CONSTITUTIONAL LAW

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JURISDICTION

Jurisdiction under section 167(4)(e) of the Constitution

In the year under review, the interpretation of s 167(4)(e) of the Constitution was considered by both the Supreme Court of Appeal in *King & others v Attorneys' Fidelity Fund Board of Control* 2006 (1) SA 474 (SCA) and by the Constitutional Court in *Doctors for Life International v Speaker of the National Assembly* 2006 (6) SA 416 (CC), 2006 (12) BCLR 1399 (discussed further under 'Standing' and 'Public involvement in legislative drafting'). Section 167(4)(e) of the Constitution provides that '[o]nly the Constitutional Court may . . . decide that Parliament or the President has failed to fulfil a constitutional obligation'.

The crisp question before both courts was whether courts other than the Constitutional Court had jurisdiction to decide cases in which it was alleged, in one case, that Parliament, and in the other, that the National Council of Provinces ('NCoP'), had failed adequately to involve members of the public in their legislative drafting processes.

In the *King* case, the appellants challenged the constitutional validity of certain amendments made to the Attorneys Act 53 of 1979 by the Attorneys and Matters Relating to Rules of Court Amendment Act 115 of 1998 on the ground that the amendments did not conform to the requirements of s 59 of the Constitution. This section requires, amongst other things, that the National Assembly must 'facilitate public involvement in the legislative and other processes of the Assembly and its committees'. Although the appellants admitted that there was some public involvement, they contended that it was insufficient. The Court *a quo* dismissed the challenge and leave was granted to appeal to the Supreme Court of Appeal.

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† Some of the discussion in this chapter relies on work published in the Constitutional Law chapter of Juta's Quarterly Review for 2006. My co-authors, Steven Budlender and Adrian Friedman, have kindly consented to my basing aspects of the discussion of the cases here on our work published in the Quarterly Review.

In the *Doctors for Life* case, the applicant approached the Constitutional Court directly alleging that Parliament had failed to fulfil its constitutional obligation to facilitate public involvement when it passed four Bills, namely the Choice on Termination of Pregnancy Amendment Act 38 of 2004; the Sterilisation Amendment Act 3 of 2005; the Traditional Health Practitioners Act 35 of 2004; and the Dental Technicians Amendment Act 24 of 2004. More precisely, its complaint was that the NCoP had failed to invite written submissions and conduct public hearings on these Bills as required by its duty to facilitate public involvement in its legislative processes and those of its committees. Furthermore, the applicant argued that the Constitutional Court was the only court that could hear its application because it involved a failure by Parliament to fulfil its constitutional obligation.

Any interpretation of s 167(4)(e) must be considered alongside s 172(2)(a) of the Constitution which contemplates that disputes concerning the constitutional validity of a statute or conduct of the President will be considered, in the first instance, by the High Courts or the Supreme Court of Appeal, which are given the power to declare any law or conduct that is inconsistent with the Constitution invalid, subject to confirmation by the Constitutional Court. As the Supreme Court of Appeal pointed out in *King*, the co-existence of these provisions requires a determination to be made of the different ways in which the Constitution envisages that statutes may be invalid (para 16).

According to the Supreme Court of Appeal, the Constitution envisages three bases for statutory invalidity. The first of these arises where, although the statue is validly adopted by Parliament, 'its provisions fall outside the scope of Parliament's legislative authority as defined in the Constitution' (ibid). Such cases would include those where it is alleged that the legislation is inconsistent with one or more of the provisions of the Bill of Rights.

The second basis for invalidity is where Parliament fails to observe the manner and form requirements for the adoption of legislation. As an example of such 'manner and form' requirements, the Supreme Court of Appeal cited s 53 of the Constitution which requires, inter alia, that a majority of the members of the National Assembly must be present before a vote is taken on a Bill. In an interesting invocation of Hart's distinction between capacity-limiting and duty-imposing rules (see HLA Hart *The Concept of Law* 2 ed (1994) 68–70), the Supreme Court of Appeal pointed out that procedural requirements that stipulate the prerequisites to validity

do not impose obligations. Rather, they define the limits of capacity. Although the Supreme Court of Appeal accepted that there may be manner and form requirements which impose obligations on the legislature, rather than define the limits of its capacity, it made clear that a requirement such as that found in s 53(1)(a) of the Constitution is an instance of the latter (para 18).

In relation to both these two bases of invalidity, the Supreme Court of Appeal held that it, and the High Courts, have jurisdiction under s 172(2) to make an order of constitutional invalidity (ibid).

Thus it was only in cases involving the third basis for invalidity that the Constitutional Court alone would have jurisdiction. This basis arose where 'Parliament so completely fails to fulfil the positive obligations the Constitution imposes on it that its purported legislative acts are invalid' (para 19). It seems that the Supreme Court of Appeal had in mind, as examples of such obligations, those relating to accountability, responsiveness and openness including the obligation to 'facilitate public involvement in legislative and other processes' contained in s 59(1)(a) of the Constitution (ibid).

In *Doctors for Life*, Ngcobo J expressly endorsed this conclusion and reasoning of the Supreme Court of Appeal, bar one proviso relating to the reference to the extent of the failure implicit in the third basis for invalidity (para 21 fn 16). What this endorsement entails is not entirely clear, however, because Ngcobo J's basis for concluding that only the Constitutional Court has exclusive jurisdiction in cases in which legislation is alleged to be invalid on the ground that the necessary public participation in its production was lacking is not obviously co-extensive with the Supreme Court of Appeal's analysis.

The core of the Supreme Court of Appeal's interpretation of s 167(4)(e) seems to be the distinction between procedural deficiencies which implicate Parliament's capacity and procedural deficiencies which constitute violations of positive obligations. By contrast, Ngcobo J's interpretation of s 167(4)(e) does not deal with disabilities but rather rests on a distinction between two types of obligation, those which are readily ascertainable and those which are not.

According to Ngcobo J, the purpose underlying s 167(4) of the Constitution is that disputes that relate to the sensitive area of the separation of powers must be decided by the Constitutional Court alone (para 24). Therefore, on Ngcobo J's analysis, 'the closer the issues to be decided are to the sensitive area of separation of powers, the more likely it is that the issues will fall within s 167(4)' (ibid). It

follows, therefore, that where a dispute will require a court to decide a crucial political question and thus intrude into the domain of Parliament, the dispute will more likely be one for the exclusive jurisdiction of the Constitutional Court (ibid).

In giving content to the notion of 'a crucial political question', Ngcobo J relied on a distinction between constitutional provisions that impose obligations that are readily ascertainable and are unlikely to give rise to disputes, on the one hand, and those provisions which impose the primary obligation on Parliament to determine what is required of it, on the other (para 25).

According to Ngcobo J, because a determination whether the former type of obligation has been fulfilled does not trench upon the sensitive area of the separation of powers, such a decision would not necessarily fall within the exclusive jurisdiction of the Constitutional Court (ibid). By contrast, however, where the obligation requires Parliament, in the first place, to determine what is necessary to fulfil its obligation, any review by a court to resolve whether Parliament has complied with its obligations implicates the autonomy of Parliament to regulate its own affairs and hence the separation of powers. This sort of intrusion is reserved for the Constitutional Court alone (paras 26–7).

There are two features of the *Doctors for Life* and *King* judgments which merit comment. The first of these relates to the procedural implications of the Constitutional Court's distinction between readily ascertainable and non-readily ascertainable obligations. The second deals with the question, already foreshadowed, whether it is possible to read the *King* and *Doctors for Life* judgments consistently.

At first blush it may seem curious to determine the ambit of the Constitutional Court's exclusive jurisdiction on the basis of the type of obligation imposed. However, if one considers the distinction within the framework of Parliamentary discretion, it may become clearer. To the extent that the Constitution places a duty on the legislature, compliance with which admits of little to no discretion on the part of that legislature — such as the case where the Constitution requires that statutes be passed by a specified majority — a court's determination on the matter will not invade the area of legislative discretion. However, where the constitutional obligation leaves a certain amount of discretion to the legislature in so far as it is empowered to regulate its own affairs, a decision by a court that the legislature has failed to fulfil that obligation requires the court to assess the lawfulness of the legislature's exercise of discretion. Such a determination necessarily has implications for the separation of powers and thus ought to be reserved for the Constitutional Court.

It is interesting to note the logical conclusion of this argument: Obligations which are readily ascertainable will fall within the jurisdiction of courts other than the Constitutional Court.

It would seem to follow from this that where an applicant alleges that the President or Parliament has failed to fulfil a constitutional obligation, the High Courts must have jurisdiction to determine whether the obligation is readily ascertainable, given that they will have jurisdiction if that obligation is, indeed, readily ascertainable. However, when they conclude that it is not readily ascertainable, they will not have jurisdiction to resolve the matter as only the Constitutional Court has jurisdiction to resolve such disputes. It remains an open question in such scenarios whether first approaching the High Courts will be the correct procedure to adopt.

In so far as reading the *King* and *Doctors for Life* judgments consistently is concerned, one might be inclined to conclude that Ngcobo J's class of 'readily ascertainable' obligations is co-extensive with the Supreme Court of Appeal's class of capacity-limiting rules. As an example of the former, Ngcobo J refers to s 74(2)(a) of the Constitution which requires a two-thirds majority vote of the members of the National Assembly in order to effect an amendment to Chapter 2 of the Constitution, and as an example of the latter, the Supreme Court of Appeal refers to s 53(1)(a) of the Constitution which requires that a majority of the members of the National Assembly be present before a vote may be taken on a Bill or an amendment to a Bill.

Both seem to stipulate procedural pre-requisites for the enactment of valid statutes. However, Ngcobo J identifies the former as an 'obligation' imposed on the legislature whereas the Supreme Court of Appeal classifies the latter as a type of capacity-limiting rule which it expressly distinguishes from obligation-imposing rules (*King* para 18). Although the Supreme Court of Appeal acknowledges that some requirements of manner and form may impose obligations as opposed to disabilities, it makes clear that where Parliament purports to adopt a Bill that fails to receive a majority of the votes cast, it does not breach an obligation but rather fails to legislate at all (ibid). If the requirement that a majority vote is required for the passing of an 'ordinary' Bill constitutes a capacity-limiting rule, it seems odd that the requirement that a two-thirds majority vote is required to pass a Bill amending Chapter 2 of the Constitution is an obligation-imposing rule. If these two rules are of the same type then either the Constitutional Court is wrong in thinking that they are duty-imposing or the Supreme Court of Appeal is wrong in thinking they are capacity-limiting.

It may be asked, however, what turns on this classification. Whether one classifies the rule as imposing a disability or a readily ascertainable duty, the consequence is the same: the High Courts and the Supreme Court of Appeal will have jurisdiction to decide the case under s 172(2) of the Constitution.

However, the first thing to note in response to this contention is that the ambit of the courts' jurisdiction may be different depending on whether the reasoning of *King* or *Doctors for Life* is adopted. The ambit of the High Courts' and the Supreme Court of Appeal's jurisdiction is potentially wider on the Constitutional Court's analysis than on the Supreme Court of Appeal's. On one reading of the *King* judgment, all questions whether Parliament has failed to fulfil an obligation are crucial political questions and hence beyond the jurisdiction of the Supreme Court of Appeal and the High Courts. By contrast, according to the Constitutional Court, the question of the fulfilment of only certain types of obligation engages a crucial political question. Thus on the Constitutional Court's analysis, disputes about a certain type of Parliament's obligations, namely those which are readily ascertainable, may be determined by courts other than the Constitutional Court.

There is, however, another reading of the Supreme Court of Appeal's judgment in *King* which tends to suggest that the ambit of the different courts' jurisdiction may be equivalent to that advanced by the Constitutional Court. This alternative reading of the *King* judgment would emphasise the fact that the Supreme Court of Appeal does not state expressly that *all* cases which deal with Parliament's constitutional obligations will fall outside its and the High Courts' jurisdiction. Rather, the Supreme Court of Appeal qualifies those questions about Parliament's obligations which are crucially political with reference to the extent of Parliament's breach, i e those in which Parliament has 'so renounced its constitutional obligations that it ceases to be or to act as the body the Constitution envisages and thus ceases to have legislative authority . . .' (para 23).

According to the Supreme Court of Appeal, the question whether such an extreme has been reached is a question reserved for the Constitutional Court. This distinction between degrees of breach may thus be taken to be similar to the distinction drawn by the Constitutional Court between readily ascertainable obligations and others.

However, even if the ambit of their respective jurisdictions is the same on either the Supreme Court of Appeal's or the Constitutional

Court's analysis, the basis for that jurisdiction is distinct. The distinction, which the Constitutional Court draws, qualifies the nature of the obligation, whereas the distinction which the Supreme Court of Appeal adopts qualifies the extent of Parliament's breach. Furthermore, it should be borne in mind that Ngcobo J expressly doubts the validity of the Supreme Court of Appeal's emphasis on the extent of Parliament's breach as relevant to the question of the ambit of s 167(4)(e) (*Doctors for Life* para 21 fn 16).

In so far as the basis of jurisdiction is concerned, it may be argued that the Supreme Court of Appeal's approach, which relies on the distinction between disabilities and duties, squares better with the text of s 167(4)(e) than does the Constitutional Court's distinction between readily ascertainable obligations and others. Section 167(4)(e) refers only to 'obligation' and does not, on its face, make any reference to different kinds of obligation. Thus to explain the fact that the Supreme Court of Appeal and the High Courts have jurisdiction in cases involving disabilities, but not those involving 'obligations' remains faithful to the express wording of s 167(4)(e) and does not require the reading-in of an implied distinction between readily ascertainable and other obligations.

This advantage of the Supreme Court of Appeal's analysis is, however, only sustained if there is no qualification to the extent of Parliament's breach which converts the question into a crucial political one and hence places it beyond the jurisdiction of the Supreme Court of Appeal. If the extent of the breach is material to the question whether the question is a crucial political one, then the Supreme Court of Appeal's approach is as much dependent on a reading-in of an implied distinction between degrees of breach as the Constitutional Court's approach is dependent on a reading-in of an implied distinction between readily ascertainable obligations and others.

Given that Ngcobo J expressly endorsed the conclusion and reasoning of the Supreme Court of Appeal in relation to the third basis for invalidity in the *King* case, one would suppose that the two judgments are capable of a consistent reading. The aforegoing discussion seeks to highlight some of the different implications of the two courts' approaches. In so far as their similarities are concerned, both courts seem to have treated the question whether the Constitutional Court has exclusive jurisdiction as a matter of degree. For the Supreme Court of Appeal, the degree was a function of the extent of the breach, and for the Constitutional Court, the degree was a function of the ease with which the obligation

could be determined. It is important to note, however, that in cases in which Parliament 'so completely failed' to observe a readily ascertainable obligation, it would seem that on the Supreme Court of Appeal's reasoning only the Constitutional Court would have jurisdiction, whereas on the Constitutional Court's reasoning, this would be a question which the High Courts and the Supreme Court of Appeal could determine.

Jurisdiction of the Constitutional Court vis-à-vis the Electoral Court

In *African Christian Democratic Party v Electoral Commission* 2006 (3) SA 305 (CC), 2005 (6) BCLR 579 the Constitutional Court was required to determine the meaning of s 96(1) of the Electoral Act 73 of 1998, which states that the 'Electoral Court has final jurisdiction in respect of all electoral disputes and complaints about infringements of the Code, and no decision or order of the Electoral Court is subject to appeal or review'.

The case involved an urgent application for leave to appeal against a judgment of the Electoral Court in which it refused to interfere with a decision of the Electoral Commission excluding the applicant from contesting the local government elections in the Cape Town Metropolitan Council. Although the Court was split 10–1 on the merits in the case, the determination of jurisdiction is at the very least impliedly assented to by Skweyiya J in that he presented a dissent on the merits and did not refuse to engage with them on jurisdictional grounds.

The Constitutional Court established that s 96(1) of the Electoral Act does not apply to disputes arising from municipal elections and therefore cannot be said to oust the jurisdiction of the Constitutional Court to hear an appeal from a decision of the Electoral Court on a matter relating to municipal elections (para 15). In reaching this conclusion, the court stressed that legislation should not be presumed to have intended to oust the jurisdiction of the Constitutional Court when it does not expressly state as much. The court specifically left open the more fundamental question whether its jurisdiction in constitutional matters could ever be ousted without offending the Constitution (ibid).

MOOTNESS

AAA Investments (Pty) Ltd v Micro Finance Regulatory Council 2007 (1) SA 343 (CC), 2006 (11) BCLR 1255 (discussed further under 'Exercise of Public Power') presented the Constitutional Court with an opportunity to develop its approach to mootness in constitu-

tional matters. In this case, the question arose whether the Constitution applies to rules made by the Micro Finance Regulatory Council ('the Council') aimed at regulating the micro-lending sector. The Supreme Court of Appeal in *Micro Finance Regulatory Council v AAA Investments (Pty) Ltd* 2006 (1) SA 27 (SCA) had held that the Constitution did not apply to the Council's rules because the rules operated only in the private sphere by reason of a contractual relationship between the Council and those micro-lenders registered with it (para 4). This case is discussed further in the chapters on Company Law and Financial Institutions and Stock Exchanges.

Even at the stage that the matter was heard in the Supreme Court of Appeal, the exemption notice issued by the Minister at issue in the case had been replaced by a new exemption notice. This new notice set out the rules determined by the Council and provided that they were rules prescribed by the Minister. In other words, the Council's rules were deemed to be the Minister's rules under the new regime and were hence brought within the ambit of the public sphere.

The Council had contended before the Supreme Court of Appeal that the publication of the new notice rendered the issue moot. However, when this point was dismissed by the Supreme Court of Appeal, it was not pursued before the Constitutional Court (para 12).

Despite this, however, the Constitutional Court held that the possibility of mootness was so strong in the case that this consideration had to be weighed in the interests of justice in relation to the application for leave to appeal (para 27).

While the Constitutional Court held that 'the issues may well be moot' (ibid — it should be noted that in his concurrence with the majority on this issue, Langa CJ held that the issues were moot (para 67)) it ultimately concluded that this should not preclude the court from dealing with the main issues in the case. It noted in this regard that there were conflicting judgments from the High Court and the Supreme Court of Appeal on whether the rules had been validly made and that the judgment of the Supreme Court of Appeal would remain binding in respect of future regulation of the industry. The Constitutional Court therefore unanimously concluded that, notwithstanding the issue of mootness, certain of the issues raised were 'so crucial to important aspects of government as well as the rights contained in the Bill of Rights that it [would be] in the interests of justice to grant leave to appeal' in respect of those issues (para 27).

This judgment marks a progression in the Constitutional Court's approach to mootness. Previously, it had held that 'a prerequisite for the exercise of the discretion [to hear a matter that is moot] is

that any order which this Court may make will have some practical effect either on the parties or on others' (*Independent Electoral Commission v Langeberg Municipality* 2001 (3) SA 925 (CC) para 11). The case broadens the class of cases which have practical effect. In this case, the 'practical effect' consisted of important issues of government and rights which had received different treatment by the High Court and the Supreme Court of Appeal (*AAA Investments* para 27). In seems, therefore, that the precedential value of the Supreme Court of Appeal's determination that the Council exercised private power in the circumstances was an issue important enough to the Constitutional Court to overturn that considerations of mootness were not to stand in its way.

Inherent Powers of Courts to Regulate Their Own Processes

The case of *Phillips & others v NDPP* 2006 (1) SA 505 (CC), 2006 (2) BCLR 274 (also discussed in the chapter on Criminal Procedure) concerned the nature of a restraint order under s 26 of the Prevention of Organised Crime Act 121 of 1998 ('POCA') and the circumstances in which it may be varied or rescinded by the court that granted it.

Section 26(1) provides:

> 'The National Director may by way of an *ex parte* application apply to a competent High Court for an order prohibiting any person, subject to such conditions and exceptions as may be specified in the order, from dealing in any manner with any property to which the order relates.'

The primary issue in the case was whether the High Court had the power to rescind an order it had made in terms of s 26 of POCA on grounds other than those specified by the Act. The Supreme Court of Appeal and the High Court differed on this question, with the Supreme Court of Appeal holding that the High Court did not have such power (see *Phillips v NDPP* 2003 (6) SA 447 (SCA)). The applicants unsuccessfully appealed to the Constitutional Court against this judgment.

The background to their appeal to the Constitutional Court began with an application to the High Court for the rescission of a restraint order which had previously been granted by the High Court under s 26(1) of POCA. In the High Court, the applicants did not seek to make out a case for the rescission of the order based on the grounds of rescission specified in s 26(10)(a) of POCA which provides as follows:

> '26(10) A High Court which made a restraint order —
> (a) may on application by a person affected by that order vary or rescind

the restraint order or an order authorising the seizure of the property concerned or other ancillary order if it is satisfied —

(i) that the operation of the order concerned will deprive the applicant of the means to provide for his or her reasonable living expenses and cause undue hardship for the applicant; and

(ii) that the hardship that the applicant will suffer as a result of the order outweighs the risk that the property concerned may be destroyed, lost, damaged, concealed or transferred.'

In fact, the applicants did not seek relief under any of the provisions of POCA, despite the fact that the restraint order was granted in terms of s 26(1) and (3) of the Act. Instead, the applicants sought to make out their cause of action for rescission of the order on the basis of the inherent jurisdiction of the High Court, which is now entrenched in s 173 of the Constitution, to protect and regulate its own process, and to develop the common law by taking into account the interests of justice.

In response, the National Director of Public Prosecutions contended that the only grounds upon which the order could be rescinded were those set out in s 26(10) of POCA and therefore maintained that, as no such case had been made out on the applicants' papers, the application had to fail.

The High Court found for the applicants on the basis that upon a proper construction, s 26(10)(a) does not take away the inherent power of the High Court to vary or rescind its order under the common law (*Philips* para 19).

The Supreme Court of Appeal reversed the High Court's decision on the basis that the initial restraint order was not one that could be granted under the common law. If its grant depended on the invocation of the provisions of POCA, then the power to vary or rescind must also be located in POCA (para 25). Therefore the Supreme Court of Appeal concluded that a court which grants a restraint order in terms of s 26(1) of POCA has no inherent jurisdiction to rescind that order (para 27).

In the Constitutional Court, the applicants alleged that there were two possible constructions which could be given to s 26 of POCA. The first of these would allow the High Court, in the exercise of its inherent power, to set aside a restraint order made under the Act on common-law grounds. This, according to the applicants, was the construction of the provision which promoted the spirit, purport and objects of the Bill of Rights (para 35). The second possible construction was that adopted by the Supreme Court of Appeal in terms of which the grounds for rescission provided by POCA consti-

tute a closed list such that a High Court is not empowered to rescind a restraint order on grounds other than those specified in POCA (para 36). This latter interpretation was not, according to the applicants, constitutionally compliant. The applicants did not, however, directly challenge s 26 of POCA as unconstitutional on the construction adopted by the Supreme Court of Appeal.

Skweyiya J, writing for a unanimous court, held that s 26 was not capable of the construction proffered by the applicants (para 37). The rationale behind this conclusion seems to have been the emphasis placed in previous judgments of the Constitutional Court (specifically, *S v Pennington* 1997 (4) SA 1076 (CC) para 22, and *Parbhoo v Getz NO* 1997 (4) SA 1095 (CC) paras 4–5) on the fact that the power in s 173 to protect and regulate relates to the process of court and arises when there is a legislative lacuna in the process (para 48). In this case, there was no legislative lacuna; in fact, the statute laid out the specific bases upon which rescission of a restraint order could be granted.

Thus, by failing to attempt to bring their application within the terms of POCA, the applicants had ignored the statutory provisions of an Act of Parliament. This was not competent, according to Skweyiya J. Although he did not provide a comprehensive interpretation of the meaning of s 173 of the Constitution, he did state unequivocally that a statutory provision could not simply be ignored and reliance placed directly on the Constitution, nor, indeed, the common law (paras 50–1). Furthermore, he expressed doubt as to whether the inherent jurisdiction of the courts under s 173 was such that it empowered a judge of the High Court to make orders which negated the unambiguous expression of the legislative will (para 52).

After concluding that s 26 did not admit of the construction placed on it by the applicants, Skweyiya J did speculate that the alternative construction of the section (that is, the one adopted by the Supreme Court of Appeal) might be inconsistent with the Constitution. However, he emphasised that that case had not been made out by the applicants on their papers. Given, therefore, that there was no direct challenge to the constitutionality of s 26, the Constitutional Court held that the interpretation of the section adopted by the Supreme Court of Appeal ought to stand.

It is significant that, as Skweyiya J's judgment emphasised, the constitutional issues in this case were raised only before the Constitutional Court. Thus neither the High Court nor the Supreme Court of Appeal had heard argument on the constitutional issues

(para 38). Although Skweyiya J expressly left open the possibility hat there may be cases in which it would be permissible to raise a constitutional matter for the first time on appeal to the Constitutional Court, such cases would have to be exceptional, and this was not one (para 43). Furthermore, in the Constitutional Court, instead of challenging the constitutionality of s 26, the applicants had invoked the Constitution as an interpretive tool in respect of s 26. Skweyiya J branded this sort of challenge, a *collateral* attack on the statute, which he held, was not ordinarily permissible (ibid). According to Skweyiya J:

> 'The constitutional challenge should be explicit, with due notice to all affected. This requirement ensures that the correct order is made; that all interested parties have an opportunity to make representations; that the relevant evidence can, if necessary, be led and that the requirements of the separation of powers are respected.' (ibid)

It cannot be disputed that notice to parties is of critical importance when constitutional challenges are made. In cases where only an interpretive argument is made, however, what is the rationale for notice not formally being a prerequisite? The oversight role which the Constitutional Court plays in order to strike the correct balance between the different branches of the state applies only in cases where declarations of invalidity are granted by lower courts, and not in cases where lower courts interpret legislation in conformity with the spirit, purport and objects of the Bill of Rights as they are required to do in terms of s 39(2). Because interpretation in accordance with s 39(2) is always circumscribed by the meanings which the language can reasonably encompass (*Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit* 2001 (1) SA 545 (CC) para 24), the exercise is restrained in a way that declaring a legislative provision to be constitutionally invalid is not. It may be that because the implication for the principle of the separation of powers is arguably greater in respect of the latter exercise than in relation to the former, notice is required to be given to the representatives of the other branches of the State.

Currie and De Waal have suggested at least one argument which justifies the notice requirement in cases where the Constitution is directly applicable to legislation, as opposed to those cases in which it is only indirectly applicable through s 39(2). Relying on Ackermann and Sachs JJ's judgments in *Du Plessis v De Klerk* 1996 (3) SA 850 (CC), 1996 (5) BCLR 658, Currie and De Waal argue that 'direct application [of the Bill of Rights] rules out certain possibili-

ties as constitutionally impermissible, whereas indirect application merely proposes a construction of the law that conforms to the Constitution' (*Bill of Rights Handbook* 5 ed (2005) 74). This suggests that the legislature's legitimate interest in the former is greater than the latter because of the greater limitation placed on the legislature's discretion to amend or enact similar legislation in cases where an order of invalidity is granted. Although the authors concede that even in cases of direct application, the extent of the limitation to the legislature's discretion will depend on the extent to which the court is prepared to 'pronounce on the meaning' of the Constitution, they assert that 'direct application however inevitably rules out certain options' (ibid).

It seems to me, however that there is an argument to be made that the indirect application of the Bill of Rights to legislative provisions may be *as limiting* to the legislature's options as direct application of the Bill of Rights.

Currie and De Waal distinguish the effect of direct and indirect application on the basis that the former rules out certain possibilities as constitutionally impermissible, whereas the latter merely proposes a constitutionally compliant construction of the law. There is, to my mind, a false distinction at the base of this comparison. When a court is called on to adopt an interpretation of legislation that promotes the spirit, purport and objects of the Bill of Rights, such an invocation is premised on the notion that there are interpretations of the legislation which do not promote the spirit, purport and objects of the Bill of Rights. The case brought by the applicants in *Phillips*, discussed above, bears this out: According to the applicants, there were two possible constructions of s 26 of POCA — one which promoted the spirit, purport and objects of the Bill of Rights (which, I will term 'interpretation *X*') and one which did not (in other words, interpretation *not-X*). The Constitutional Court held against the applicants essentially on the basis that the section was not capable of interpretation *X*. But consider the import of a determination, by the Constitutional Court, that the legislation could admit of such an interpretation.

If the legislation could admit of such an interpretation then the court would have been required to adopt it given the injunction contained in s 39(2). Implicit in any such determination that a legislative provision ought to be given interpretation *X* in order to promote the spirit, purport and objects of the Bill of Rights is the proposition that giving the provision interpretation *not-X* would not promote the spirit, purport and objects of the Bill of Rights. If it is part of a court's determination that a provision must, in terms of

s 39(2), be given interpretation *X* that giving it interpretation *not-X* would not promote the spirit, purport and objects of the Bill of Rights, how is such a determination any less an instance of ruling out what is constitutionally impermissible than a declaration of invalidity? What is constitutionally impermissible is interpretation *not-X*.

If, after such a determination by the court, the legislature decided to amend the legislation or enact similar legislation, why would it be any freer to enact legislation with interpretation *not-X*, than it would be to enact legislation which was inconsistent with a declaration of invalidity granted by the Constitutional Court? If it is implicit in a court's determination that interpretation *X* promotes the spirit, purport and objects of the Bill of Rights that interpretation *not-X* does not, then a subsequent amendment of the relevant legislative provision unequivocally to admit of only interpretation *not-X*, must be 'ruled out' in the same way that the re-enactment of a legislative provision which the Constitutional Court had declared to be invalid in terms of s 172(1)(a) of the Constitution would be.[1]

It may be argued that the crucial distinction between work done by the courts through ss 172(1)(a) and 39(2) is that in the former case invalidity flows expressly from the declaration granted by the court whereas no equivalent invalidity flows from an interpretive exercise. However, as is highlighted later in this chapter in relation to the Constitutional Court's declarator judgment in *Minister of Health v New Clicks South Africa (Pty) Ltd; In re: Application for Declaratory Relief* 2006 (8) BCLR 872 (CC) (discussed under 'Remedial power of courts') the Constitutional Court has long held that the theory of objective invalidity implies that a given law is invalid from the moment it is in conflict with the Constitution, and not from the moment that the court declares it to be so. The declaration of invalidity is not, therefore, what makes the law invalid; it is simply what declares it to be so. The argument I advance here suggests that implicit in the interpretive work done by courts through s 39(2) is a declaration that interpretation *not-X* is constitutionally inconsistent.

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[1] It must be emphasised that there may be a number of interpretations of a legislative provisions which promote the spirit, purport and objects of the Bill of Rights. The argument I advance here does not deny this. All that the argument asserts is that when a court determines that interpretation *X* promotes the spirit, purport and objects of the Bill of Rights, it in turn concludes that interpretation *not-X* does not. When it does so, the court does not determine that *only* interpretation *X* promotes the spirit, purport and objects of the Bill of Rights.

As Roederer has pointed out, the implications of the distinction between direct and indirect application of the Bill of Rights offered by Currie and De Waal are based on the proposition that direct application is about conflict between the law and the Bill of Rights, whereas indirect application is not about conflict but about avoidance of conflict through interpretation (Roederer 'Post-Matrix Legal Reasoning: Horizontality and the Rule of Values in South African Law' 19 *SAJHR* (2003) 57, 78–9). If my argument here is accepted, this proposition is called into question because every interpretation in terms of s 39(2) carries an implicit determination of conflict, namely, that interpretation *not-X* is inconsistent with the spirit, purport and objects of the Bill of Rights.

There are at least two procedural implications of a narrowing of the distinction between direct and indirect application of the Bill of Rights which I have advanced above. The first is that the narrower the gap between these two exercises, the greater becomes the need for notice to be given to the relevant Minister responsible for the legislation at issue in cases in which only interpretive arguments are advanced. The second is that the rationale for requiring Constitutional Court confirmation only of declarations of invalidity and not of the interpretive exercises of lower courts is called into question. These procedural implications alone may provide reason enough for not narrowing the gap between direct and indirect application of the Bill of Rights. However, the existence of any gap must be capable of justification and in so far as the impact of these two exercises on the ambit of legislative discretion is concerned, I struggle to see that justification.

It should be noted that the extensive debate which has waged between academics over the implications of direct versus indirect application of the Constitution has tended to focus on the indirect application of the Bill of Rights to the common law and not indirect application of the Bill of Rights to legislation despite the fact that the injunction in s 39(2) refers to the interpretation of legislation as well as the development of the common law. It is important to stress that my comments here relate only to the indirect application of the Bill of Rights to legislative provisions. To follow the debate over the indirect application of the Bill of Rights to the common law see Sprigman & Osborne 'Du Plessis is *Not* Dead: South Africa's 1996 Constitution and the Application of the Bill of Rights to Private Disputes' 15 *SAJHR* (1999) 25 and Roederer op cit 57.

STANDING

In *Doctors for Life International v Speaker of the National Assembly* 2006 (6) SA 416 (CC), 2006 (12) BCLR 1399 (discussed further under 'Jurisdiction' and 'Public involvement in legislative drafting' Ngcobo J held that the Constitutional Court will only consider an application to declare legislation invalid on the ground that there was a failure to allow for public participation where the applicant has sought and been denied an opportunity to be heard on the relevant Bills, and where the applicant has launched his or her application for relief in the Constitutional Court as soon as practicable after the Bills had been promulgated (para 216). This is, as Ngcobo J accepts, a substantially different approach to standing to that mandated by s 38 of the Constitution in respect of breaches of fundamental rights (para 217). However, it appears to be a sensible and pragmatic approach to avoid improper intrusions into the domain of Parliament and to avoid legislation being challenged on these grounds long after its enactment.

INTERGOVERNMENTAL DISPUTE BETWEEN ORGANS OF STATE

In the case of *Minister of Education, Western Cape & others v Governing Body, Mikro Primary School* 2006 (1) SA 1 (SCA) the respondent was an Afrikaans-medium public school, the governing body of which refused to accede to a request by the Western Cape Education Department to change the language policy of the school so as to convert it into a parallel-medium school. In response to a subsequent directive by the Head of Education, Western Cape Education Department to the principal of the school to admit certain learners and to have them taught in English, the school unsuccessfully appealed to the Western Cape Minister of Education. As a result of this unsuccessful appeal, the school, together with its governing body, launched an urgent application to the Cape Provincial Division for an order setting aside the directive and the decision on appeal, as well as for ancillary relief. The application was successful in the High Court (*Governing Body, Mikro Primary School v Minister of Education, Western Cape* 2005 (3) SA 504 (C)) and the first and second appellants were granted leave to appeal against the judgment to the Supreme Court of Appeal. In resisting the application in the High Court, the appellants had argued that the High Court proceedings were premature because the school, as an organ of state was required, in terms of s 41(1)(h)(vi) of the Constitution, as well as s 7(2)(a) of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA'), to exhaust the options provided in the Norms and Stan-

dards (promulgated by the Minister in terms of s 6(1) of the South African Schools Act 84 of 1996).

Key to the application of these provisions was the question whether a school is an 'organ of state'. An organ of state is defined in s 239 of the Constitution as follows:

> '"organ of State" means —
> (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 a judicial officer.'

The Supreme Court of Appeal noted that in holding that the school was not an organ of state (and was hence intended by the legislature to be independent of state or government control in the performance of its functions), the High Court had relied on the judgment of Van Dijkhorst J in *Directory Advertising Cost Cutters v Minister for Posts, Telecommunications and Broadcasting* 1996 (3) SA 800 (T) (para 19). However, it held that the High Court had erred in adopting the reasoning in this case (para 20) since Van Dijkhorst J's decision had been based on the definition of 'organ of state' in the interim Constitution and that definition has been comprehensively changed in the 1996 Constitution. In the interim Constitution, only institutions that were under the direct control of government were considered to be 'organs of state'. By contrast, on the definition provided in s 239 of the Constitution, the Supreme Court of Appeal concluded that the school was, indeed, an organ of state as it was an institution performing a public function in terms of the South African Schools Act 84 of 1996 (ibid).

Although the Supreme Court of Appeal held that the school qualified as an organ of state, this determination did not entail that the provisions of s 41(1)(h)(vi) of the Constitution applied to it. Relying on the dicta of the Constitutional Court in *Independent Electoral Commission v Langeberg Municipality* 2001 (3) SA 925 (CC) the Supreme Court of Appeal held that, for the purposes of s 41 of the Constitution, an intergovernmental dispute was 'a dispute between parties that [were] part of government in the sense of being either a sphere of government or an organ of State within a sphere of government' (*Langeberg* para 21). Just as the Independent Electoral Commission was not subject to national executive control and was not an organ of state *within the national sphere of government*,

the school, at least insofar as the determination of a language and admission policy was concerned, was similarly not subject to executive control at the national, provincial or local level and thus could not be said to form part of any sphere of government (*Mikro* para 22). Accordingly, the Supreme Court of Appeal held that the High Court had correctly rejected the appellants' argument that the dispute over the school's language and admission policy was an intergovernmental dispute within the meaning of s 41(3) of the Constitution (ibid).

Whether organs of state are subject to the requirements of s 41 therefore depends on whether they fall within a sphere of government, and that question is to be answered in the affirmative if the organ of state is subject to executive control at the national, provincial or local level of government. This case is discussed from the perspective of the right to education in the chapter on Bill of Rights Jurisprudence.

Exercise of Public Power

In the case of *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council* 2007 (1) SA 343 (CC), 2006 (11) BCLR 1255 (CC) (also discussed under 'Mootness') the Constitutional Court upheld the validity of certain rules made by the Micro Finance Regulatory Council ('the Council') by a majority of 10. Two separate concurring judgments were delivered in the case. The first of these was written by Yacoob J and achieved the concurrence of 7 members of the court. The second judgment was written by O'Regan J and achieved the concurrence of Ngcobo J. Langa CJ wrote a dissenting judgment in the case. Critical to this determination was, first, the court's unanimous conclusion that the Council exercised public power when it made the rules in question (Yacoob J paras 31–45; O'Regan J paras 119–121; Langa CJ para 69), and secondly, the majority conclusion that the delegation of such power to the Council was lawful (Yacoob J paras 46–56 and O'Regan J paras 124–147. Langa CJ dissented partially on this issue — see paras 70–106).

Of particular significance in relation to the first finding was the court's *obiter* remark that even a determination that a particular action constitutes private power does not entail that the Bill of Rights is not applicable. In this regard, Yacoob J stressed that, in terms of s 8(2) of the Constitution, a provision of the Bill of Rights binds a natural or juristic person if and to the extent that it is applicable to it and hence reinforced the fact that some of the rights in the Bill of Rights apply horizontally, as well as vertically. He therefore held that the Supreme Court of Appeal may have been

incorrect in concluding that the attack on the rules in terms of the right to privacy became irrelevant once it had found that the Council exercised private power (para 29).

In contrast to the decision of the Supreme Court of Appeal in *Mikro*, discussed above, the Constitutional Court placed some emphasis on elements of control which the Minister exercised over the functions of the Council in reaching the determination that the Council exercised a public function and hence qualified as an organ of state within the terms of s 239 of the Constitution. Despite the fact that it was common cause between the parties that the Council was an organ of state as defined in s 239, Yacoob J spent some time discussing the elements of the s 239 test in reaching his determination that the Council was bound by the legality principle and Bill of Rights in the exercise of its functions.

In reaching the contrary conclusion in *Micro Finance Regulatory Council v AAA Investment (Pty) Ltd & another* 2006 (1) SA 27 (SCA) the Supreme Court of Appeal had emphasised the fact that the Council was incorporated as a company and its object, in terms of its memorandum of association, was to make and to enforce rules that were to be complied with by micro-lenders that were registered with the company (SCA judgment para 23). Furthermore, the Supreme Court of Appeal relied on the fact that the company was not, and did not purport to be, a public regulator with authority unilaterally to exercise powers over outside parties. It was, according to the Supreme Court of Appeal, a company that conducted business as a private regulator of lenders who chose to submit to its authority by agreement and hence was a mere private entity (SCA judgment para 24).

For Yacoob J, the extent of the Minister's control over the Council was relevant to the question of the public character of the function performed by it. Given the definition of organ of state, if the Council performed its functions in terms of national legislation, and these functions were public in character, it would be subject to the legality principle and privacy protection (para 29). Having concluded that the Council exercised its functions in terms of the Exemption Notice promulgated by the Minister, which qualified as national legislation (para 42), Yacoob J turned to consider the character of the functions exercised by the Council. In determining that those functions were public in character, Yacoob J emphasised the 'almost absolute ministerial control over the Council's functions' (para 45). Although the Council's composition and mandate showed that its legal form was that of a private company, its func-

tions were essentially regulatory of an industry and closely circumscribed by the terms of the ministerial notice.

It seems, therefore, that control is not only relevant to the question whether an organ of state falls within a sphere of government, as the Supreme Court of Appeal held in *Minister of Education, Western Cape & others v Governing Body, Mikro Primary School* 2006 (1) SA 1 (SCA), but also to the question of the character of the functions performed by a private company in terms of national legislation. In this respect, the majority of the Constitutional Court seems to have taken a slightly different approach to that of the Supreme Court of Appeal in *Mikro*, at least to the extent that it regarded issues of control as still relevant to the character of the functions performed by an institution which performs those function in terms of national legislation and hence to the question of whether it qualified as an organ of state.

On the second key finding in *AAA Investments*, Yacoob J stressed that while the rules made by the Council were legislative in nature, the Council had not, by making the rules, usurped the legislative authority of Parliament (para 49). Similarly, in a concurring judgment, O'Regan J held that the fact that the rules were public in character did not automatically mean that they constituted an unlawful usurpation of legislative power. On the contrary, no modern state could hope to regulate all of its affairs through legislation passed in the national, provincial and local spheres of government and therefore courts should, according to O'Regan J, 'be cautious to avoid adopting unduly restrictive rules in this area which will limit the possibility of effective ordering of our society by organisations which may not form part of government' (paras 122–3).

This approach is consistent with the court's previous jurisprudence on the delegation of legislative power which has repeatedly stressed both the importance and validity of delegating legislative power, provided that it is done within appropriate limits (*Executive Council, Western Cape Legislature v President of the Republic of South Africa* 1995 (4) SA 877 (CC) paras 51, 62–3 and 148; and *Executive Council, Western Cape v Minister of Provincial Affairs and Constitutional Development* 2000 (1) SA 661 (CC) paras 122–124). This is, however, the first time that the Court has extended its approach on legislative delegation to a body such as the Council which falls outside the three spheres of government.

Public Involvement in Legislative Drafting

In the case of *Doctors for Life International v Speaker of the National Assembly* 2006 (6) SA 416 (CC), 2006 (12) BCLR 1399 (also dis-

cussed under 'Jurisdiction' and 'Standing') Ngcobo J dealt extensively with the nature and scope of the duty to facilitate public involvement in the legislative processes imposed on the NCoP and the provincial legislatures by ss 72(1) (a) and 118(1) (a) of the Constitution respectively (para 75).

According to Ngcobo J, the duty to facilitate public involvement in the legislative process is an aspect of the right to political participation (para 89). The link which Ngcobo J forged between the obligation to facilitate public involvement and the right to political participation is a defining feature of his judgment, and the feature which produces the crux of the disagreement between him and the minority of the court (see, in this regard, Yacoob J's judgment at para 308). It is therefore useful to unpack this proposition.

Ngcobo J held that the Constitution's commitment to principles of accountability, responsiveness and openness shows that our constitutional democracy is not only representative, but also contains participatory elements. According to Ngcobo J, this is a defining feature of the democracy that is contemplated in the Constitution. It is apparent from the preamble of the Constitution that one of the basic objectives of our constitutional enterprise is the establishment of a democratic and open government in which the people will participate to some degree in the law-making process (para 111). Therefore our democracy includes, as one of its basic and fundamental principles, the principle of participatory democracy. The democratic government that is contemplated is partly representative and partly participatory, is accountable, responsive and transparent and makes provision for public participation in the law-making processes. Parliament must therefore function in accordance with the principles of participatory democracy (para 116).

Although Ngcobo J accepted that Parliament and the provincial legislatures must be given a significant measure of discretion in determining how best to fulfil their duty to facilitate public involvement, he nevertheless held that 'courts can, and in appropriate cases will, determine whether there has been the degree of public involvement that is required by the Constitution' (para 124). Although what will be required to facilitate public involvement will vary from case to case, Ngcobo J set the standard of reasonableness as the measure against which the particular facts of each case ought to be assessed (para 125).

The factors relevant to determining the reasonableness of the legislature's conduct in a given case include the nature and importance of the legislation and the intensity of its impact on the public.

Reasonableness also requires that appropriate account be paid to practicalities such as time and expense, which relate to the efficiency of the law-making process. The Constitutional Court will also have regard to what Parliament itself considered to be appropriate public involvement in the light of the legislation's content, importance and urgency (para 128). According to Ngcobo J:

> '[W]hat is ultimately important is that the legislature has taken steps to afford the public a reasonable opportunity to participate effectively in the law-making process. Thus construed, there are at least two aspects of the duty to facilitate public involvement. The first is the duty to provide meaningful opportunities for public participation in the law-making process. The second is the duty to take measures to ensure that people have the ability to take advantage of the opportunities provided.' (para 129)

Applying these factors to the facts of the case, Ngcobo J concluded that the requests for public hearings in relation to the Traditional Health Practitioners Act and the Choice on Termination of Pregnancy Amendment Act were evidence of the extensive public interest generated by these Acts. In the light of these requests, the NCoP had decided that public hearings would be held in the provinces and had advised the interested groups of this fact. Despite this, however, a majority of the provinces did not hold hearings on the Bills because of insufficient time. Furthermore, this fact was drawn to the attention of the NCoP, but despite this, the NCoP did not hold public hearings. This, according to Ngcobo J, was unreasonable in the circumstances and thus the NCoP had not complied with its obligation to facilitate public involvement in relation to these two Acts as contemplated by s 72(1)(a) of the Constitution.

In relation to the Dental Technicians Amendment Act, Ngcobo J found that when the Bill was first published for public comment, it did not generate any public interest. Having regard to this and the nature of the Bill, Ngcobo J held that the NCoP did not act unreasonably in not inviting written representations or holding public hearings on the statute. He concluded that the NCoP did not breach its duty to facilitate public involvement in relation to this statute and accordingly dismissed the challenge relating to it.

Yacoob J provided a detailed dissent in the case (Skweyiya J concurred in the dissenting judgment of Yacoob J and Van der Westhuizen J wrote a separate concurrence with this dissent). The crux of his disagreement with the majority was his view that the Constitution does not require the public involvement provision to be complied with as a pre-requisite to any legislation being validly passed (para 339). According to Yacoob J, to infer such a require-

ment when it is not expressly provided impermissibly undermines the legislature and the right to vote (ibid). Despite acknowledging that the failure to give the public an opportunity to comment in the NCoP and in most of the provinces was regrettable, Yacoob J concluded that such failure is of 'no constitutional moment in relation either to whether the [NCoP] or the provincial legislatures have complied with their constitutional obligations or to whether the health Bills have been validly passed' (ibid).

In *Matatiele Municipality & others v President of the Republic of South Africa & others* 2007 (6) SA 477 (CC), 2007 (1) BCLR 47 (CC) (*Matatiele 2*) (also discussed under 'Inconsistent conduct and constitutional invalidity below'),[2] Ngcobo J again wrote for the majority. The decision in *Matatiele 2* arose out of the Constitutional Court's decision in *Matatiele Municipality v President of the RSA* 2006 (5) SA 47 (CC), 2006 (5) BCLR 622 (*Matatiele 1*), in which the Constitutional court had, of its own motion, raised the question whether the Constitution Twelfth Amendment Act of 2005 ('the Twelfth Amendment') had been adopted in accordance with the provisions of the Constitution. In the light of the importance of this issue, the Court called for further argument on the matter, despite the fact that the question of procedural compliance had been conceded by the applicants. The court's consideration of that further argument produced the decision in *Matatiele 2*.

The result in *Matatiele 2* was significantly informed by the precedent set, a day earlier, in the *Doctors for Life* decision (discussed further above). The issue in relation to which the Constitutional Court required argument from the parties in *Matatiele 2* was whether the provisions of s 74(8) of the Constitution applied to the passing of the Twelfth Amendment. The Kwa-Zulu Natal legislature contended that s 74(8) did not apply to the Twelfth Amendment because the amendment affect but affected all nine provinces and not only a specific province or provinces.

Section 74(8) of the Constitution reads as follows:

> 'If a Bill referred to in subsection 3(b), or any part of the Bill, concerns only a specific province or provinces, the National Council of Provinces may not pass the Bill or the relevant part unless it has been approved by the legislature or legislatures of the province or provinces concerned.'

Section 74(3)(b), in turn, provides:

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[2] Although this decision was reported in 2007, I have chosen to review it here because of its relevance to the discussion of the first *Matatiele* decision, which was reported during 2006, and its inextricable link to *Doctors for Life*.

'Any other provision of the Constitution may be amended by a Bill passed —

(a) by the National Assembly, with a supporting vote of at least two thirds of its members; and

(b) also by the National Council of Provinces, with a supporting vote of at least six provinces, if the amendment —

(i) relates to a matter that affects the Council;

(ii) alters the provincial boundaries, powers, functions or institutions; or

(iii) amends a provision that deals specifically with a provincial matter.'

The core of the Kwa-Zulu Natal legislature's argument was that the amendment was of general application because it altered the nature of the boundaries of all provinces by delimiting them on the basis of municipalities rather than magisterial districts. The amendment did not, therefore, concern a specific province or provinces as required by s 74(8) (*Matatiele 2* para 18).

In response to this contention, Ngcobo J emphasised that for the purposes of s 74(8) it mattered not that some of the proposed amendment's provisions dealt with all the provinces; what mattered was that there were parts of the amendment which dealt only with specific provinces and not other provinces (para 21). For example, that part of the amendment, which redrew the boundaries of KwaZulu-Natal and the Eastern Cape by relocating the area previously known as Matatiele Municipality from a district in KwaZulu-Natal and incorporating it into one in the Eastern Cape concerned only the provinces of KwaZulu-Natal and the Eastern Cape and no other province. From this, Ncgobo J concluded that 'only those provinces whose boundaries were altered [by the proposed amendment] were required to approve the parts of the amendment that concerned them specifically in terms of s 74(8)' (para 26). This, it seems, flows from the terms of s 74(8) itself.

However, Ngcobo J did not end his discussion of this matter there. Four paragraphs later he changed what had earlier been taken to be a conditional application of s 74(8) into a mandatory injunction. Ngcobo J held as follows:

'It follows therefore that *whenever* a proposed constitutional amendment alters provincial boundaries, the provisions of section 74(8) are engaged. To hold that the applicability of section 74(8) depends on the precise number of provinces specifically affected by the amendment would therefore be contrary to the basic structure of government. Indeed this would be inconsistent with the very purpose of section 74(8), which is aimed at protecting the territorial integrity of each of the nine provinces.' (para 30, my emphasis)

The first sentence of the quoted section above seems to be too broadly stated. Until para 30 of the judgment, Ngcobo J maintained that it was only if the proposed amendment concerned a specific province or provinces that it ought to be approved by the relevant legislature or legislatures of the province or provinces concerned (para 27). However, in paragraph 30, the claim broadens to the following: *Whenever* a proposed constitutional amendment alters provincial boundaries, the provisions of s 74(8) are engaged. However, on Ngcobo J's previous holding, 'section 74(8) does not require the provinces to approve a general provision that defines the new criterion for delimiting provincial boundaries on the basis of municipalities' (para 25).

But what if this had been the only provision in the proposed amendment? Or, indeed, what if the relevant provision had redetermined the provincial boundaries by stipulating that all such boundaries were to move 2 kilometres to the west, for example? In other words, what if the amendment was crafted in such a way that it altered the provincial boundaries by way of a general provision and did not make any specific reference to any of the provinces (either individually or collectively)? On the strength of Ngcobo J's reasoning, at least until para 30, s 74(8) ought not to apply.

To ensure consistency, the breadth of the first proposition in para 30 should be read subject to the qualifications preceding it and should not be taken to hold that *any* proposed constitutional amendment which alters provincial boundaries must satisfy the requirements of s 74(8).

I am mindful of the fact that this point may have little practical significance as it will be an unusual case in which the provincial boundaries of all the provinces are altered by the operation of only a general provision such as the one discussed above. However, to the extent that this is possible, such a case ought not to engage s 74(8).

Having determined that s 74(8) applied to the amendment in respect of seven of the nine provinces, Ngcobo J then turned to the question whether, in considering a proposed constitutional amendment which alters its boundary, a provincial legislature is obliged to facilitate public involvement as required by s 118(1)(a) (para 32).

Section 118(1)(a) provides that '[a] provincial legislature must facilitate public involvement in the legislative and other processes of the legislature and its committees.' In construing the meaning of this section, Ngcobo J referred to what he termed the 'structural approach' to interpretation (para 37). This 'structural approach' would appear to be a new term for the combination of the purpo-

sive, contextual and historical approaches which have previously been adopted by the Court in construing sections of the Constitution (ibid). Applying this approach to s 118(1)(a), Ngcobo J concluded that when provincial legislatures consider a proposed constitutional amendment that alters their provincial boundaries, they are involved in a law-making process and must, therefore, facilitate public participation in making their decision (paras 45–8).

According to Ngcobo J, in facilitating public involvement, a provincial legislature must act reasonably (para 67). In addition to the factors identified in *Doctors for Life* which ought to inform the reasonableness enquiry, Ngcobo J drew attention to the fact that the more discreet and identifiable the potentially affected section of the population, and the more intense the possible effect on their interests, the more reasonable it would be to ensure that the potentially affected section of the population is given a proper opportunity to have a say (para 68).

In applying these factors to the circumstances of the case, Ngcobo J found that the proposed constitutional amendment would have had the effect of relocating a whole community from one province to another (para 79). Moreover, it had a direct impact on a discreet and identifiable section of the population. It threatened an important and not easily reversible change to the provincial status of a clearly defined section of the population. The consequences of the amendment were, therefore, far-reaching (para 81). In these circumstances, Ngcobo J held that in deciding whether to approve the constitutional amendment altering its boundary, the KwaZulu-Natal provincial legislature was required to involve the public. In the light of that duty, the KwaZulu-Natal provincial legislature's failure to hold any public hearings or to invite any written submissions was unreasonable (para 84).

In summary therefore, Ngcobo J held that, in terms of s 74(8) of the Constitution, the legislature of KwaZulu-Natal was required to approve that part of the Twelfth Amendment which concerned the province of KwaZulu-Natal. As this approval should have been given by the KwaZulu-Natal legislature after complying with the provisions of s 118(1)(a) of the Constitution, the failure by that legislature to comply with the provisions of s 118(1)(a) rendered the purported approval of that part of the amendment invalid. According to Ngcobo J, it followed, therefore, that that part of the Twelfth Amendment which concerned Matatiele was invalid (para 89).

Parliamentary Privilege

In *Dikoko v Mokhatla* 2006 (6) SA 235 (CC), 2007 (1) BCLR 1 the Constitutional Court was faced with two legal questions: Firstly, to determine whether the privilege afforded to municipal councillors in terms of s 28 of the Local Government: Municipal Structures Act 117 of 1998 ('the Structures Act') extended beyond the proceedings of the municipal council itself. This was because the defamatory statements made by the applicant had not been made in the municipal council itself but rather before the Standing Committee of the North West Provincial Legislature. Secondly, whether the privilege afforded in terms of s 28 extended not only to legislative functions of councillors but also to their executive functions.

This case is discussed more fully in the chapters on Bill of Rights Jurisprudence and the Law of Delict. For this chapter it is sufficient to note that the court rejected the contention that the statements by Dikoko had been privileged, but in a classic example of judicial avoidance, determined that it did not need to answer either of these questions. The court held that even if s 28 of the Structures Act extended to the business of the council outside of the council or its sub-committees, the statements by Dikoko could in no way be viewed as constituting the real and legitimate business of the council. Rather, the statements made by the applicant concerned only his personal finances and his indebtedness to the council (para 40).

This holding may have significant implications for parliamentary privilege not only in municipal councils but also in Parliament and the provincial legislatures. This is because s 28 of the Structures Act confers an identical level of protection on councillors as ss 58(1) and 117(1) of the Constitution confer on members of Parliament and members of a provincial legislature respectively. Each of the relevant provisions confer immunity from civil or criminal proceedings on members of the legislature for 'anything they have said in, produced before or submitted to the [legislature] or any of its sub-committees' and 'anything revealed as a result of anything they have said in, adduced before or submitted to the [legislature] or any of its committees.'

Thus on their own terms these provisions do not appear to exclude protection for purely personal statements. Notwithstanding this, the Constitutional Court's decision in *Dikoko* makes it clear that purely personal statements will not be covered by the immunity. This decision thus constitutes a development of the dicta of the Constitutional Court in its previous decision of *Swartbooi v Brink* 2006 (1) SA 203 (CC) (para 12) where it appeared to confine the

ambit of s 28(1) of the Structures Act to conduct that was integral to the 'legitimate business' of the council.

The purpose for which parliamentary privilege and immunity is granted is to promote freedom of expression and to encourage democracy and full and effective deliberation (*Dikoko* para 39). In keeping with this purpose, it is appropriate that where a councillor participates in the genuine and legitimate functions or business of council, the privilege afforded by s 28 ought to extend to her or him in order to remove the fear of repercussions for what is said. However, when what is said, produced or submitted is of a purely personal nature, the rationale for the immunity does not attach to such speech. It is thus fitting to restrict the reach of parliamentary privilege to exclude purely personal matters.

Remedial Power of Courts

Effect of a declaration of invalidity not covered by section 172(2)(a) of the Constitution

In what the Constitutional Court refers to as its 'declarator judgment' in the case of *Minister of Health & another v New Clicks South Africa (Pty) Ltd; In re: Application for Declaratory Relief* 2006 (8) BCLR 872 (CC) (also discussed under 'Inherent powers of courts to regulate their own processes' above, the Minister of Health and the Pricing Committee sought a declaration from the Constitutional Court that the judgment and order of the Supreme Court of Appeal (which was appealed against in the main application to the Constitutional Court) setting aside the regulations relating to a transparent pricing system for medicines and scheduled substances published by the Minister of Health was automatically suspended upon the bringing of the application for leave to appeal to the Constitutional Court.

The essence of the Constitutional Court's dismissal of this application was the distinction it drew between declarations of invalidity made in terms of s 172(2)(a) of the Constitution and those which are not made in terms of s 172(2)(a). According to the Constitutional Court, declarations of constitutional invalidity, which do not fall within the ambit of s 172(2)(a), made by courts other than the Constitutional Court, in the absence of any appeal against those orders, have effect without the need to be confirmed by the Constitutional Court (para 19). Given that the subject-matter of the judgment and order of the Supreme Court of Appeal which was appealed to the Constitutional Court dealt with regulations passed by the Minister of Health, the provisions of s 172(2)(a) did not

apply and hence the order was not subject to the confirmation requirement of that section in order to have force and effect.

In addition to this, the Constitutional Court emphasised that when the Supreme Court of Appeal made such orders it was empowered, in terms of s 172(1) of the Constitution, to suspend them on terms that were just and equitable (ibid). According to the Constitutional Court, s 172(1) effectively enables a court to regulate the effect of an order of invalidity pending an appeal. A litigant who considers that it would be just and equitable for an order of invalidity to be suspended pending an appeal, should, therefore, make a timeous and appropriate application to the court considering the application for a declaration of constitutional invalidity and draw the court's attention to the relevant considerations of justice and equity (para 20).

Drawing on this analysis, the Constitutional Court determined that although the applicants' application was not expressed in such terms, it was, effectively, an application for an order suspending the declaration of invalidity made by the Supreme Court of Appeal pending appeal (para 22). According to the Constitutional Court, the application should therefore have been made to the Supreme Court of Appeal which was best placed to determine what was just and equitable in the circumstances and whether an order suspending the declaration of invalidity ought to have been made pending the appeal or any other event or period of time (ibid). In the absence of such an application to the Supreme Court of Appeal, its declaration of invalidity would have had immediate effect and not be suspended by the mere noting of an appeal to the Constitutional Court.

As the Constitutional Court pointed out in its judgment, the common law rule that execution of a judgment is suspended pending an appeal has no application to declarations of constitutional invalidity of legislation (para 16). This is certainly correct, in so far as declarations of constitutional invalidity of legislation covered by s 172(2)(a) are concerned, because such orders, until they are confirmed by the Constitutional Court, have no force or effect and therefore there simply is no *effect* to *suspend* until the Constitutional Court has made the final determination on constitutional validity.

However, in relation to declarations of constitutional invalidity which are not governed by s 172(2)(a), it is not as readily apparent why the common law rules of suspension pending appeal do not apply. On this score, the Constitutional Court held as follows:

> 'If a law is objectively invalid, a declaration of invalidity made by a competent court that is subsequently set aside on appeal does not

> validate the law. For the same reason, an appeal against a declaration of constitutional invalidity of a law does not breathe life into that law. The objective validity or invalidity of a law will ultimately be determined at the end of the appeal process. That does not mean, however, that courts have no power to temper the effect of orders of constitutional invalidity made pending the finalisation of the appeal process.' (ibid)

The four propositions contained in the above extract are offered as the consequence of the doctrine of objective invalidity which has long been adopted by the Constitutional Court (see *Ferreira v Levin NO; Vryenhoek v Powell NO* 1996 (1) SA 984 (CC) paras 27–30), and in terms of which a law's invalidity flows from its inconsistency with the Constitution and not from the court's order (*New Clicks* para 15).

However, the implications of objective invalidity have to accommodate a system of appellate review in which the highest court in the hierarchy finally makes the determination of consistency or inconsistency. That the highest court makes the final determination of inconsistency does not entail that the invalidity flows from the court's order, but rather that the highest court has the final say on what flows from the Constitution.

With this in mind, it seems that the first and third of the sentences in the quoted passage above may be inconsistent. If the objective validity or invalidity of a law will ultimately be determined at the end of the appeal process, how can it be that a declaration of invalidity which is set aside on appeal by the last court in that process, namely the Constitutional Court, does not confirm the validity of the law? If the first sentence is intended to convey that even the last court in the appeal process may be wrong and to reinforce the notion that invalidity flows from inconsistency with the Constitution and not from the court's order, then it must be correct. However, it is difficult to square such a statement of the immateriality of the court's pronouncement on the issue with the claim, in the third sentence, that validity or invalidity will ultimately be determined at the end of the appeal process; in other words, by the highest court in that process.

It seems, furthermore, that the above quoted passage may confuse the distinction between the effect of noting an appeal and a successful appeal. While the second sentence of the quoted passage may be correct in so far as the effect of noting an appeal is concerned; in other words, that the noting of an appeal against an order of invalidity would not breathe life into the provision, it cannot be correct in so far as the outcome of a successful appeal is concerned. The consequence of a successful appeal against an

order of invalidity is to confirm the validity of the relevant law and hence to breathe life into it.

For example, when the majority of the Constitutional Court determined in the main application in *New Clicks* that regulations 22 and 23 were constitutionally consistent, it reversed the declaration of invalidity granted by the Supreme Court of Appeal. The consequence of holding that the two regulations were constitutionally consistent was to confirm, as valid, the conferral of power on the Director-General to determine whether a specific single exit price was reasonable. In other words, the setting aside of the Supreme Court of Appeal's declaration of invalidity in relation to regulations 22 and 23 confirmed the validity of the conferral of power to the Director General under those regulations.

To the extent that the quoted passage is taken to be an expression of the principle that an order of constitutional invalidity granted by a court other than the Constitutional Court and which does not fall within the ambit of s 172(2)(a) has immediate effect and is only capable of suspension on application to the court which granted the order, and not the court to which an appeal has been made, it is to be supported. However, if the passage is taken to suggest that the effect of a successful appeal against such a declaration of invalidity is not to pronounce on the validity of the law, it must be incorrect, as the facts of the main application in *New Clicks* bears out in relation to regulations 22 and 23.

Suspension of declarations of invalidity and the computation of court days

The case of *Ex parte Minister of Social Development & others* 2006 (4) SA 309 (CC) dealt with the technical question of the method of calculation to be applied to Constitutional Court orders and the issue whether the Constitutional Court has the power to revive legislation which has been declared invalid as a result of the expiration of a period of suspension of such a declaration.

Ex parte Minister of Social Development was, in fact, the next chapter in a case decided by the Constitutional Court in 2004: *Mashava v President of the Republic of South Africa* 2005 (2) SA 476 (CC). In *Mashava*, the Constitutional Court had confirmed the High Court's order that a presidential proclamation, which sought to assign the administration of almost the whole of the Social Assistance Act 59 of 1992 to provincial governments, was invalid. Paragraph 2 of the Constitutional Court's order, of 6 September 2004, stipulated that 'the order of invalidity is suspended for a period of 18 months from the date of this order.'

On Saturday 4 March 2006, the applicants in *Ex parte Minister of Social Development* lodged an application with the court requesting that the court vary that earlier order by extending the period of suspension of the declaration of invalidity. The applicants requested that the matter be heard on Monday 6 March 2006, as one of urgency. It was set down for hearing at 15h00 on that day.

The applicants contended that paragraph 2 of the order of 6 September 2004 meant that the period of suspension expired on 6 March 2006. Van der Westhuizen J, writing for the majority, held that this was incorrect. On his reasoning, because the order of invalidity necessarily came into force on the day the order was made, namely, 6 September 2004 and the suspension order too came into force on that day, the period of suspension ended on the last day of the eighteen months, namely, at midnight on 5 March 2006. Accordingly, 6 March 2006 fell outside the period of 18 months (para 24).

In reaching this conclusion, Van der Westhuizen J relied on the long line of cases which have established that the commencement of a period of time in curial calculation is governed by the ordinary civilian method where any unit of time other than days is used. According to the civil computation method, a period of time expressed in months expires at the end of the day preceding the corresponding calendar day in the subsequent month.

Because the application for an extension of the period of suspension was only heard on 6 March 2006, the period of suspension had already expired when the Constitutional Court heard the application. Given this fact, the applicants could no longer, according to Van der Westhuizen J, apply for an extension of the period of suspension but rather had to seek a revival of an expired suspension order and a temporary reversal of the declaration of invalidity. Relying on the authority of *Minister of Justice v Ntuli* 1997 (3) SA 772 (CC) and *Zondi v MEC, Traditional and Local Government Affairs* 2006 (3) SA 1 (CC) Van der Westhuizen J held that a court does not have the power to grant such an application.

The effect of the combination of the *Ex parte Minister of Social Development* judgment with that of *Ntuli* and *Zondi* is as follows: Before the expiration of a suspension order, the relevant provision is not yet invalid and a court retains its power under s 172(1)(b)(ii) to make a just and equitable order extending an existing suspension. However, once a suspension period lapses, the provision is invalid and a court's suspension power under s 172(1)(b)(ii) has ended.

Punitive Costs Orders

In the case of *Swartbooi & others v Brink* 2006 (1) SA 203 (CC) the Constitutional Court set aside a costs order awarded by the High Court on the basis that it violated the separation of powers. *Swartbooi* involved an application by two members of the Nala Local Municipality for orders a) setting aside certain decisions made by the council of Nala Local Municipality which affected their rights and b) directing the council to pay the costs of the suit on the scale as between attorney and client (para 1).

The High Court set aside the relevant decisions and concluded that a special costs order was appropriate. It took the view that it was fair in the circumstances for the members of the council to be required personally to pay the costs and issued a rule *nisi* calling upon the appellants and other members of the council who supported the decisions which had been set aside to show cause why they should not be ordered to pay the costs of the proceedings on the scale as between attorney and own client. The High Court was not persuaded by the appellants' showing on the return day and ordered them to pay the costs of the application on the scale as between attorney and own client *de bonis propriis* (ibid).

According to the Constitutional Court, it was wrong for the High Court to use the costs order 'to ensure that members of the council would consider their decisions more carefully in the future' and thereby to 'teach them a lesson' (para 25). Not only did the Constitutional Court regard this as an improper approach to costs orders, but it was also, according to the Court, motivated by an improper purpose (ibid). The impropriety of the measure lay in its implications for the separation of powers. Implicit in the Constitutional Court's reasoning on this matter is the assumption that it is through the vehicle of declarations of invalidity that courts are empowered to keep the legislature and the executive in check. However, courts may not, through their orders, attempt to punish the members of the other branches of the state and in so doing influence their future conduct.

Thus it seems that the ambit of the 'just and equitable' orders which courts are empowered to grant in terms of s 172(1)(b) does not extend to punitive costs orders which are designed to teach the members of the other arms of government a lesson. Because of their implications for the separation of powers, it seems that such orders would be neither just nor equitable.

The precise contours of the 'just and equitable' orders which a court may grant in the face of unconstitutional conduct of the other

branches of the state raises serious separation of powers considerations and provided the *leitmotif* to three decisions of the Durban and Coast Local Division which are discussed below.

Structural interdicts and non-compliance by the government

In the case of *N & others v Government of Republic of South Africa & others (No 1)* 2006 (6) SA 543 (D) (*N (No 1)*) a number of prisoners incarcerated at the Westville Correctional Centre (WCC) who had HIV/Aids and who needed antiretroviral (ARV) treatment instituted proceedings seeking orders against the respondents that they must: (1) Immediately remove the restrictions preventing the applicants and other HIV/Aids-infected prisoners at WCC who qualified for ARVs under the Department of Health's operational plan, from accessing ARVs at an accredited public health facility; (2) immediately provide ARVs to the applicants and to any other HIV/Aids-infected prisoners at WCC who qualified for ARVs under the Department of Health's operational plan at an accredited public health facility; and (3) within one week of the grant of the order furnish the court with an affidavit setting out the manner in which it intended complying with order (2).

They brought the application in both their individual capacities and in their capacities as representatives of the class of prisoners incarcerated at WCC who had HIV/Aids and who needed or would need ARVs. The applicants based their request for relief on two grounds: First, that the respondents had failed to fulfil their constitutional obligation to the applicants to take reasonable legislative and other measures within their available resources to provide access to health care services as articulated in s 27 of the Constitution; and secondly, that the respondents had violated the right of every detained person, including every sentenced prisoner, to conditions of detention that are consistent with dignity, including at least exercise, and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment as entrenched in s 35(2)(e) of the Constitution.

The respondents opposed the application on the ground that they were not in breach of their constitutional obligations since they were taking reasonable steps to ensure that the applicants and other HIV/Aids-infected prisoners incarcerated at WCC received adequate medical treatment.

It was not at issue in the case that the applicants had the aforementioned rights and that the respondents bore a corresponding obligation to fulfil those rights. Furthermore, the respondents did

not allege resource constraints as an explanation for any failure on their part to fulfil their obligations in question. According to the respondents, they *were* fulfilling their obligations. Thus the essence of the dispute was whether the plans and guidelines which the respondents had put in place to meet these obligations and their implementation were sufficient.

It is beyond the scope of this chapter to engage with the rights' analysis which led Pillay J to conclude that the respondents' implementation of the relevant policies was unreasonable. However, the remedial issues which followed from this conclusion will be addressed in detail.

Having resolved the merits issue in favour of the applicants, Pillay J turned to the question of remedy and expressed his initial scepticism about the structural relief sought (para 32). He made reference to the separation of powers' implications of structural relief but ultimately took the view that such relief was justified on the basis that there had been nothing workable or rational forthcoming from the respondents in relation to the matter. Moreover, the steps that had been taken by the respondents were characterised by delays, obstacles and restrictions which had seriously compromised the health of the applicants. Accordingly, Pillay J made an order which, in its first part, removed the restrictions on the applicants and similarly placed prisoners at WCC, who met the criteria as set out in the National Department of Health's operational plan for comprehensive HIV and Aids care, management and treatment for South Africa, from accessing anti-retroviral treatment at an accredited public health facility (para 35). The second paragraph of the order took the form of a *mandamus* ordering the respondents with immediate effect, 'to provide antiretroviral treatment in accordance with the operational plan to the first, second, third, fifth, sixth, seventh, ninth, tenth, eleventh, twelfth and fifteenth applicants and all other similarly situated prisoners at WCC at an accredited public health facility' (ibid). The third paragraph of the order contained the structural relief: It required the respondents to serve on the applicants' attorney and the court an affidavit setting out the manner in which it proposed to comply with paragraph 2 of the order. This, the respondents were required to do on or before 7 July 2006 — effectively two weeks from the date of judgment (ibid).

This brings us to the second of the cases in the trilogy. In *N & others v Government of Republic of South Africa & others (No 2)* 2006 (6) SA 568 (D) (*N (No 2)*), two applications were before Pillay J. The first of these was an application by the respondents for leave to appeal to

the full bench of the Natal Provincial Division or the Supreme Court of Appeal against the judgment in *N (No 1)*. The second application was one in terms of rule 49(11) of the Uniform Rules of Court in which the applicants requested that the order of the court in *N (No 1)* be implemented pending the final determination of the appeal. Both applications were opposed.

After granting leave to appeal on the merits (at 571A), Pillay J then considered the applicants' application in terms of rule 49(11). Pillay emphasised the fact that when a court considers a rule 49(11) application it has a wide general discretion which should be exercised taking into account a number of factors. These include: (a) The potential of irreparable harm being sustained by the respondents if leave to execute were to be granted and to the applicants if leave were to be refused; (b) the prospects of success on appeal; and (c) where there is potential of irreparable harm or prejudice to both applicants and respondents, the balance of hardship or inconvenience, as the case may be (at 572A).

In assessing these factors, Pillay J took the view that the prejudice to the respondents, if any, paled into insignificance when compared to the potential for prejudice to the applicants and other similarly situated prisoners (at 572B–C). According to Pillay J, for the applicants, it was a matter of life and death. For the respondents, it involved no more than the conduct of an exercise and thereafter the setting out in affidavit form how it intended to carry out its obligations in terms of its operational plan and guidelines. With the resources at their disposal, it would be a matter of relative ease for them to comply with the order. Furthermore, Pillay J was of the view that even if the respondents were eventually to succeed on appeal, complying with the order would constitute more of an inconvenience to them than real prejudice. In so far as the question of irreparable harm was concerned, Pillay J held that it did not even arise in the case of the respondents (at 572D–E). In Pillay J's view, the balance of convenience manifestly favoured the applicants (at 572F).

In reaching the conclusion to grant the rule 49(11) application, Pillay J referred (at 574C), with approval, to the dicta of Botha J in *Minister of Health v Treatment Action Campaign* (TPD case no 21182/2001, unreported) dealing with a similar application. In that case, Botha J had held as follows:

> 'If the order is suspended and the appeal were to fail, it is manifest that it will result in the loss of lives that could have been saved. It would be odious to calculate the number of lives one could consider affordable in

> order to save the respondents the sort of inconvenience they foreshadow. I find myself unable to formulate a motivation for tolerating preventable deaths for the sake of sparing the respondents prejudice that cannot amount to much more than organisational inconvenience.'

Thus Pillay J granted both applications: The application for leave to appeal to a full bench of the Natal Provincial Division, and the Rule 49(11) application to implement the order in *N (No 1)* pending the final determination of the appeal. In relation to the latter, Pillay J held that the order in *N (No 1)* should be implemented pending the outcome of the appeal subject to the date in paragraph 3 of the order being amended to read '14 August 2006' (at 574H).

However, the date of 14 August 2006 came and went without the respondents serving an affidavit on the applicants and the court as was required in terms of paragraph 3 of the original order.

This failure and the various procedural steps taken next were dealt with together in the third judgment in the trilogy: *N & others v Government of Republic of South Africa & others* 2006 (6) SA 575 (D) (*N (No 3)*).

Instead of complying with the order in *N (No 2)*, the respondents applied for leave to appeal against the rule 49(11) order on 15 August 2006 ('the rule 49(11) leave to appeal'). In response, the applicants filed an application on 18 August 2006, the main thrust of which was a declaration that the rule 49(11) leave to appeal did not suspend the operation of the earlier rule 49(11) order; allied to that was an application for an order that the rule 49(11) order be carried out forthwith unless and until set aside on appeal ('the second implementation application'). The date for the filing of the affidavit in paragraph 3 of the *N (No 1)* order was to be 25 August 2006.

In response to the second implementation application, the respondents filed a notice in terms of rule 30(1) on 18 August 2006 to the effect that the second implementation application was an irregular step for a number of reasons ('the rule 30(1) application'). First, that no reasons were given which rendered the matter urgent. Secondly, it constituted an improper duplication of rule 49(11) proceedings. Thirdly, the application was premature as the rule 49(11) leave to appeal application had not been set down. In addition to this, the respondents argued that Pillay J ought to have heard the matter and not, as was to be the case, Nicholson J.

In dealing with the rule 49(11) leave to appeal application, Nicholson J held that

> '[T]he authorities do not view with particular favour appeals from implementation orders. These have taken place . . . on extremely rare

> occasions. It is somewhat ironic and sad that both occasions relate to the government seeking to avoid the effect of court orders for the provision of ARVs.' (para 15)

Nicholson J relied on the dicta of the Constitutional Court, in this regard, in the case of *Minister of Health v Treatment Action Campaign (No 1)* 2002 (5) SA 703 (CC). There, the Constitutional Court explained the basis for courts' reluctance to grant such orders in the following terms: Before making an order to execute pending appeal, a court will have regard to the possibility of irreparable harm and to the balance of convenience of the parties. Having granted leave to execute, permitting an aggrieved litigant to appeal that execution order pending the final appeal would generally result not only in the piecemeal determination of the appeal, but would stultify the very order made (para 10). Moreover, the Constitutional Court held that ordinarily, for an applicant to succeed in such an application, the applicant would have to show that irreparable harm would result if the interim appeal were not to be granted — a matter which would, by definition, have been considered by the court below in deciding whether or not to grant the execution order. If irreparable harm cannot be shown, an application for leave to appeal will generally fail. If the applicant can show irreparable harm, that irreparable harm would have to be weighed against any irreparable harm that the respondent (in the application for leave to appeal) may suffer were the interim execution order to be overturned (para 15).

Applying this reasoning to the case before him, Nicholson J held that, in terms of the *N (No 2)* order, the respondents' affidavit had to be filed by 14 August 2006. Noting an appeal after that date could not, according to Nicholson J, have stayed the effect of that order. Moreover, the respondents were aware of the difficulty in appealing against a rule 49(11) order from their earlier experience at the hands of the Constitutional Court. In addition, no affidavit had yet been forthcoming from the respondents. This led Nicholson J to the conclusion that the respondents were in contempt of the *N (No 2)* order (*N (No 3)* para 29).

A finding of contempt against organs of state highlights, in the starkest relief, some of the fault lines in a system of government which observes the separation of powers. Given the statutory restraint placed on the courts by s 3 of the State Liability Act 20 of 1957, which provides that 'no execution, attachment or like process shall be issued against the defendant or respondent in any such proceedings or against any property of the State . . .', it is unclear

what options may be available to courts in the face of non-compliance by organs of the state.

Despite the fact that the matter of non-compliance by organs of state has been addressed by the High Courts, particularly those in the Eastern Cape Division (see *Mjeni v Minister of Health and Welfare, Eastern Cape* 2000 (4) SA 446 (Tk) and *East London Transitional Local Council v Member of the Executive Council of the Province of the Eastern Cape for Health* [2000] 4 All SA 443 (Ck)) and, on two occasions, the Supreme Court of Appeal (*Jayiya v Member of The Executive Council for Welfare, Eastern Cape* 2004 (2) SA 611 (SCA) and *MEC, Department of Welfare, Eastern Cape v Kate* 2006 (4) SA 478 (SCA)), there are a number of issues which remain unresolved. One of these is the implications of a number of comments by Conradie JA in the case of *Jayiya* and the Supreme Court of Appeal's avoidance of those issues in the later case of *Kate* on the likely outcome of a direct attack on the constitutionality of s 3 of the State Liability Act (*N (No 3)* paras 18–19).

The present case grappled with these problems in a new context. Here, the *N (No 2)* order did not require the payment of money by the respondents but rather the issuing of an affidavit to instruct the applicants and the court as to the steps taken to ensure the immediate provision of ARVs to prisoners who qualified for such treatment at WCC.

It is interesting to consider the implications of s 3 of the State Liability Act in this context given that Nicholson J's judgment proceeds on the assumption that the section precludes a court from finding the state in contempt of court and accordingly incarcerating the relevant official responsible for ensuring compliance with the order (para 23).

In the case of *Minister of Finance v Barberton* 1914 AD 335, which was cited with approval in the later decision of the Appellate Division in *Schierhout v Minister of Justice* 1926 AD 99, Innes JA held that the words 'attachment or process in the nature thereof' which appeared in s 4 of the Crown Liabilities Act 1 of 1910 (which preceded the State Liability Act of 1957) referred to proceedings against the person of the defendant for non-compliance with a declaratory or mandatory order (*Barberton* at 354). On this reading of the section, it was clear to Innes JA that the courts could exercise jurisdiction, in proceedings against the Crown, not only in respect of claims for damages but also in respect of claims for declaratory or mandatory orders (at 355). However, he was equally clear that 'no decree granted, whether sounding in money or not, can be

enforced against the Crown' (ibid). According to Innes JA, by imposing this restriction on the efficacy of orders against the Crown, the legislature had been content to rely on the moral obligation which such decrees were bound to exercise over all concerned (ibid).

This is the point which drove Nicholson J in *N (No 3)* to conclude that until the s 3 of the State Liabilities Act is challenged on constitutional grounds, an order granted against the state has the potential to become a *brutum fulmen* (a useless thunderbolt) (*N (No 3)* para 32).

Without a constitutional challenge to the legislation before him, Nicholson J resolved the issue of the respondents' contempt by relying, in essence, on counsel for the respondents' indication that 'the respondents would never neglect or refuse to comply with a court order' (para 34). Given this undertaking, Nicholson J was persuaded to provide a further extension, until 8 September 2006, to the respondents to comply with paragraph 3 of the initial order in *N (No 1)*. Nicholson J seemed additionally inclined towards this result given that, despite the absence of proper compliance with the initial order, there had been some progress made (ibid).

It should be noted that Nicholson J's willingness to accept the respondents' undertaking, together with his indication that some progress had been made towards complying with the order in *N (No 2)* may undercut his initial finding of contempt against the respondents. Given that the crime of contempt of court is only committed in the face of deliberate and *mala fide* ignorance of an order of court (*Jayiya* para 18), the conclusion Nicholson J seems ultimately to have reached, without expressly indicating as much, was the absence of contempt on the part of the government.

Even if the actions of the respondents in this case are painted with the gloss of technical lawyering and did not in fact achieve the status of contempt, it is not possible to overlook the fact that at each turn the respondents sought to impede the implementation of the orders against them, with dire consequences for their opponents. If anything, the recalcitrance on the part of the respondents in this case highlights the need for structural relief in some cases and for a supervisory role to be adopted by the courts. However, it also points to the perilous position of the courts when they elect to take on such a role and are met with severe resistance on the part of the respondents. In the end, the approach adopted by Nicholson J was probably the most practical in the circumstances. In the face of further resistance, however, the applicants would, it seems, need to chal-

lenge the constitutionality of s 3 of the State Liability Act in order to ensure that their order is not a *brutum fulmen*.

Inconsistent conduct and constitutional invalidity

One of the most interesting aspects of the decision of the Constitutional Court in both *Doctors for Life International v Speaker of the National Assembly & others* 2006 (6) SA 416 (CC), 2006 (12) BCLR 1399 and *Matatiele Municipality & others v President of the Republic of South Africa & others* 2007 (6) SA 477 (CC), 2007 (1) BCLR 47 (CC) (*Matatiele 2*) (both cases are discussed further above) from a remedial point of view was the question whether, consequent upon a declaration that the NCoP or a provincial legislature's *conduct* in relation to the passing of legislation was inconsistent with the Constitution and therefore invalid, *the Acts themselves* ought to be declared invalid. In *Doctors for Life*, the respondents contended that the court had no power to declare the resulting statutes invalid. To do so, it was submitted, would infringe upon the doctrine of separation of powers (para 198). In response to this contention, Ngcobo J reasoned that the requirement to facilitate public involvement in the law-making process was a 'requirement of manner and form' and failure to comply with such an obligation rendered the resulting legislation invalid (para 209). Moreover, according to Ngcobo J, while the Constitutional Court has an obligation to be sensitive to and respect the separation of powers, such respect does not entail that courts cannot or should not make orders that have an impact on the other branches of government (para 199).

Ngcobo J therefore declared, in *Doctors for Life*, the Traditional Health Practitioners Act and the Choice on Termination of Pregnancy Amendment Act and, in *Matatiele*, that part of the Twelfth Amendment that transferred the area of Matatiele Local Municipality, invalid and further ordered that the declarations of invalidity be suspended for a period of 18 months to enable Parliament to enact the statutes and amendment afresh in a manner that was consistent with the provisions of the Constitution (para 214).

It is interesting to speculate whether an order of invalidity without an accompanying suspension thereof would ever be appropriate in such cases. The option of mediating the effect of an order of invalidity by suspending its operation is specifically provided for in s 172(1)(b)(ii) of the Constitution. The courts are granted a discretion in this regard. However, given that the defect which renders the statutes at issue unconstitutional and invalid is procedural in nature, it seems that suspension may always be the appropriate

remedy. An order of immediate invalidity would not, I suspect, be sufficiently sensitive to the cause of the unconstitutionality in the case to be appropriate. Where the defect is procedural, justice and equity probably require that its architect be given an opportunity to remedy it before the product of that defective process is rendered void. Process related defects should, it seems, be met with process facilitating remedies.

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