

Chapter 3

Constitutional Litigation

Matthew Chaskalson, Gilbert Marcus & Michael Bishop

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3.1 Introduction

While constitutional litigation has much in common with conventional litigation, it has a number of special rules that justify its treatment as a distinct discipline.¹ So although standard rules of court and principles of evidence, both common law and statutory, apply to constitutional litigation, they are themselves now subject to constitutional scrutiny.²

The special rules encompass specific additions to the Uniform Rules of Court relating to joinder³ and submissions by an *amicus curiae*.⁴ A separate set of rules regulate proceedings in the Constitutional Court.⁵ A range of specific provisions of the Final Constitution deal with matters of jurisdiction,⁶ standing,⁷ and remedy⁸ which have application only in constitutional matters. Apart from the Final Constitution itself, the Constitutional Court Complimentary Act regulates matters

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- 1 See HJ Erasmus *Superior Court Practice* (1994)(devotes an entire chapter to issues peculiar to constitutional litigation).
 - 2 The Constitutional Court has made it clear that all rules of court must comply with the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996)('Final Constitution' or 'FC'). Where, for example, a particular rule limits the right of access to court or has that effect, the rule itself may be challenged. See, for example, *Giddey NO v JC Barnard and Partners* 2007 (2) BCLR 125 (CC) at para 16. In *Ferreira v Levin NO & Others*, Ackermann J observed that the coming in-to operation of the Interim Constitution would require two areas of the law of evidence to be reconsidered in the light of the Bill of Rights: 'The one relates to the way in which evidence, particularly in criminal proceedings is obtained and the second to the question when and to what extent a trial judge has a discretion to exclude otherwise admissible evidence.' 1996 (1) SA 984 (CC), 1996 (1) BCLR 1 (CC) at para 146. The latter issue is now regulated by FC s 35(5): 'evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.' For more on FC s 35(5) and constitutionalization of the rules of evidence, see PJ Schwikkard 'Evidence' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2007) Chapter 52.
 - 3 Rule 10A of the Uniform Rules of Court. For more on the rules governing constitutional matters, see K Hofmeyr 'Rules & Procedure in Constitutional Matters' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 5.
 - 4 Rule 16A of the Uniform Rules of Court. For more on the rules governing *amicus curiae* in constitutional matters, see G Budlender 'Amicus Curiae' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 8.
 - 5 The Constitutional Court Rules 2003, GN R1675, *Government Gazette* 25726 (31 October 2003) ('CC Rules').
 - 6 See T Roux & S Seedorf 'Jurisdiction' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 4.
 - 7 See C Loots 'Standing, Ripeness and Mootness' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 7.
 - 8 See M Bishop 'Remedies' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 9.

incidental to the establishment of the Constitutional Court.⁹ These matters embrace the scope and the execution of process, the seat of the Court, contempt of the Constitutional Court and the subpoena of witnesses.¹⁰ The Constitutional Court has also developed a number of principles which apply

specifically in constitutional litigation: the principle of legality and the principle of constitutional avoidance are, perhaps, the most important.¹¹

3.2 What is a constitutional issue?

The Final Constitution draws a distinction between constitutional matters and non-constitutional matters. It does so in terms of the jurisdiction of the Constitutional Court to hear appeals. FC s 167(3)(a) provides that the Constitutional Court 'is the highest court in all constitutional matters'. FC s 167(3)(b) provides that the Constitutional Court 'may decide only constitutional matters and issues connected with decisions on constitutional matters'. Rule 19 of the Constitutional Court Rules, which regulates appeals to the Constitutional Court, requires that an application for leave to appeal must contain 'a statement setting out clearly and succinctly the constitutional matter raised in the decision, and any other issues including issues that are alleged to be connected with a decision on the constitutional matter'.¹² The purpose of these provisions is to delineate the jurisdiction of the Constitutional Court as the highest court in constitutional matters and to distinguish that Court's specialised jurisdiction from the general jurisdiction of other courts. The Supreme Court of Appeal, for example, possesses general jurisdiction. The dividing line, however, between constitutional and non-constitutional matters is far from clear. As Ngcobo J observed in *Van der Walt v Metcash Trading Limited*: '[W]hether one can speak of a non-constitutional issue in a constitutional democracy where the Constitution is the supreme law and all law and conduct has to conform to the Constitution is not free from doubt'.¹³ However, he pointed out that it must be accepted that such a distinction exists and that the judges must 'try to make sense of that distinction'.¹⁴ Justice Carol Lewis of the Supreme Court of Appeal has, nevertheless, argued that the distinction is illusory:

9 Act 13 of 1995.

10 Section 16 of the Constitutional Court Complimentary Act is the source of the Constitutional Court Rules.

11 For more on the principle of avoidance, see L du Plessis 'Interpretation' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 32; I Currie 'Judicious Avoidance' (1999) 15 *SAJHR* 138; C Sunstein *One Case at a Time* (1996). For a critique of the jurisprudence of avoidance, see S Woolman 'The Amazing, Vanishing Bill of Rights' (2007) 124 *SALJ* 762; T Roux 'Principles & Pragmatism in the South African Constitutional Court' International Association of Constitutional Lawyers Conference (Athens, July 2007).

12 CC Rule 19(3)(b).

13 2002 (4) SA 317 (CC), 2002 (5) BCLR 454 (CC) at para 32.

14 *Ibid.*

The most notable defect in the present system arises from the distinction that was sought to be drawn between constitutional and other issues. In the context of a body of law that must necessarily be constitutionally coherent, that distinction is, and always was, an illusion. And because it is an illusory distinction it has not only sown uncertainty as to what is and what is not a 'constitutional issue', with practical consequences for the expeditious treatment of litigation, but it also threatens to impede the coherent development of the law.¹⁵

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Whatever difficulties there may be in seeking to draw a clear distinction between constitutional issues and non-constitutional issues — and there are many — it is an exercise central to constitutional litigation. The question as to whether the distinction is illusory is beyond the scope of a 'practical' chapter such as ours. An effort to get at the truth of the matter — through an extended engagement with the logic and the (in)coherence of the Court's jurisprudence — is carried out by both Frank Michelman in his chapter on 'The Rule of Law, Legality and the Supremacy of the Constitution'¹⁶ and by Theunis Roux and Sebastian Seedorf in 'Jurisdiction'.¹⁷ For present purposes, it suffices to say that constitutional matters clearly exist. Such matters embrace challenges to law or to conduct that is allegedly inconsistent with the Final Constitution, issues concerning the status, powers and functions of an organ of state,¹⁸ the interpretation,¹⁹ the application²⁰ and the upholding of the Final Constitution, the judicial review of administrative action,²¹ and the question as to whether the interpretation of any legislation or the development of the common law promotes the spirit, purport and objects of the Bill of Rights.²²

15 C Lewis 'Reaching the Pinnacle: Principles, Policies and People for a Single Apex Court in South Africa' (2005) 21 *SAJHR* 512 as cited in *Dikoko v Mokhatla* 2006 (6) SA 235 (CC), 2007 (1) BCLR 1 (CC) ('*Dikoko*') at para 123.

16 F Michelman 'The Rule of Law, Legality and the Supremacy of the Constitution' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 11.

17 T Roux & S Seedorf 'Jurisdiction' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2007) Chapter 4.

18 See S Woolman 'Application' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 31, 31.4 (f).

19 See L du Plessis 'Interpretation' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 32

20 See Woolman 'Application' (supra).

21 Pharmaceutical Manufacturers' Association of South Africa and Another: In re: Ex parte President of the Republic of South Africa and Others 2000 (2) SA 674 (CC), 2000 (3) BCLR 241 (CC) at para 33. See J Klaaren & G Pennfold 'Just Administrative Action' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2002) Chapter 62; Michelman (supra).

22 On the meaning and use of FC s 39(2), see Woolman 'Application' (supra). See also *Dikoko* (supra) at para 130.

3.3 Conceptualising the case

(a) Context in which a constitutional issue may arise

Constitutional matters can arise in a wide diversity of contexts: in both civil litigation and criminal litigation; they can be adjudicated by both courts of law and statutory tribunals. A constitutional matter may arise, for example, as a defence to a criminal charge. In such a case, the accused might wish to challenge the constitutional validity of the law in terms of which she has been charged or she might

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lodge a constitutional challenge to some pre-trial procedure (ie, the circumstances under which a confession was made.) Similarly, a constitutional issue may arise in a civil context as a defence to a claim. If, for example, an issue arose concerning the validity of a contract which was required to conform to certain statutory formalities, a defendant may wish to challenge the constitutional validity of the statute in question. Because of FC s 8's endorsement of horizontal application, a rule of common law is also susceptible to direct constitutional challenge.²³ FC s 39(2), on the other hand, may be invoked by a party who wishes, through indirect application of the Bill of Rights, to resist the provisions of a contract, trust or will in the name of public policy (now informed by the provisions of the Final Constitution.²⁴) Constitutional matters may be raised offensively or defensively. A litigant in civil or criminal proceedings may initiate the challenge to a particular statute or conduct. Or the constitutional matter may arise as a defence to a criminal charge or a civil claim.

The Final Constitution vests a specific power in members of the National Assembly to apply to the Constitutional Court for an order declaring that all or part of an Act of Parliament is unconstitutional.²⁵ Such an application must be supported by at least one third of the members of the National Assembly and must be made within thirty days of the date on which the President assented to and signed the Act.²⁶ A similar power vests in members of a Provincial Legislature to apply to the Constitutional Court for an order declaring that all or part of a provincial Act is unconstitutional.²⁷ Such an application must be supported by at least 20% of the members of the legislature and must be made within thirty days of the date on which the Premier assented to and signed the Act.²⁸

23 See, for example, *Khumalo & Others v Holomisa* 2002 (5) SA 401 (CC), 2002 (8) BCLR 771 (CC) (Common law rule of defamation, in terms of which a plaintiff does not have to allege and to prove the falsity of the defamatory imputations, was unsuccessfully challenged).

24 See, for example, *Barkhuizen v Napier* 2007 (5) SA 323 (CC), 2007 (7) BCLR 691 (CC) (Provisions of a prescriptive period in a contract of insurance unsuccessfully challenged.)

25 See S Budlender 'National Legislative Authority' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2004) Chapter 17.

26 FC s 80.

27 See T Madlingozi & S Woolman 'Provincial Legislative Authority' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 19.

Constitutional issues may also be raised in statutory tribunals other than courts of law. Although only a court of law has the power to declare legislation or conduct unconstitutional, statutory tribunals may draw down on the dictates of the Final Constitution. It has been held, for example, that the Competition Tribunal, established in terms of the Competition Act,²⁹ has the jurisdiction to consider whether or not a particular statutory provision is constitutionally compliant. Although it does not have the power to strike down a provision, if the

Tribunal were to conclude that the provision was inconsistent with the Final Constitution, it would have a duty not to enforce the provision.³⁰

The context in which a constitutional issue is raised has procedural implications which must be considered by practitioners. For example, if a constitutional issue is raised by way of exception in a civil matter or objection to the charge in a criminal matter, an adverse decision against the objector may not be appealable to the Supreme Court of Appeal because it will not be a 'judgment or order' in terms of appealability case law under s 21 of the Supreme Court Act 59 of 1959.³¹ In such cases, if the objector wants a final decision on her constitutional defence in advance of a full hearing of a trial, then she may be better served by bringing a free standing application for declaratory constitutional relief rather than by raising her constitutional defence in exception or objection proceedings.³²

Similarly, if a constitutional issue is raised in proceedings before a court which has no jurisdiction to hear the constitutional issue,³³ and the litigant fails to institute parallel proceedings before a court with jurisdiction to determine the constitutional issue, then a litigant may find herself in the undesirable situation of either having to lead evidence relevant to the constitutional issue in the proceedings before a court which has no jurisdiction to determine the issue,³⁴ or having to introduce evidence relevant to the constitutional issue on appeal.

(b) Need for pleading

28 FC s 122.

29 Act 89 of 1998.

30 See *Federal Mogul Aftermarket Southern Africa (Pty) Limited v Competition Commission & Another* 2005 (6) BCLR 613 (CAC).

31 See, for example, *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A); *Minister of Safety and Security v Hamilton* 2001 (3) SA 50 (SCA); *S v Western Areas Ltd & Others* 2005 (5) SA 214 (SCA), 2005 (1) SACR 441 (SCA) ('Western Areas').

32 See, for example, *Western Areas* (supra) at para 35.

33 An example would be a plea that raised a constitutional challenge to a law in proceedings before the magistrates court. In terms of FC s 170, a magistrates' court 'may not enquire into or rule on the constitutionality of any legislation or any conduct of the President.'

34 This procedure is competent, if unsatisfactory. See *Walker v Stadsraad van Pretoria* 1997 (4) SA 189 (T).

Irrespective of how and in which forum a constitutional matter arises, it has been frequently stressed that constitutional matters must be properly pleaded.³⁵ The general principles of civil procedure and the need to alert a party to litigation of the case must be met. Pleading is particularly important in cases where a party seeks to justify a limitation of fundamental rights. Justification cases frequently depend not on facts, but on the policies underlying laws intended to effect legitimate governmental objectives. However, even here, the party seeking to justify existing law must plead that the policy is being furthered by the challenged law, offer the reasons for that policy and demonstrate why it ought to be considered reasonable, in pursuit of that policy, to limit the fundamental right. In the absence

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of pleaded particulars of this nature, the party mounting the constitutional challenge will not have a fair opportunity of rebutting the case for justification through countervailing evidence of a factual or expert nature.³⁶ Thus a bald allegation in pleadings that a limitation of fundamental rights is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom is excipiable as a vague and embarrassing plea.

Similar considerations would apply to remedial issues in cases where the constitutionality of any law or conduct is being challenged. Because of the Court's wide remedial powers under FC s 38 and FC s 172, it has been frequently stressed that a proper evidential foundation for the granting of ancillary orders of suspension of invalidity, retrospectively or prospectively, must be laid.³⁷ At the level of pleading, practitioners must ensure that they provide sufficient particulars of their client's remedial case under FC s 38 or FC s 172 to enable their opponents to adduce all relevant evidence necessary to rebut the challenge.

Although the general principle in constitutional litigation is the same as in conventional litigation — that a party raising a constitutional issue must raise the matter appropriately in the affidavits or the pleadings — the courts have also recognised that they may, of their own accord, raise a constitutional matter and give directions for the disposition of the case. In *De Beer v Raad Vir Gesondheidsberoepe van Suid-Afrika*, the court raised, mero motu, a constitutional issue and laid down particular procedures to be followed by the parties when addressing that constitutional issue.³⁸ Where courts raise constitutional issues on their own, the following steps should be followed:

1. The reservations or doubts as to the constitutionality of the specific provision or conduct should be described with precision.
2. The provisions of the Final Constitution that allegedly violated or engaged should be identified.

35 See *National Director of Public Prosecutions v Phillips & Others* 2002 (4) SA 60 (W) at para 37 (contains a useful collection of the authorities on the subject).

36 *Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO) & Others* 2005 (3) SA 280 (CC), 2004 (5) BCLR 445 (CC) at para 36.

37 *Chief Lesapo v North-West Agricultural Bank & Another* 2000 (1) SA 409 (CC), 1999 (12) BCLR 1420 (CC) at para 33.

38 2004 (3) BCLR 284 (T).

3. The parties should be afforded an unrestricted opportunity to comment on the court's *prima facie* view.
4. If the court remains of the view that the matter requires the clarification of a constitutional point, then the parties should be invited to assist the court in formulating the question to be resolved.
5. The parties should be afforded an opportunity to comment on whether there are other interested persons who should be invited to join.
6. The parties should be invited and afforded an opportunity to study the authorities on the question before the constitutional point is finally formulated.
7. The formulation adopted has to be acceptable to both parties and to the court.

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8. The court should then make appropriate orders in order for the requirements of Rule 16A of the Uniform Rules to be fulfilled.

(c) Bill of Rights litigation

The Bill of Rights contained in Chapter 2 of the Final Constitution has been the primary source of constitutional challenges. Bill of Rights challenges generally involve two independent steps.³⁹ The first step establishes whether or not the law or conduct entails a breach of the right in question. The party alleging such breach bears the burden of demonstrating that an infringement or limitation has occurred. Once a *prima facie* violation of a guaranteed right is established, the second stage of the enquiry requires an investigation as to whether or not the limitation of the right by law of general application is justifiable.⁴⁰ The burden of justification for proving that the limit on a fundamental right is permissible in terms of FC s 36 rests upon the party seeking to uphold the limitation.⁴¹ The need for specificity in pleading assumes particular importance in relation to questions of justification.

In the assessment of the constitutional validity of a law, it is competent to enquire into both the purpose and the effect of the impugned provision. In this regard, and in the context of unfair discrimination analysis, the Constitutional Court has observed:

The purpose and effect of a statute are relevant in determining its constitutionality. A statute can be held to be invalid either because its purpose or its effect is inconsistent with the Constitution. If a statute has a purpose that violates the Constitution, it must be held to be invalid regardless of its actual effects. The effect of legislation is relevant to show that although the statute is facially neutral, its effect is unconstitutional. This

39 For a detailed analysis of the two stages of Bill of Rights litigation, see S Woolman & H Botha 'Limitations' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 34.

40 *S v Zuma & Others* 1995 (2) SA 642 (CC), 1995 (4) BCLR 401 (CC) ('Zuma') at para 21; *S v Williams & Others* 1995 (3) SA 632 (CC), 1995 (7) BCLR 861 (CC) at para 54; *Coetzee v Government of the Republic of South Africa* 1995 (4) SA 631 (CC), 1995 (10) BCLR 1382 (CC) at para 9. Only law, and not conduct may be justified in terms of FC s 36. See S Woolman & H Botha 'Limitations' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 34.

41 *Zuma* (supra) at paras 35–38; *S v Makwanyane & Another* 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC) at para 102.

will be the case where, for example, the legislation has a discriminatory impact on a particular racial group.⁴²

Several rights require the enactment of legislation to give effect to the right in question: the right to equality,⁴³ the right of access to information⁴⁴ and the right to just administrative action,⁴⁵ and the right to security of tenure.⁴⁶ With respect to

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all four rights, the envisaged national legislation has been enacted.⁴⁷ Other rights envisage, but do not require, national legislation.⁴⁸ Where legislation gives effect to a constitutional right, it has been held that it is not permissible to invoke the right directly. Instead, recourse must be had, in the first instance, to the statute giving effect to the right. Thus, where reliance is placed upon the right to just administrative action, a party is obliged to bring the case under the Promotion of Administrative Justice Act. If the party contends that this Act does not go far enough to give effect to the fundamental right, only then may it invoke FC s 33 to challenge the constitutionality of the PAJA — as opposed to the conduct ultimately at issue.⁴⁹

Other statutes have been enacted to give effect to constitutional rights even where the Final Constitution does not expressly require it. The Labour Relations Act was enacted to give effect to the labour rights embodied in the Interim Constitution.⁵⁰ Likewise, the National Environment Management Act was enacted to give effect to the environmental rights embodied in FC s 24.⁵¹ Where such legislation has been enacted to give effect to a constitutional right, a litigant wishing to invoke the right to challenge the validity of conduct must first proceed under the statute in

42 Zondi v MEC for Traditional and Local Government Affairs & Others 2005 (3) SA 589 (CC), 2005 (4) BCLR 347 (CC) ('Zondi') at para 90.

43 FC 9(4) provides: 'national legislation must be enacted to prevent or prohibit unfair discrimination'.

44 FC 32(2) requires national legislation to give effect to the rights embodied in FC s 32(1).

45 FC s 33(3) requires national legislation to give effect to the rights embodied in FC s 33(1) and (2).

46 FC s 25(9) requires national legislation to give effect to the right in FC s 25(6).

47 The prohibition on unfair discrimination is given effect by the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. The right of access to information is given effect by the Promotion of Access to Information Act 2 of 2000. The right to administrative justice is given effect by the Promotion of Administrative Justice Act 3 of 2000. The right to security of tenure is given effect by a range of legislation including the Communal Land Rights Act 11 of 2004 and the Extension of Security of Tenure Act 62 of 1997.

48 FC s 23.

49 See *Bato Star Fishing (Pty) Limited v Minister of Environmental Affairs & Others* 2004 (4) SA 490 (CC), 2004 (7) BCLR 687 (CC) at paras 22–6 (court held that an applicant for judicial review must invoke the statute rather than the constitutional right). See also *Zondi* (supra) at paras 99–103; *Minister of Health & Another v New Clicks South Africa (Pty) Limited & Others (Treatment Action Campaign & Another as amici curiae)* 2006 (2) SA 311 (CC), 2006 (1) BCLR 1 (CC) at paras 92–97.

50 Act 66 of 1995.

question rather than the fundamental right.⁵² Direct recourse to the fundamental right in such cases is limited to challenges to the validity of the enabling legislation.⁵³

Litigation concerning socio-economic rights presents different conceptual and

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evidentiary issues.⁵⁴ These differences flow primarily from the nature of the state's duties in relation to such rights and particularly its obligation to ensure the 'progressive realisation' of the rights in question 'within its available resources'.⁵⁵ In *Government of the Republic of South Africa v Grootboom*⁵⁶ – in which the state's failure to provide access to adequate housing was challenged – the following principles were laid down:

1. The state is obliged to take positive action to meet the needs of those living in extreme conditions of poverty, homelessness or intolerable housing.⁵⁷
2. The poor are particularly vulnerable and their needs require special attention.⁵⁸
3. The state's obligations depend upon context and may vary.⁵⁹

51 Act 107 of 1998.

52 *NEHAWU v University of Cape Town & Others* 2003 (3) SA 1 (CC), 2003 (2) BCLR 154 (CC) (Court held that with respect to the invocation of rights concerning labour relations in FC s 23, it is not permissible to invoke FC s 23 directly but, recourse should rather be had to the Labour Relations Act 66 of 1995.).

53 See *Zondi* (supra) at para 99.

54 See S Liebenberg 'Interpretation of Socio-economic Rights' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 33; D Bilchitz 'Health' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 56A; K McLean 'Housing' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 55; D Brand 'Food' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 56C; A Kok & M Langford 'Water' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2004) Chapter 56B; M Swart 'Social Security' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 56D.

55 This formula is used in FC s 26(2) and FC s 27(2). Slightly different formulations are used in FC s 24(b) and FC s 29(1)(b).

56 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC) ('*Grootboom*').

57 *Ibid* at para 24.

58 *Ibid* at para 36.

59 *Ibid* at para 37.

4. The state is required to 'devise a comprehensive and workable plan to meet its obligations'. That obligation is not unqualified and is defined by the state's obligation to take reasonable measures to achieve the progressive realisation of the right within available resources.⁶⁰
5. A reasonable programme must 'clearly allocate responsibilities and tasks to the different spheres of government and ensure that the appropriate financial and human resources are available'.⁶¹
6. In the context of housing, 'a co-ordinated state housing programme must be a comprehensive one determined by all three spheres of government in consultation with each other'. Each sphere of government 'must accept responsibility for the implementation of particular parts of the programme but the national sphere of government must assume responsibility for ensuring that laws, policies, programmes and strategies are adequate to meet the state's . . . obligations'.⁶²

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7. The measures in question must establish a coherent programme directed towards the progressive realisation of the right: 'The programme must be capable of facilitating the realisation of the right. The precise contours and contents of the measures to be adopted are primarily a matter for the legislature and the executive. They must, however, ensure that the measures they adopt are reasonable'.⁶³
8. The state is required to take reasonable legislative and other measures to meet its obligations. Mere legislation is not enough: 'These policies and programmes must be reasonable both in the conception and their implementation. The formulation of a programme is only the first stage in meeting the state's obligations. The programme must also be reasonably implemented'.⁶⁴

These principles must be addressed by the relevant State department once a breach of the right in question has been established.

(d) Non-chapter 2 litigation

The Final Constitution is the supreme law and any law or conduct inconsistent with it is invalid. It follows that law or conduct inconsistent with any provision of the Final Constitution may be challenged. Accordingly, provisions of the Final Constitution other than those found in the Bill of Rights may be invoked to challenge the validity of law or conduct.

60 Ibid at para 38.

61 Ibid at para 39.

62 Ibid at para 40.

63 *Grootboom* (supra) at para 41.

64 Ibid at para 42.

FC s 1 articulates the founding values of the Constitution. One of those values, embodied in FC s 1(c), is 'supremacy of the Constitution and the rule of law'. The Constitutional Court has relied on FC s 1(c) to develop the legality principle and the rule of law doctrine. According to the legality principle and the rule of law doctrine: all legislative and executive organs of state can exercise only those powers conferred lawfully on them;⁶⁵ executive action cannot be arbitrary;⁶⁶ all legislation must be rational;⁶⁷ the judiciary may not act arbitrarily and must be held accountable;⁶⁸ and rules of law must be stated in a clear and accessible manner.⁶⁹

The Constitutional Court has also held that rationality is a minimum requirement of all law:

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The constitutional state is expected to act in a rational manner. It should not regulate in an arbitrary manner or manifest 'naked preferences' that serve no legitimate governmental purpose, for that would be inconsistent with the rule of law and the fundamental premises of the constitutional state.⁷⁰

However, the Constitutional Court has only once struck down a statute as not being rationally connected to a legitimate governmental purpose.⁷¹ In another matter, the Constitutional Court held that a decision by the President was irrational in

65 *Fedsure Life Assurance Limited v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC), 1998 (12) BCLR 1458 (CC) at paras 56-57; *President of the Republic of South Africa v South African Rugby Football Union* 1999 (2) SA 14 (CC), 1999 (2) BCLR 175 (CC) at para 42; *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC), 1999 (10) BCLR 1059 (CC) at para 148.

66 *Pharmaceutical Manufacturers' Association of South Africa & Another: In re: Ex parte President of the Republic of South Africa & Others* 2000 (2) SA 674 (CC), 2000 (3) BCLR 241 (CC) ('Pharmaceutical Manufacturers') at paras 83-5.

67 *New National Party v Government of the Republic of South Africa* 1999 (3) SA 191 (CC), 1999 (5) BCLR 489 (CC) ('New National Party') at para 24.

68 *Mphahlele v First National Bank of South Africa Limited* 1999 (2) SA 667 (CC), 1999 (3) BCLR 253 (CC) at para 12.

69 *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC), 2000 (8) BCLR 837 (CC) at para 47.

70 *Prinsloo v Van der Linde & Another* 1997 (3) SA 1012 (CC), 1997 (6) BCLR 759 (CC) ('Prinsloo') at para 25; *Harksen v Lane NO & Others* 1998 (1) SA 300 (CC), 1997 (11) BCLR 1489 (CC) at para 53.

71 *Van der Merwe v Road Accident Fund & Another (Women's Legal Centre Trust as amicus curiae)* 2006 (4) SA 230 (CC), 2006 (6) BCLR 682 (CC) (The Court concluded that s 18(b) of the Matrimonial Property Act 88 of 1984 was unconstitutional because it infringed FC s 9(1). Section 18(b) prohibited spouses married in community of property from claiming damages for patrimonial loss in respect of bodily injuries caused by the other spouse. The Court held that the section both differentiated between patrimonial and non-patrimonial damages and between marriages in community of property and those out of community of property. The latter distinction was held not to be useful and was no more than a 'relic of the common law of marriage'. The differentiation was arbitrary insofar as it gave one class of person 'greater protection from wilful domestic battery or accidental bodily injury' than another class. The Minister conceded that while the only purpose of the section was to avoid the futility of spousal claims, this objective was not a legitimate government purpose. A spousal claim in respect of patrimonial losses arising from bodily injuries caused by the other spouse would not be futile as the damages awarded in terms of such a claim would not accrue to the joint estate.)

circumstances where the President himself had conceded the irrationality of the decision under consideration.⁷² While law or conduct may be challenged on grounds of irrationality, the Constitutional Court has emphasised the narrow scope of rationality review. It has stated that rationality review is: a deferential standard of review;⁷³ likely to be invoked only rarely;⁷⁴ not to be employed simply because a court disagrees with law or conduct;⁷⁵ not designed to enable courts to make policy choices which are the preserve of the legislature;⁷⁶ not a legitimate grounds for striking down legislation because the court believes that the legislature could have achieved its desired ends through better means or means that are less invasive of private rights.⁷⁷

Constitutional challenges need not only be founded on the express provisions of the Final Constitution. Implied provisions carry the same force as express provisions. Thus, although the Final Constitution does not expressly create a justiciable doctrine of separation of powers, this doctrine is implicit in the basic

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law. A provision of a statute that violated the implied separation of powers was held to be inconsistent with the Final Constitution and therefore invalid.⁷⁸

The Final Constitution prescribes the procedures to be adopted for passing a bill into law. Four different categories are identified and specific procedures are prescribed in each case.⁷⁹ The four categories are bills amending the Constitution,⁸⁰

72 *Pharmaceutical Manufacturers* (supra).

73 *New National Party* (supra) at para 122 (O'Regan J dissenting, but not on this point).

74 *Pharmaceutical Manufacturers* (supra) at para 90.

75 *Ibid*; *New National Party* (supra) at para 24.

76 *Jooste v Score Supermarket Trading (Pty) Limited (Minister of Labour intervening)* 1999 (2) SA 1 (CC), 1999 (2) BCLR 139 (CC) at para 17; *S v Lawrence*; *S v Negal*; *S v Solberg* 1997 (4) SA 1176 (CC), 1997 (10) BCLR 1348 (CC) at paras 41-6.

77 *Prinsloo* (supra) at para 36; *East Zulu Motors (Pty) Limited v Empangeni/Ngwelezane Transitional Local Council & Others* 1998 (2) SA 61 (CC), 1998 (1) BCLR 1 (CC) at paras 24 and 30.

78 *South African Association of Personal Injury Lawyers v Heath & Others* 2001 (1) SA 883 (CC), 2001 (1) BCLR 77 (CC) (In this case, a provision of the Special Tribunals Act 74 of 1996 required that a judge or acting judge of the High Court be appointed to head a Special Investigating Unit for the purpose of investigating serious malpractices or maladministration in connection with the administration of state institutions. This provision was held to violate the separation of powers between the legislature, executive and judiciary.) See further T Roux & S Sibanda 'Separation of Powers' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 12.

79 See S Budlender 'National Legislative Authority' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2004) Chapter 17.

80 FC s 74.

ordinary bills not affecting provinces,⁸¹ ordinary bills affecting provinces⁸² and money bills.⁸³ Non-compliance with constitutional procedures will render invalid any law passed pursuant to an incorrect procedure. In *Executive Council, Western Cape Legislature & Others v President of the Republic of South Africa & Others*, the Court held that the 'manner and form' provisions of the Interim Constitution were not merely directory and can only be departed from when the Constitution permits this expressly or by necessary implication.⁸⁴ In *Executive Council, Western Cape*, the Court held that a provision of a statute which purported to vest a power in the President, acting alone, to amend an Act of Parliament was unconstitutional. The Final Constitution possesses similarly detailed provisions that must be followed for the passing of provincial legislation.⁸⁵ In principle, non-compliance with these provisions would likewise render a provincial statute invalid.

The Final Constitution has brought about a fundamental change in the structures of government. Provincial legislatures, for example, are vested with original legislative competence in respect of a wide range of matters and with exclusive legislative competence over matters described in Part B of Schedules 4 and 5 of the Final Constitution. Legislation, whether national or provincial, may accordingly be challenged as falling beyond the legislative competence of a particular legislature.⁸⁶

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(e) Interpretive issues

The Final Constitution itself identifies rules of interpretation peculiar to constitutional litigation. FC s 39(2) provides: 'When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.'

The leading decision on the use of FC s 39(2) to develop the common law is *Carmichele v Minister of Safety and Security & Another*.⁸⁷ The following principles emerge from that decision:

81 FC s 75.

82 FC s 76.

83 FC s 77. Although money Bills constitute a special category, FC s 77 prescribes that they are to be dealt with in accordance with the procedure established by FC s 75.

84 1995 (4) SA 877 (CC), 1995 (10) BCLR 1289 (CC) at para 62.

85 See T Madlingozi & S Woolman 'Provincial Legislative Authority' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 19.

86 See, for example, *Ex parte President of the Republic of South Africa: In re: Constitutionality of the Liquor Bill 2000* (1) SA 732 (CC), 2000 (1) BCLR 1 (CC). See also V Bronstein 'Legislative Competence' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2004) Chapter 15.

87 2001 (4) SA 938 (CC), 2001 (10) BCLR 995 (CC) ('*Carmichele*').

1. Where the common law deviates from the spirit, purport and objects of the Bill of Rights, the courts have an obligation to develop it.⁸⁸
2. When courts exercise their powers to develop the common law, they should be 'mindful of the fact that the major engine for law reform should be the legislature and not the judiciary'.⁸⁹
3. Where the cause of action arises before the coming into operation of the Final Constitution, but proceedings take place thereafter, the courts are 'obliged to have regard to the provisions of s 39(2) of the Constitution when developing the common law'.⁹⁰
4. The obligation to develop the common law in the context of FC s 39(2) is not purely discretionary. Courts are under a 'general obligation' to develop the common law. This general obligation does not mean that 'a court must in each and every case where the common law is involved, embark on an independent exercise as to whether the common law is in need of development and, if so, how it is to be developed under s 39(2). At the same time there might be circumstances where a court is obliged to raise the matter on its own and require full argument from the parties'.⁹¹
5. The development of the common law occurs in two stages which 'cannot be hermetically separated from one another'. The first stage 'is to consider whether the existing common law, having regard to the s 39(2) objectives, requires development in accordance with these objectives. This enquiry requires a reconsideration of the common law in the light of s 39(2). If this enquiry leads to a positive answer, the second stage concerns itself with how such development is to take place in order to meet the s 39(2) objectives'.⁹²

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6. The common law must be developed within the matrix of an 'objective normative system'. This requirement does not, however, entail 'overzealous judicial reform'.⁹³

The obligation imposed by FC s 39(2) is not confined to the development of the common law. Its most frequent application arises in the context of the interpretation of statutes. The Constitutional Court has stressed that the obligation imposed by FC s 39(2) requires that 'all statutes must be interpreted through the prism of the Bill of

88 Ibid at para 30.

89 Ibid at para 36.

90 Ibid at para 37.

91 Ibid at para 39.

92 Ibid at para 40.

93 *Carmichele* (supra) at para 55. For a discussion and a critique of the notion of an 'objective normative value system', see S Woolman 'Application' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 31.

Rights' and that 'the process of interpreting the Constitution must recognise the context in which we find ourselves and the Constitution's goal of a society based on democratic values, social justice and fundamental human rights.'⁹⁴ The *Hyundai* Court went on to state that 'the purport and objects of the Constitution find expression in s 1 which lays out the fundamental values which the Constitution is designed to achieve'.⁹⁵ As such the Final Constitution 'requires that judicial officers read legislation, where possible, in ways that give effect to its fundamental values.'⁹⁶

The obligation to interpret statutes in a manner that promotes the spirit, purport and objects of the Bill of Rights assumes particular importance when litigants first seek to characterise the precise nature of the constitutional attack. Prior to the launching of a constitutional challenge, litigants are under an obligation to attempt an interpretation of a law which preserves the statute's constitutionality rather than the adoption of an interpretation that would necessitate the invalidation of the statute. However, the duty to read down a statute to preserve its constitutionality has obvious limits. The language used by the legislature cannot be put under unreasonable strain merely to preserve the constitutionality of the law in question. Consequently, the process required by FC s 39(2) entails that only a reasonable interpretation should be adopted. There may be cases, however, in which the legislature has deliberately framed legislation in a way which consciously entails the violation of a protected right, but does so in a manner which the legislature contends would meet the test for justification under FC s 36. Thus, where the legislature intends legislation to limit rights, and where that legislation does so clearly but justifiably, that interpretation must be preferred. In such circumstances, however, the Court 'would have to be persuaded by careful and thorough argument that such an interpretation was indeed the proper interpretation and that any limitation caused was justifiable as contemplated by s 36 of the Constitution.'⁹⁷ Where the legislature actually intends to limit fundamental rights in a justifiable manner, this intention must be specifically pleaded. It

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cannot be purely a matter of argument. The legislature will likely be required to provide evidence to justify the limitation in question.

While the Final Constitution vests original legislative competence in both the provinces and the national legislature, it also recognises that both legislative spheres have concurrent legislative competence over a range of areas.⁹⁸ Legislation on the same topic may be passed by both a provincial legislature and the national legislature. It is therefore necessary to have a mechanism for resolving conflicts

94 *Investigating Directorate: Serious Economic Offenses & Others v Hyundai Motor Distributors (Pty) Limited & Others* 2001 (1) SA 545 (CC), 2000 (10) BCLR 1079 (CC) at para 21.

95 *Ibid* at para 22.

96 *Ibid*.

97 *NUMSA & Others v Bader Bop (Pty) Limited & Another* 2003 (3) SA 513 (CC), 2003 (2) BCLR 182 (CC) at para 37.

98 See V Bronstein 'Conflicts' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 16.

between national and provincial legislation.⁹⁹ However, in cases of only apparent conflict between national and provincial legislation or between national legislation and a provincial constitution, 'every court must prefer any reasonable interpretation of the legislation or Constitution that avoids a conflict, over any alternative interpretation that results in a conflict.'¹⁰⁰

The Final Constitution incorporates various forms of international law into domestic law.¹⁰¹ With respect to the interpretation of domestic law, FC 233 provides that 'when interpreting any legislation, any court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law'.

3.4 Procedural and jurisdictional issues

(a) Mootness, ripeness and standing¹⁰²

FC s 34 guarantees a right of access to court: 'Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.'¹⁰³ Like all other rights in the Bill of Rights, the right of access to court is capable of justifiable limitations. Indeed, over many years, courts have

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fashioned rules which permit them to avoid deciding cases. In general, courts will only act 'if the right remedy is sought by the right person in the right proceedings and circumstances.'¹⁰⁴ In general, therefore, courts will only entertain matters initiated by persons with standing, which are not hypothetical or academic and which are brought at a time and in a manner which renders them appropriate for

99 See FC ss 146–50.

100 FC s 150. A 'conflict' may arise in two different contexts. In the first instance, a conflict may arise where, for example, a provision in provincial legislation is simply beyond the legislative competence of the province. Secondly, a conflict may arise between two legislative provisions where 'they cannot stand at the same time, or cannot stand together, or cannot both be obeyed at the same time'. See *Ex parte Speaker of the KwaZulu-Natal Provincial Legislature: In re: Certification of the Constitution of the Province of KwaZulu-Natal*, 1996 (4) SA 1098 (CC), 1996 (11) BCLR 1419 (CC) at para 24. For more on the resolution of conflicts between a provincial constitution and national legislation or between a provincial constitution and the Final Constitution, see S Woolman 'Provincial Constitutions' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 21.

101 See FC ss 231–233.

102 See C Loots 'Standing, Ripeness and Mootness' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 7.

103J Brickhill & A Friedman 'Access to Courts' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2007) Chapter 59.

104 HWR Wade & C Forsyth *Administrative Law* (7th Edition, 1994) 342 cited in *Oudekraal Estates (Pty) Limited v City of Cape Town & Others* 2004 (6) SA 222 (SCA) at para 28.

decision. Constitutional litigation is, in principle, no different.¹⁰⁵ However, the Constitutional Court has recognised that even in cases which are technically moot as between the parties, the interests of justice may tip the balance in favour of entertaining a particular dispute. Such an occasion might arise, for example, where the law on a particular topic is not settled and is of critical import to the operation of government.¹⁰⁶

The Final Constitution has substantially relaxed the rules of standing in Bill of Rights litigation. In *Ferreira v Levin NO & Others*, Chaskalson P, while stressing that the Constitutional Court should not be required to deal with abstract issues, could nevertheless 'see no good reason for adopting a narrow approach to the issue of standing in constitutional cases'.¹⁰⁷ He continued:

On the contrary, it is my view that we should rather adopt a broad approach to standing. This would be consistent with the mandate given to this Court to uphold the Constitution and would serve to ensure that constitutional rights enjoy the full measure of the protection to which they are entitled.¹⁰⁸

Notwithstanding the broadened scope of standing under the Final Constitution, those seeking relief in terms of the Bill of Rights must still bring themselves within the ambit of FC s 38.¹⁰⁹

(b) Joinder of necessary organs of state

In keeping with general principles of litigation, a party initiating a constitutional challenge must join all necessary parties to the dispute.¹¹⁰ In relation to constitutional

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litigation, however, a special rule has been introduced. Rule 10A of the Uniform Rules provides:

If in any proceedings before the Court, the constitutional validity of a law is challenged, the party challenging the validity of the law shall join the provincial or national executive authorities responsible for the administration of the law in the proceedings.

105 *JT Publishing (Pty) Limited & Another v Minister of Safety and Security & Others* 1997 (3) SA 514 (CC), 1996 (12) BCLR 1599 (CC) at para 15.

106 *AAA Investments (Pty) Limited v Micro-Finance Regulatory Council & Another* 2007 (1) SA 343 (CC), 2006 (11) BCLR 1255 (CC) at para 27.

107 *Ferreira v Levin NO; Vryenhoek v Powell NO* 1996 (1) SA 984 (CC), 1996 (1) BCLR 1 (CC) at para 165.

108 *Ibid* (The Court was concerned with the standing provisions in the Interim Constitution which, for practical purposes, are the same as those contained in FC s 38.)

109 See, generally, HJ Erasmus *Superior Court Practice* (1994) A2-3 to A2-4R.

110 The common law position is well established. See, for example, *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A). The matter is also now specifically regulated by Rule 10 of the Uniform Rules of Court. See Erasmus (*supra*) at B1-93 to B1-98.

This rule is, in any event, a codification of principles established by the Constitutional Court in relation to joinder.¹¹¹

Rule 5 of the Constitutional Court Rules goes further than its counterpart in the Uniform Rules. It provides:

5(1) In any matter, including any appeal, where there is a dispute over the constitutionality of any executive or administrative act or conduct or threatened executive or administrative act or conduct, or in any enquiry into the constitutionality of any law, including any act of Parliament or that of a Provincial Legislature, and the authority responsible for the executive or administrative act or conduct or the threatening thereof or for the administration of any such law is not cited as a party to the case, the party challenging the constitutionality of such act or conduct or law shall, within five days of lodging with the Registrar a document in which such contention is raised for the first time in the proceedings before the Court, take steps to join the authority concerned as party to the proceedings.

(2) No order declaring such act, conduct or law to be unconstitutional shall be made by the court in such matter unless the provisions of this rule have been complied with.

The Constitutional Court has stressed the importance of this rule: in a constitutional democracy, 'a court should not declare the acts of another arm of government to be inconsistent with the Constitution without ensuring that that arm of government is given a proper opportunity to consider the constitutional challenge and to make such representations to the court as it considers fit.'¹¹² The Court stated that there were two reasons for this requirement:

First, the Minister responsible for administering the legislation may well be able to place pertinent facts and submissions before the Court necessary for the proper determination of the constitutional issue. Secondly, a constitutional democracy such as ours requires that the different arms of government respect and acknowledge their different constitutional functions.¹¹³

(c) Submissions by an amicus curiae¹¹⁴

Constitutional disputes, particularly those affecting the validity of a statute, have implications and effects beyond the immediate parties to the dispute. It is for that

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reason that interventions by interested parties are permitted in appropriate circumstances, now regulated by Rule 16A of the Uniform Rules of Court, Rule 16 of the Supreme Court of Appeal Rules and Rule 10 of the Constitutional Court Rules. The provisions of these rules are essentially the same. They all permit intervention by interested third parties on such terms and conditions as the relevant court may

111 See, eg, *Parbhoo & Others v Getz NO & Another* 1997 (4) SA 1095 (CC), 1997 (10) BCLR 1337 (CC) at para 5.

112 *Mabaso v Law Society of the Northern Province & Another* 2005 (2) SA 117 (CC), 2005 (2) BCLR 129 (CC) at para 13.

113 *Ibid.*

114 See, generally, G Budlender 'Amicus Curiae' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 8.

allow. Such intervention may have significant consequences. In appropriate circumstances, an *amicus* may be permitted to introduce new evidence.¹¹⁵

One aspect of Rule 16A of the Uniform Rules which is frequently overlooked is the obligation in Rule 16A(1) that requires any person raising a constitutional issue in an application or action to give notice thereof to the Registrar at the time of filing the relevant affidavit or pleading. The notice is required to contain 'a clear and succinct description of the constitutional issue concerned.' The notice must be placed upon a notice board designated for that purpose for a period of twenty days. The purpose of this notice is to inform the world at large that a constitutional issue has been raised and to permit the intervention of interested parties. The Constitutional Court has stressed the importance of this requirement. In *Shaik v Minister of Justice and Constitutional Development & Others*, the Court stated that the minds of litigants and, in particular, practitioners in the High Courts should be focused on the need for specificity.¹¹⁶ The *Shaik* Court stated that 'the purpose of the rule is to bring to the attention of persons (who may be affected by or have a legitimate interest in the case) the particularity of the constitutional challenge, in order that they may take steps to protect their interests.'¹¹⁷

The twenty-day period (and other time periods stipulated by the rule) can be dispensed with by the court if it is in the interests of justice to do so.¹¹⁸ Rule 16A is enacted in the public interest. The parties to litigation cannot, therefore, simply agree that the requirements of the rule may be ignored: 'The reason for the rule is that constitutional cases often have consequences which go far beyond the parties concerned.'¹¹⁹ However, circumstances may exist that might justify a relaxation of the requirements of the rule. If the matter in issue has received wide notice in the public media, then the fundamental purpose of the rule would have been achieved. Urgency may also justify a relaxation of the time periods prescribed.¹²⁰

(d) Form of proceedings

Although the vast majority of constitutional cases arise in motion proceedings, no reason exists why constitutional matters should not be dealt with by way of action. The choice of proceeding depends upon long established principles.

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With regard to motion proceedings, however, the conventional practice established by the Rules of Court is not ideally suited for rights-based litigation. The general rule limiting the number of affidavits in motion proceedings was not formulated with

115 See, eg, *Pretoria City Council v Walker* 1998 (2) SA 363 (CC), 1998 (3) BCLR 257 (CC) at para 61.

116 2004 (3) SA 599 (CC), 2004 (4) BCLR 333 (CC).

117 *Ibid* at para 24.

118 Rule 16A(9) of the Uniform Rules.

119 *Rates Action Group v City of Cape Town* 2004 (5) SA 545 (C), 2004 (12) BCLR 1328 (C) at para 21.

120 *Ibid* at para 22.

constitutional litigation in mind.¹²¹ Where an applicant alleges the violation of a fundamental right, the respondent bears the burden of justifying the limitation of the right in question. Accordingly, questions of justification will be raised for the first time in the answering affidavit. The proper disposition of rights-based litigation therefore warrants the filing of further affidavits. (Such a procedure was sanctioned in the pre-constitutional era in cases involving the deprivation of individual liberty.¹²²)

(e) Appropriate court

The Final Constitution expressly delineates the jurisdiction of the courts of law to hear constitutional matters. The precise rules of jurisdiction are dealt with elsewhere in this work.¹²³ For present purposes, it must be emphasised that appropriate relief must be sought in an appropriate court. Six matters fall within the exclusive jurisdiction of the Constitutional Court: disputes between organs of state in the national or provincial sphere concerning the constitutional status, powers or functions of any of those organs of state; the constitutionality of any parliamentary or provincial bill; matters referred to the Constitutional Court by members of the National Assembly or a Provincial Legislature; the constitutionality of any amendment to the Final Constitution; whether Parliament or the President has failed to fulfil a constitutional obligation; and the certification of a provincial constitution.¹²⁴

Outside of these areas of exclusivity, the High Courts are vested with jurisdiction to decide any constitutional matter unless the matter in question has been assigned by an Act of Parliament to another court of a status similar to a High Court.¹²⁵ The Final Constitution further provides in FC s 172(2)(a) that the Supreme Court of Appeal, a High Court or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial act or the conduct of the President. However, an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court.

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The Constitutional Court is vested with jurisdiction to hear matters as a court of first instance. FC s 167(6) provides that National Legislation or the Rules of the Constitutional Court must allow a person, when it is in the interests of justice and

121 Rule 6(5) of the Uniform Rules of Court envisages a founding affidavit, answering affidavit and replying affidavit in motion proceedings. Rule 6(5)(e) vests the court with a discretion to permit the filing of further affidavits.

122 See *Minister Van Wet en Orde v Matshoba* 1990 (1) SA 280 (A) (Botha JA, on behalf of the majority, held that a detainee should be allowed to seek in motion proceedings an order for his release based on a founding affidavit in which he alleges that he is being held against his will notwithstanding the general requirement that an applicant must disclose his complete case in the founding affidavit. Moreover, the court held that the restriction on the number of sets of affidavits usually accepted in motion proceedings should be relaxed in accordance with Rule 6(5)(e) and that the filing of up to five sets of affidavits would be acceptable.)

123 See T Roux & S Seedorf 'Jurisdiction' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2008) Chapter 4.

124 FC s 167(4)

125 FC s 169.

with leave of the Constitutional Court, to bring a matter directly to the Constitutional Court. The matter is regulated by CC Rule 18.

Notwithstanding the jurisdiction to entertain matters by way of direct access, the Constitutional Court has repeatedly emphasised that it is undesirable for it to sit both as the court of first and final instance in a matter in which other courts have jurisdiction.¹²⁶ The expansive constitutional jurisdiction of the High Court means that most constitutional cases will not commence in the Constitutional Court itself but will reach it only on appeal.

(f) Reasons for a court to decline to exercise constitutional jurisdiction

A court may decline to hear a constitutional matter within its jurisdiction in certain defined circumstances. In disputes between spheres of government and organs of state, certain procedural requirements must be met before the dispute can be entertained by a court of law.¹²⁷ FC s 41(3) provides that an organ of state involved in an intergovernmental dispute 'must make every reasonable effort to settle the dispute by means of mechanisms and procedures provided for that purpose, and must exhaust all other remedies before it approaches a court to resolve the dispute.' FC s 41(4) provides that 'if a court is not satisfied that the requirements of sub-section (3) have been met, it may refer a dispute back to the organs of state involved.' The Constitutional Court has therefore held that a court 'will rarely decide intergovernmental dispute unless the organs of state involved in the dispute have made every reasonable effort to resolve it at a political level.'¹²⁸ In any case, the promulgation of the constitutionally mandated Intergovernmental Relations Framework Act 15 of 2005 has meant that courts will rarely, if ever, entertain such disputes.

Other important jurisdictional limitations exist. Rule 5 of the Constitutional Court Rules precludes the Constitutional Court from declaring an act, conduct or law to be unconstitutional until the joinder of necessary parties has been

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effected. Similarly, non-compliance with the notice provisions in Rule 16A of the Uniform Rules of Court may result in a court declining to exercise jurisdiction.

(g) The principle of constitutional avoidance

At a very early stage of its constitutional jurisprudence, the Constitutional Court laid down a general principle 'that where it is possible to decide any case, civil or

126 See *Transvaal Agricultural Union v Minister of Land Affairs & Another* 1997 (2) SA 621 (CC), 1996 (12) BCLR 1573 (CC) at para 18; *Bruce & Another v Fleecytex Johannesburg CC & Others* 1998 (2) SA 1143 (CC), 1998 (4) BCLR 415 (CC) at para 8; *Christian Education South Africa v Minister of Education* 1999 (2) SA 83 (CC), 1998 (12) BCLR 1449 (CC) at para 12; *Satchwell v President of the Republic of South Africa & Another* 2003 (4) SA 266 (CC), 2004 (1) BCLR 1 (CC) at para 6; *Zondi v MEC for Traditional and Local Government Affairs & Others* 2005 (3) SA 589 (CC), 2005 (4) BCLR 347 (CC) at para 13.

127 S Woolman & T Roux 'Co-operative Government' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2004) Chapter 14.

128 *Uthukela District Municipality & Others v President of the Republic of South Africa & Others* 2003 (1) SA 678 (CC), 2002 (11) BCLR 1220 (CC) at para 14.

criminal, without reaching a constitutional issue, that is the course which should be followed'.¹²⁹ The Court recognised, however, that the general principle is not inflexible. Thus, where a criminal trial was likely to last a long time, a challenge to the constitutional validity of the statute in terms of which the accused was charged would justify a departure from the general principle.¹³⁰ The principle of constitutional avoidance makes the most sense in the context of challenges to the validity of statutes. The striking down of a statute is considered to be a drastic remedy. It is understandable, therefore, that measures short of a striking down are to be preferred. However, the principle of constitutional avoidance cannot be treated a rule of constitutional law that disposes of matters. To elevate 'avoidance' to a constitutional rule would, at a minimum, undermine the obligation imposed by FC s 39(2) to interpret all statutes and to develop the common law in accordance with the spirit, purport and object of the Bill of Rights. It would, if treated as a rule, and not as a form of rhetoric, ultimately empty the specific substantive rights of Chapter 2 of their content.¹³¹

3.5 Appeals

(a) Appeals to the Constitutional Court

The rules relating to appeals to the Constitutional Court are addressed in detail elsewhere in this work.¹³² However, the following principles may be of interest to practitioners:

1. Applications for leave to appeal to the Constitutional Court must be made directly to the Constitutional Court. Unlike applications for leave to appeal to the Supreme Court of Appeal, the High Court has no power to grant leave to appeal to the Constitutional Court.
2. The Constitutional Court will grant leave to appeal only when it finds that the interests of justice require the grant of leave: reasonable prospects of success are a necessary, but not sufficient requirement in any application for leave to appeal. In addition to demonstrating reasonable prospects of success, an applicant for leave to appeal will usually have to show that the constitutional issue is of sufficient importance to merit the attention of the Constitutional Court.

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3. Ordinarily, the Constitutional Court will not hear an appeal directly from the High Court. It will require appeals to proceed from the High Court to the Supreme Court of Appeal. This general rule is subject to three specific exceptions: appeals against orders of constitutional invalidity of Acts of Parliament; appeals against orders of invalidity of Acts of a provincial

129 *S v Mhlungu & Others* 1995 (3) SA 867 (CC), 1995 (7) BCLR 793 (CC) at para 59.

130 *Ibid.*

131 See S Woolman 'The Amazing, Vanishing Bill of Rights' (2007) 124 *SALJ* 762.

132 See K Hofmeyr 'Rules and Procedure in Constitutional Matters' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2007) Chapter 5.

legislature; and appeals against orders invalidating the conduct of the President. In such cases, FC s 172(2)(d) vests the losing litigant with a right of direct appeal to the Constitutional Court.

(b) Appeals to the Supreme Court of Appeal

FC s 168(3) vests the Supreme Court of Appeal with jurisdiction over appeals 'in any matter'. The Supreme Court of Appeal has held that this provision invests it with appellate jurisdiction from specialist appellate courts like the Labour Appeal Court and the Competition Appeal Court. It has, however, made clear that it will exercise this appellate jurisdiction from specialist appellate courts sparingly. The test to be applied in such cases is the test for special leave to appeal. This test requires not only reasonable prospects of success, but also 'some additional factor' militating in favour of leave to appeal. That the applicants for leave to appeal from a specialist appellate court have already had the benefit of a full appeal before that court will ordinarily weigh heavily against the grant of leave to appeal by the Supreme Court of Appeal.¹³³

The Supreme Court of Appeal has also recognised that FC s 168(3) changes the test for appeals of decisions of the High Court. A decision which does not amount to a 'judgment or order' in terms of the appealability case law¹³⁴ generated under s 21 of the Supreme Court Act 59 of 1959 may yet be appealable to the Supreme Court of Appeal if the applicant can show that it is in the interests of justice for her to be granted leave to appeal.¹³⁵ In order to satisfy the Supreme Court of Appeal that the interests of justice support the grant of leave to appeal, the applicant for leave to appeal must canvass all facts relevant to the interests of justice in the affidavits filed in support of her application for leave to appeal.¹³⁶

3.6 Costs¹³⁷

FC s 172 vests courts, when dealing with a constitutional matter, with the widest possible remedial jurisdiction. A court may make any order that is 'just and

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equitable'. Pursuant to this power, and its predecessor in the Interim Constitution, the Constitutional Court has deviated from the conventional principle that costs follow the result. The underlying rationale for this deviation has been articulated as follows:

133 *American Natural Soda Ash Corp & Another v Competition Commission & Others* 2005 (6) SA 158 (SCA) at paras 21-22. See also *National Union of Metalworkers of South Africa v Fry's Metals (Pty) Ltd* 2005 (5) SA 433 (SCA) at para 43.

134 See, for example, *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A); *Minister of Safety and Security v Hamilton* 2001 (3) SA 50 (SCA).

135 *S v Western Areas Ltd & Others* 2005 (5) SA 214 (SCA), 2005 (1) SACR 441 (SCA) at para 28.

136 *Ibid* at para 35.

137 For more on costs in constitutional matters, see A Friedman 'Costs' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2007) Chapter 6.

The award of costs is a matter which is within the discretion of the Court considering the issue of costs. It is a discretion that must be exercised judicially having regard to all the relevant considerations. One such consideration is the general rule in constitutional litigation that an unsuccessful litigant ought not to be ordered to pay costs. The rationale for this rule is that an award of costs might have a chilling effect on the litigants who might wish to vindicate their constitutional rights. But this is not an inflexible rule. There may be circumstances that justify departure from this rule such as where the litigation is frivolous or vexatious. There may be conduct on the part of the litigant that deserves censure by the Court which may influence the Court to order an unsuccessful litigant to pay costs. The ultimate goal is to do that which is just having regard to the facts and circumstances of the case.¹³⁸

In cases which do not amount to some form of abuse of process, the Constitutional Court has frequently recognised that caution should be exercised 'in awarding costs against litigants who seek to enforce their constitutional right against the state, particularly where the constitutionality of the statutory provision is attacked, lest such orders have an unduly inhibiting or 'chilling effect' on other potential litigants in this category'.¹³⁹ In litigation between private parties, the Constitutional Court has, on occasion, followed the conventional rule that costs follow the result.¹⁴⁰ And when it comes to the Constitutional Court's review jurisdiction concerning the duties of a taxing master in relation to a bill of costs, it has held that no difference in principle exists between the role of the Constitutional Court and the role of the Supreme Court of Appeal.¹⁴¹

3.7 The duties of the state in constitutional litigation

(a) The General Ethical Duty

The Final Constitution imposes a separate and distinct burden on the state in the conduct of constitutional litigation that is not placed on other constitutional litigants. That duty is best explained by Justice Sachs, writing separately in *Matatiele Municipality & Others v President of the Republic of South Africa & Others*:

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[T]he Constitution requires candour on the part of government. What is involved is not simply a matter of showing courtesy to the public and to the courts, desirable though that always is. It is a question of maintaining respect for the constitutional injunction that our democratic government be accountable, responsive and open. Furthermore, it is consistent with ensuring that the courts can function effectively, as s 165(4) of the Constitution requires The notion that 'government knows best, end of enquiry', might have satisfied Justice Stratford CJ in the pre-democratic era. It is no longer compatible with democratic government based on the rule of law as envisaged by our Constitution. . . . [F]ar from the foundational values of the rule of law and of accountable government existing in discreet categories, they overlap and reinforce

138 *Affordable Medicines Trust & Others v Minister of Health & Others* 2006 (3) SA 247 (CC), 2005 (6) BCLR 529 (CC).

139 *Motsepe v Commissioner for Inland Revenue* 1997 (2) SA 898 (CC), 1997 (6) BCLR 692 (CC) at para 30.

140 See, eg, *Dikoko v Mokhatla* 2006 (6) SA 235 (CC), 2007 (1) BCLR 1 (CC) at para 103; *Khumalo & Others v Holomisa* 2002 (5) SA 401 (CC), 2002 (8) BCLR 771 (CC) at para 46.

141 *President of the Republic of South Africa & Others v Gauteng Lions Rugby Union & Another* 2002 (2) SA 64 (CC), 2002 (1) BCLR 1 (CC) at paras 10-12.

each other. Openness of government promotes both the rationality that the rule of law requires, and the accountability that multi-party democracy demands. In our constitutional order, the legitimacy of laws made by Parliament comes not from awe, but from openness.¹⁴²

As Justice Sachs makes clear, the general 'ethical' duty on the state flows directly from a number of fundamental provisions in the Final Constitution. First, the rule of law requires that all laws and government action are rational.¹⁴³ To establish rationality, the government must provide courts with all available and germane information so that the courts deliver decisions based on a full and proper understanding of the facts. Second, FC s 165(4) requires '[o]rgans of state . . . to assist and protect the courts.'¹⁴⁴ This obligation must impose a duty on the state to act in such a manner when it is involved in litigation. Third, FC s 195(1) requires that all public administration be accountable¹⁴⁵ and transparent.¹⁴⁶ Finally, the general ethical duty gives effect to the transformative ideals of the Final Constitution — these ideals at a minimum, require a transition from a 'culture of authority' to a 'culture of justification'.¹⁴⁷

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The main duty on the State is to provide courts with all the information they need to make their decisions. This duty is not limited to the specific stages in constitutional litigation where the State often bears a specific evidentiary burden. It extends to all aspects of constitutional litigation.¹⁴⁸ The duty is not, nor can it be, limited only to the provision of information for the State to win its case. The duty covers all information that would assist a court in rendering its decision. The duty to

142 2006 (5) SA 47 (CC), 2006 (5) BCLR 622 (CC) ('*Matatiele I*') at paras 107, 109 and 110.

143 FC s 1(c) entrenches 'the rule of law' as a founding value of the Final Constitution. For more on the rule of law, see F Michelman 'The Rule of Law, Legality and Supremacy of the Constitution' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, 2003) Chapter 11. For more on the status and the content of the Final Constitution's founding values, see C Roederer 'Founding Values' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 13.

144 FC s 165(4) reads in full: 'Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.'

145 FC s 195(1)(f).

146 FC s 195(1)(g). For more on FC s 195, see A Bodasing 'Public Administration' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2007) Chapter 23A.

147 This 'celebrated formulation' is drawn from Etienne Mureinik's article 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994) 10 *SAJHR* 31, 32. See also K Klare 'Legal Culture and Transformative Constitutionalism' (1998) 14 *SAJHR* 146; P Langa 'Transformative Constitutionalism' (2006) 17 *Stellenbosch LR* 351. The Constitutional Court has endorsed this principle in *S v Makwanyane* 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC) at para 156 (Ackermann J); *Prinsloo v Van der Linde & Another* 1997 (3) SA 1012 (CC), 1997 (6) BCLR 759 (CC) at para 25; *Ferreira v Levin NO & Others* 1996 (1) SA 984 (CC), 1996 (1) BCLR 1 (CC) at para 51 (Ackermann J); *Matatiele I* (supra) at para 100 (Sachs J).

adduce information arises from the time the litigation begins: it is not necessary for a court to request information from the State.¹⁴⁹

Because the ethical duty on the State does not flow from its position as a litigant, but from obligations imposed by the Final Constitution, the Constitutional Court has emphasised that the State must provide relevant information even if the State does not oppose the specific challenge at issue. In *Khosa*, the Court wrote:

Even in those cases where the view is taken that there is nothing to be said in support of challenged legislation, a court, in order to exercise the due care required of it when dealing with such matters, may well require the assistance of counsel. In this case it should have been apparent to the [government] respondents that the declaration of invalidity of the impugned legislation could have significant budgetary and administrative implications for the State. If the necessary evidence is not placed before the courts dealing with such matters their ability to perform their constitutional mandate will be hampered and the constitutional scheme itself put at risk. *It is government's duty to ensure that the relevant evidence is placed before the Court.*¹⁵⁰

Apart from providing relevant material, the State's attorney is required to act professionally. Of course, all attorneys bear such a duty, but the duty on the State's attorney flows not only from her duty as a professional, but from the constitutional responsibilities she bears when she represents the State. As the

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Constitutional Court noted in *South African Liquor Traders*: 'Given the government's responsibility to assist the work of courts, a lapse . . . in the State Attorney's office gives cause for grave concern.'¹⁵¹ In two recent hearings, several justices of the Constitutional Court have expressed particular displeasure and concern over the conduct of the State Attorney.¹⁵²

A number of consequences can follow a failure by the State to fulfil its ethical duty. Firstly, it can be mulcted in costs, not only for wasted time, but also in the main application.¹⁵³ Secondly, it may justify a postponement of the application. While courts, especially the Constitutional Court, are reluctant to grant postponements,¹⁵⁴ the public importance of most constitutional cases is a powerful justification for

148 It is arguable that the duty should extend also to non-constitutional matters. Indeed, considering the constitutional sources of the duty, it makes little sense to distinguish between matters concerning the Final Constitution and those that do not. However, that question goes beyond the boundaries of this chapter.

149 *Khosa & Others v Minister of Social Development & Others; Mahlaule v Minister of Social Development & Others* 2004 (6) SA 505 (CC); 2004 (6) BCLR 569 (CC) ('*Khosa*') at para 18 ('The respondents had the opportunity to place evidence before the High Court and cannot be heard to say that it was the duty of the High Court to call for evidence before declaring the impugned legislation unconstitutional. It was the respondents who were to be blamed for the failure to place relevant information and argument before the High Court which explained the reasons for the disputed provisions and the purpose they were intended to serve.')

150 *Ibid* at para 19. See also *Gory v Kolver NO & Others (Starke & Others Intervening)* 2007 (4) SA 97 (CC), 2007 (3) BCLR 249 (CC) at para 64 (The Minister had not opposed the constitutional challenge in the High Court, but had argued for a retrospective order. In the Constitutional Court the Minister did not oppose confirmation at all, despite the retrospective order being granted by the High Court. Van Heerden AJ commented in this regard as follows: 'To my mind, something more substantive is required when a state official is called upon to deal with the constitutionality of a statutory provision falling under his or her administration and with the formulation of an appropriate remedy in the event that such provision is held to be constitutionally invalid is under consideration by a court.')

postponing a case rather than deciding it without sufficient input from the State.¹⁵⁵ Finally, a failure to present enough evidence will 'tip the scales'

against the State.¹⁵⁶

(b) Specific evidentiary burdens

(i) Limitations¹⁵⁷

The burden of proof to justify an infringement of rights under FC s 36 will fall on the party relying on FC s 36.¹⁵⁸ The most obvious justification for placing this burden on the party relying upon the law in question, most often the State, is that the State will

151 See *South African Liquor Traders Association & Others v Chairperson, Gauteng Liquor Board & Others* 2006 (8) BCLR 901 (CC) at para 52 (The State Attorney had failed to inform the MEC of a constitutional challenge to provincial legislation and had failed to appear in court despite a request by the Registrar. O'Regan J expressed the court's displeasure in the following terms: 'The result is both unfortunate and serious. It is unfortunate because the effect in this case was to give the impression that the MEC, a senior member of the executive in provincial government, was not interested in assisting this court in resolving important constitutional litigation. That impression has now been rectified. It is serious because as a matter of common practice it is the State Attorney who is briefed by the government when it is involved in litigation. Given the government's responsibility to assist the work of courts, a lapse of this sort in the State Attorney's office gives cause for grave concern.')

152 *Nyathi v MEC for Health: Gauteng & Another* 2008 (5) SA 94 (CC), 2008 (9) BCLR 865 (CC)(The State Attorney again failed to inform the MEC or the Minister of Justice of a constitutional challenge to the State Liability Act 20 of 1957. The court issued directions requiring the State Attorney to explain the failure. At the hearing several justices expressed dismay at the apparent lack of competence and capacity of the State Attorney. Some even suggested the possibility of a structural interdict so that the court could supervise the Office of the State Attorney and improve its performance.); *Shilubana v Nwamitwa* 2007 (5) SA 620 (CC), 2007 (9) BCLR 919 (CC)(The State Attorney failed to properly paginate the record or to respond to a request for power of attorney from the respondents. The court was openly hostile to the conduct of the State Attorney and only did not strike the matter from the roll because of its importance.)

153 See, for example, *Liquor Traders* (supra) at para 54 (The court ordered costs *de bonis propriis* against the State Attorney for the negligent way it conducted the case). For more on costs in constitutional litigation, see A Friedman 'Costs' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2007) Chapter 6.

154 The general principles relating to postponements in constitutional matters have been set out by the Constitutional Court in a number of judgments. See *Shilubana v Nwamitwa* [2007 (5) SA 620 (CC), 2007 (9) BCLR 919 (CC); *National Police Service Union & Others v Minister of Safety and Security & Others* 2000 (4) SA 1110 (CC), 2001 (1) BCLR 775 (CC); *Lekolwane & Another v Minister of Justice and Constitutional Development* 2007 (3) BCLR 280 (CC).

155 *Khosa* (supra) at paras 24-5 ('This Court required further information to enable it to discharge its constitutional duty, and it was in the interests of justice that such information be placed before it. In the circumstances, the most appropriate way of dealing with the situation was to require the respondents to place the necessary information before this Court expeditiously. For these reasons, the matter was postponed'); *Liquor Traders* (supra) at para 20 (There was no appearance for the State at the hearing, despite numerous requests from the Court, because of a failure on the part of the State Attorney. The Court ordered a postponement, presumably because it did not want to hear the matter without input from the state, although the judgment does not specify the reason); *Shilubana v Nwamitwa* CCT 03/07 (Order of 4 September 2007)(Case was postponed because of a failure by the State to properly paginate the record or to respond to a request for a power of attorney.)

have unique access to the type of information that would be relevant to a justification analysis. That information will generally consist of statistical or other information that demonstrates: (a) the important purpose served by the law and the adverse consequences that may flow if the law is set aside;¹⁵⁹ or (b) the administrative or financial impact that a change in the law will have on the state.¹⁶⁰

However, even if government fails to put up a case for justification, a court is still obliged to determine whether the impugned legislation can be justified.¹⁶¹ However, as Somyalo AJ noted in *Moise*: 'The absence of evidence or argument in support of the limitation has a profound bearing on the weighing up exercise,

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the more so as the parties who chose to remain silent have special knowledge of provincial and local government administration.¹⁶² Somyalo AJ then held that a 'failure by government to submit such data and argument may, in appropriate cases, tip the scales against it.'¹⁶³

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- 156 See *Moise v Greater Germiston Transitional Local Council: Minister of Justice and Constitutional Development Intervening (Women's Legal Centre as Amicus Curiae) ('Moise')* 2001 (4) SA 491 (CC), 2001 (8) BCLR 765 (CC) at para 19 ('If the government wishes to defend the particular enactment, it then has the opportunity — indeed an obligation — to do so. The obligation includes not only the submission of legal argument but the placing before Court of the requisite factual material and policy considerations. Therefore, although the burden of justification under s 36 is no ordinary onus, failure by government to submit such data and argument may in appropriate cases tip the scales against it and result in the invalidation of the challenged enactment.')
- 157 See, generally, S Woolman & H Botha 'Limitations' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, 2006) Chapter 34, 34.6 - from which this section is primarily drawn.
- 158 See *S v Makwanyane* 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC) at para 102 ('It is for the legislature, or the party relying on the legislation, to establish this justification, and not for the party challenging it to show that it was not justified.')
- 159 Ibid at paras 116 and 118 (The Attorney-General argued that the death penalty served as a deterrent and pointed to the increase in crime rates since a moratorium had been placed on implementing the death penalty); *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division) & Others* 2004 (1) SA 406 (CC), 2003 (12) BCLR 1333 (CC) at paras 64-5 (The State led evidence about the link between child pornography and child abuse and the serious effects of child abuse on children); *S v Jordan & Others* 2002 (6) SA 642 (CC), 2002 (11) BCLR 1117 (CC) at para 86 (State argued that the criminalisation of prostitution was justified by leading evidence that prostitution was linked to human trafficking, drug abuse, violent crime, sexually transmitted diseases and child prostitution).
- 160 See, eg, *Khosa* at paras 60-61 (State led evidence of the financial burden of providing social assistance to permanent residents as well as the administrative difficulties in identifying who would qualify for a grant); *Prince v President of the Law Society of the Cape of Good Hope* 2002 (2) SA 794 (CC), 2002 (3) BCLR 231 (CC) at paras 133-4 (in finding that a prohibition on marijuana use by Rastafari was a justifiable limitation of the right to freedom of religion, the majority of the court relied on evidence presented by the state of the financial and administrative difficulties of establishing and policing an exemption in the form of a permit system).
- 161 See *Du Toit & Another v Minister of Welfare and Population Development & Others* 2003 (2) SA 198 (CC), 2002 (10) BCLR 1006 (CC) at para 31; *Phillips & Another v Director of Public Prosecutions (Witwatersrand Local Division) & Others* 2003 (3) SA 345 (CC), 2003 (4) BCLR 357 (CC) at para 20; *J v Director-General, Department of Home Affairs & Others* 2003 (5) SA 621 (CC), 2003 (5) BCLR 463 (CC) at para 15.

The State should also bear an evidentiary burden with respect to certain, if not all, internal limitations clauses.¹⁶⁴ Although the text offers no express guidance, and the courts have not yet provided an answer, Liebenberg, Woolman and Botha have all argued that there should be a burden shift in socio-economic rights cases. They contend that, if a litigant establishes a prima facie case of unreasonableness, the burden of justification should shift to the state to prove that it lacks available resources. 'It would be unreasonable,' as Liebenberg notes, 'to expect ordinary litigants to identify and to quantify the resources available to the State for the realisation of particular socio-economic rights.'¹⁶⁵

(ii) Remedies¹⁶⁶

Orders that declare legislation invalid ordinarily go into effect immediately and apply retrospectively to the date the Final Constitution came into force.¹⁶⁷ Such orders can, accordingly, seriously affect the operation of government and the conduct of private affairs. They can undo settled arrangements upon which many have reasonably relied. And they can leave gaping lacuna in the law. The Final Constitution therefore makes specific provision for limiting the effect of declarations of invalidity by both suspending and limiting the retrospective effect of orders of invalidity.¹⁶⁸ However, the Constitutional Court has emphasised

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162 *Moise* (supra) at para 20. See also *Phillips* (supra) at para 20 (Yacoob J emphasised that the lack of evidence will 'tip the scales' only in 'appropriate cases'.)

163 *Moise* (supra) at para 19.

164 For more on internal modifiers and internal limitations, and why the State bears the burden of justification for internal limitations (but not internal modifiers), see S Woolman & H Botha 'Limitations' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 34.

165 S Liebenberg 'Interpretation of Socio-economic Rights' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, 2003) Chapter 33, at 33-53—33-54.

166 For more on constitutional remedies in general, and the operation of orders of invalidity and the circumstances and manner in which they can be limited in particular, see M Bishop 'Remedies' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 9.

167 See *Women's Legal Centre, Ex parte: In re Moise v Greater Germiston Transitional Local Council* 2001 (4) SA 1288 (CC), 2001 (8) BCLR 765 (CC) at paras 13-15.

168 FC s 172(1)(b) reads:

When deciding a constitutional matter within its power, a court —

(b) may make any order that is just and equitable, including —

- (i) an order limiting the retrospective effect of the declaration of invalidity; and
- (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.

that it will only grant such an order if an evidentiary basis exists for doing so.¹⁶⁹ That evidence should reflect

the effect of the order . . . on the successful litigant and on those prospective litigants in positions similar to that of the former, as well as the effect on the administration of justice or State machinery.¹⁷⁰

The burden to supply that evidence will ordinarily rest on the State, both because it will be the only party in possession of the relevant information and because it will most often be the party seeking a limitation of the order.

The importance of presenting such evidence was demonstrated in *Chief Lesapo*. The Constitutional Court refused to grant a suspension order – despite the fact that the government had expressed grave concern about the effect of an immediate order – because the government had not presented any evidence to justify its fears.¹⁷¹ However, specific evidence will not always be necessary. Other concerns may motivate granting such an order.¹⁷² In addition, the detrimental effects might be clear to all concerned from the existing record or the nature of the provision in question.

The State bears an even stricter evidential burden when it seeks an extension of a suspension order. In such cases, the state must demonstrate that it is 'just and equitable' to extend the suspension. A court, when deciding to grant such an extension, will consider the following factors:

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169 *S v Mello* 1998 (3) SA 712 (CC), 1998 (7) BCLR 908 (CC) at para 11. See also *Chief Lesapo v North West Agricultural Bank* 2000 (1) SA 409 (CC), 1999 (12) BCLR 1420 (CC) ('*Chief Lesapo*') at para 33; *S v Ntsele* 1997 (11) BCLR 1543 (CC), 1997 (2) SACR 740 (CC) at para 13; *S v Julies* 1996 (4) SA 313 (CC), 1996 (7) BCLR 899 (CC), 1996 (2) SACR 108 (CC) at para 4; *S v Mbatha*; *S v Prinsloo* 1996 (2) SA 464 (CC), 1996 (3) BCLR 293 (CC), 1996 (1) SACR 371 (CC) at para 30; *S v Bhulwana*; *S v Gwadiiso* 1996 (1) SA 388 (CC), 1995 (12) BCLR 1579 (CC), 1995 (2) SACR 748 (CC) at para 30.

170 *Chief Lesapo* (supra) at para 33. See also *S v Ntuli* 1996 (1) SA 1207 (CC), 1996 (1) BCLR 141 (CC) at para 27 (The *Ntuli* Court set aside provisions requiring a judge's certificate before an appeal from the magistrates' court, but suspended the order because of the impact it would have on the administration of justice.)

171 *Chief Lesapo* (supra) at para 33.

172 For example, suspension is often justified on the basis that the matter has many possible solutions and is best left to the legislature to decide. See, eg, *Fraser v Children's Court, Pretoria North* 1997 (2) SA 261 (CC), 1997 (2) BCLR 153 (CC) at paras 50–51 (Court suspended an order invalidating a provision which did not require the consent of fathers of children born-out-of-wedlock for their adoption because of the many possible ways the legislature could address the problem); *Minister of Home Affairs v Fourie*; *Lesbian and Gay Equality Project v Minister of Home Affairs* 2006 (1) SA 524 (CC), 2006 (3) BCLR 355 (CC) (The unconstitutionality of limiting marriage to heterosexual couples was suspended to allow the legislature to deal with it, both because there were a number of possibilities and because any change was more likely to be accepted if it came from the legislature.) Courts often limit retrospectivity because of the obvious injustice that will flow from retrospective application, without the need for evidence of any specific injustices. See, eg, *Ex parte Minister of Safety and Security v Walters* 2002 (4) SA 613 (CC), 2002 (7) BCLR 663 (CC) at para 74 (The Court invalidated provisions permitting policemen to use lethal force in effecting an arrest, but limited the retrospective effect because it would criminalize acts performed in good faith); *Masiya v Director of Public Prosecutions, Pretoria and Another (Centre for Applied Legal Studies and Another, Amici Curiae)* 2007 (5) SA 30 (CC) (After extending the definition of rape to include anal penetration of a female, the court refused to apply the decision retrospectively because it would violate the principle of legality.)

the sufficiency of the explanation for failure to comply with the original period of suspension; the potentiality of prejudice being sustained if the period of suspension were extended or not extended; the prospects of complying with the deadline; the need to bring litigation to finality; and the need to promote the constitutional project and prevent chaos.¹⁷³

It is not possible to extend a suspension order if the original suspension period has already lapsed.¹⁷⁴

(c) Constitutional duty of the state in the enforcement of court orders

Part of the general ethical duty imposed on the state flows from FC s 165(4):

Organs of state, through legislative and other means, must assist and protect the courts to ensure independence, impartiality, dignity, accessibility and effectiveness of the courts.

This general obligation, together with the rule of law and the right of access to courts, implies a duty on the state, in certain circumstances, to take positive action to ensure compliance with court orders or the maintenance of the social fabric.

In *President of RSA & Another v Modderklip Boerdery (Pty) Ltd & Others*, the Constitutional Court was faced with a situation where tens of thousands of people had taken residence on a private party's land.¹⁷⁵ The scale of the problem prevented the enforcement of an ordinary eviction order. Langa ACJ (as he then was) found that FC s 34 imposed an obligation on the state to find a solution to the problem:

The obligation on the State goes further than the mere provision of the mechanisms and institutions referred to above. It is also obliged to take reasonable steps, where possible, to ensure that large-scale disruptions in the social fabric do not occur in the wake of the execution of court orders, thus undermining the rule of law. The precise nature of the State's obligation in any particular case and in respect of any particular right will depend on what is reasonable, regard being had to the nature of the right or interest that is at risk, as well as on the circumstances of each case.¹⁷⁶

The obligation to take steps to ensure compliance with court orders does not, it seems, extend to a failure to comply with court orders against foreign states. The Supreme Court of Appeal in *Rootman v President of the Republic of South Africa* rejected an application to force the government to take steps to force the Democratic Republic of Congo to comply with an existing High Court order in the applicant's favour.¹⁷⁷ Lewis JA relied on the principle established in *Kaunda v President of the Republic of South Africa* that the Final Constitution does not apply

173 *Zondi v MEC for Traditional and Local Government Affairs & Others* 2006 (3) SA 1 (CC), 2006 (3) BCLR 423 (CC) at para 47.

174 See *Ex Parte Minister of Social Development* 2006 (4) SA 309 (CC), 2006 (5) BCLR 604 (CC); *Minister of Justice v Ntuli* 1997 (3) SA 772 (CC), 1997 (6) BCLR 677 (CC).

175 2005 (5) SA 3 (CC), 2005 (8) BCLR 786 (CC).

176 *Ibid* at para 43.

177 [2006] SCA 80 (RSA) ('*Rootman*').

outside South Africa and therefore cannot require the DRC to comply with South African court orders.¹⁷⁸

Finally, the State has a duty to comply with court orders against the State. The Transvaal High Court, in *Nyathi v Member of the Executive Council for Health, Gauteng & Another*, found that s 3(1) of the State Liability Act violated FC ss 34 and 165(5)¹⁷⁹ because it prohibited attachment 'or like processes' in enforcing a court order against the State.¹⁸⁰ This decision implies that the State has a constitutional duty to ensure that court orders can be effectively enforced.

178 *Rootman* (supra) at para 12. For a compelling critique of *Kaunda*, and thus its application in *Rootman*, see S Woolman 'Application' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, 2005) Chapter 31, 31.6. Even if the Final Constitution does not apply outside South Africa, Mr Rootman and the South African government are 'in' South Africa. It is therefore possible to require the State to take action to enforce the court order without invoking extra-territorial application of the Final Constitution (say, by freezing the assets of the foreign state located in South Africa.). Lewis JA accepted that the State could take certain diplomatic steps (eg writing a letter or making a telephone call). However, she concluded that these steps would likely be ineffective and therefore should not be granted. However, while the effect of diplomatic negotiations cannot be foreseen, the uncertainty of securing a positive response should hardly be grounds for releasing the government from taking any steps at all. For an alternative reading of *Kaunda*, see J Klaaren 'Citizenship' in S Woolman, J Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS December 2007) Chapter 60.

179 FC s 165(5) reads: 'An order issued by a court binds all persons to whom and all organs of state to which it applies.'

180 [2007] ZAGPHC 16 (30 March 2007). The matter was then heard as part of confirmation proceedings in the Constitutional Court. At the time of writing, judgment had not yet been delivered. (The case has since been reported as *Nyathi v MEC for Department of Health, Gauteng and Another* 2008 (5) SA 94 (CC), 2008 (9) BCLR 865 (CC).)