Chapter 5
Rules and Procedure in Constitutional Matters

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(iv) Factors relevant to applications for leave to appeal in criminal cases

(aa) Simultaneous appeals

(bb) Litigants aggrieved by a decision

(v) Factors to be considered with respect to appeals against interim orders of execution

(vi) Factors to be considered with respect to appeals from the Labour Appeal Court

Appendix: Constitutional Court Rules

5.1 Introduction*

This chapter begins with a general overview of the 2003 Rules[1] and then proceeds to discuss certain of the Rules in greater detail: Rules 8 & 10: intervenors and *amici curiae*;[2] Rules 14 & 15: referral of Bills and Acts; Rule 16: confirmation proceedings; Rule 18: direct access; and Rules 19 & 20: appeals. For ease of reference, the Rules are reproduced in full in an appendix to this chapter.

5.2 General overview of the rules

The 2003 Rules commence with a definitions' section and certain general provisions.[3] Of particular significance for practitioners is the inclusion, among the general provisions, of matters which were previously covered by Practice Direction 2.[4]

Rule 1(3) now stipulates that any references to 'lodging documents with the Registrar'[5] in the Rules shall be construed as including prior service of such documents on other parties and the lodging of 25 copies of all relevant documents and an electronic version thereof that is compatible with the software used by the

1 The Constitutional Court Rules, 2003 ('2003 Rules') were promulgated under Government Notice R1675 in Government Gazette 25726 of 31 October 2003 and came into effect on 1 December 2003. These rules replaced the Constitutional Court Rules, 1998 ('1998 Rules') which were promulgated on 29 May 1998 — GN R757 *Reg Gaz* 6199. In a number of respects, the 2003 Rules have simplified the procedures that existed under the 1998 Rules, particularly in relation to appeals to the Constitutional Court.

2 For an extended discussion of the rules and practice of amici curiae, see G Budlender 'Amicus' 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.

3 Rule 1(2)–1(8).

4 1999 (2) SA 666 (CC), 1999 (3) BCLR 260 (CC), 1999 (1) SACR 370 (CC).

5 In the remainder of the chapter, references to 'Registrar' will denote the Registrar of the Constitutional Court and references to 'Court' will denote the Constitutional Court.

Court.[6] This marks a change from the position under Practice Direction 2, where the lodging of an electronic copy was not compulsory.[7] By contrast, Rule 1(3) is couched in mandatory terms. Rule 1(3)'s requirement that 25 copies of all relevant documents be lodged with the Registrar must be read subject to the proviso in Rule 20(2)*(i)*. Rule 20(2)*(i)* provides that where a disk or electronic version of a document other than a record is provided in an appeal, the party need lodge only 13 copies of the document concerned with the Registrar.

Rule 1(4) now covers the requirement — previously found in Practice Direction 2[8] — that where notices or other communications are made by electronic copy, the party giving such notice or communication must lodge with the Registrar a hard copy of the notice or communication with a certificate signed by such party verifying the date of such communication or notice.

* I would like to thank Matthew Chaskalson for his helpful comments on previous drafts of this chapter and Adrian Friedman for all the insights our discussions on various aspects of this chapter produced.

Rule 1(8) stipulates that, subject to Rule 5, the provisions of rule 4 of the Uniform Rules of Court shall apply, with the necessary modifications, to the service of any process of the Court.

Following the definitions' section, the Rules are divided into ten parts. Part 1 of the rules details the Court terms.[9] Part 2 includes provisions relating to the Registrar's office hours[10] and general duties.[11] Whenever the Court makes an order declaring or confirming any law to be inconsistent with the FC 172, the Registrar is required, no later than 15 days after such order has been made, to publish such order in the Government Gazette or the Provincial Gazette if the order relates to provincial legislation. The Registrar also has certain duties in relation to unrepresented parties who apply to the Court. Those obligations have, in fact, been slightly amended in the 2003 Rules from the position under the 1998 Rules. Under the 1998 Rules, the Registrar was obliged to refer that party to the nearest office of the South African Human Rights Commission, the Legal Aid Board, or any law clinic which may be willing to assist the party. The Registrar was similarly obliged to render assistance in preparing the papers required by the rules if the unrepresented party was unable to obtain assistance or, if so directed by the President of the Court, to request an advocate or attorney to assist the party. These latter two requirements

6 Although Practice Direction 2 (para 2) indicated that electronic copies of documents lodged with the Registrar should be in Word Perfect (5, 6, or 7) format, the Registrar, at the time of writing, has indicated a preference for documents to be formatted in MS Word.

7 1999 (2) SA 666 (CC), 1999 (3) BCLR 260 (CC), 1999 (1) SACR 370 (CC) at para 2.

8 Ibid at para 4.

9 Rule 2.

10 Rule 3. The office of the Registrar is open from 08h30 to 13h00 and from 14h00 to 15h30 on Court days.

11 Rule 4.

have been altered under the 2003 Rules. In terms of Rule 4(11), the Registrar is now only required to refer an unrepresented party to the nearest office or officer of the Human Rights Commission, the Legal Aid board, a law clinic or such other appropriate body or institution that may be willing and in a position to assist such party.[12]

In two recent decisions, *De Kock v Minister of Water Affairs and Forestry* and *Mnguni v Minister of Correctional Services* the Constitutional Court, despite refusing to grant direct access to the unrepresented applicants in both cases, directed the Registrar to bring the judgments to the attention of the Law Society of the Northern Provinces. The Registrar was obliged to ask the Law Society of the Northern Provinces whether one of its members might provide assistance to the unrepresented applicants. In neither of these cases were the obligations of the Registrar in terms of Rule 4(11) discussed. It therefore remains unclear whether such a referral occurred. However, it must be safe to assume that, if it did take place, the applicants were unsuccessful in obtaining legal assistance. It will be interesting to see the extent to which the Court makes use of such a procedure where unrepresented applicants seek direct access to the Court in cases that raise 'important yet difficult issues which may well require adjudication'.[13]

Part 3 deals with the joinder of organs of state.[14] Rule 5(2) makes it clear that no order declaring an executive or administrative act or conduct, or threatened executive or administrative act or conduct, or any law to be unconstitutional may be made by the Court unless the party challenging the constitutionality of such act, conduct or law has, 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, taken steps to join the authority concerned as a party to the proceedings.[15] In *Mabaso v Law Society, Northern Provinces, and Another*, O'Regan J, writing for the Court, spoke to the importance of this rule.[16] She highlighted the fact that, in a constitutional democracy, a court should not declare the acts of another arm of government to be inconsistent with the Final 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.[17] O'Regan J identified two underlying rationales for this approach. First, the Minister responsible for administering the legislation may well be able to place before the court pertinent facts and submissions necessary for the proper determination of the

12 See *De Kock v Minister of Water Affairs and Forestry* 2005 (12) BCLR 1183 (CC) ('*De Kock*'); *Mnguni v Minister of Correctional Services* 2005 (12) BCLR 1187 (CC) ('*Mnguni*').

13 *De Kock* (supra) at para 5; *Mnguni* (supra) at para 7.

14 Rule 5.

15 The Court indicated, with respect to the 1998 Rules, that although the Rules apply only to proceedings in the Constitutional Court, in cases concerning the constitutional validity of law or an executive act, the relevant executive authority should be given the opportunity to be joined in the proceedings at the earliest possible stage. See *Pharboo and Others v Getz NO & Another* 1997 (4) SA 1095 (CC), 1997 (10) BCLR 1337 (CC) ('*Pharbo*') at para 5; *Beinash v Ernst & Young* 1999 (2) SA 116 (CC), 1999 (2) BCLR 125 (CC) at paras 27-8. See, further, *Jooste v Score Supermarket Trading* 1999 (2) SA 1 (CC), 1999 (2) BCLR 139 (CC) ('*Jooste*') at paras 7-9.

16 2005 (2) SA 117 (CC), 2005 (2) BCLR 129 (CC) ('*Mabaso*').

constitutional issue.[18] Second, Rule 5 shows respect for the other arms of government and their different constitutional functions.[19]

Part 4 covers matters relating to the representation of parties;[20] a change of parties owing to the fact that a party dies or becomes incompetent to continue any proceedings;[21] intervention by a party to the proceedings;[22] and requirements relating to powers of attorney.[23] Unless otherwise directed by the Chief Justice,

only persons who are entitled to appear in the High Courts may appear on behalf of any party to proceedings of the Court.[24] Legal representatives are not required to file a power of attorney, but one can be demanded by a party who disputes the authority of a practitioner to act on behalf of another party.[25] Any person entitled to join as a party or liable to be joined as a party in the proceedings may, on notice to all parties, at any stage of the proceedings, apply for leave to intervene as a party.[26]

17 *Mabaso* (supra) at para 13. In *Mabaso*, the applicant had failed to join the Minister for Justice and Constitutional Development, who was responsible for administering the Act, which he challenged in his application for leave to appeal to the Constitutional Court. In the special circumstances of the case, however, the Registrar had provided the Minister for Justice and Constitutional Development with a copy of the full record in the case, as well as the written submissions lodged by the parties and given her an opportunity to indicate whether she wished to intervene as a party. In a written notice to the Court, the Minister consented to being joined as a party in the proceedings, and indicated that she would abide by any judgment given by the Court. Thus, the Court had, on its own motion, cured the applicant's failure to take steps to join the Minister. The Court was, however, quick to emphasise that it would not ordinarily take steps to remedy the failure by an applicant to comply with Rule 5. It stressed that it had done so only because the Rule had recently been introduced and the applicant had taken steps to comply with the former Rule. Ibid at para 14.

18 Ibid at para 13.

19 Ibid.

20 Rule 6.

21 Rule 7.

22 Rule 8.

23 Rule 9.

24 Rule 6.

25 Rule 9(1).

26 Rule 8(1).

Part 5 deals with *amici curiae* submissions.[27] It provides for any person interested in any matter before the Court to appear as an amicus curiae either in terms of the written consent of all the parties in the matter, or, if such written consent has not been secured, on application to the Chief Justice to be admitted as an amicus curiae.

Part 6 covers Rules 11 to 13 which deal with application procedure,[28] urgent applications[29] and argument.[30] In any matter in which an application is necessary, including the obtaining of directions from the Court, the procedure to be used is notice of motion supported by affidavit.[31] The procedure prescribed is similar to the High Court application procedure. Once all affidavits have been filed, the application will be placed before the Chief Justice and he or she will then issue directions as to how the application will be dealt with and, in particular, whether it shall be set down for hearing.[32] Rule 13(2) makes it clear that oral argument will be allowed in the matter only if directions to that effect are given by the Chief Justice.[33] The Chief Justice may, when giving directions, permit the lodging of further affidavits.[34] Where an application is urgent, the Chief Justice may, at the request of the applicant, dispense with the forms and the service provided for in the Rules.[35]

Part 7 of the Rules covers those matters within the exclusive jurisdiction of the Court, including, referrals of Bills in terms of FC s 79(4)*(b)* or FC s 121(2)*(b)*;[36] applications in terms of FC s 80(1) and FC s 122(1);[37] confirmations of orders of constitutional invalidity;[38] and certifications of provincial constitutions.[39] Not all

27 Rule 10. See, further, G Budlender 'Amicus' 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.

28 Rule 11.

29 Rule 12.

30 Rule 13.

31 Rule 11(1).

32 Rule 11(4).

33 Rule 13(2).

34 Rule 11(3) *(d)*.

35 Rule 12(1).

36 Rule 14.

37 Rule 15.

38 Rule 16. 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.

matters which fall within the exclusive jurisdiction of the Constitutional Court are specifically dealt with in the Rules, however. Those matters excluded are twofold: the constitutionality of amendments to the Final Constitution and matters relating to the failure of the President or Parliament to perform a constitutional obligation.[40] *Matatiele Municipality and Others v The President of the Republic of South Africa* deals with the first form of exclusion.[41] In *Matatiele*, the applicants challenged the constitutional validity of the Constitution Twelfth Amendment Act ('Twelfth Amendment') and the Cross-Boundary Municipalities Laws Repeal and Related Matters Act[42] ('Repeal Act'). Although the Court had exclusive jurisdiction to resolve the issue in relation to the Twelfth Amendment under FC s 167(4)*(d)*, the applicants' challenge to the Repeal Act did not fall within the Court's exclusive jurisdiction and thus an application was made for direct access to the Court to challenge the constitutionality of the Repeal Act in the same proceedings. On the question as to whether to grant the application for direct access, the Court held that the close interrelationship between the two Acts was sufficient to warrant granting the application for direct access. As the discussion of direct access later in this chapter makes plain, the Constitutional Court has been inclined to grant direct access in situations where a matter, to which the substance of the direct access application is closely related, is already before the Court.

Part 8 of the Rules deals with matters which fall within the concurrent jurisdiction of the Constitutional Court, the High Courts, the Supreme Court of Appeal and other courts of similar status. Rule 18 deals with direct access to the Constitutional Court. In appropriate cases, direct access will be granted, with leave of the Court, when it is in the interests of justice to do so. Rule 19 deals with appeals to the Constitutional Court and vastly simplifies the bifurcated approach to appeals that had been adopted under the 1998 Rules. Rule 20 details the procedures to be adopted on appeal. Rule 21 covers matters previously dealt with in Practice Direction 2.[43]

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39 Rule 17. 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.

40 Such matters will, in all likelihood, have to be brought using the application procedure provided for in Rule 11 which applies to 'any matter in which an application is necessary for any purpose' except those matters for which Rules have been specifically provided. It should be noted that Rule 11(1)*(a)* itself refers to matters contemplated in FC s 167(4)*(a)*: that is, 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.

41 *Matatiele Municipality and Others v The President of the Republic of South Africa and Others (No 2)* CCT 73/05 (Decided on 18 August 2006, as yet unreported.)

42 Act 23 of 2005.

43 1999 (2) SA 666 (CC), 1999 (3) BCLR 260 (CC), 1999 (1) SACR 370 (CC). This direction dealt with the practice notes which were required to be filed together with any application for confirmation of an order of constitutional invalidity or appeal against such an order, as well as any application for leave to appeal. The notes were required to set out the length of the record or, if the record had not yet been transcribed, an estimate of its length and the time required for transcription. In addition, the practice note was required to set out any special circumstances which might justify a hearing of more than one day, or which might otherwise be relevant to the directions to be given by the President of the Court. The new Rule 21 replicates these requirements subject to the necessary amendment to replace references to the 'President of the Court' with references to the 'Chief Justice'.

Part 9 of the Rules deals with fees and costs.[44] The last section of the Rules — Part 10 — covers remaining miscellaneous provisions, including, matters relating to the library;[45] translations of records or other documents lodged with the Registrar;[46] models diagrams and exhibits;[47] the withdrawal of cases;[48] the formatting of documents;[49] the application of certain rules of the Uniform Rules of Court[50] and sections of the Supreme Court Act 59 of 1959;[51] non-compliance with the rules;[52] execution;[53] transitional provisions;[54] repeal of the previous rules;[55] and the short title.[56] In addition to these twelve items, Part 10 also includes a rule, which is dealt with in detail in the chapter in this treatise entitled 'Constitutional Litigation', that relates to the lodging of documents that canvass factual material which is relevant

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44 Rules 22 & 23. 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.

45 Rule 24.

46 Rule 25.

47 Rule 26.

48 Rule 27.

49 Rule 28.

50 Rule 29. The Uniform Rules incorporated the following: joinder of parties on application and other matters relating to application procedure; amendments to pleadings and documents; discovery, inspection and production of documents; procuring evidence for trial by way of a hearing before a commission; variation and rescission of orders; sworn translators; interpretation of evidence; filing, preparing and inspection of documents; authentication of documents executed outside the Republic for use within the Republic; destruction of documents; and enrolment of commissioners of the Court.

51 Rule 30. The sections of the Supreme Court Act that apply concern the reference of matters for investigation by a referee; the powers of court on the hearing of appeals; examinations by interrogatories of persons whose evidence is required in civil cases; and the manner of dealing with commissions *rogatorie*, letter of request and documents for service originating from foreign countries. It should be noted that the last-mentioned provision is to apply subject to the replacement of 'English and Afrikaans' with the phrase 'any official language'.

52 Rule 32.

53 Rule 33 stipulates that costs orders of the Constitutional Court are to be executed in the magistrates' courts. Where a costs order has not been complied with, the party in whose favour the order was made is to file with the Registrar an affidavit setting out the details of the costs order and stating that the order has not been complied with or has not been complied with in full, as well as the outstanding amount, and requesting that the Registrar furnish him or her with a certified copy of such costs order. Rule 33(2). The party in whose favour the costs order was made must then file the certified copy of the order with the clerk of the civil court of the district in which he or she resides, carries on business or is employed. Rule 33(4). The order shall be executed in accordance with the provisions of the Magistrates' Courts Act 32 of 1944 and the Magistrates' Courts Rules published under GN R1108 of 21 June 1968, as amended, regarding warrants of execution against moveable and immoveable property and the issuing of emolument attachment orders and garnishee orders only. Rule 33(5).

to the determination of the issues before the Court and which does not specifically appear on the record.[57]

5.3 Analysis of particular rules

(a) Rules 8 & 10: intervenors and amici curiae

Although Geoff Budlender engages the role of an amicus curiae at length elsewhere in this work, it is worth spending a moment here to consider the manner in which the 2003 Rules distinguishes the roles of *amici* and intervenors.[58] In *Hoffman v South African Airways*,[59] the Constitutional Court places the following gloss on this distinction:

> An amicus curiae assists the Court by furnishing information or argument regarding questions of law or fact. An amicus is not a party to litigation, but believes that the Court's decision may affect its interest. The amicus differs from an intervening party, who has a direct interest in the outcome of the litigation and is therefore permitted to participate as a party to the matter. An amicus joins proceedings, as its name suggests, as a friend of the Court. It is unlike a party to litigation who is forced into the litigation and thus compelled to incur costs. It joins in the proceedings to assist the Court because of its expertise on or interest in the matter before the Court. It chooses the side it wishes to join unless requested by the Court to urge a particular position.[60]

(i) Rule 8: Intervention of parties in proceedings

The 2003 Rules' inclusion of a specific provision relating to the procedure to be adopted by parties seeking leave to intervene in proceedings before the Court marks a change from the position under the 1998 Rules. The 1998 Rules embraced many of the Uniform Rules of Court. However, Rule 12 — which details the procedure for the intervention of parties — was excluded.[61] Rule 12 of the Uniform Rules of Court was

54 Rule 34.

55 Rule 35.

56 Rule 36.

57 Rule 31. See M Chaskalson, G Marcus & M Bishop 'Constitutional Litigation' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition) OS, November 2007) Chapter 3.

58 See G Budlender 'Amicus' 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.

59 2001 (1) SA 1 (CC), 2000 (11) BCLR 1211 (CC)('*Hoffman*').

60 Ibid at para 63.

61 Rule 12 (which is to be read with Rule 10) reads as follows:

> Any person entitled to join as a plaintiff or liable to be joined as a defendant in any action may, on notice to all parties, at any stage of the proceedings apply for leave to intervene as a plaintiff or a

also excluded from incorporation in the 2003 Rules. However, an entirely new Rule 8 — which substantially mimics Rule 12 of the Uniform Rules of Court — has been added in the 2003 Rules.[62]

Although the Court has yet to interpret Rule 8 itself, the Court's previous case law on intervention, as well as the case law surrounding Rule 12 of the Uniform Rules of Court, may provide some indication of what to expect from the Court

under Rule 8. In *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Another (Mukhwevho Intervening)*, an application was made by one of the Alexandra flood victims — who was offered temporary accommodation at Leeuwkop — for leave to intervene as a party.[63] Chaskalson P noted the applicant's 'direct and substantial interest in the proceedings' — the test articulated in the case law surrounding Rule 12 of the Uniform Rules of Court — and determined that it entitled him to be joined in his own right to the proceedings.[64]

In *United Watch and Diamond Company (Pty) Ltd v Disa Hotels Ltd*,[65] Corbett J highlighted the fact that the test of a direct and substantial interest in the subject-matter of the action had been regarded as the decisive criterion in applications for intervention.[66] He also drew two important distinctions which relate to the power of a court in intervention applications. The first distinction is that between applications for intervention and cases where the non-joinder of a necessary party is raised by a defendant or by the court *mero motu*. The second distinction is that between applications for intervention and those cases where joinder of another is demanded as of right. In the case of the former distinction, Corbett J held that the court has a discretion in relation to the intervenor application which does not exist where the non-joinder issue is raised by a defendant or the court *mero motu*. In relation to the second distinction, Corbett J held that the power of a court to grant leave to intervene is wider than where joinder of another is demanded as of right.[67]

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defendant. The court may upon such application make such order, including any order as to costs, and give such directions as to further procedure in the action as to it may seem meet.

62 Rule 8 reads as follows:

1. Any person entitled to join as a party or liable to be joined as a party in the proceedings may, on notice to all parties, at any stage of the proceedings apply for leave to intervene as a party.

2. The Court or the Chief Justice may upon such application make such order, including any order as to costs, and give such directions as to further procedure in the proceedings as may be necessary.

63 2001 (3) SA 1151 (CC), 2001 (7) BCLR 652 (CC)('*Kyalami*').

64 Ibid at para 30.

65 1972 (4) SA 409 (C)('*United Watch and Diamond Company*').

66 *United Watch and Company* (supra) at 416.

67 Ibid.

The conclusions reached by the courts in *Kyalami* and *United Watch and Diamond Company* raise several interesting questions in relation to Rule 8. On its face, it is clear that the Rule envisages leave being sought from the Court by a party wishing to intervene in proceedings before it. By adding the requirement that leave be sought, the Rule seems to envisage that while an applicant's entitlement to join as a party or liability to be joined as a party in the proceedings is a necessary requirement for intervention, it is not sufficient. The Court would appear to retain a discretion where a party seeks to intervene in proceedings. If this is, indeed, the correct construction of Rule 8, the success of applications under the Rule will depend on the factors identified by the Court as guiding the exercise of this discretion.

Although the Court's judgment in *Kyalami* regarded the existence of a 'direct and substantial interest' as the definitive criterion for the success of the applicant's leave to intervene application, it will be interesting to see whether the Court continues to adopt this approach to Rule 8 applications under the 2003 Rules. It should be noted, however, that if this 'interest' remains the sole criterion, the discretionary space which appears to be provided by Rule 8 will have been almost

entirely eliminated.[68] By contrast, if the Court were to add a proviso regarding the 'interests of justice' then its discretionary scope would be increased.

The Court may well wish to retain this discretionary space, particularly in relation to applications under Rule 8 in confirmation proceedings.[69] As Ackermann J emphasised in *National Director of Public Prosecutions v Mohamed NO*,[70] the Constitution demands that the courts adopt an objective approach to questions of constitutional validity.[71] The Court had previously made clear in *Ferreira v Levin NO and Others*[72] that such an approach entails that:

> a statute is either valid or 'of no force and effect to the extent of its inconsistency'. The subjective positions in which parties to a dispute may find themselves cannot have a bearing on the status of the provisions of a statute under attack. The Constitutional Court, or any other competent Court for that matter, ought not to restrict its enquiry to the position of one of the parties to a dispute in order to determine the validity of a law. The consequence of such a (subjective) approach would be to recognise the validity of a statute in respect of one litigant, only to deny it to another. Besides resulting in a denial of equal protection of the law, considerations of legal certainty, being a central consideration in a constitutional state, militate against the adoption of the subjective approach.[73]

The class of applicants with a direct and substantial interest in a declaration of invalidity that reaches the Constitutional Court for confirmation is potentially vast. In

68 See *Nelson Mandela Metropolitan Municipality & Others v Greyvenouw CC & Others* 2004 (2) SA 81 (SE), at para 9 (Plasket J offers a construction of Uniform Rule 12 which excludes any discretion on the part of the court when a direct and substantial interest has been established.)

69 I am grateful to Matthew Chaskalson for pointing me to the application of Rule 8 to confirmation proceedings.

70 2003 (4) SA 1 (CC), 2003 (5) BCLR 476 (CC).

71 Ibid at para 58.

72 1996 (1) SA 984 (CC), 1996 (1) BCLR 1 (CC)('*Ferreira*').

principle, any person affected by the impugned provision or conduct may satisfy the requirements for joinder and would therefore be entitled, should the test be limited to the showing of a direct and substantial interest, to intervene in the proceedings. However, against the backdrop of an objective approach to constitutional validity, the specific circumstances of those applicants, although they may shed further light on some of the implications of the impugned law or conduct, ought to be immaterial to the determination of the Court.[74] When the demands of an objective approach to constitutionality is considered alongside the potentially extensive class of persons with a direct and substantial interest in confirmation proceedings, the Court may be tempted to increase the requirements

for admission as an intervenor under Rule 8. Were the Court to do so, though, it would need to ensure that the applicant's right under FC s 34 was not unjustifiably limited by such an approach.[75] Thus, where a person is entitled to join as a party in terms of the direct and substantial interest test, the Court would be obliged to show that the interests of justice outweigh those interests and justify the denial of the application. Where an application is made to be admitted as an amicus curiae, the situation is different. The applicant is not a party to the proceedings and hence cannot claim a direct interest in the outcome of the litigation. Instead, it appears with the consent of the parties or by direction of the Chief Justice in order to assist the Court because of its expertise on or interest in the matter before the Court. The procedure governing *amici curiae* submissions is dealt with in Rule 10.

(ii) Rule 10: Amici curiae submissions

In *In Re Certain Amicus Curiae Applications: Minister of Health and Others v Treatment Action Campaign and Others*,[76] the Constitutional Court discussed the particular duty which an *amicus curiae* owes to the Court:

> In return for the privilege of participating in the proceedings without having to qualify as a party, an amicus has a special duty to the Court. That duty is to provide cogent and helpful submissions that assist the Court. The amicus must not repeat arguments already made but must raise new contentions; and generally these new contentions must be raised on the data already before the Court.[77]

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73 *Ferreira* (supra) at para 26. For more on the doctrine of objective unconstitutionality, see C Loots 'Standing, Ripeness & Mootness' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (2nd Edition, OS, February 2005) Chapter 7; S Woolman 'Application' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (2nd Edition, OS, February 2005) Chapter 31.

74 For more on the relationship between the doctrine of objective unconstitutionality and the interpretation of constitutional rights, see S Woolman & H Botha 'Limitations' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (2nd Edition, OS, July 2006) Chapter 34; S Woolman 'Application' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (2nd Edition, OS, February 2005) Chapter 31.

75 For more on FC s 34, see J 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, November 2007) Chapter 60.

76 2002 (5) SA 713 (CC), 2002 (10) BCLR 1028 (CC)('*TAC*').

77 Ibid at para 5.

Despite this warning, the Constitutional Court regularly notes the valuable role that *amici curiae* have played in shaping the Court's thinking about the matter before it.[78] In terms of Rule 10, an *amicus* may be admitted in only one of two scenarios: first, where it has obtained written consent of all the parties in the matter.[79] Where this consent has been obtained, the *amicus* will be admitted upon such terms and conditions, and with such rights and privileges as are agreed upon in writing with all the parties before the Court or as is directed by the Chief Justice.[80] Furthermore, the Chief Justice may amend any terms, conditions, rights and privileges which are agreed upon with all the parties.[81] The second scenario in

which an *amicus* may be admitted is on application to the Chief Justice.[82] Such an application must be made within the time limits prescribed by any direction given in the matter, or in the absence of such directions, not later than five days after the lodging of the respondent's written submissions or after the time for lodging such submissions has expired.[83]

An application to be admitted as an *amicus curiae* must engage three issues. First, it must briefly describe the interest of the *amicus* in the proceedings. Secondly, it must briefly identify the position to be adopted by the *amicus* in the proceedings. Thirdly, it must set out the submissions to be advanced by the *amicus*, their relevance to the proceedings and the *amicus's* reasons for believing that the submissions will be useful to the Court and different from the submissions of the other parties.[84]

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78 See, eg, *Bannatyne v Bannatyne (Commission for Gender Equality, as Amicus Curiae)* 2003 (2) SA 363 (CC), 2003 (2) BCLR 111 (CC)('*Bannatyne*') at para 3; *Moise v Greater Germiston Transitional Local Council: Minister of Justice and Constitutional Development Intervening (Women's Legal Centre as Amicus Curiae)* 2001 (4) SA 491 (CC), 2001 (8) BCLR 765 (CC) ('*Moise*') at para 4; *Minister of Defence v Potsane and Another; Legal Soldier (Pty) Ltd and Others v Minister of Defence and Others* 2002 (1) SA 1 (CC), 2002 (11) BCLR 1137 (CC) at para 9.

79 Rule 10(1).

80 Rule 10(1).

81 Rule 10(3). In relation to its predecessor in the 1995 Rules, the Court in *Fose v Minister of Safety and Security* stressed that although a person or body has obtained the written consent of all parties, the Court's control over the participation of the amicus in the proceedings is not diminished because, in terms of subrule (3), 'the terms, conditions, rights and privileges agreed upon between the parties and the person seeking amicus status are subject to amendment by the [Chief Justice]'. 1997 (3) SA 786 (CC), 1997 (7) BCLR 851 (CC) at para 9.

82 Rule 10(4).

83 Rule 10(5). It should be noted that this changes the situation somewhat from that which existed under the 1998 Rules. Under the 1998 Rules, the application had to be made, in the case of an application for leave to appeal to the Court and in any case where the right of direct access had been invoked, within ten days after such application had been lodged with the Registrar. In any other matter, the application had to be made not later than ten days after the lodging of the respondent's written submissions or after the time for lodging such submissions had expired.

84 Rule 10(6)*(a)-(c)*.

An *amicus* has the right to lodge written argument, provided that argument does not repeat any matter set forth in the argument of the other parties and raises new contentions which may be useful to the Court.[85] Rule 10(8) makes it clear that the amicus will be limited (subject to the provisions of Rule 31) to the record on appeal or referral and the facts found proved in other proceedings. Furthermore, the default position in relation to oral argument by an amicus is that oral argument will not be presented.[86] In practice, however, *amici curiae* are often invited by the Chief Justice, pursuant to the power under Rule 10(1) and (3), to present oral argument.[87]

An *amicus* is subject to the same requirements as the parties to the proceedings in so far as Rule 1(3) is concerned. An *amicus* will be required to serve any documents lodged with the Registrar on the parties to the proceedings and to lodge 25 copies, as well as an electronic version, of such documents with the Registrar.

Finally, *amici curiae* should be aware that pursuant to Rule 10(10), a costs order may make provision for the payment of costs incurred by or as a result of the intervention of an *amicus*. This Rule raises two possibilities: either an amicus curiae may be ordered to pay a portion of the costs, or costs may be awarded in its

favour. In *President of The Republic of South Africa and Another v Modderklip Boerdery (Pty)* L*td (Agri Sa and Others, Amici Curiae)*, the Pretoria High Court had awarded costs in favour of the applicant, Modderklip Boerdery Pty Ltd, and the amicus curiae Agri SA.[88] On appeal, the Supreme Court of Appeal declined to interfere with the costs order made by the High Court. Langa ACJ, writing for the Constitutional Court, noted that although it is unusual, and will rarely be appropriate for costs to be awarded in favour of an amicus curiae, the State had expressly indicated in the Constitutional Court that it was not seeking to overturn the order of the High Court awarding those costs to Agri SA. Given that there was, accordingly, no basis upon which to interfere with the costs orders, the Constitutional Court did not disturb the costs order in favour of Agri SA.[89]

(b) Rules 14 & 15: Referral of Bills and Acts

(i) Referral of Bills

85 Rule 10(7).

86 Rule 10(8).

87 See, eg, *Minister of Home Affairs v Fourie (Doctors for Life International and Others, Amici Curiae) Lesbian and Gay Equality Project and Others v Minister of Home Affairs* 2006 (1) SA 524 (CC) 2006 (3) BCLR 355 (CC)('*Fourie*') at paras 37-8; *Bhe and Others v Magistrate, Khayelitsha, and Others (Commission for Gender Equality as Amicus Curiae); Shibi v Sithole and Others; South African Human Rights Commission and Another v President of The Republic of South Africa and Another* 2005 (1) SA 580 (CC), 2005(1) BCLR 1 (CC)('*Bhe*') at para 11; *Kaunda and Others v President of The Republic of South Africa and Others* 2005 (4) SA 235 (CC), 2005 (10) BCLR 1009 (CC) ('*Kaunda*') at para 6; *Janse van Rensburg NO and Another v Minister of Trade and Industry and Another NNO* 2001 (1) SA 29 (CC), 2000 (11) BCLR 1235 (CC)('*Janse van Rensburg*') at para 6.

88 2005 (5) SA 3 (CC), 2005 (8) BCLR 786 (CC)('*Modderklip Boerdery*').

89 Ibid at para 67.

The referral of a Bill in terms of FC s 79(4)*(b)* or FC s 121(2)*(b)* by the President of the Republic or by the Premier of a province must be in writing and addressed to the Registrar and to the Speaker of the National Assembly and the National Council of Provinces (in respect of a national Bill) or to the Speaker of the provincial legislature in question (in respect of a provincial Bill).[90] The referral must cover the following three issues. First, it must identify the provision*(s)* of the Bill in respect of which the President or Premier has reservations.[91] Second, it must specify the constitutional provision*(s)* which the President or Premier believes render the Bill constitutionally infirm. Third, it must set out the grounds or reasons for such reservations.[92] Rule 14 makes further provision for political parties represented in the national Parliament or the provincial legislature concerned, to be entitled, as of right, to make written submissions relevant to the

determination of the issue.[93] Directions, issued by the Chief Justice, will indicate the time frames for receipt of such submissions[94] and may include a request to the relevant Speaker or Chairperson of the National Council of Provinces for additional information considered necessary or expedient to deal with in the matter.[95]

(ii) Referral of Acts

The procedure in relation to applications in terms of FC s 80(1) and FC s 122(1) substantially mimics the procedure for Bills discussed above. However, a few differences warrant comment. In the case of the referral of a Bill by the President or Premier, the referral is made in writing and is addressed to the Registrar of the Court, as well as the Speaker of the National Assembly and the National Council of Provinces (in respect of a national Bill) or to the Speaker of the provincial legislature

90 Rule 14(1).

91 In *In Re Constitutionality of The Mpumalanga Petitions Bill, 2000,* the Court held that it did not have jurisdiction to decide upon an objection which a Premier had not referred to the relevant legislature, but had raised for the first time before the Court (2002 (1) SA 447 (CC), 2001 (11) BCLR 1126 (CC)('*Mpumalanga Petitions Bill*')). In *Mpumalanga Petitions Bill*, the Mpumalanga Petitions Bill, 2000, was submitted to the Premier for his assent and signature in terms of FC s 121. The Premier had reservations concerning the constitutionality of the powers conferred on the Speaker by clauses 18 and 19 of the Bill. Acting in terms of FC s 121(1), the Premier then referred the Bill back to the legislature for reconsideration, specifying his reservations in respect of these two clauses only. Although the legislature made certain amendments to the Bill on the basis of other typographical and grammatical changes suggested by the Premier, it failed to address the Premier's reservations concerning the functions and powers given to the Speaker under clauses 18 and 19. The Premier then referred the Bill to the Constitutional Court, in terms of FC s 121(2)*(b)*, but in addition to requesting that the Court determine the constitutionality of clauses 18 and 19 of the Bill, he requested that the Court determine whether the Mpumalanga legislature had the competence to pass the Petitions Bill. It was this latter question which the Court held that it did not have jurisdiction to entertain, given that it had not been referred to the legislature for consideration. Ibid at para 11.

92 Rule 14(2)*(a)-(c)*.

93 Rule 14(3).

94 Rule 14(4)*(b)*

95 Rule 14(4)*(a)*.

in question (in respect of a provincial Bill). In the case of an application in terms of FC s 80(1) and FC s 122(1), the application is to be brought on notice of motion supported by an affidavit which is lodged with the Registrar and served on the Speaker of the National Assembly and, where applicable, the Chairperson of the National Council of Provinces, or on the Speaker of the provincial legislature concerned.[96] The application must be accompanied by a certificate from the Speaker of the legislature concerned indicating that the members of the legislature have complied with the requirements of FC s 80(2)*(a)* or FC s 122(2)*(a)*.[97] The notice of motion must also request the Speaker and, if relevant, the Chairperson of the National Council of Provinces, to bring the application to the attention of all political parties represented in the relevant house or legislature.[98] The application should cover all those matters required in terms of any referral under Rule 14, and, in addition, must specify the relief, including interim relief, sought.[99]

Rule 15(5) requires any political party in the legislature concerned, or any government that wishes to oppose the granting of the order sought in such application, to give notice of its intention to oppose to the Registrar, in writing, within fifteen days of service of such application.[100] Where such notice is given, the application is to be disposed of in accordance with the application procedures set out in Rule 11.[101] Where no notice of opposition is lodged, the matter is to be disposed of in accordance with directions issued by the Chief Justice.[102]

(c) Rule 16: Confirmation proceedings

FC s 172(2)*(a)* makes it clear that although 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 any conduct of the President, an order of constitutional invalidity issued by such a court has no force unless it is confirmed by the Constitutional Court.[103]

FC s 172(2)*(c)* further stipulates that national legislation must provide for the referral of an order of constitutional invalidity to the Constitutional Court. The Constitutional Court Complementary Act[104] was amended in 1997 in order to make provision for such referrals.

Section 8(1)*(a)* of the Constitutional Court Complementary Act provides:

96 Rule 15(1).

97 Rule 15(3).

98 Rule 15(2).

99 Rule 15(4).

100 Rule 15(5)*(a)*.

101 Rule 15(5)*(b)*.

102 Rule 15(6).

> Wherever the Supreme Court of Appeal, a High Court or a court of similar status declares an Act of Parliament, a provincial Act or conduct of the President invalid as contemplated in section 172(2)*(a)* of the Constitution that court shall, in accordance with the rules, refer the order of constitutional invalidity to the [Constitutional] Court for confirmation.

In *Pharmaceutical Manufacturers Association of SA & Another: In Re Ex Parte President of The Republic of South Africa and Others*, the Court placed the following gloss on FC s 172(2):

> [The Constitutional Court] has exclusive jurisdiction in respect of certain constitutional matters and makes the final decision on those constitutional matters that are also within the jurisdiction of other courts. This is the context within which s 172(2)*(a)* provides that an order made by the SCA, a High Court or a Court of similar status 'concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President' has no force unless confirmed by the Constitutional Court. The section is concerned with the law-making acts of the legislatures at the two highest levels, and the conduct of the President who, as head of State and head of the Executive, is the highest functionary within the State. The apparent purpose of the section is to ensure that this Court, as the highest Court in constitutional matters, should control declarations of constitutional invalidity made against the highest organs of State.[105]

In *SARFU*, the Court emphasised that the aim of the section was to 'preserve the comity between the judicial branch of government, on the one hand, and the legislative and executive branches of government, on the other.'[106]

In accordance with section 8(1)*(a)* of the Constitutional Court Complementary Act, Rule 16(1) requires the registrar of a court that has made an order of constitutional invalidity, as contemplated in FC s 172, to lodge a copy of such order with the Registrar of the Constitutional Court. Such an order must be lodged within fifteen days of such order having been made. Thus, the Constitutional Court receives notification of orders of invalidity automatically on the lodging of such orders by the registrars of the other courts.[107] It is not, therefore, necessary for the parties concerned to apply for confirmation of such orders.[108] However, the trend has been for parties to make such applications. The motive for many such applications is to

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103 The Constitutional Court has, on a number of occasions, made it clear that declarations of invalidity made in respect of regulations are not subject to confirmation under FC s 172(2). See *Satchwell v President of the Republic of South Africa & Another* 2002 (6) SA 1 (CC), 2002 (9) BCLR 986 (CC)('*Satchwell*') at para 2; *Van Rooyen and Others v The State & Others (General Council of The Bar of South Africa Intervening)* 2002 (5) SA 246 (CC), 2002 (8) BCLR 810 (CC)('*Van Rooyen*'), 2002 (2) 222 SACR (CC) at para 11; *Minister of Home Affairs v Liebenberg* 2002 (1) SA 33 (CC), 2001 (11) BCLR 1168 (CC)('*Liebenberg*')at para 13; *Booysen & Others v Minister of Home Affairs & Another* 2001 (4) SA 485 (CC), 2001 (7) BCLR 645 (CC)('*Booysen*') at para 1. But see *Moseneke & Others v The Master & Another* 2001 (2) SA 18 (CC), 2001 (2) BCLR103 (CC)('*Moseneke*') at para 13 (Court left open the question of whether FC s 172(2)*(a)* applies to regulations made by State Presidents prior to the coming into force of the Interim Constitution.)

104 Act 13 of 1995.

105 2000 (2) SA 674 (CC), 2000 (3) BCLR 241 (CC) at paras 55-56.

106 *President of The Republic of South Africa & Others v South African Rugby Football Union & Others* 1999 (2) SA 14 (CC)('*SARFU*') at para 29.

pre-empt an appeal to the Supreme Court of Appeal by a respondent who does not wish the case to go directly to the Constitutional Court.

In a number of judgments, the Constitutional Court has highlighted the pursuit of legal certainty as an important aim of the confirmation process. Given the need to achieve legal certainty, the fact that a settlement may have been reached between the litigants in a case does not dispose of the need for confirmation proceedings.[109]

This certainty rationale has further implications in relation to challenges to an applicant's standing in confirmation proceedings. The question whether an applicant's standing to bring an application for confirmation of a declaration of constitutional invalidity can be challenged was raised in *Lawyers for Human Rights & Another v Minister of Home Affairs & Another*.[110] In the High Court proceedings, the government had disputed the standing of the applicants and had argued in favour of the validity of the impugned sections of the Immigration Act.[111] The High Court held that the applicants did have the requisite standing and further held that two of the

107 See *Janse van Rensburg NO & Another v Minister of Trade and Industry & Another NNO* 2001 (1) SA 29 (CC), 2000 (11) BCLR 1235 (CC)('*Janse van Rensburg*'). In *Janse van Rensburg*, the Constitutional Court held that the approach of the registrar of the Transvaal High Court to delay referring the order of constitutional invalidity made by the Transvaal High Court to the Constitutional Court on the basis that he was aware that there was an appeal to the Supreme Court of Appeal and was thus under the impression that the registrar of the Supreme Court of Appeal would have the duty of lodging any order of constitutional invalidity made by the Supreme Court of Appeal with the Constitutional Court was incorrect. Pursuant to the then existing Rule 15, the registrar of the Transvaal High Court ought to have referred the declaration of invalidity to the Constitutional Court within fifteen days of its having been made, irrespective of the fact that there was an appeal to the Supreme Court of Appeal in the matter. Ibid at para 4.

108 See *Sibiya & Others v Director of Public Prosecutions, Johannesburg & Others* 2005 (5) SA 315 (CC), 2005 (8) BCLR 812 (CC)('*Sibiya*'). The applicants had applied for confirmation of the orders of constitutional invalidity of certain provisions of the Criminal Law Amendment Act 105 of 1997. Although the High Court order also declared certain conduct of the President to be invalid, the applicants had not applied for confirmation of that aspect of the High Court's order. According to the Constitutional Court, the absence of any application for confirmation and any appeal against the order declaring the conduct of the President to be invalid raised the question whether the Court should enquire into the correctness of that aspect of the High Court order. In answering this question in the affirmative, the Court reasoned that it would not be appropriate to leave such a declaration of invalidity 'in limbo', with the attendant uncertainty that such a situation would create. Accordingly, the Court held that it must consider the issue. Ibid at para 44. It seems that this reasoning (and, indeed, the raising of the question) was superfluous. Section 8(1)*(a)* of the Constitutional Court Complementary Act specifically obliges the courts concerned to refer any orders of constitutional invalidity made by them in relation to an Act of Parliament, a provincial Act or conduct of the President to the Constitutional Court for confirmation. Thus the fact that the applicants did not apply for confirmation of that provision of the order relating to the conduct of the President cannot be relevant to the question whether the Constitutional Court must consider that aspect of the order. Such an application is not required in order to place the matter before the Constitutional Court; it is by virtue of its referral to the Constitutional Court by the court *a quo* that the matter is placed before the Constitutional Court and hence deserves its attention.

109 See *Moise* (supra) at para 4; *Khosa & Others v Minister of Social Development and Others; Mahlaule and Others v Minister of Social Devlopment and Others* 2004 (6) SA 505 (CC), 2004 (6) BCLR 569 (CC)('*Khosa*') at para 35.

110 2004 (4) SA 125 (CC), 2004 (7) BCLR 775 (CC)('*Lawyers for Human Rights*').

111 Act 13 of 2002.

impugned provisions were constitutionally invalid. In dealing with the challenge to the applicants' standing, Yacoob J remarked *obiter* that

> [I]t may in any event be incumbent on [the Constitutional] Court to deal with the substance of a dispute concerning the constitutionality of legislation that reaches [it] pursuant to s 172(2) of the Constitution. This is because a High Court has already declared a particular provision to be inconsistent with the Constitution. There are good public policy reasons to suggest that the uncertainty in relation to constitutional consistency ought not to be allowed to prevail. There is therefore a strong argument that the purpose of s 172(2) of the Constitution is to ensure that the uncertainty generated by the High Court decision of unconstitutionality is eliminated and that the substance of the debate raised by the declaration is finally determined.[112]

This reasoning seems to support the view that even where the court *a quo* has made an error in relation to the standing of an applicant before it, the fact of its order of constitutional invalidity and the uncertainty that such an order creates prior to confirmation by the Constitutional Court may require that such an error be overlooked.

In cases where the provision declared invalid by the court *a quo* has subsequently been repealed, the Constitutional Court has held that it possesses the discretion to decide whether or not to deal with the matter.[113] In deciding how to exercise its discretion, the Court will consider whether any order it may make will have a practical effect on the parties or on others. In at least two such confirmation cases, the Court has declined to exercise its discretion.[114]

FC s 172(2)*(d)* declares that any person or organ of state with a sufficient interest may appeal, or apply directly, to the Constitutional Court to confirm or to

vary an order of constitutional invalidity granted by a court.[115] Rules 16(2) and (4) set out the requirements for the lodging of an appeal against an order of invalidity and for confirming such an order. Once a notice of appeal or an application for confirmation is lodged, the matter is to be disposed of in accordance with directions issued by the Chief Justice. Where no notice or application is lodged, the matter is to be disposed of in accordance with directions issued by the Chief Justice to that effect.[116]

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112 Ibid at para 24.

113 *President, Ordinary Court Martial & Others v Freedom of Expression Institute and Others* 1999 (4) SA 682 (CC), 1999 (11) BCLR 1219 (CC)('*President, Ordinary Court Martial*') at para 16.

114 *President, Ordinary Court Martial & Others v Freedom of Expression Institute & Others* 1999 (4) SA 682 (CC), 1999 (11) BCLR 1219 (CC); *Uthukela District Municipality & Others v President of The Republic of South Africa & Others* 2003 (1) SA 678 (CC), 2002 (11) BCLR 1220 (CC). In *Janse van Rensberg*, the Court held that given that one of the provisions, in respect of which a declaration of invalidity had been made by the High Court, had subsequently been amended by legislation which removed the inconsistency, the matter had become moot. It accordingly held that no order would be made in respect of the confirmation proceedings relating to that particular provision of the impugned legislation. *Janse van Rensberg* (supra) at paras 9-10.

115 See *President of The Republic of South Africa & Others v South African Rugby Football Union & Others* 1999 (2) SA 14(CC) (Court highlighted the fact that the reference to 'sufficient interest' in subsection *(d)* qualifies the persons entitled to appeal or apply for confirmation and not the subject-matter of the appeal or application.)

In *City of Cape Town & Another v Robertson & Another*, the Cape High Court had, pursuant to FC s 172(2)*(a)*, referred its order of invalidity to the Constitutional Court for confirmation.[117] The City of Cape Town and the Minister of Provincial and Local Government had opposed the confirmation and appealed directly to the Court in terms of FC s 172(2)*(d)*. In addition, however, they had also appealed against other orders of the High Court which were not subject to confirmation. There was no objection to this procedure, and while the Court did not finally answer the question whether the appeal against the other orders lies as of right in terms of FC s 172(2)*(d)*, the Court did hold that even if the appeal was regarded as an application for leave to appeal against those other aspects of the order, leave would have been granted in the interests of justice.[118] It is difficult to conceive of a case where it would not be in the interests of justice to grant the application for leave to appeal against the other aspects of the court *a quo*'s order and thus it is likely that the Constitutional Court will hear such matters as part of the confirmation proceedings.

(d) Rule 18: Direct access

Although the Constitutional Court ordinarily functions as an appellate court in constitutional matters, provision is made for the Court to act as a court of first instance where it is in the interests of justice to do so.[119] To facilitate such applications, Rule 18 provides for direct access to the Court.

Rule 18 replicates the requirements of its predecessor in the 1998 Rules.[120] An application for direct access is to be brought on notice of motion, supported by

affidavit.[121] The application must be lodged with the Registrar and hence the provisions of Rule 1(3) apply to the form and number of copies required and the service of the application[122] on 'all parties with a direct or substantial interest in the relief claimed'.[123]

116 Rule 16(5).

117 2005 (2) SA 323 (CC), 2005 (3) BCLR 199 (CC)('*City of Cape Town*').

118 Ibid at para 2. It should be noted that *Van Rooyen* left open the same question. See Van *Rooyen* (supra) at para 11.

119 FC s 167(6) provides: National legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court — *(a)* to bring a matter directly to the Constitutional Court.

120 The rules are identical save for the necessary substitution of references to 'the Chief Justice' for 'the President of the Court'.

121 Rule 18(1).

122 See *Ex Parte Omar* 2006 (2) SA 284 (CC), 2003 (10) BCLR 1087 (CC)('*Ex Parte Omar*') at para 7 (Court confirmed that it is necessary for applicants to comply with the provisions of Rule 1(3) when making an application for direct access.)

123 Rule 18(2).

The application must set out the following: *(a)* the grounds on which it is contended that it is in the interests of justice for an order for direct access be granted; *(b)* the nature of the relief sought and the grounds upon which such relief is based; *(c)* whether the matter can be dealt with by the Court without the hearing of oral evidence and, if it cannot, *(d)* how such evidence should be adduced and the conflicts of fact resolved.[124] Rule 18(3) makes provision for any person or party wishing to oppose the application for direct access to notify the applicant and the Registrar in writing of his or her intention to oppose within ten days from the lodging of the application for direct access. After such notice is received, or where the period during which it may be lodged has expired, the matter will be disposed of in accordance with directions issued by the Chief Justice. Those directions may either call upon the respondents to make written submissions to the Court as to whether or not direct access should be granted or indicate that no written submissions or affidavits need to be filed.[125] Provision is made for such applications to be dealt with summarily, provided that where the respondent has indicated an intention to oppose, an application for direct access shall be granted only after the respondents have made written submissions to the Court, within the time period specified in directions, as to whether or not direct access should be granted.[126]

The Court has repeatedly emphasised that direct access is an exceptional procedure[127] and that it is not ordinarily in the interests of justice for the Court to sit as

a court of first and last instance.[128] According to the Court, 'experience shows that decisions are more likely to be correct if more than one court has been required to

124 Rule 18(2)*(a)-(d)*.

125 Rule 18(4)*(a)-(b)*.

126 Rule 18(5).

127 *S v Zuma and Others* 1995 (2) SA 642 (CC), 1995 (4) BCLR 401 (CC), 1995 (1) SACR 568 (CC) at para 11; *S v Mbatha; S v Prinsloo* 1996 (2) SA 464 (CC), 1996 (3) BCLR 293 (CC), 1996 (1) SACR 371 (CC) at para 29; *Luitingh v Minister of Defence* 1996 (2) SA 909 (CC), 1996 (4) BCLR 581 (CC) at para 15; *Besserglik v Minister of Trade, Industry and Tourism & Others (Minister of Justice Intervening)* 1996 (4) SA 331 (CC), 1996 (6) BCLR 745 (CC)('*Beseerglik*') at para 6; *Tsotetsi v Mutual & Federal Insurance Co Ltd* 1997 (1) SA 585 (CC), 1996 (11) BCLR 1439 (CC) at para 12; *Transvaal Agricultural Union v Minister of Land Affairs & Another* 1997 (2) SA 621 (CC), 1996 (12) BCLR 1573 (CC)('*Transvaal Agricultural Union*') at para 16; *Hekpoort Environmental Preservation Society and Another v Minister of Land Affairs and Others* 1998 (1) SA 349 (CC), 1997 (11) BCLR 1537 (CC) at para 6; *Van der Spuy v General Council of The Bar of South Africa (Minister of Justice and Constitutional Development, Advocates for Transformation and Law Society of South Africa Intervening)* 2002 (5) SA 392 (CC), 2002 (10) BCLR 1092 (CC) ('*Van der Spuy*') at para 7; *Mkontwana v Nelson Mandela Metropolitan Municipality & Another; Bissett and Others v Buffalo City Municipality & Others; Transfer Rights Action Campaign and Others v MEC, Local Government and Housing, Gauteng & Others (KwaZulu-Natal Law Society and Msunduzi Municipality as Amici Curiae)* 2005 (1) SA 530 (CC), 2005 (2) BCLR 150 (CC)('*Mkontwana*') at para 11; *Ex Parte Omar* (supra) at para 4.

128 *Transvaal Agricultural Union* (supra) at para 18; *Bruce & Another v Fleecytex Johannesburg CC & Others* 1998 (2) SA 1143 (CC), 1998 (4) BCLR 415 (CC)('*Fleecytex*') at para 8; *Christian Education South Africa v Minister of Education* 1999 (2) SA 83 (CC), 1998 (12) BCLR 1449 (CC)('*Christian Education South Africa*') at para 12; *Van der Spuy* (supra) at para 19; *Satchwell* (supra) at para 6; *Zondi v MEC for Traditional and Local Government Affairs and Others* 2005 (3) SA 589 (CC), 2005 (4) BCLR 347 (CC)('*Zondi*') at para 13; *Mkontwana* (supra) at para 11.

consider the issues raised'.[129] Thus 'compelling reasons'[130] are required to persuade the Court that it should exercise its discretion to grant direct access.[131]

Three factors count against the granting of direct access:[132] first, where direct access is granted the Court may be called on to deal with disputed facts on which the leading of evidence might be necessary;[133] secondly, the Court may be required to decide constitutional issues which are not decisive of the litigation and which might prove to be purely academic; and thirdly, where litigants approach the Court directly, the Court is required to adjudicate the matter without the benefit of the views of other Courts having constitutional jurisdiction. Furthermore, where the applicant is an organ of state, direct access will rarely be granted where those organs have not fulfilled their obligations of cooperative government as detailed in FC ss 40 and 41.[134] In addition, the Court has made it clear that it 'will not grant an application for direct access to consider a challenge to the constitutionality of legislation where the Minister responsible for the legislation is not cited in the application.'[135]

In setting out the grounds upon which it is contended that it is in 'the interests of justice' for an order of direct access to be granted, an applicant should cover the following three matters. First, the applicant's request must engage the

question whether the applicant has exhausted all other remedies or procedures that may have been available.[136] Secondly, the applicant's request must demonstrate that the matter raised in the application is of sufficient urgency or public importance

129 *Fleecytex* (supra) at para 8. See also *Fourie* (supra) at para 39.

130 See *Fleecytex* (supra) at para 9; *Dormehl v Minister of Justice and Others* 2000 (2) SA 987 (CC), 2000 (5) BCLR 471 (CC)('*Dormehl*') at para 5.

131 See J Dugard 'Court of First Instance? Towards a Pro-Poor Jurisdiction for the South African Constitutional Court' 22 *SAJHR* (2006) 261, 275, 277 (Dugard is critical of the extent to which the combination of the absence of 'a de facto right to legal representation at state expense' and the Court's restrictive approach to direct access increases the risk of the Court becoming an elite institution. In response, Dugard proposes a pro-poor revamping of the requirements for direct access that would seek to lower the hurdle to access.) See also S Woolman & D Brand 'Is There a Constitution in This Classroom? Constitutional Jurisdiction after Walters and Afrox' (2003) 18 *SA Public Law* 38 (Sets out the doctrine of *stare decisis* for all courts with constitutional jurisdiction, and the severe constraints that the current doctrine, as explicated in *Walters* and *Afrox*, imposes on the development of constitutional doctrine, common-law rules and statutory interpretation in the High Courts.)

132 *Fleecytex* (supra) at para 7.

133 For a decision to deny an application for direct access in terms of this factor, see *Van der Spuy* (supra) at paras 16-17, 19.

134 See *National Gambling Board v Premier, Kwazulu-Natal, & Others* 2002 (2) SA 715 (CC), 2002 (2) BCLR 156 (CC) at paras 29-31, 37 (Parties' failure to comply with their FC Chapter 3 obligations was deemed to be a sufficient ground for refusing direct access.) See, generally, S Woolman, T Roux & B Bekink 'Cooperative Government' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (2nd Edition, OS, December 2004) Chapter 14.

135 *Ex parte Omar* (supra) at para 4.

to warrant direct access.[137] To this end, proof of prejudice to the public interest or the ends of justice and good government will be relevant considerations.[138] Thirdly, the applicant's request must address the prospects of success.[139]

On a number of occasions, the Constitutional Court has emphasised that direct access should not be used where another procedure is appropriate, nor should it be used to cure a defect in an application. In *S v Shongwe*, the Court held that the applicant's application for direct access was in essence an application for leave to appeal against his conviction by the High Court.[140] The Court held that the rule governing direct access was not applicable to appeal procedures and could not be used for disguised appeals.[141] Furthermore, where an applicant attempted to use the direct access provision of the rules to have a judgment of the High Court declared 'unconstitutional and invalid', the Court stressed that when the correctness of a judgment is in question, the appropriate procedure is not to seek direct access to have the judgment declared a nullity. It is, rather, to seek leave to appeal against the judgment.[142] Thus the general approach of the Court is to insist that direct access is an exceptional procedure that may not be used to avoid the consequences of a failure properly to formulate a constitutional challenge.[143]

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136 *Besserglik* (supra) at para 6.

137 *Transvaal Agricultural Union* (supra) at para 19 (An applicant who contends that such urgency exists assumes an obligation of establishing such averment to the satisfaction of the Court.)

138 *Fleecytex* (supra) at para 19.

139 Ibid at para 7. See *Christian Education South Africa* (supra) at para 6; *Dormehl* (supra) at para 5.

140 2003 (5) SA 276 (CC), 2003 (8) BCLR 858 (CC), 2003 (2) SACR 103 (CC)('*Shongwe*').

141 Ibid at para 4.

142 *Wallach v High Court of South Africa, Witwatersrand Local Division, and Others* 2003 (5) SA 273 (CC), 2003 (12) BCLR 1333 (CC) at para 5.

143 See *Zondi* (supra) at para 19. *Zondi* raised a number of interesting procedural issues. The applicant challenged the constitutional validity of a number of the provisions of the Pound Ordinance (KwaZulu-Natal), 1947 ('the Ordinance') in the Pietermaritzburg High Court. The High Court held the impugned provisions of the Ordinance constitutionally invalid and referred its order of invalidity to the Constitutional Court for confirmation in terms of FC s 172(2)*(a)*. The respondent also noted an appeal against the High Court decision. On the eve of the hearing of the matter, the applicant additionally brought an application for direct access to the Court to challenge the validity of the entire Ordinance. In rejecting the application for direct access the Court held that direct access applications should not be used to cure failures to formulate properly constitutional challenges from the outset of litigation. Ibid at para 19. It went on to consider the question whether a declaration of invalidity given in respect of the provisions of an ordinance required confirmation under FC s 172(2)*(a)*. However, because of the existence of the respondent's appeal in the case, and the Court's resolve to treat the notice of appeal as an application for leave to appeal (which it summarily granted), the Court declined to answer this interesting question. Ibid at para 30.

Direct access applications are increasingly being used by parties where the relief they seek is substantially similar to, or has a direct impact on, the relief sought by other parties in a matter already before the Constitutional Court.[144] The

Constitutional Court has tended to grant these applications where, and to the extent that, the submissions sought to be made by the applicants relate to substantive issues that are already before the Court and where the insights offered by the applicants may help to resolve difficult issues before the Court. Such issues often encompass questions of the appropriate remedy[145] or enable the Court to fill in doctrinal 'gaps' in the matter already before the Court. However, where the issues raised in the application for direct access are complex, the Court will tend to privilege the value of another court's views on the topic over the interests of the applicant in securing direct access. In *Mkontwana*, the Court granted the WLD applicants[146] direct access in relation to the constitutionality of section 118(1) of the Local Government: Municipal Systems Act 32 of 2000. That issue was already before the Court in a confirmation proceeding.[147] However, it declined to grant the applicants direct access in relation to other aspects of their challenge. With respect to the applicant's challenge to section 118(3) of the Local Government: Municipal Systems Act 32 of 2000, the Court found that the 'reasoned judgment of another court on how the section is to be interpreted is likely to be helpful'.[148]

(e) Rules 19 & 20: Appeals to the Constitutional Court

The most substantial change from the 1998 Rules to the 2003 Rules relates to appeals procedure. Whereas the 1998 Rules drew a distinction between appeals directly from the High Courts or other superior courts (such as the Labour Courts or Land Claims Court) to the Constitutional Court, on the one hand (Rule 18), and appeals from the Supreme Court of Appeal to the Constitutional Court, on the other (Rule 20), the 2003 Rules deal with all appeals in terms of one category — Rule 19.

Under the 1998 Rules, a litigant wishing to appeal directly to the Constitutional Court in terms of Rule 18 had, first, to obtain a certificate on the prospects of

144 See *Bhe & Others v Magistrate, Khayelitsha, and Others (Commission for Gender Equality as Amicus Curiae); Shibi v Sithole & Others; South African Human Rights Commission and Another v President of The Republic of South Africa and Another* 2005 (1) SA 580 (CC), 2005 (1) BCLR 1 (CC) ('*Bhe*'); *Mkontwana* (supra); *Fourie* (supra).

145 See *Bhe* (supra) at para 33.

146 In December 2002, an application was launched in the Witwatersrand Local Division of the High Court. That application required a consideration of the meaning and constitutionality of national, provincial and local government legislation including s 118(1) of the Local Government: Municipal Systems Act 32 of 2000. Certain consequential relief was also sought in the application. The applicants included an association of persons and were jointly referred to as 'the WLD applicants'.

147 The *Mkontwana* Court also granted direct access in relation to section 50(1)*(a)* of a Gauteng Local Government Ordinance 17 of 1939. The arguments advanced by the parties regarding the interpretation and the constitutionality of section 50(1)*(a)* were virtually the same as those directed at section 118(1). See *Mkontwana* (supra) at para 15.

148 Ibid at para 13. The Court also declined to grant direct access in relation to the WLD applicants' challenge to section 49 of Gauteng Local Government Ordinance 17 of 1939 and certain by-laws of the City of Johannesburg. Ibid at para 14.

success and the desirability of a direct appeal from the court which gave the decision which formed the subject of the appeal, and had, secondly, to make an application for leave to appeal to the Constitutional Court. In relation to appeals from the Supreme Court of Appeal, under the 1998 Rules, a litigant did not have

to obtain leave to appeal from the Supreme Court of Appeal prior to applying for leave to appeal to the Constitutional Court.[149]

Under the 2003 Rules, a single, vastly simplified procedure has been adopted for all appeals. That said, differences of substance, as opposed to form, remain. For example, the Constitutional Court takes a number of distinct, and additional, factors into the 'interests of justice' evaluation when an application for leave to appeal concerns a matter which has been dealt with only by a High Court (or court of similar status) as opposed to an application for leave to appeal from the Supreme Court of Appeal. Moreover, the Constitutional Court has stressed that applicants not conflate the considerations which influence decisions regarding direct access with the considerations which influence leave to appeal applications.[150] The difference in the respective considerations turns primarily on the fact that in direct access cases the Court sits as a court of first instance, whereas in the latter set of cases it sits as a court of appeal.

The procedure set out in Rule 19 requires the lodging of an application for leave to appeal, after notice has been given to the other party or parties involved, within fifteen days of the order[151] against which the appeal is sought.[152] The application for leave to appeal must be signed by the applicant or his or her legal representative and must contain the following: *(a)* the decision against which the appeal is sought and the grounds upon which such decision is disputed; *(b)* a statement setting out clearly and succinctly the constitutional matter raised in the decision; and any other issues allegedly connected with a decision on a constitutional matter; *(c)* such supplementary information or argument as the applicant considers necessary to

149 In addition, the certificate procedure which used to form part of the direct appeals procedure has not been carried over to the 2003 Rules.

150 See *Member of the Executive Council for Development Planning and Local Government, Gauteng v Democratic Party & Others* 1998 (4) SA 1157 (CC), 1998 (7) BCLR 855 (CC)('*Members of the Executive Council*') at paras 26-27.

151 Rule 19 refers, as did its predecessor under the 1998 Rules, to applications for leave to appeal to the Constitutional Court where a *decision* on a constitutional matter has been given by any court. The reference to 'decision' was interpreted, in relation to its predecessor — Rule 18 — under the 1998 Rules, in *Khumalo v Holomisa* 2002 (5) SA 401 (CC), 2002 (8) BCLR 771 (CC)('*Khumalo*'). The *Khumalo* Court had to determine whether the dismissal of an exception was appealable to the Constitutional Court where such a dismissal was not appealable to the SCA. The *Khumalo* Court held that the term 'decision', in Rule 18, should not be given the same meaning as the words 'judgment or order' in section 20(1) of the Supreme Court Act. According to the *Khumalo* Court, were it to adopt a restrictive meaning of 'decision' in the light of a range of policy considerations relevant to determining when a matter should be the subject of an appeal, it would be adopting a test different to that proclaimed by the Final Constitution, namely, that the interests of justice be the determinative criterion for deciding when appeals should be entertained by the Court. Furthermore, the Court opined that all the considerations that had led the SCA to adopt a limited interpretation of 'judgment or order' could be accommodated by the 'interests of justice' criterion. Ibid at para 8.

152 Rule 19(2). It should be noted that where the Chief Justice has refused leave to appeal, the fifteen day period will run from the date of the order refusing leave.

bring to the attention of the Court; and *(d)* a statement indicating whether the applicant has applied or intends applying for leave or special leave to appeal to any other court and, if so, (i) which court, (ii) whether such application is conditional upon the application to the Constitutional Court

being refused, and (iii) the outcome of such application if known at the time that the application to the Constitutional Court is made.[153]

The respondent is given ten days from the date upon which the application is lodged with the Registrar to respond in writing thereto,[154] indicating whether or not the application for leave to appeal is being opposed and, if so, on what grounds.[155] Furthermore, where a respondent wishes to lodge a cross-appeal, an application for leave to cross-appeal must be lodged with the Registrar within the same ten day period following the lodging of the application for leave to appeal.[156]

Applications for leave to appeal may be dealt with summarily.[157] The Court may order that the application be set down for argument and direct that the written argument of the parties deal not only with the question as to whether leave to appeal should be granted, but also with the merits of the dispute.[158] Rule 20 then sets out the procedure to be followed when leave to appeal is granted.[159]

Whether to grant leave is a matter within the discretion of the Court.[160] Leave to appeal to the Court will be granted where the application raises a constitutional matter and it is in the interests of justice to grant the application. In *Director of Public Prosecutions, Cape of Good Hope v Robinson*, the Court held that Rule 19

153 Rule 19(3). This provision makes it clear that it is permissible to apply for leave to appeal to the Constitutional Court while at the same time applying for leave to appeal to another appellate court.

154 The response must be signed by the respondent or his or her legal representative. Rule 19(4)*(b)*.

155 Rule 19(4)*(a)*.

156 Rule 19(5)*(a)*.

157 Rule 19(6)*(b)*.

158 Rule 19(6)*(c)*.

159 The requirements of the Constitutional Court in respect of the formatting of documents for an appeal record are less stringent than those of the corresponding Supreme Court of Appeal rule. See, in this regard, Rule 20(2) of the 2003 Rules as compared with rule 8 of the Rules of the Supreme Court of Appeal promulgated under GN R1523 in *Government Gazette* 19507 of 27 November 1998.

160 *Phillips & Others v National Director of Public Prosecutions* 2006 (1) SA 505 (CC), 2006 (2) BCLR 274 (CC)('*Philips*') at para 30; *National Education Health & Allied Workers Union v University of Cape Town & Others* 2003 (3) SA 1 (CC), 2003 (2) BCLR 154 (CC), (2003) 24 *ILJ* 95 ('*NEHAWU*') at para 25; *Ingledew v Financial Services Board: In Re Financial Services Board v Van Der Merwe & Another* 2003 (4) SA 584 (CC), 2003 (8) BCLR 825 (CC) at para 13; *S v Boesak* 2001 (1) SA 912 (CC), 2001 (1) BCLR 36 (CC), 2001 (1) SACR 1 (CC)('*Boesak*'), at para 12.

must be interpreted in the context of FC s 167(3) and FC s 167(6)*(b)*.[161] The former section — read with FC s 167(7) — makes the Constitutional Court the highest court in all constitutional matters, including any issue concerning the interpretation, protection and enforcement of the Final Constitution.[162] The latter section stipulates that national legislation or the Rules of the Constitutional Court must allow a person to appeal directly to the Constitutional Court from any other court, with leave of the Constitutional Court, whenever it is in the interests of justice.[163]

The Court's assessment of the interest of justice 'involves a careful and balanced weighing-up of all relevant factors'[164] and a case-specific approach which allows for each application to be considered in the light of its own facts.[165] The following section outlines the factors relevant to the Court's evaluation of the interests of justice.

(i) Factors relevant to all applications for leave to appeal

(aa) Importance of the issue raised[166]

In *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division & Others*, the Court held that the relevant question is whether the grounds of appeal raise a constitutional issue of importance on which a decision by the Court is desirable.[167]

(bb) Prospects of success

Although the prospects of success is an important factor in the determination of the interests of justice, the Court has repeatedly emphasised that it is not, generally, outcome determinative.[168] Indeed, the Court has stressed that the prospects of success is rather accommodating: 'the Court does not anticipate a decision as to the success of the intended appeal, but considers only the viability of the appeal'.[169] In *S v Boesak*, the Court held that an applicant who seeks leave to appeal must ordinarily

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161 2005 (4) SA 1 (CC)('*Director of Public Prosecutions, Cape of Good Hope*').

162 On what constitutes a 'constitutional matter', see 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 (2nd Edition, OS, February 2005) Chapter 11; S Seedorf 'Jurisdiction' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (2nd Edition, OS, June 2008) Chapter 4.

163 *Director of Public Prosecutions, Cape of Good Hope* (supra) at para 21.

164 *Radio Pretoria v Chairperson, Independent Communications Authority of South Africa, and Another* 2005 (4) SA 319 (CC), 2005 (3) BCLR 231 (CC)('*Radio Pretoria*') at para 19.

165 *S v Basson* 2005 (1) SA 171 (CC), 2004 (6) BCLR 620 (CC), 2004 (1) SACR 285 (CC) at para 39.

166 *Khumalo* (supra) at para 14; *Islamic Unity Convention v Independent Broadcasting Authority & Others* 2002 (4) SA 294 (CC), 2002 (5) BCLR 433 (CC)('*Islamic Unity Convention*') at para 15; *Member of the Executive Council* (supra) at para 32.

167 *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division & Others* 2004 (1) SA 406 (CC), 2003 (12) BCLR 1333 (CC), 2003 (2) SACR 445 (CC)('*De Reuck*') at para 3.

show that there are reasonable prospects that the Court will reverse or materially alter the decision against which leave is sought.[170]

(cc) Public interest in a determination of the constitutional issues raised[171]

The Court has held that it may, in certain circumstances, be in the interests of justice for it to decide a constitutional matter for the benefit of the broader public or to achieve legal certainty or some other public purpose, even if the decision is of no practical value to the litigants themselves.[172]

(dd) Accuracy of pleadings

In *Shaik v Minister of Justice and Constitutional Development & Others*,[173] the Court emphasised that 'it constitutes sound discipline in constitutional litigation to require accuracy in the identification of statutory provisions that are attacked on the ground of their constitutional invalidity'[174] and that such accuracy will be relevant to an interests of justice determination.[175]

(ii) Factors relevant to applications for leave to appeal directly to the Constitutional Court

(aa) Saving in time and costs

In *Dudley v City of Cape Town & Another*, the Court noted that it would consider whether savings in time and costs would result from a direct appeal.[176]

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168 *De Reuck* (supra) at para 3; *National Union of Metalworkers of South Africa and Others v Bader Bop (Pty) Ltd and Another* 2003 (3) SA 513 (CC), 2003 (2) BCLR 182(CC)('*NUMSA*') at para 17; *NEHAWU* (supra) at para 25; *Minister of Health and Others v Treatment Action Campaign and Others (No 1)* 2002 (5) SA 703 (CC)('*TAC I*') at paras 9-10; *Brummer v Gorfil Brothers Investments (Pty) Ltd & Others* 2000 (2) SA 837 (CC), 2000 (5) BCLR 465 (CC)('*Brummer*') at para 3; *Fraser v Naude & Others* 1999 (1) SA 1 (CC), 1998 (11) BCLR 1357 (CC)('*Fraser*') at para 7.

169 *Beyers v Elf Regters van die Grondwetlike Hof* 2002 (6) SA 630 (CC)('*Beyers*') at para 11.

170 *S v Boesak* 2001 (1) SA 912 (CC), 2001 (1) BCLR 36 (CC), 2001 (1) SACR 1 (CC)('*Boesak*') at para 12.

171 *Islamic Unity Convention* (supra) at para 18; *Khumalo* (supra) at para 14.

172 *Radio Pretoria* (supra) at para 22.

173 2004 (3) SA 599 (CC), 2004 (4) BCLR 333 (CC)('*Shaik*').

174 Ibid at para 25.

175 See, further, *Phillips* (supra) at para 40.

(bb) Urgency of having a final determination of the matters in issue[177]

In *Minister of Public Works & Others v Kyalami Ridge Environmental Association & Another (Mukhwevho Intervening)*,[178] the Court held that although there were a number of issues with which the High Court did not deal and which it would be forced to adjudicate if it were to grant leave to appeal, the interests of justice demanded that the dispute as to the legality of the transit camp that the government had established for flood victims at Leeuwkop be resolved as expeditiously as possible.[179]

(cc) Value of the views of the Supreme Court of Appeal

In *Amod v Multilateral Motor Vehicle Accidents Fund*,[180] the Court noted that

> when a constitutional matter is one which turns on the direct application of the Constitution and which does not involve the development of the common law, considerations of costs and time may make it desirable that the appeal be brought directly to [the Constitutional] Court. But when the constitutional matter involves the development of the common law, the position is different. The Supreme Court of Appeal has jurisdiction to develop the common law in all matters including constitutional matters. Because of the breadth of its jurisdiction and its expertise in the common law, its views as to whether the common law should or should not be developed in a 'constitutional matter' are of particular importance.[181]

Employing the same logic, the Court has also held that where both constitutional and other issues have been raised on appeal, it will seldom be in the interests of justice for the appeal to be brought directly to the Constitutional Court.[182] However, in *Mkangeli and Others v Joubert and Others*, the Constitutional Court noted that where the Court refuses leave to appeal because the matter properly belongs before the Supreme Court of Appeal, this decision does not preclude a litigant from approaching the Constitutional Court again for leave to appeal after the Supreme Court of Appeal has disposed of the matter.[183] Whether the Supreme Court of Appeal

176 *Dudley v City of Cape Town & Another* 2005 (5) SA 429 (CC), 2004 (8) BCLR 805 (CC), (2004) 25 ILJ 991 (CC)('*Dudley*') at para 7; *Member of Executive Council* (supra) at para 32; *Islamic Unity Convention* (supra) at para 19.

177 *Dudley* (supra) at para 7; *Member of Executive Council* (supra) at para 32.

178 2001 (3) SA 1151 (CC), 2001 (7) BCLR 652 (CC).

179 Ibid at para 28.

180 1998 (4) SA 753 (CC), 1998 (10) BCLR 1207 (CC)('*Amod*').

181 Ibid at para 33. See also *Khumalo* (supra) at para 10; *S v Bierman* 2002 (5) SA 243 (CC), 2002 (10) BCLR 1078 (CC)('*Bierman*') at para 7.

182 *Member of Executive Council* (supra) at para 32.

183 2001 (2) SA 1191 (CC), 2005 (4) BCLR 316 (CC)('*Mkangeli*').

has disposed of the matter by way of a judgment or by refusing the petition for leave to appeal, the Constitutional Court will consider the application on its merits.[184]

(dd) Value of the views of the Labour Appeal Court

In *Dudley v City of Cape Town and Another*, the Court held that direct appeals from the labour courts deny it the advantage of having before it the judgments of the Labour Appeal Court on the matters in issue.[185] Any saving of time and costs and avoidance of delay must, according to the Court, be weighed against the need to ensure that the Labour Appeal Court, as the appellate court in labour matters, has had the opportunity to express its views on important labour matters.[186]

(ee) Compliance with obligations of cooperative government

The Court has held that where organs of State have not discharged their duties of co-operative government, such failure may militate against granting an organ of State leave to appeal directly to the Constitutional Court.[187]

(iii) Factors relevant to applications for leave to appeal in custody cases: Best interests of the child

In *Fraser v Naude and Others*, the Court held that where a matter involves a child, the interests of that child are paramount in assessing whether to grant leave to appeal.[188] The *Fraser* Court opined that even if leave to appeal were to be granted, and the applicant were to succeed in his application to have the adoption order set aside, that would not be the end of the matter. The adoption proceedings would then have to be reopened and the dispute would again have to wind its way through the courts.[189] Thus, according to the *Fraser* Court, even where it could be

shown that there were reasonable prospects of success, it would not generally be in the interests of justice for a further appeal to be heard because the continued uncertainty as to the status and the placing of the child could not be in the child's best interests.[190]

(iv) Factors relevant to applications for leave to appeal in criminal cases

184 Ibid at para 7.

185 2005 (5) SA 429 (CC), (2004) (8) BCLR 805 (CC)('*Dudley*').

186 Ibid at para 8.

187 *MEC for Health, Kwazulu-Natal v Premier, KwaZulu-Natal: In Re Minister of Health and Others v Treatment Action Campaign and Others* 2002 (5) SA 717 (CC), 2002 (10) BCLR 1028 (CC)('*TAC II*') at para 9.

188 1999 (1) SA 1 (CC), 1998 (11) BCLR 1357(CC)('*Fraser*') at para 9.

189 Ibid.

190 *Fraser* (supra) at paras 9-10.

The decision to grant leave to appeal in criminal cases tends to turn on three primary considerations: (1) the nature of the crimes concerned; (2) the FC s 35 rights of accused persons; and (3) the interests of the victims of the crimes.[191] In *S v Bierman*, the Court also indicated that it would not be in the interests of justice to grant leave to appeal against a criminal conviction on a point of law where a favourable decision would not result in the conviction being set aside.[192]

(aa) Simultaneous appeals

In *S v Basson*,[193] the Court made it clear that it would not sanction simultaneous appeals which, in effect, gave the litigant 'two bites at the appeal process'.[194] Thus litigants will not be permitted to apply for leave to appeal directly to the Constitutional Court from a High Court judgment where the issue in dispute has already been dealt with by the Supreme Court of Appeal and special leave to appeal has also been sought against that judgment of the Supreme Court of Appeal.[195]

This principle received further attention in *Mabaso v Law Society, Northern Provinces, and Another*.[196] In *Mabaso,* the applicant had sought leave to appeal against a judgment of the Supreme Court of Appeal. The Supreme Court of Appeal had refused condonation for a failure to comply with its rules and had not dealt with the constitutional issue raised by the applicant in the High Court judgment. The Constitutional Court held that, in such circumstances, the applicant should seek leave to appeal against the judgment of the High Court in which the constitutional matter was considered.[197] For although the Supreme Court of Appeal's decision whether to condone a failure to comply with its Rules is a matter of discretion, the Court held that such discretionary decisions by the Supreme Court of Appeal could not be allowed to frustrate the Constitutional Court in the performance of its constitutional duty to ensure that constitutional matters are engaged appropriately.[198]

On their face, these two judgments may appear contradictory. However, they do, in fact, cohere. What *Basson* prohibits is simultaneous appeals in which the appeal from the High Court judgment is used, in effect, to cure shortcomings in the appeal

191 *S v Basson* 2005 (1) SA 171 (CC), 2004 (1) SACR 285 (CC) ('*Basson*') at para 39.

192 2002 (5) SA 243 (CC), 2005 (10) BCLR 1078 (CC)('*Bierman*') at para 9.

193 2005 (1) SA 171 (CC), 2004 (6) BCLR 620 (CC), 2004 (1) SACR 285 (CC)('*Basson*').

194 Ibid at para 77.

195 Ibid at para 78.

196 2005 (2) SA 117 (CC), 2005 (2) BCLR 129 (CC)('*Mabaso*').

197 Ibid at para 23.

198 Ibid at para 24.

to the Supreme Court of Appeal.[199] By contrast, what *Mabaso* recommends is that in a case where a constitutional matter is raised in the High Court's decision but, owing to the Supreme Court of Appeal's refusal to condone non-compliance with its rules, the Supreme Court of Appeal decision on the matter fails to deal with that constitutional matter, a litigant should apply to the Constitutional Court for leave to appeal against the judgment of the High Court. No problem of simultaneous appeals arises in the latter set of cases because the correct procedure to follow is to seek leave to appeal against the High Court decision alone.

That said, in *Mabaso*-like cases, reference will need to be made to the Supreme Court of Appeal decision, and, where available, the judgment of the Supreme Court of Appeal will presumably need to be lodged with the Constitutional Court: the Court has stressed that in assessing whether to grant such an application for leave to appeal, it will consider the circumstances in which the Supreme Court of Appeal has refused the application for condonation.[200] Furthermore, where there has been a flagrant and gross breach of the rules of the Supreme Court of Appeal by the litigant, that will, according to the Court, militate against the grant of leave. It will only be in the interests of justice for leave to be granted in such cases where it is clear that the constitutional issue is of some importance and that there are reasonable prospects of success in relation to the appeal on the constitutional issue.[201]

(bb) Litigants aggrieved by a decision

In *Director of Public Prosecutions, Cape of Good Hope v Robinson*,[202] the respondent contended that, in terms of Rule 19(2), the Director of Public Prosecutions ('DPP') was neither 'aggrieved by the decision of the High Court' nor a 'litigant' within the meaning of the Rule and hence the application for leave to appeal was not competent.[203] The High Court decision, against which leave to appeal was sought by the DPP, held that the magistrate concerned ought not to have declared that the respondent was liable to surrender within the meaning of section 10(1) of the Extradition Act.[204] On the magistrate's reading of the apposite section, the respondent would, contrary to the provisions of the Final Constitution, be forced, upon extradition, to serve a sentence of imprisonment imposed in his absence. In answering the respondent's contention, the Court held that the reference to 'person' in FC s 167(6) should be broadly construed.[205] On the basis of this

199 *Basson* (supra) at para 78.

200 *Mabaso* (supra) at para 27.

201 Ibid.

202 2005 (4) SA 1 (CC)('*Director of Public Prosecutions, Cape of Good Hope*').

203 Ibid at para 15.

204 Act 67 of 1962.

205 *Director of Public Prosecutions, Cape of Good Hope* (supra) at para 31.

reading of FC s 167(6), the Court held that the DPP qualified as a 'litigant' for the purposes of Rule 19.[206] Moreover, the Court held that the DPP was more than merely 'disappointed by the High Court decision'.[207] The office was, according to the Court, 'aggrieved' by the decision of the High Court because it had a direct and substantial interest in the adjudication of the issue: the DPP wished to have the respondent extradited and had been barred from extraditing him as a result of the High Court judgment.[208]

(v) Factors to be considered with respect to appeals against interim orders of execution

In so far as appeals against interim orders of execution are concerned, the Court has held that it will generally not be in the interests of justice for a litigant to be granted leave to appeal against such orders.[209] Ordinarily, for an applicant to succeed in such an application, the applicant would have to show that irreparable harm would result if the interim appeal were not to be granted — a matter which would, by definition, have been considered by the court below in deciding whether or not to grant the execution order. If irreparable harm cannot be shown, an application for leave to appeal will generally fail. If the applicant can show irreparable harm, that irreparable harm would have to be weighed against any irreparable harm that the respondent (in the application for leave to appeal) may suffer were the interim execution order to be overturned.[210]

(vi) Factors to be considered with respect to appeals from the Labour Appeal Court

In so far as appeals from the Labour Appeal Court are concerned, the Constitutional Court has held that it will be slow to hear appeals from the Labour Appeal Court because, by their very nature, labour disputes ought to be resolved expeditiously and be brought to finality so that the parties can organise their affairs accordingly.[211] It is in the public interest that labour disputes be resolved speedily and by experts appointed for that purpose. Nevertheless, where the case raises important matters of constitutional principle, as it did in *National Education Health and Allied Workers Union v University of Cape Town and Others*, the Constitutional Court may grant leave to appeal.[212]

206 *Director of Public Prosecutions, Cape of Good Hope* (supra) at para 39.

207 Ibid at para 40.

208 Ibid.

209 *TAC I* (supra) at para 12.

210 Ibid.

211 *National Education Health and Allied Workers Union v University of Cape Town & Others* 2003 (3) SA 1 (CC), 2004 (3) BCLR 237 (CC) at para 31.

212 Ibid at para 32.

Appendix: Constitutional Court Rules

1 Definitions

1. In these Rules any word or expression to which a meaning has been assigned in the Constitution shall bear that meaning and, unless the context otherwise indicates:

'affidavit' includes an affirmation or a declaration contemplated in section 7 of the Justices of the Peace and Commissioners of Oaths Act, 1963 (Act 16 of 1963);

'apply' means apply on notice of motion, and 'application' has a corresponding meaning;

'Chief Justice' means the Chief Justice of South Africa appointed in terms of section 174 (3) of the Constitution;

'Constitution' means the Constitution of the Republic of South Africa, 1996;

'Court' means the Constitutional Court established by section 166 *(a)* of the Constitution, read with item 16 (2) *(a)* of Schedule 6 to the Constitution;

'Court day' means any day other than a Saturday, Sunday or public holiday, and only Court days shall be included in the computation of any time expressed in days prescribed by these rules or fixed by any order of the Court;

'Deputy Chief Justice' means the Deputy Chief Justice appointed in terms of section 174 (3) of the Constitution;

'directions' means directions given by the Chief Justice with regard to the procedures to be followed in the conduct and disposition of cases;

'judge' means a judge or acting judge of the Court appointed under section 174 or 175 of the Constitution, sitting otherwise than in open court;

'law clinic' means a centre for the practical legal education of students in the faculty of law at a university in the Republic, and includes a law centre controlled by a non-profit organisation which provides the public with legal services free of charge and is certified as contemplated in section 3(1)*(f)* of the Attorneys Act, 1979 (Act 53 of 1979);

'legal representative' means an advocate admitted in terms of section 3 of the Admission of Advocates Act, 1964 (Act 74 of 1964), or an attorney admitted in terms of section 15 of the Attorneys Act, 1979 (Act 53 of 1979);

'party' or any other reference to a litigant includes a legal representative appearing on behalf of a party, as the context may require;

'President' means the President of the Supreme Court of Appeal;

'Registrar' means the Registrar of the Court, and includes any acting or assistant Registrar of the Court, or in their absence any person designated by the Director of the Court;

'sheriff' means a person appointed in terms of section 2 of the Sheriffs Act, 1986 (Act 90 of 1986), and includes a person appointed in terms of section 5 or section 6 of that Act as an acting or a deputy sheriff, respectively, and a sheriff, an acting or a deputy sheriff appointed in terms of any law not yet repealed by a competent authority and in force immediately before the commencement of the Constitution, in any area which forms part of the national territory;

'Supreme Court of Appeal Rules' means the rules regulating the conduct of the proceedings of the Supreme Court of Appeal published under Government Notice R1523 of 27 November 1998; and

'Uniform Rules' means the rules regulating the conduct of the proceedings of the several provincial and local divisions of the high courts published under Government Notice R48 of 12 January 1965, as amended.

2. Any powers or authority vesting in the Chief Justice in terms of these rules may be exercised by a judge or judges designated by the Chief Justice for that purpose.

3. Any reference in these rules to a party having to sign documents shall be construed as including a reference to a legal representative representing such party, and a reference to lodging documents with the Registrar as including prior service of such documents on other parties and the lodging of 25 copies of all relevant documents and an electronic version thereof that is compatible with the software used by the Court, with the Registrar.

4. Notices, directions or other communications in terms of these rules may be given or made by registered post or by facsimile or other electronic copy: Provided that, if a notice or other communication is given by electronic copy, the party giving such notice or communication shall forthwith lodge with the Registrar a hard copy of the notice or communication, with a certificate signed by such a party verifying the date of such communication or notice.

5. The Chief Justice may extend any time limit prescribed in these rules.

6. Written arguments, responses and any other representations to the Court shall be clear and succinct.

7. Applications shall be legible and in double-spaced, typewritten format on A4-size paper.

8. Subject to rule 5, the provisions of rule 4 of the Uniform Rules shall apply, with such modifications as may be necessary, to the service of any process of the Court.

Part I (Rule 2)

2 Court

1. There shall be four terms in each year as follows:

   - 15 February to 31 March, inclusive;
   - 1 May to 31 May, inclusive;
   - 15 August to 30 September, inclusive;

   - 1 November to 30 November, inclusive.

2. A case may be heard out of term if the Chief Justice so directs.

3. If the day fixed for the commencement of a term is not a Court day, the term shall commence on the next succeeding Court day and, if the day fixed for the end of a term is not a Court day, the term shall end on the Court day preceding.

Part II Registrar (Rules 3-4)

3 Registrar's office hours

1. The office of the Registrar shall be open from 08:30 to 13:00 and from 14:00 to 15:30 on Court days.

2. The Registrar may in exceptional circumstances accept documents at a time outside office hours, and shall do so when directed by a judge.

4 General duties of the registrar

1. A notice of appeal, an order of court referring any matter to the Court by another court, or another document by which proceedings are initiated in the Court in terms of these rules shall be numbered by the Registrar with a consecutive number for the year during which it is filed.

2. Every document afterwards lodged in such a case or in any subsequent case in continuation thereof shall be marked with that number by the party lodging it and shall not be received by the Registrar until so marked.

3. All documents delivered to the Registrar to be filed in a case shall be filed by the Registrar in a case file under the number of such case.

4. All documents referred to in subrule (1) shall be subject to the payment of R75, 00 court fees in the form of a revenue stamp: Provided that if a party satisfies the Registrar in terms of subrule (5) that he or she is indigent, the payment of court fees shall be waived by the Registrar who shall make a note to that effect on the first page of the document in question.

5. A party who desires to initiate or oppose proceedings in the Court and who is of the opinion that he or she is indigent, or anybody on behalf of such party, shall satisfy the Registrar that, except for household goods, wearing apparel and tools of trade, such party is not possessed of property to the amount of R20 000 and will not be able within a reasonable time to provide such sum from his or her earnings.

6. Where photocopies are made, the fee prescribed in subrule (6) *(a)* shall be payable. Copies of a record may be made by any person in the presence of the Registrar.

    a. The Registrar shall at the request of a party make a copy of any court document on payment of court fees with revenue stamps of R0, 50 for every photocopy of an A4-size page or part thereof and shall against payment of a fee of R1, 00 certify that photocopy to be a true copy of the original.

    b. The payment of court fees may be waived by the Registrar in the case of an indigent person referred to in subrules (4) and (5).

7. Whenever the Court makes an order declaring or confirming any law or provision thereof to be inconsistent with the Constitution under section 172 of the Constitution, the Registrar shall, not later than 15 days after such order has been made, cause such order to be published in the Gazette and in the relevant Provincial Gazette if the order relates to provincial legislation.

8. The Registrar shall publish a hearing list, which shall be affixed to the notice board at the Court building not less than 15 days before each term for the convenience of the legal representatives and the information of the public.

9. Directions with regard to any proceedings shall be furnished by the Registrar to the parties concerned within five days of such directions having been given.

10. a. The Registrar shall maintain the Court's records and shall not permit any of them to be removed from the court building.

    b. Any document lodged with the Registrar and made part of the Court's records shall not thereafter be withdrawn permanently from the official court files.

    c. After the conclusion of the proceedings in the Court, any original records and papers transmitted to the Court by any other court shall be returned to the court from which they were received.

11. a. If it appears to the Registrar that a party is unrepresented, he or she shall refer such party to the nearest office or officer of the Human Rights Commission, the Legal Aid Board, a law clinic or such other appropriate body or institution that may be willing and in a position to assist such party.

    b. The State or the Registrar shall not be liable for any damage or loss resulting from assistance given in good faith by that Registrar to such party in proceedings before the Court or in the enforcement of an order in terms of these rules in the form of legal advice or in the compilation or preparation of any process or document.

Part III Joinder of Organs of State (Rule 5)

5 Joinder of organs of state

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 inquiry 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 a 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.

Part IV Parties (Rules 6-9)

6 Representation of parties

Except where the Court or the Chief Justice directs otherwise, no person shall be entitled to appear on behalf of any party at any proceedings of the Court unless he or she is entitled to appear in the high courts.

7 Change of parties

1. If a party dies or becomes incompetent to continue any proceedings, the proceedings shall thereby be stayed until such time as an authorised representative or other competent person has been appointed in the place of such party, or until such incompetence ceases to exist.

2. Where an authorised or other competent person has been so appointed, the Court may, on application, order that such authorised or competent person be substituted for the party who has so died or become incompetent.

8 Intervention of parties in the proceedings

1. Any person entitled to join as a party or liable to be joined as a party in the proceedings may, on notice to all parties, at any stage of the proceedings apply for leave to intervene as a party.

2. The Court or the Chief Justice may upon such application make such order, including any order as to costs, and give such directions as to further procedure in the proceedings as may be necessary.

9 Power of attorney or authorisation to act

1. A power of attorney need not be filed, but the authority of a legal practitioner to act on behalf of any party may, within 21 days after it has come to the notice of any party that the legal practitioner is so acting, or with the leave of the Court on good cause shown at any time before judgment, be disputed by notice, whereafter the legal practitioner may no longer so act, unless a power of attorney is lodged with the Registrar within 21 days of such notice.

2. Every power of attorney or authorisation to act lodged shall be signed by or on behalf of the party giving it, and shall otherwise be duly executed according to law.

3. No power of attorney or authorisation to act shall be required to be lodged by anyone acting on behalf of the State.

Part V (Rule 10)

10 Amici curiae

1. Subject to these rules, any person interested in any matter before the Court may, with the written consent of all the parties in the matter before the Court, given not later than the time specified in subrule (5), be admitted therein as an amicus curiae upon such terms and conditions and with such rights and privileges as may be agreed upon in writing with all the parties before the Court or as may be directed by the Chief Justice in terms of subrule (3).

2. The written consent referred to in subrule (1) shall, within five days of it having been obtained, be lodged with the Registrar and the amicus curiae shall, in addition to any other provision, comply with the times agreed upon for the lodging of written argument.

3. The Chief Justice may amend the terms, conditions, rights and privileges agreed upon as referred to in subrule (1).

4. If the written consent referred to in subrule (1) has not been secured, any person who has an interest in any matter before the Court may apply to the Chief Justice to be admitted therein as an amicus curiae, and the Chief Justice may grant such application upon such terms and conditions and with such rights and privileges as he or she may determine.

5. If time limits are not otherwise prescribed in the directions given in that matter an application pursuant to the provisions of subrule (4) shall be made not later than five days after the lodging of the respondent's written submissions or after the time for lodging such submissions has expired.

6. An application to be admitted as an amicus curiae shall-

    a. briefly describe the interest of the amicus curiae in the proceedings;

    b. briefly identify the position to be adopted by the amicus curiae in the proceedings; and

    c. set out the submissions to be advanced by the amicus curiae, their relevance to the proceedings and his or her reasons for believing that the submissions will be useful to the Court and different from those of the other parties.

7. An amicus curiae shall have the right to lodge written argument, provided that such written argument does not repeat any matter set forth in the argument of the other parties and raises new contentions which may be useful to the Court.

8. Subject to the provisions of rule 31, an amicus curiae shall be limited to the record on appeal or referral and the facts found proved in other proceedings and shall not add thereto and shall not present oral argument.

9. An order granting leave to be admitted as an amicus curiae shall specify the date of lodging the written argument of the amicus curiae or any other relevant matter.

10. An order of Court dealing with costs may make provision for the payment of costs incurred by or as a result of the intervention of an amicus curiae.

11. The provisions of rule 1 (3) shall be applicable, with such modifications as may be necessary, to an amicus curiae.

Part VI Applications (Rules 11-13)

11 Application procedure

1. Save where otherwise provided, in any matter in which an application is necessary for any purpose, including-

    a. in respect of a matter contemplated in section 167 (4) *(a)* of the Constitution; and

    b. the obtaining of directions from the Court,

    such application shall be brought on notice of motion supported by an affidavit as to the facts upon which the applicant relies for relief and shall set out an address within 25 kilometres from the office of the Registrar stating the physical and postal address with facsimile, telephone numbers and an e-mail address, where available, at which he or she will accept notice and service of all documents in the proceedings and shall set forth a day, not less than five days after service thereof on the respondent, on or before which such respondent is required to notify the applicant in writing whether he or she intends to oppose such application and shall further state that if no such notification is given, the Registrar will be requested to place the matter before the Chief Justice to be dealt with in terms of subrule (4).

2. When relief is claimed against any person, authority, government, organ of state or body, or where it is necessary or proper to give any of the aforementioned notice of an application referred to in subrule (1), the notice of motion shall be addressed to both the Registrar and the aforementioned, and shall set out such particulars, including physical address, facsimile, telephone numbers and an e-mail address, where available, of the party against whom the relief is sought, as will enable the Registrar to communicate with such party, otherwise it shall be addressed to the Registrar and shall be as near as may be in accordance with Form 1 or 2, as the case may be.

3. a. Any person opposing the granting of an order sought in the notice of motion shall—

i. within the time stated in the said notice, notify the applicant and the Registrar in writing of his or her intention to oppose the application and shall in such notice appoint an address within 25 kilometres of the office of the Registrar at which he or she will accept notice and service of all documents in the proceedings;

ii. within 15 days of notifying the applicant of his or her intention to oppose the application lodge his or her answering affidavit, if any, together with any relevant documents, which may include supporting affidavits.

b. The applicant may lodge a replying affidavit within 10 days of the service upon him or her of the affidavit and documents referred to in paragraph *(a)* (ii).

c. i. Where no notice of opposition is given or where no answering affidavit in terms of paragraph *(a)* (ii) is lodged within the time referred to in paragraph *(a)* (ii), the Registrar shall within five days of the expiry thereof place the application before the Chief Justice.

ii. Where an answering affidavit is lodged, the Registrar shall place the application before the Chief Justice within five days of the lodging of the replying affidavit.

d. The Chief Justice may, when giving directions under subrule (4), permit the lodging of further affidavits.

4. When an application is placed before the Chief Justice in terms of subrule (3) *(c)*, he or she shall give directions as to how the application shall be dealt with and, in particular, as to whether it shall be set down for hearing or whether it shall be dealt with on the basis of written argument or summarily on the basis of the information contained in the affidavits.

12 Urgent applications

1. In urgent applications, the Chief Justice may dispense with the forms and service provided for in these rules and may give directions for the matter to be dealt with at such time and in such manner and in accordance with such procedure, which shall as far as is practicable be in accordance with these rules, as may be appropriate.

2. An application in terms of subrule (1) shall on notice of motion be accompanied by an affidavit setting forth explicitly the circumstances that justify a departure from the ordinary procedures.

13 Argument

1. Written argument shall be filed timeously and shall contain a table of contents, and a table of authorities with references to the pages in the document on which they are cited.

2. Oral argument shall not be allowed if directions to that effect are given by the Chief Justice.

3. a. Oral argument shall be relevant to the issues before the Court and its duration shall be subject to such time limits as the Chief Justice may impose.

b. The parties shall assume that all the judges have read the written arguments and that there is no need to repeat what is set out therein.

4. a. Argument may be addressed to the Court in any official language and the party concerned shall not be responsible for the provision of an interpreter.

b. Should a person wish to address the Court in an official language other than the language in which such person's written argument is couched, such person shall, at least seven days prior to the hearing of the matter in question, give written notice to the Registrar of his or her intention to use another official language and shall indicate what that language is.

5. On the Court's own motion, or on the application of one or more parties, the Court may order that two or more cases, involving what appear to be the same or related questions, be argued together as one case or on such other terms as may be prescribed.

14 Referral of a bill

1. The referral of a Bill in terms of section 79 (4) *(b)* or 121 (2) *(b)* of the Constitution by the President of the Republic of South Africa or by the Premier of a province, as the case may be, shall be in writing and shall be addressed to the Registrar and to the Speaker of the National Assembly and the Chairperson of the National Council of Provinces, or to the Speaker of the provincial legislature in question, as the case may be.

2. Such referral shall specify-

    a. the provision or provisions of the Bill in respect of which the President of the Republic of South Africa or the Premier of a province has reservations;

    b. the constitutional provision or provisions relating to such reservations; and

    c. the grounds or reasons for such reservations.

3. Political parties represented in the national Parliament or the provincial legislature concerned, as the case may be, shall be entitled as of right to make written submissions relevant to the determination of the issue within the time specified in directions given under subrule (4).

4. Upon receipt of the referral, the matter shall be dealt with in accordance with directions given by the Chief Justice, which may include a direction-

    a. requesting the relevant Speaker or the Chairperson of the National Council of Provinces, as the case may be, for such additional information as the Chief Justice may consider to be necessary or expedient to deal with the matter; and

    b. calling upon all interested political parties in the national Parliament or the provincial legislature concerned, as the case may be, who may wish to do so to make such written submissions as are relevant to the determination of the issue within a period to be specified in such direction.

15 Constitutionality of an act

1. An application in terms of sections 80 (1) and 122 (1) of the Constitution by members of the National Assembly or a provincial legislature shall be brought on notice of motion supported by an affidavit as to the contentions upon which the applicants rely for relief and shall be lodged with the Registrar and

served on the Speaker of the National Assembly and, where applicable, the Chairperson of the National Council of Provinces, or on the Speaker of the provincial legislature concerned, as the case may be.

2. The notice shall request the Speaker and, if relevant, the Chairperson of the National Council of Provinces, to bring the application to the attention of all political parties represented in the relevant house or legislature in writing within five days of the service upon him or her of such application.

3. The application referred to in subrule (1) shall be accompanied by a certificate by the Speaker of the legislature concerned that the requirements of section 80 (2) *(a)* or section 122 (2) *(a)* of the Constitution, as the case may be, have been complied with.

4. The application referred to in subrule (1) shall also specify—

    a. the provision or provisions of the Act being challenged;

    b. the relevant provision or provisions of the Constitution relied upon for such challenge;

    c. the grounds upon which the respective provisions are deemed to be in conflict; and

    d. the relief, including any interim relief, sought.

5. a. Any political party in the legislature concerned or any government that wishes to oppose the granting of an order sought in such an application shall notify the Registrar in writing within 15 days of service of such application of such intention to oppose and shall, in such

notification, appoint an address at which such party or government will accept notice and service of all documents in the proceedings.

b. If such a notice is given, the application shall be disposed of in accordance with the provisions of rule 11.

6. If a notice to oppose is not lodged in terms of subrule (5), the matter shall be disposed of in accordance with directions given by the Chief Justice, which may include a direction—

a. calling for such additional information as the Chief Justice may consider necessary or expedient to deal with the matter; and

b. that all interested political parties in the national Parliament or the provincial legislature concerned, as the case may be, who wish to do so make such written submissions as are relevant to the determination of the issue within a period specified in such direction.

16 Confirmation of an order of constitutional invalidity

1. The Registrar of a court which has made an order of constitutional invalidity as contemplated in section 172 of the Constitution shall, within 15 days of such order, lodge with the Registrar of the Court a copy of such order.

2. A person or organ of state entitled to do so and desirous of appealing against such an order in terms of section 172 (2) *(d)* of the Constitution shall, within 15 days of the making of such order, lodge a notice of appeal with the

Registrar and a copy thereof with the Registrar of the Court which made the order, whereupon the matter shall be disposed of in accordance with directions given by the Chief Justice.

3. The appellant shall in such notice of appeal set forth clearly the grounds on which the appeal is brought, indicating which findings of fact and/or law are appealed against and the order it is contended ought to have been made.

4. A person or organ of state entitled to do so and desirous of applying for the confirmation of an order in terms of section 172 (2) *(d)* of the Constitution shall, within 15 days of the making of such order, lodge an application for such confirmation with the Registrar and a copy thereof with the Registrar of the Court which made the order, whereupon the matter shall be disposed of in accordance with directions given by the Chief Justice.

5. If no notice or application as contemplated in subrules (2) and (4), respectively, has been lodged within the time prescribed, the matter of the confirmation of the order of invalidity shall be disposed of in accordance with directions given by the Chief Justice.

17 Certification of a provincial constitution

1. The Speaker of a provisional legislature which has passed or amended a constitution in terms of sections 142 and 144 (2) of the Constitution and which wishes such constitution or constitutional amendment to be certified by the Court shall certify in writing the content of the constitution or amendment passed by the provincial legislature and submit such constitution or constitutional amendment to the Registrar with a formal request to the Court to perform its functions in terms of section 144 of the Constitution.

2. The certificate contemplated in subrule (1) shall include a statement specifying that the constitution or the constitutional amendment was passed by the requisite majority.

3. Any political party represented in the provincial legislature shall be entitled as of right to present oral argument to the Court, provided that such political party may be required to submit a written submission to the Court in advance of the oral argument.

4. Upon the receipt of the request referred to in subrule (1), the matter shall be disposed of in accordance with directions given by the Chief Justice, which may include—

a. referral to the Speaker for such additional information as is considered by the Chief Justice to be necessary or expedient to deal with the matter;

b. a direction, specifying the time within which written submissions from interested political parties shall be made;

c. a direction that any written submissions made in terms paragraph *(b)* should be brought to the attention of other political parties in the provincial legislature by such means as the Chief Justice considers suitable.

5. An order of the Court pursuant to section 144 of the Constitution may specify the provisions of the provincial constitution or of the constitutional amendment, if any, which comply and which do not comply with the Constitution.

Part VIII Direct Access and Appeals (Rules 18-21)

18 Direct access

1. An application for direct access as contemplated in section 167 (6) *(a)* of the Constitution shall be brought on notice of motion, which shall be supported by an affidavit, which shall set forth the facts upon which the applicant relies for relief.

2. An application in terms of subrule (1) shall be lodged with the Registrar and served on all parties with a direct or substantial interest in the relief claimed and shall set out—

   a. the grounds on which it is contended that it is in the interests of justice that an order for direct access be granted;

   b. the nature of the relief sought and the grounds upon which such relief is based;

   c. whether the matter can be dealt with by the Court without the hearing of oral evidence and, if it cannot;

   d. how such evidence should be adduced and conflicts of fact resolved.

3. Any person or party wishing to oppose the application shall, within 10 days after the lodging of such application, notify the applicant and the Registrar in writing of his or her intention to oppose.

4. After such notice of intention to oppose has been received by the Registrar or where the time for the lodging of such notice has expired, the matter shall be disposed of in accordance with directions given by the Chief Justice, which may include—

   a. a direction calling upon the respondents to make written submissions to the Court within a specified time as to whether or not direct access should be granted; or

   b. a direction indicating that no written submissions or affidavits need be filed.

5. Applications for direct access may be dealt with summarily, without hearing oral or written argument other than that contained in the application itself: Provided that where the respondent has indicated his or her intention to oppose in terms of subrule (3), an application for direct access shall be granted only after the provisions of subrule (4) *(a)* have been complied with.

19 Appeals

1. The procedure set out in this rule shall be followed in an application for leave to appeal to the Court where a decision on a constitutional matter, other than

an order of constitutional invalidity under section 172 (2) *(a)* of the Constitution, has been given by any court including the Supreme Court of Appeal, and irrespective of whether the President has refused leave or special leave to appeal.

2. A litigant who is aggrieved by the decision of a court and who wishes to appeal against it directly to the Court on a constitutional matter shall, within 15 days of the order against which the appeal is sought to be brought and after giving notice to the other party or parties concerned, lodge with the Registrar an application for leave to appeal: Provided that where the President has refused leave to appeal the period prescribed in this rule shall run from the date of the order refusing leave.

3. An application referred to in subrule (2) shall be signed by the applicant or his or her legal representative and shall contain—

a. the decision against which the appeal is brought and the grounds upon which such decision is disputed;

b. 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;

c. such supplementary information or argument as the applicant considers necessary to bring to the attention of the Court; and

d. a statement indicating whether the applicant has applied or intends to apply for leave or special leave to appeal to any other court, and if so—

i. which court;

ii. whether such application is conditional upon the application to the Court being refused; and

iii. the outcome of such application, if known at the time of the application to the Court.

4. a. Within 10 days from the date upon which an application referred to in subrule (2) is lodged, the respondent or respondents may respond thereto in writing, indicating whether or not the application for leave to appeal is being opposed, and if so the grounds for such opposition.

b. The response shall be signed by the respondent or respondents or his or her or their legal representative.

5. a. A respondent or respondents wishing to lodge a cross-appeal to the Court on a constitutional matter shall, within 10 days from the date upon which an application in subrule (2) is lodged, lodge with the Registrar an application for leave to cross-appeal.

b. The provisions of these rules with regard to appeals shall apply, with necessary modifications, to cross-appeals.

6. a. The Court shall decide whether or not to grant the appellant leave to appeal.

b. Applications for leave to appeal may be dealt with summarily, without receiving oral or written argument other than that contained in the application itself.

c. The Court may order that the application for leave to appeal be set down for argument and direct that the written argument of the parties deal not only with the question whether the application for leave to appeal should be granted, but also with the merits of the dispute. The provisions of rule 20 shall, with necessary modifications, apply to the procedure to be followed in such procedures.

20 Procedure on appeal

1. If leave to appeal is given in terms of rule 19, the appellant shall note and prosecute the appeal as follows:

a. The appellant shall prepare and lodge the appeal record with the Registrar within such time as may be fixed by the Chief Justice in directions.

b. Subject to the provisions of subrule (1) *(c)* below, the appeal record shall consist of the judgment of the court from which the appeal is noted, together with all the documentation lodged by the parties in that court and all the evidence which may have been led in the proceedings and which may be relevant to the issues that are to be determined.

c. i. The parties shall endeavour to reach agreement on what should be included in the record and, in the absence of such agreement, the appellant shall apply to the Chief Justice for directions to be given in regard to the compilation of the record.

ii. Such application shall be made in writing and shall set out the nature of the dispute between the parties in regard to the compilation of the record and the reasons for the appellant's contentions.

iii. The respondent may respond to the application within 10 days of being served with the application and shall set out the reasons for the respondent's contentions.

iv. The Chief Justice may assign the application to one or more judges, who may deal with the matter on the papers or require the parties to appear before him or her or them on a specified day and at a specified time to debate the compilation of the record.

v. The judge or judges concerned shall give directions in regard to the compilation of the record, the time within which the record is to be lodged with the Registrar and any other matters which may be deemed by him or her or them to be necessary for the purpose of enabling the Court to deal with the appeal, which directions may include that the matter be referred back to the court a quo for the hearing of additional evidence specified in the directions, or that additional evidence be put before the Court by way of affidavit or otherwise for the purpose of the appeal.

2. a. One of the copies of the record lodged with the Registrar shall be certified as correct by the Registrar of the court appealed from.

b. Copies of the record shall be clearly typed on stout A4-size paper, double-spaced in black record ink, on one side of the paper only.

c. Legible documents that were typed or printed in their original form such as cheques and the like shall not be retyped and clear photocopies on A4-size paper shall be provided instead.

d. The pages shall be numbered clearly and consecutively and every tenth line on each page shall be numbered and the pagination used in the court a quo shall be retained where possible.

e. Bulky records shall be divided into separate conveniently-sized volumes of approximately 100 pages each. The record shall be securely bound in book format to withstand constant use and shall be so bound that upon being used will lie open without manual or other restraint.

f. All records shall be securely bound in suitable covers disclosing the case number, names of the parties, the volume number and the numbers of the pages contained in that volume, the total number of volumes, the court a quo and the names of the attorneys of the parties.

g. The binding required by this rule shall be sufficiently secure to ensure the stability of the papers contained within the volume; and where the record consists of more than one volume, the number of each volume and the number of the pages contained in a volume shall appear on the upper third of the spine of the volume.

h. Where documents are lodged with the Registrar, and such documents are recorded on a computer disk, the party lodging the document shall where possible also make available to the Registrar a disk containing the file in which the document is contained, or transmit an electronic copy of the document concerned by e-mail in a format determined by the Registrar which is compatible with software that is used by the Court at the time of lodgement, to the Registrar at: registrar@concourt.org.za: Provided that the transmission of such copy shall not relieve the party concerned from the obligation under rule 1 (3) to lodge the prescribed number of hard copies of the documents so lodged.

i. If a disk is made available to the Registrar the file will be copied and the disk will be returned to the party concerned. Where a disk or an electronic copy of a document other than a record is provided, the party need lodge only 13 copies of the document concerned with the Registrar.

3. If a record has been lodged in accordance with the provisions of paragraphs *(b)* and *(c)* of subrule (1), the Registrar shall cause a notice to be given to the parties to the appeal requiring—

a. the appellant to lodge with the Registrar written argument in support of the appeal within a period determined by the Chief Justice and specified in such notice; and

b. the respondent to lodge with the Registrar written argument in reply to the appellant's argument by a specified date determined by the Chief Justice, which shall be subsequent to the date on which the appellant's argument was served on the respondent.

4. The appellant may lodge with the Registrar written argument in answer to the respondent's argument within 10 days from the date on which the respondent's argument was served on the appellant.

5. The Chief Justice may decide whether the appeal shall be dealt with on the basis of written arguments only.

6. Subject to the provisions of subrule (5), the Chief Justice shall determine the date on which oral argument will be heard, and the Registrar shall within five days of such determination notify all parties to the appeal of the date of the hearing by registered post or facsimile.

21 Additional information to be furnished to the registrar

When an application for confirmation of an order of constitutional invalidity or a notice of appeal against such order is lodged with the Registrar in terms of rule 16, or an application for leave to appeal is lodged in terms of rule 19, the applicant or appellant shall at the same time provide the Registrar with a note—

a. setting out the length of the record, or if the record consists of evidence that has not been transcribed, an estimate of the length of the record and the time required for transcription;

b. whether there are any special circumstances that may require a hearing of more than one day or which might otherwise be relevant to the directions to be given by the Chief Justice.

Part IX Fees and Costs (Rules 22-23)

22 Taxation of costs and attorneys' fees

1. Rules 17 and 18 of the Supreme Court of Appeal Rules regarding taxation and attorneys' fees shall apply, with such modifications as may be necessary.

2. In the event of oral and written argument, a fee for written argument may in appropriate circumstances be allowed as a separate item.

23 Fees of the court

1. In addition to the Court fees already prescribed in these rules the fees in Schedule 2 shall be the fees of the court payable with revenue stamps.

2. The proviso to rule 4 (4) and the provisions of rule 4 (5) shall apply, with such modifications as may be necessary.

Part X Miscellaneous Provisions (Rules 24-36)

24 Library

1. The Court's library shall be available for use by the judges, the staff of the Court and other persons who have permission from the librarian for the purposes of constitutional research.

2. The library shall be open during such times as the reasonable needs of the Court may require and its operation shall be governed by the rules made by the Court's Library Committee in consultation with the Chief Justice.

25 Translations

Where any record or other document lodged with the Registrar contains material written in an official language that is not understood by all the judges, the Registrar shall have the portions of such record or document concerned translated by a sworn translator of the High Court into a language or languages that will be understood by such judges, and shall supply the parties with a copy of such translations.

26 Models, diagrams and exhibits

1. Models, diagrams and exhibits of material forming part of the evidence taken in a case and brought to the Court for its inspection shall be placed in the custody of the Registrar at least 10 days before the case is to be heard or submitted.

2. All models, diagrams and exhibits of material placed in the custody of the Registrar shall be removed by the parties within 40 days after the case is decided.

3. When this is not done, the Registrar shall notify the party concerned to remove the articles forthwith and if they are not removed within six months thereafter, the Registrar shall destroy them or otherwise appropriately dispose of them.

27 Withdrawal of cases

Whenever all parties, at any stage of the proceedings, lodge with the Registrar an agreement in writing that a case be withdrawn, specifying the terms relating to the payment of costs and payment to the Registrar of any fees that may be due, the Registrar shall, if the Chief Justice so directs, enter such withdrawal, whereupon the Court shall no longer be seized of the matter.

28 Format of documents

1. Every document that exceeds 15 pages shall, regardless of the method of duplication, contain a table of contents with correct references.

2. Every document at its close shall bear the name of the party or his or her attorney, the postal and physical address, facsimile, telephone number and an e-mail address, where available, and the original document shall be signed by the party or his or her attorney.

3. a. The Registrar shall not accept for lodging any document presented in a form not in compliance with these rules, but shall return it to the defaulting party indicating respects in which there has been a failure to comply: Provided that if new and proper copies of any such document are resubmitted within five days of receiving written notification, such lodging shall not be deemed late.

   b. If the Court finds that the provisions of these rules have not been complied with, it may impose, in its discretion, appropriate sanctions.

29 Application of certain rules of the uniform rules

The following rules of the Uniform Rules shall, with such modifications as may be necessary, apply to the proceedings in the Court:

6 (7) to 6 (15)	Joinder of parties on application and related matters
28	Amendments to pleadings and documents
35 (13)	Discovery, inspection and production of documents
38 (3) to 38 (8)	Procuring evidence for trial
42	Variation and rescission of orders
59	Sworn translators
61	Interpretation of evidence
62	Filing, preparation and inspection of documents
63	Authentication of documents executed outside the Republic for use within the Republic
64	Destruction of documents
65	Commissioners of the Court

30 Application of certain sections of the supreme court act, 1959 (act 59 of 1959)

The following sections of the Supreme Court Act, 1959 (Act 59 of 1959), shall apply, with such modifications as may be necessary, to proceedings of and before the Court as if they were rules of their court.

19 bis	Reference of particular matters for investigation by referee
22	Powers of court on hearing of appeals
32	Examinations by interrogatories of persons whose evidence is required in civil cases
33	Manner of dealing with commissions rogatoire, letters of request and documents for service originating from foreign countries: Provided that this provision shall apply subject to the replacement of English or Afrikaans with the phrase 'any official language'.

31 Documents lodged to canvass factual material

1. Any party to any proceedings before the Court and an amicus curiae properly admitted by the Court in any proceedings shall be entitled, in documents lodged with the Registrar in terms of these rules, to canvass factual material that is relevant to the determination of the issues before the Court and that does not specifically appear on the record: Provided that such facts—

    a. are common cause or otherwise incontrovertible; or

    b. are of an official, scientific, technical or statistical nature capable of easy verification.

2. All other parties shall be entitled, within the time allowed by these rules for responding to such document, to admit, deny, controvert or elaborate upon such facts to the extent necessary and appropriate for a proper decision by the Court.

32 Non-compliance with the rules

The Court or the Chief Justice may—

1. of their own accord or on application and on sufficient cause shown, extend or reduce any time period prescribed in these rules and may condone non-compliance with these rules; and

2. give such directions in matters of practice, procedure and the disposal of any appeal, application or other matter as the Court or Chief Justice may consider just and expedient.

33 Execution: section 3 of the constitutional court complementary act, 1995 (act 13 of 1995)

Costs orders of the Court shall be executed in the magistrate's court as follows:

1. The costs order shall have the effect of a civil judgment of the magistrate's court and the party in whose favour a costs order was made shall be deemed the judgment creditor and the party against whom such order was made shall be deemed the judgment debtor.

2. The party in whose favour a costs order was made shall, where a costs order has not been complied with, fiile with the Registrar an affidavit setting out the details of the costs order and stating that the costs order has not been complied with or has not been complied with in full, as the case may be, and the amount outstanding, and shall request the Registrar to furnish him or her with a certified copy of such costs order.

3. The Registrar shall, after having inspected the court file concerned to verify the contents of the affidavit, furnish the party referred to in subrule (2) with a certified copy of the costs order concerned and shall record such furnishing on the Court file.

4. The party referred to in subrule (2) shall file the said copy with the clerk of the civil court of the district in which he or she resides, carries on business or is employed.

5. Such order shall be executed in accordance with the provisions of the Magistrates' Courts Act, 1944 (Act 32 of 1944), and the Magistrates' Courts Rules published under Government Notice

R1108 of 21 June 1968, as amended, regarding warrants of execution against movable and immovable property and the issuing of emolument attachment orders and garnishee orders only.

34 Transitional provisions

When a time is prescribed for any purpose in terms of these rules, and such time would otherwise have commenced to run prior to the commencement of these rules, such time shall begin to run only on the date on which these rules come into operation.

35 Repeal of rules

The Rules of the Constitutional Court previously published shall be repealed on the date on which these rules come into operation: Provided that any directions in writing pertaining to the procedures to be followed in the determination of a dispute or an issue in cases already instituted shall remain in force, unless repealed in writing by the Chief Justice.

36 Short title

These rules shall be called the Constitutional Court Rules, 2003.

Schedule 1 — Forms

Form 1: notice of motion to registrar

Form 2: notice of motion to registrar and respondent

Schedule 2 — Fees

	R
Lodging of any application (other than the first document)	10,00
Lodging of an answering affidavit (each)	10,00
Lodging of a notice of appeal or cross-appeal	15,00
Order of the court granting leave to appeal	15,00
For the Registrar's certificate on certified copies of documents (each)	1,00
Taxing fee in any matter	25,00