requirements for certification.³⁸ Nugent JA, who wrote the judgment in *Mukaddam SCA*, (the SCA's judgment in the distributor class appeal) joined Wallis JA in the appeal in *Children's Resource Centre* and adopted the same list of requirements for certification.³⁹

Wallis JA's list of requirements originated from the recommendations made in the SALC *Report on Class Actions*.⁴⁰ The SALC recommended that a class should only be certified if: (a) there is an identifiable class of persons; (b) a cause of action is disclosed; (c) there are issues of fact or law which are common to the class; (d) a suitable representative is available; (e) the interests of justice so requires; and (f) the class action is the appropriate method of proceeding with the action.⁴¹

The Court found that the 'Wallis JA factors' are relevant to the enquiry into whether it is in the interests of justice to certify a class. They are, however, not to be treated as conditions precedent for class certification: '[t]he absence of one or another requirement must not oblige a court to refuse certification where the interests of justice demand otherwise'.⁴² The Court reasoned that the right of access to justice in s 34 of the Constitution, read with the right to approach a court on behalf of a group or class of persons in s 38(c) of the Constitution is unlimited. The power conferred on courts to protect and regulate their own process in s 173 of the Constitution is similarly unlimited – except that what is done must be in the interests of justice. Accordingly, there can be no justification for making the list of requirements jurisdictional facts that must exist in order to certify a class.⁴³

Arguably, it may never be in the interests of justice to certify a class in the absence of one or more of the SCA's criteria for certification. However, the interests of justice test for certification set by the Court is indicative of its acknowledgement of the important role that the class action mechanism plays in the promotion of the right of access to justice. Courts should not be bound to a strict check list of requirements to be met before they can grant certification. Instead, the interests of justice standard allows courts to adopt a flexible approach to certification, allowing for the consideration of other factors in favour (or not) of certifying, in the circumstances of each particular case.

³⁶ Ibid at para 34.

³⁷ *Children's Resource Centre* (note 3 above).

³⁸ Ibid at paras 26-28.

³⁹ See *Mukaddam SCA* (note 27 above) at para 4 (Nugent JA states that 'I have already joined with Wallis JA in the appeal in the *Children's Resource Centre* case in recognising class actions as a permitted procedural device for pursuing claims, where the case calls for it, so as to permit those who are wronged to have access to a court. I need not repeat what will need to be shown for such a class action to be certified.')

⁴⁰ SALC *Report on Class Actions* (note 1 above).

⁴¹ Prior to the Constitutional Court's decision in *Mukaddam*, this list was relied upon by the High Court and SCA in the application for certification in *Ngxuzza I* and *Ngxuzza II* (note 22 above).

⁴² *Mukaddam* (note 2 above) at para 35.

⁴³ Ibid at paras 34-37.

By upholding the appeal, the Court in *Mukaddam* also inadvertently confirmed that non-constitutional class actions are permitted in our law. Instead of classifying class actions as constitutional or non-constitutional, with reference to the basis of the claim, it may be more useful to classify them according to the nature of the relief sought. The source and nature of the class action claim will give rise to different types of relief, be it in the form of a declarator or mandamus, or an award for compensation or damages. The relief sought will determine whether the matter may be disposed of by way of action or application proceedings. It will also dictate which factors are relevant to determine whether it is in the interests of justice to certify a class.

B Prior Certification

Jafta J found that plaintiffs seeking to institute a class action are required to seek leave to do so by way of an application for class certification, prior to the institution of the action.⁴⁴

Prior certification allows courts to maintain control over class actions, ensuring that they are permitted only in circumstances where a class action advances the interests of justice. It would not be in the interests of justice to certify a class action which may be oppressive to the proposed defendants. For example, prior certification will prevent the institution of class actions which are used to induce defendants into financial settlements.⁴⁵

Jafta J qualified his finding in respect of the prior certification requirement and specifically excluded the application of his judgment in that regard to class actions in which plaintiffs seek to enforce constitutional rights against the state. In those circumstances, the class action would fall squarely within the ambit of s 38 of the Constitution, which confers an unlimited right to pursue a class action, without the preliminary step of certification. The Court specifically left open the question whether certification is a requirement in class actions which involve the horizontal application of the Bill of Rights.⁴⁶

In a separate judgment, Mhlantla AJ disagreed with the main judgment insofar as it qualified the circumstances in which prior certification is a requirement. In her view, prior certification should be a requirement in all class actions, regardless of the basis of the class action claim. Certification is important because it allows courts to maintain control over class actions and it affords all potential class members the opportunity to be informed of their rights in respect of the class action.⁴⁷ For Mhlantla AJ, the source and nature of the class action claim is relevant to the certification process and will be a factor to consider in determining what the interests of justice demand in each case.⁴⁸ But it does not obviate the need for certification.

⁴⁴ Ibid at para 38.

⁴⁵ Ibid.

⁴⁶ Ibid at paras 40-41.

⁴⁷ Ibid at paras 59 and 61-62.

⁴⁸ Ibid at para 60.

As discussed briefly above, due process dictates that a person should be notified and informed of any court proceedings which may affect their rights.⁴⁹ The nature of class action litigation is that persons who are not party to the litigation are bound by the outcome. The benefit of certification proceedings is that a decision to certify a class gives rise to notification procedures, affording all potential class members the opportunity to indicate whether they wish to be bound by a judgment in respect of the class. The source and nature of the claim in the class action will assist in shaping the notification strategy to ensure that potential class members are made aware of the litigation.

In qualifying the application of the prior certification rule, Jafta J gives little guidance as to what nature of class action would not require prior certification. The suggestion that constitutional class actions brought against the state ‘assume a public character which necessarily widens the reach of orders issued to cover persons who were not privy to a particular litigation’⁵⁰ supports the argument for prior certification. The broader the potential scope of the outcome to a class action, the greater the need to give class members the opportunity to exercise their rights to opt-in or out of the action.

As Froneman J notes in his separate judgment,⁵¹ the issue of certification in class actions brought under s 38 of the Constitution was not before the Court. Jafta J’s exclusion of prior certification in such class actions is, accordingly, *obiter* and Mhlantla AJ’s reasoning that prior certification should be a requirement in all class actions is to be preferred.⁵²

C The SCA’s decision not to certify

In *Children’s Resource Centre*, the SCA found that the applicants in the consumer class had made out a *prima facie* case and that it would be premature to decide whether their claims were good in law. On that basis, the SCA referred the consumer class certification application back to the High Court for adjudication.⁵³

However, the SCA found that the appeal in the distributor certification application must fail because the alternative bases of the claim were not legally

⁴⁹ See the discussion of notice in JC Alexander *An Introduction to Class Action Procedure in the United States* (Conference Presentation, Geneva, 21-22 July 2000) 7-8, available at <https://www.law.duke.edu/grouplit/papers/classactionalexander.pdf>.

⁵⁰ *Mukaddam* (note 2 above) at para 40.

⁵¹ *Ibid* at para 64.

⁵² Such an approach is in line with Federal Rule 23(c) which requires certification in all class actions and provides:

Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses.

(1) *Certification Order*.

(A) *Time to Issue*. At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.

(B) *Defining the Class; Appointing Class Counsel*. An order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

(C) *Altering or Amending the Order*. An order that grants or denies class certification may be altered or amended before final judgment.

⁵³ *Children’s Resource Centre* (note 3 above) at para 75.

plausible. Nugent JA found that the distributors could not rely on delict, nor could they rely on the Competition Act to make out a *prima facie* case for damages.⁵⁴

In justifying interference with the SCA's decision, Jafta J found that, despite hearing and adjudicating the applications for leave to appeal in both the consumer and distributor class certification applications simultaneously, the SCA erred in adopting a different approach to the two applications in respect of the bases of the respective applicants' claims. He found that the SCA 'decided the very issues which it had declined to consider in *Children's Resource Centre* because it held that their determination in that case would have been premature.'⁵⁵

In his separate concurring judgment, Froneman J (with Skweyiya J concurring) disagreed with the way in which the SCA treated the distributor applicants' claim. In his view, the SCA erred in dismissing the appeal on the basis that there is no action for damages based on s 65(1) of the Competition Act. Froneman J reasoned that it is not yet clear in our law what the nature of such a claim is and, at the early stage of certification, it would be premature to decide finally whether the claim is legally tenable. Complex issues such as the determination of unlawfulness and legal causation (raised by the respondents) should be left for full examination and consideration in the class action, as is the case in any action.⁵⁶

Froneman J enunciates an important aspect of certification proceedings. Courts that are called on to determine applications for class certification should not delve into the merits of the class members' claims to decide whether to certify the class.⁵⁷ The only enquiry at the certification stage should be into whether, in light of all relevant factors in a particular case, it is in the interests of justice to certify the class. The certifying court should consider the prospects of success of the class members' claims, but a deep enquiry into the merits of the claims is not required. After all, there is no determination of liability in certification proceedings and, as in any action, plaintiffs bear the burden of proving their claims and the defendants may raise any and all appropriate defences to the claims levelled against them at the trial stage of the action.

VI *MUKADDAM* AND THE DEVELOPMENT OF THE LAW OF CLASS ACTIONS

The Court's invitation in *Mukaddam* to other courts to embrace class actions as an option for litigants to place disputes before a court,⁵⁸ is a triumph in the pursuit of the realisation of the right of access to justice. In South Africa, there are many people who are poor and vulnerable, who do not have access to information; and who lack access to resources and individual legal representation. The class action mechanism affords such persons who have suffered damage as a result of a similar cause of action enhanced access to justice.⁵⁹

⁵⁴ *Mukaddam SCA* (note 27 above) at paras 9-10.

⁵⁵ *Mukaddam* (note 2 above) at para 51.

⁵⁶ *Ibid* at paras 73-77.

⁵⁷ This approach is in line with the certification procedure in the United States. See Alexander (note 49 above) at 6-7.

⁵⁸ *Mukaddam* (note 2 above) at para 38.

⁵⁹ SALC *Report on Class Actions* (note 1 above).

Class actions also foster judicial economy. They protect the courts from having to entertain numerous claims relating to the same cause of action – an attractive prospect when many court rolls are full and backlogs prevent litigants from getting trial dates timeously. Judgments on the common issues in class actions bind all class members, which can be advantageous to both plaintiffs and defendants, protecting them from having to defend multiple unknown future claims.

A The interests of justice

The interests of justice standard for certification is an appropriately flexible test with a relatively low threshold. Certification proceedings are, after all, a preliminary (procedural) step to determine the appropriateness of using the class action mechanism. Froneman J's view that the court in certification proceedings should not concern itself with issues which are destined to be determined at the trial stage of the class action is correct. It is not the certifying court's role to decide whether the applicants have a legally tenable case.

In its discussions of the need for certification and the advantages thereof, the judgment in *Mukaddam* echoes a general scepticism of class actions. In making the interests of justice the overall standard to be met when certifying a class, the Constitutional Court has struck an appropriate balance between allowing class actions to enhance the right of access to justice, and the improper use of the mechanism to promote interests, other than the best interests of the class members. A stricter or more rigorous test for certification could inhibit rather than promote access to justice.

In setting the test for certification, the Court found that the factors discussed by the SCA in *Children's Resource Centre* are relevant to the determination of where the interests of justice lie. They are not, however, a closed list of requirements for certification. Jafta J did not engage with these factors at all, and future class action litigants or courts of first instance may have to look to the SCA's discussion of these factors for guidance, to the extent that they are relevant.⁶⁰

B Prior Certification and Prescription

An issue with which the Court did not engage (and which was not directly before it) is the effect of the institution of an application for class certification on the class members' claims. Jafta J noted that prior certification is necessary to ensure that class actions which hinder access to justice are kept out of the courts. The downside to the prior certification requirement is that class representatives with damages claims are precluded from issuing summons (to institute the class action, thereby interrupting prescription) until the class has been certified. Certification proceedings may take some years to reach finality (the consumers in the Bread class action launched certification proceedings in November 2010 and they have yet to be finalised), placing class members' claims at risk of prescribing, pending the outcome of the certification application. The certification requirement may,

⁶⁰ *Children's Resource Centre* (note 3 above) at paras 26-28.

accordingly, deny access to justice if the institution of certification proceedings does not interrupt prescription.

Although there is no constitutional authority on the issue, in an *obiter* statement, the SCA in *Children's Resource Centre*, indicated that there may be grounds on which it would be justified to find that the institution of certification proceedings interrupts prescription:

If, as we now hold, an application for certification is the first necessary step in proceedings to pursue a class action there is much to be said for the proposition that, for purposes of prescription, service of the application for certification would be service of process claiming payment of the debt for the purposes of s 15(1) of the Prescription Act. Such an interpretation would be supported by cases where the institution of similar necessary preliminary proceedings have been held to constitute the bringing or commencement of suit for various purposes.⁶¹

The issue of whether the institution of certification proceedings interrupts prescription remains open for consideration by our courts.

C Opting-in or out

The applicants in *Mukaddam* sought to certify an opt-in class. However, apart from finding that the SCA erred in making exceptional circumstances a requirement for opt-in class actions,⁶² there is no discussion of the ways in which members of a class are bound by the outcome to a class action, when an opt-in or opt-out class is appropriate, or how potential class members should be notified of their rights in relation to a class action.

The Court's reluctance to deal with issues of prescription, opt-in and opt-out classes and notice procedures is likely as a result of its reluctance to be the court of first and last instance on issues that have not been ventilated in the lower courts. The certification application in *Mukaddam* was referred back to the High Court, leaving the final pronouncement on these issues for another day.⁶³

VII CONCLUSION

The decision in *Mukaddam* provides little practical assistance to practitioners seeking to institute class actions: the Court missed the opportunity to provide clarity on the basics of class action law.

The Court was asked to decide whether to certify the distributor class, requiring an analysis of the law and applying it to the facts. The Court pronounced on the possibility of non-constitutional class actions, it established the test for certification and it found that the distributor class members' claims are potentially legally plausible. Instead of pronouncing finally on whether the class should be certified, it referred the matter back to the High Court for consideration. Any High Court Judge faced with a reconsideration of the law (as developed in *Mukaddam*) will be

⁶¹ *Children's Resource Centre* (note 3 above) at para 89.

⁶² *Mukaddam* (note 2 above) at para 55.

⁶³ The SCA also referred the consumer class certification application back to the High Court for reconsideration.

hard pressed not to find in favour of certification of the distributor class, which makes the reconsideration of the application an exercise in futility.⁶⁴

The judgment in *Mukaddam* engages very little with the substantive aspects of class actions and the Court missed an opportunity to fully examine and analyse the rationale for class actions and the advantage of the procedural mechanism in the context of our relatively new constitutional democracy. The Court's narrow decision and refusal to make a final pronouncement on certification leaves potential class action litigants and practitioners in the dark as to accessing courts on a class basis, deferring much of the heavy lifting to the lower courts to do, which slows down legal development, and inhibits legal certainty.

POSTSCRIPT

More recently, a class action against 32 South African gold mining companies in relation to the contraction of silicosis and tuberculosis was brought before the Gauteng Local Division for purposes of class certification. Silicosis is an occupational lung disease caused by prolonged inhalation of silica dust while tuberculosis is an infectious disease primarily affecting the lungs, caused by various mycobacteria and spread through the air. This case has garnered much attention not only due to the alleged severity of silicosis and tuberculosis and the value of the claims but also due to the size of the class, estimated at 100 000 claimants.

An important aspect of this class action is the management and administration of the class, given its magnitude. This case has undoubtedly created an opportunity through which class actions in South Africa can be further developed and solidified by the courts.

Judgment was delivered only days before this article went to print. In *Nkala and Others v Harmony Gold Mining Company Ltd and Others* [2016] ZAGPJHC 97 the court certified the silicosis and tuberculosis classes. The court affirmed *Mukaddam* and, after considering the 'Wallis JA factors', found that it is in the interests of justice to certify the classes. It also found that any settlement of a class action that is reached post certification must be approved by the court in order for it to be valid.

⁶⁴ See, generally, LTC Harms 'The Puisne Judge, the Chaos Theory and the Common Law' (2014) 131 *South African Law Journal* 3.