

## Chapter 59

### Access to Courts

**Jason Brickhill & Adrian Friedman**

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### Access to courts

34. Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.<sup>1</sup>

## 59.1 Introduction<sup>2</sup>

The right of access to courts is a pre-requisite to the enjoyment of other constitutional rights. Without it, the extensive protections and guarantees provided in our Bill of Rights would be meaningless. In this chapter, we attempt to give meaning to the rights enshrined in FC s 34 and to emphasize how this provision of the Final Constitution gives effect to the founding value of the rule of law.

To do so, we begin in § 59.2 by considering the tools necessary to offer a proper construction of FC s 34. Without a basic understanding of the appropriate modes of interpreting FC s 34, the analysis that follows lacks context. Having discussed these modes of interpretation, and before considering the content of the right in detail, we consider, in § 59.3, the nature and the application of the right of access to courts. Once the applicability of FC s 34 has been considered, we engage in § 59.4, in depth, with the different elements of the right. We have found it appropriate to focus on four discreet aspects of the right: (a) the right of access to courts; (b) the right to a fair public hearing before such courts; (c) the right, where appropriate, to have one's dispute resolved in another independent and impartial tribunal and forum; and (d) the right to enforcement of an effective remedy. The first three components are expressed in the text of FC s 34 itself. The last arises from the interpretation of FC s

1 The Constitution of the Republic of South Africa, 1996 ('Final Constitution' or 'FC').

2 We are greatly indebted to Kate Hofmeyr: Her input has been indispensable and has assisted in moulding certain critical components the chapter. We would also like to thank Michael Bishop, whose editorial interventions have benefited us greatly.

34 by the Constitutional Court. We conclude in § 59.5 with an analysis of reasonable limitations of the right.

## 59.2 Interpreting FC s 34

When interpreting FC s 34, it is important to consider, first, the historical background underlying access to courts; second, the (constitutional) textual context of the right; third, relevant international law; and, finally, significant foreign law.

### (a) Historical context

The right of access to courts must be interpreted in the light of South Africa's history of deliberate state denial of access by various means.

One of the key legal tools in implementing apartheid was the use of 'ouster clauses'. Ouster clauses deny courts the jurisdiction to review conduct of the executive. These clauses were used, in particular, to prevent review of executive

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decisions to detain political activists and decisions regarding immigration.<sup>3</sup> Although certain decisions mitigated the impact of these clauses,<sup>4</sup> ouster clauses were largely successful in immunizing the worst of apartheid executive conduct from judicial scrutiny.<sup>5</sup> In the pre-constitutional era, parliamentary supremacy limited the power of the courts to review legislation to non-compliance with procedural limitations that had been imposed by Parliament itself. However, even the exercise of these partial review powers invited the ire of the government.

One of the most blatant instances of apartheid-state interference with judicial authority occurred after the famous Appellate Division decision in *Harris I*.<sup>6</sup> In *Harris I*, the Appellate Division struck down the Separate Representation of Voters Act:<sup>7</sup> the Act provided for 'the separate representation of European and non-European voters in the Province of the Cape of Good Hope'.<sup>8</sup> The government sought to circumvent the judgment by passing the High Court of Parliament Act, which purported to turn

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3 For example, s 29(6) of the notorious Internal Security Act 74 of 1982 provided that '[n]o court of law shall have jurisdiction to pronounce on any action taken in terms of this section, or to order the release of any person detained in terms of this section.'

4 See *Minister of Law and Order v Hurley* 1986 (3) SA 568 (A) (The Appellate Division endorsed reasoning that a decision that was *ultra vires* had not been taken 'in terms of' s 29 of the Internal Security Act, and accordingly was not hit by the ouster clause excluding judicial review of decisions taken in terms of the section.)

5 On ouster clauses, see C Hoexter *Administrative Law in South Africa* (2007) 522-525.

6 *Harris v Minister of the Interior* 1952 (2) SA 428 (A).

7 Act 46 of 1951.

8 The basis of the decision was that the Act was not passed in conformity with the provisions of the South Africa Act of 1909. It required more than a two-thirds parliamentary majority, and special procedures to disqualify any person as a voter on the ground of race. See 'Constitutional History' Stu Woolman & Jonathan Swanepoel 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 2.

Parliament itself into the highest court in constitutional matters, with the power to review and set aside, by simple majority vote, any Appellate Division decision declaring an Act of Parliament invalid. The 'High Court of Parliament' proceeded to declare *Harris I* wrongly decided. Thus followed *Harris II*,<sup>9</sup> in which a unanimous Appellate Division struck down the High Court of Parliament Act.

As apartheid intensified, South Africa saw increasing interference with the independence of the judiciary. Such blatant interference included the practices of 'packing' courts and making political appointments of judges: the most notorious appointment was that of LC Steyn, the senior state law advisor, to the Transvaal Provincial Division and ultimately to Chief Justice.<sup>10</sup> In addition, the state appointed executive-minded judges to decide political cases.<sup>11</sup>

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Another relevant slice of historical perspective is found in the bifurcated judicial system established in 1927 with the creation of chiefs' and headmen's courts, Commissioners' Courts and Black Appeal Courts to decide disputes between black people.<sup>12</sup> This bifurcation brought with it a set of overtly racist choice of law rules that determined whether a black person ought to be governed by the common law or customary law.<sup>13</sup>

The proper interpretation of FC s 34 must take into account that the provision aims to immunize everyone (and, indirectly, the courts) against a recurrence of these historical ills.

### **(b) Related constitutional provisions**

It is appropriate to view FC s 34 within the matrix of related constitutional provisions, both within the Bill of Rights and outside it.<sup>14</sup> At the level of underlying constitutional values, FC s 34 is most closely related to the provisions of FC s 1(c). FC s 1(c)

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9 *Minister of the Interior v Harris* 1952 (4) SA 769 (A).

10 A debate took place during the early 1980s regarding whether judges should resign for moral reasons. Professor Raymond Wacks argued that they should, while John Dugard contended that judges should rather use what power they retained to oppose apartheid. See R Wacks 'Judges and Injustice' (1984) 101 *SALJ* 267; J Dugard 'Should Judges Resign? A Reply to Professor Wacks' (1984) 101 *SALJ* 286; R Wacks 'Judging Judges: A Brief Rejoinder to Professor Dugard' (1984) 101 *SALJ* 295. The role of judges in apartheid has attracted much criticism. See, for example, E Cameron 'Nude Monarchy: The Case of the South African Judges' (1987) 3 *SAJHR* 338.

11 See S Ellmann *In a Time of Trouble* (1992) (Ellmann considered the record of the Appellate Division in cases concerning the exercise of emergency powers).

12 Black Administration Act 38 of 1927.

13 See, eg, *Ramothatha v Makhothe* 1934 NAC (N&T) 74 (The plaintiff lived a 'European lifestyle' and so the common law applied); *Mbuli v Mehlomakulu* 1961 NAC 68.

14 See *Beinash v Ernst & Young* 1999 (2) SA 116 (CC), 1999 (2) BCLR 125 (CC) at para 17 (Mokgoro J linked FC s 34 to other particular constitutional provisions: she noted in her limitations analysis that FC ss 7(2), 34, 35 and 165 are rights that require the protection of 'bona fide litigants, the processes of the courts and the administration of justice against vexatious litigants'.)

recognizes the founding values of supremacy of the Final Constitution and the rule of law. FC s 34 concretizes the higher-level value of the rule of law.<sup>15</sup>

At the outset, FC s 34 forms part of a three-piece cluster of rights with FC s 32 (the right of access to information) and FC s 33 (the right to just administrative action). Access to courts is a 'leverage' right: it allows litigants to leverage their other (substantive) rights. Accordingly, depending on the nature of the underlying substantive dispute in any case, FC s 34 is the constitutional tool that allows a person to vindicate the particular substantive rights in issue. In this sense, FC s 34 is related to all the rights in Chapter 2. FC ss 32 and 33 are also leverage rights. Access to information is obviously often required to determine *whether* one in fact has rights to vindicate. The right to reasons which forms part of FC s 33, is also a substantive rights-determining tool. The primary FC s 33 right to fair administrative action may also be regarded as a leverage right. It ensures that a fair process must be followed in taking administrative decisions that invariably affect other substantive rights, such as environmental and property rights. As leverage rights, FC ss 32 to 34 consist mainly of procedural guarantees, rather than rights to specific entitlements. All presuppose the existence of another, independent, substantive right. However, this largely procedural nature should not be overemphasized: an element of *meaningful* access (to courts, information or reasons for administrative action) is the remedy that lies at the end of the road.

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FC s 34 bears an intricate relationship, in particular, to FC s 33, the right to just administrative action. In the first place, Currie and de Waal argue that FC s 34 applies to disputes that may be resolved by the application of the law, which include disputes in respect of administrative action; but only *after* the relevant administrative decision is taken, because only then does a legal dispute arise.<sup>16</sup> By contrast, the requirements of FC s 33 apply to administrative action at the time of the decision. In our view, at least some decisions will constitute both administrative action in terms of FC s 33 *and* give rise to a dispute capable of resolution by the application of law such as to engage FC s 34. For example, as Hoexter notes, administrative action of a judicial nature, such as decisions of a valuation court, would give rise to a 'dispute' of the sort contemplated in FC s 34.<sup>17</sup> The majority of the Constitutional Court in *Sidumo v Rustenburg Platinum Mines* has recently endorsed this view in relation to arbitrations of the Commission for Conciliation, Mediation and Arbitration. The Court held that the CCMA's decisions constitute administrative action under FC s 33 *but are also* an instance of another independent and impartial tribunal or forum performing a function under FC s 34.<sup>18</sup> Therefore, although the distinction between FC s 33 and FC s 34 causes of action is a useful one, it is not absolute or impermeable. One of the consequences of the relationship

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15 See *Zondi v MEC for Traditional and Local Government Affairs* 2005 (3) SA 589 (CC), 2005 (4) BCLR 347 (CC) at para 61; *Barkhuizen v Napier* 2007 (5) SA 323 (CC), 2007 (7) BCLR 691 (CC) at para 32.

16 See I Currie & J de Waal *The Bill of Rights Handbook* (5th Edition, 2005) 705. See also *Baramoto v Minister of Home Affairs* 1998 (5) BCLR 562 (W) (The court accepted that the decision of an administrative body to grant or refuse refugee status did not implicate the FC s 34 right.)

17 Hoexter (supra) at 524.

18 [2007] ZACC 22 ('*Sidumo*'). We discuss *Sidumo* in more detail at § 59.4(c)(ii) *infra*, when we consider arbitration proceedings.

between the two rights, however, is that if administrative review to another independent and impartial forum is available to litigants in respect of a legal dispute, procedures that exclude the ordinary courts' jurisdiction may not infringe FC s 34.<sup>19</sup> Another dimension to their relationship is that FC s 33 envisages a judicial-review power in respect of all administrative action: as embodied in the Promotion of Administrative Justice Act ('PAJA').<sup>20</sup> In this respect, therefore, FC s 33 bolsters FC s 34 and guarantees a limited right of access to courts in respect of review of administrative action.<sup>21</sup>

FC s 34 is also, in a sense, the twin of FC s 35. FC s 35 is concerned with criminal matters and provides for the right to a fair trial. FC s 35 is far more detailed than FC s 34 in fleshing out the content of the right to a fair (criminal) trial. FC s 34 does not apply to criminal matters.<sup>22</sup> As a result, the two provisions

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do not overlap or regulate the same area of law. Still, given this textual proximity and relationship, is it possible that FC s 34 confers, albeit tacitly, any of the specific sub-rights contained in FC s 35? Some of the content of FC s 35 is clearly inapplicable in the civil context: the rights to be presumed innocent and to remain silent. However, much of the content of the criminal fair trial right in FC s 35(3) may form part of its civil counterpart in FC s 34. In particular, the right to receive adequate notice,<sup>23</sup> the right to have proceedings begin and conclude without unreasonable delay,<sup>24</sup> to adduce and challenge evidence,<sup>25</sup> and, as we argue below, the right to free legal representation<sup>26</sup> should form part of the content of a 'fair hearing' in terms of FC s 34.<sup>27</sup>

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19 *Metcash Trading Ltd v Commissioner, South African Revenue Service* 2001 (1) SA 1109 (CC), 2001 (1) BCLR 1 (CC). However, it should be noted that FC s 169 provides that a High Court may decide 'any matter not assigned to another court by an Act of Parliament.' This potentially precludes the ousting of the jurisdiction of the High Court unless another court, as opposed to tribunal, has been given jurisdiction. See *Fredericks v MEC for Education and Training, Eastern Cape, and Others* 2002 (2) SA 693 (CC), 2002 (2) BCLR 113 (CC) at para 31.

20 Act 3 of 2000.

21 See J Klaaren & G Penfold 'Administrative Justice' 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 63.

22 See § 59.3(a)(iii) *infra*.

23 The equivalent rights are described in criminal terms in FC ss 35(3)(a) and (b) as the 'right to be informed of the charge with sufficient detail to answer it' and 'to have adequate time and facilities to prepare a defence'.

24 FC s 35(3)(d).

25 FC s 35(3)(i).

26 FC s 35(3)(g).

27 See § 59.3(a)(iv) *infra*.

FC s 34 must also be interpreted with due regard to the provisions that recognize and endorse the application of customary law, and the jurisdiction of traditional authorities. The constitutional rights to culture in FC ss 30 and 31, read with FC s 39(3) and FC s 211, which recognize the customary law, require the legislature and the courts to give effect to the customary law and the dispute- resolution roles of traditional leaders. However, these powers must be exercised in a manner consistent with the other rights in the Bill of Rights.<sup>28</sup> FC s 166 (e) recognizes that the courts include 'any other court established or recognized in terms of an Act of Parliament': eg, the chiefs' and headmen's courts recognized in terms of the Black Administration Act.<sup>29</sup> The recognition of customary law, and the chiefs' and headmen's courts that apply it, is significant for FC s 34 in a number of ways. It may indicate that the notion of 'fairness' contained in FC s 34 must be read to apply in a context-sensitive way to customary law dispute resolution. For example, traditional authorities do not observe the doctrine of separation of powers: legislative, executive and judicial powers reside in the same persons.<sup>30</sup> This appears to be a limitation of the right in FC s 34. However,

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it may be that this is a limitation of a right by another provision of the Constitution, as envisaged by FC s 36(2).

The decision of the Constitutional Court in *Modderklip* has revealed the relationship between FC s 34 and the entitlement in terms of FC s 38 to approach a court for 'appropriate relief' when a right in the Bill of Rights has been threatened or infringed.<sup>31</sup> It would seem that, in the light of *Modderklip*, FC s 38 entrenches the right to a remedy for a breach of a substantive right, while FC s 34 entrenches the right to have that remedy enforced.

Finally, FC s 34 must be read with the provisions of Chapter 8 of the Constitution, which governs the courts and the administration of justice. The means and level of access to courts contemplated by FC s 34 must be consistent with the court machinery contemplated in FC s 166, with the powers and regulated as set out in the other provisions of Chapter 8.

### (c) International law

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28 On the internal limitations, or consistency requirements, found in FC s 30 and FC s 31, see S Woolman 'Community Rights: Language, Culture & Religion' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2007) Chapter 58.

29 Act 38 of 1927.

30 See *Bangindawo v Head of the Nyanda Regional Authority* 1998 (3) SA 262 (Tk), 1998 (3) BCLR 314 (Tk) (The High Court rejected a challenge to the independence and impartiality of traditional courts established under old-order Transkei legislation. The challenge was premised on the fact that the king or chief exercises judicial functions in addition to law-making and law-enforcing functions. The court held (at 327D) that there was no room for 'the Western conception of the notions of judicial impartiality and independence in the African customary law setting'.) See also I Currie & J de Waal *The New Constitutional and Administrative Law: Volume One, Constitutional Law* (2001) 311.

31 *President of the RSA v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC), 2005 (8) BCLR 786 (CC) ('*Modderklip*').

In terms of FC s 39(1)(c), when interpreting the Bill of Rights, a court must consider international law. It is incumbent on courts, therefore, to have regard to analogous rights of access to courts (or their equivalent, regardless of differences in nomenclature) in international law when interpreting FC s 34. FC s 233 also requires courts interpreting legislation to prefer an interpretation that is consistent with international law over any inconsistent interpretation. Therefore, when legislation is tested against FC s 34, the legislation must first be interpreted, if possible, so that it accords with relevant international law.

South Africa is a party to the United Nations Charter, the African Charter on Human and Peoples' Rights of 1981, and the International Covenant on Civil and Political Rights of 1966 (ICCPR), to which South Africa is accordingly bound. Other treaties to which South Africa is not a party, such as regional instruments outside Africa, together with decisions interpreting their provisions, could nevertheless assist courts interpreting the Bill of Rights. As held by Chaskalson P in *S v Makwanyane*, both binding and non-binding international law have a role to play in interpreting provisions of the Bill of Rights.<sup>32</sup> Binding norms of international law are likely to come to bear far more heavily in the interpretation of rights in the Bill of Rights. Non-binding norms are likely to serve as no more than a guide.<sup>33</sup>

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Article 14(1) of the ICCPR provides that all persons shall be equal before the courts and tribunals. The article goes on to guarantee a 'fair and public hearing by a competent, independent and impartial tribunal established by law ... in the determination of any criminal charge against a person, or of a person's rights and obligations in a suit at law'. Article 14(1), at least, is therefore a guarantee applicable to both criminal and civil matters.<sup>34</sup> The remainder of art 14 is concerned with criminal fair trial rights. In its General Comment on art 14(1), the United Nations Human Rights Committee discussed the requirements of the fair trial right in art 14(1) and identified the following elements: 'equality before the courts, including equal access to courts, fair and public hearings and competence, impartiality and independence of the judiciary [must be] established by law and guaranteed in practice'.<sup>35</sup> The Committee discussed the obligation of states parties to enact laws which provide for the establishment of the courts and to ensure that they are independent, impartial and competent. In this regard, the Committee emphasized the regulation of the appointment and tenure of judges, their promotion, transfer and removal, and the independence of the judiciary from the executive and legislative branches. Article 14(1) of the ICCPR permits the exclusion of the press and the public from a trial 'for reasons of morals, public order (ordre public) or

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32 *S v Makwanyane and Another* 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC) ('*Makwanyane*') at para 35.

33 H Strydom & K Hopkins 'International Law' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 30, 30-11 — 30-14. See also *Makwanyane* (supra) at paras 34, 35 and 39 (Chaskalson P); *Government of the Republic of South Africa and Others v Grootboom* 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC) at para 26.

34 United Nations Human Rights Committee 'General Comment No. 13: Equality Before The Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law (Art. 14)' (Twenty-first session, 1984) UN Doc. HRI/GEN/1/Rev.1 ('GC 13') at para 2.

35 *Ibid* at para 3.



national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice'. However, art 14(1) requires that any judgment rendered in a criminal case or in a suit at law shall be made public except where otherwise required in the interest of juvenile persons or the proceedings concern matrimonial disputes or the guardianship of children.

Like art 14 of the ICCPR, art 7 of the African Charter<sup>36</sup> establishes a general fair-trial guarantee that applies to civil and criminal matters. It then provides a number of more specific rights applicable only in the criminal context. The umbrella right in art 7, which applies to civil and criminal matters, is the right of 'every individual ... to have his cause heard'. This right encompasses a number of constituent rights, one of which is 'the right to an appeal to competent national

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organs against acts of violating his fundamental rights as recognised and guaranteed by conventions, laws, regulations and customs in force'. A rich, although non-binding, jurisprudence on art 7 is already emerging out of the African Commission on Human and Peoples' Rights, which has fleshed out the fairly general terms of the provision. The decisions of the Commission do not formally have the binding force of a ruling of a court but constitute persuasive authority similar to the opinions of the UN Human Rights Committee.<sup>37</sup>

Evans and Murray criticize the vagueness of art 7, which leaves much to the interpretive imagination, for failing to provide expressly for rights such as the right to a public hearing, the right to have proceedings interpreted, the right against self-incrimination and the right against double jeopardy.<sup>38</sup> However, the Commission has interpreted art 7 to include a number of these elements, some of which are relevant to the interpretation of FC s 34. In particular, the Commission has concluded that the decree of a military government ousting the jurisdiction of the ordinary courts violates art 7;<sup>39</sup> that the nullification by executive decree of ongoing suits at law violated the article;<sup>40</sup> that the dismissal of judges opposed to the establishment of special courts and their replacement by military tribunals was a violation of the

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36 Article 7 of the African Charter provides:

1. Every individual shall have the right to have his cause heard. This comprises:
  - (a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;
  - (b) the right to be presumed innocent until proved guilty by a competent court or tribunal;
  - (c) the right to defence, including the right to be defended by counsel of his choice;
  - (d) the right to be tried within a reasonable time by an impartial court or tribunal.
2. No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender.

37 M Evans & R Murray *The African Charter on Human and People's Rights: The System in Practice, 1986-2000* (2002) 10.

38 *Ibid* at 155.

right;<sup>41</sup> and that art 7 prohibits the determination of a dispute by a court with the appearance of partiality.<sup>42</sup> It should be noted that the word 'appeal' in art 7 refers not to an appeal in the sense of challenging a decision of a lower court in a higher court. Rather it denotes the general right to seek a judicial remedy, and is therefore the African Charter equivalent to 'access' in FC s 34.<sup>43</sup>

#### (d) Foreign law

In terms of FC s 39(1)(c), when interpreting the Bill of Rights, a court *may* consider foreign law. It is permissible and may be appropriate, therefore, to have regard to the constitutional rights of access to courts in other constitutional

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regimes, and the approach of foreign courts to such provisions. Below we consider the constitutional position on access to courts in Germany and Canada. We have selected these jurisdictions because they have similar constitutional schemes to our own.

Article 19(4) of the German Basic Law (*Grundgesetz*) provides:

Should any person's rights be violated by public authority, recourse to the court is open to him. Insofar as no other jurisdiction has been established, recourse is available to the courts of ordinary jurisdiction....

This right is regarded as a core aspect of the German *Rechtsstaat*. It reflects a particular concern, with strong German historical resonance, for the need for judicial review of actions of 'public authority', that is, executive and administrative action. In addition, art 101(1) of the Basic Law prohibits 'extraordinary courts' and the removal of persons from the jurisdiction of their lawful judge, while art 103 states the perhaps axiomatic principle that, in the courts, everyone is entitled to a hearing in accordance with the law. Article 97(1) provides for judicial independence. Strong rule of law and separation of powers themes are prominent in the Basic Law.

In Canada, the Charter contains no fundamental right of access to courts. However, s 24(1) does provide that '[a]nyone whose rights or freedoms, as guaranteed by th[e] Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and

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39 *Civil Liberties Organisation v Nigeria* Communication 129/94, 9th Activity Report 1995-1996, Annex VIII, referred to in Evans & Murray (supra) at 156.

40 *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v Nigeria* Communications 140/94, 141/94 and 145/95, 13th Activity Report 1999-2000, Annex V at para 33, referred to in Evans & Murray (supra) at 157.

41 *Amnesty International, Comité Loosli Bachelard, Lawyers Committee for Human Right, Association of Members of the Episcopal Conference of East Africa v Sudan* Communications 48/90, 50/91, 52/91 and 89/93, 13th Activity Report 1999-2000, Annex V at paras 68-69, discussed in Evans & Murray (supra) at 162.

42 *International Pen, Constitutional Rights Project, Interights on behalf of Ken Saro-Wiwa Jr and Civil Liberties Organisation v Nigeria* Communications 137/94, 139/94, 154/96 and 161/97, 12th Activity Report 1998-1999, Annex V at para 95.

43 Evans & Murray (supra) at 156.

just in the circumstances.' This is only a partial right of access to courts: it applies only to Charter rights and freedoms. It is perhaps more accurately described as a provision confirming the justiciability of Charter rights and freedoms and the entitlement to relief for their infringement. Section 24(1) is narrower than FC s 34 in another sense: it only applies to the ordinary courts, and not to other fora. Accordingly, s 24(1) of the Charter is possibly more akin to FC s 38, which similarly provides for a right to approach a competent court when a right in Chapter 2 has been infringed or threatened, and to obtain appropriate relief. This similarity between s 24(1) and FC s 38 highlights, in our view, the relationship between FC ss 34 and 38 and reinforces our view — set out in § 59.4(d) — that access includes an entitlement to the enforcement of the relief guaranteed by FC s 38.

## 59.3 The nature and the application of the right

### (a) Application

In respect of all rights in the Bill of Rights, it is necessary to ask who benefits from the rights that they confer, and who bears the obligations that they impose. In particular, one must usually ask two questions: whether the right applies to juristic persons; and whether the right applies horizontally, that is, whether it imposes obligations on private persons. In this section, we consider these two

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questions in relation to FC s 34. We then consider three further questions of relevance to the application of the rights contained in FC s 34. First, we consider whether FC s 34 has any application to criminal matters. Next, we consider whether FC s 34 applies to appeals. Lastly, we consider the fact that FC s 34 applies only to disputes capable of resolution by the application of law.

### (i) The bearer of the rights: juristic persons

FC s 8(4) provides that a 'juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person.' This entails an enquiry specific to each right in the Bill of Rights, in which a court must consider the nature of the right and the nature of the juristic person seeking to invoke it.<sup>44</sup>

In *Hallowes v The Yacht 'Sweet Waters'*, Hurt J considered the application of s 22 of the Interim Constitution,<sup>45</sup> the predecessor to FC s 34, to juristic persons.<sup>46</sup> An employee of the defendant close corporation which was the owner of the arrested vessel in issue in the case purported to appear for the defendant. The employee was not admitted to practise in the Supreme Court. It was contended that an aspect of the right in IC s 22 was the right to present one's own case in court, and that the procedural requirement that a company must be represented in court by an

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44 On the beneficiaries of constitutional rights, and the benefits that flow to juristic persons, see S Woolman 'Application' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 31, § 31.3.

45 Constitution of the Republic of South Africa Act 200 of 1993 ('Interim Constitution' or IC'). IC s 22 provides that '[e]very person shall have the right to have justiciable disputes settled by a court of law or, where appropriate, another independent and impartial forum.'

46 1995 (2) SA 270 (D) ('*Hallowes*').

admitted legal representative limits the right in IC s 22 of juristic persons that lack the financial means to secure legal representation.<sup>47</sup> The court was urged to develop a rule of procedure permitting such a party to be represented by an 'agent'. The court noted that IC s 7(3) provided that juristic persons are entitled to the rights enshrined in the Bill of Rights where, and to the extent that, the nature of the rights permits.<sup>48</sup>

The court held that IC s 22 includes within its ambit the right of the 'person' to stand up in court and argue his own case, but that a juristic person is incapable of doing so.<sup>49</sup> Therefore, the court held that the right to present one's own case is a right which cannot vest in a juristic person, since it is a right which, by its nature, a juristic person cannot exercise.<sup>50</sup> The court therefore dismissed the constitutional challenge to the rule requiring juristic persons to be represented by an admitted legal representative. So, while Hurt J appeared to accept as a starting point that the express constituent rights in IC s 22 apply to juristic persons to the extent that

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the nature of the specific rights in the provision permit, *Hallowes* is ultimately authority for the proposition that at least some aspects of the right of access to courts are not applicable to juristic persons.

In *Lees Import and Export (Pvt) Ltd v Zimbabwe Banking Corporation Ltd*,<sup>51</sup> the Zimbabwean Supreme Court considered the same question that had arisen in *Hallowes*. It reached the opposite conclusion. Subsection (1) of s 18 of the Constitution provides that every person is 'entitled to the protection of the law'; and ss (9) provides that every person is 'entitled to be afforded a *fair hearing* within a reasonable time by an independent and impartial court or other adjudicating authority established by law in the determination of the existence or extent of his civil rights or obligations' (our emphasis).

Gubbay CJ, on behalf of a unanimous court, declined to follow the decision in *Hallowes*, holding:

True, a juristic person, being a purely legal concept, is incapable of being physically present at any place and must always act through an agent. This is what the corporation *Hallowes* sought to do through Mr Labuschagne. It would seem, however, that Hurt J regarded a juristic person as lacking the capacity to exercise the right to present its own case before him, even if it were to do so through an organ or *alter ego*. This, I think, was to confuse the content of the right with the manner of its exercise.<sup>52</sup>

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47 *Hallowes* (supra) at 272I–273F and 276B.

48 *Ibid* at 272I.

49 *Ibid* at 272B–C.

50 *Ibid* at 278B–C.

51 1999 (4) SA 1119 (ZSC), 1999 (10) BCLR 1181 (ZSC) ('*Lees Import and Export*').

52 *Ibid* at 1128I–1129A.

Gubbay CJ concluded that the common-law rule offends against s 18(9) of the Constitution of Zimbabwe to the extent that it prohibits the duly authorized organ or alter ego of a company from appearing in the person of the company before the High Court or the Supreme Court of Zimbabwe.<sup>53</sup> The court held that the right given to 'every person' under this constitutional mandate includes within its reach a corporate body appearing through its alter ego. He held that this view does not undermine the general rule of practice requiring juristic persons to obtain legal representation, but merely provides an exception to it. It does not permit a company to appear before the Superior Courts through someone who is a mere director, officer, servant or agent. Companies that are not embodied by any natural person, will not qualify under s 18(9), because 'no human being personifies the company 'in person'.<sup>54</sup> In general, however, the court envisaged that small companies should be able to avail themselves of the exception.<sup>55</sup>

Gubbay CJ made an order directing that, provided that the applicant's managing director, Mr Phiri, was able to satisfy the High Court that he was the alter ego of the applicant with the requisite authority to appear, 'the applicant through him must be permitted to argue the application for rescission of the default

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judgment granted against it, since a denial of appearance would amount to a violation of the applicant's entitlement to the protection of the law and to be afforded a fair hearing as guaranteed by sub-ss (1) and (9) of s 18 of the Constitution'.<sup>56</sup>

In our view, the approach of the Zimbabwean Supreme Court in *Lees Import and Export* is to be preferred to that of Hurt J in the High Court in *Hallowes*. Both cases are consistent with the proposition that, in general, the right of access to courts applies to juristic persons. However, *Lees Import and Export* adopts a more generous approach, in terms of which the common law 'alter ego' doctrine is employed to enable small companies to enjoy access rights that are, by their nature, rights that can only be exercised by natural persons. This approach is consistent with the Constitutional Court's *dicta* to the effect that the failure to accord constitutional rights to juristic persons would 'undermine the very fabric of our democratic state'<sup>57</sup> and the Court's statements that, in general, rights in the Bill of Rights should be given the most generous interpretation.<sup>58</sup> In respect of FC s 34, a generous interpretation is one that extends the application of the right to juristic persons as far as possible within the language of the provision and the nature of the rights that it confers.

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53 Ibid at 1130G.

54 Ibid at 1130H-I.

55 Ibid at 1131A.

56 *Lees Import and Export* (supra) at 1131B-C.

57 *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd* 2001 (1) SA 545 (CC), 2000 (10) BCLR 1079 (CC) at para 18 (Discussion of the right to privacy in FC s 14), cited with approval in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC), 2002 (7) BCLR 702 (CC) at para 42.

## (ii) The bearer of the obligations: horizontality

The second question to consider in respect of the application of FC s 34 is whether the right applies horizontally and imposes obligations on private persons.<sup>59</sup> In our view, the *positive* obligations to protect, promote and fulfill the right of access to courts imposed by FC s 34 fall on the state. It fulfils them primarily by establishing the judicial system with all its necessary trappings. In § 59.4(b)(i), we consider whether these positive obligations extend to an obligation to provide free legal assistance to indigent civil litigants. In addition, in § 59.4(d) we note that *Modderklip* has extended the state's obligations beyond merely providing for dispute-resolution mechanisms: it must provide effective enforcement of remedies. FC s 34 imposes negative obligations upon the state: the obligations not to interfere with the independence of the judiciary and not to oust impermissibly, by legislation, the jurisdiction of the courts.

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However, FC s 34 must also impose at least some *negative* obligations on private persons to respect the right of access to courts and not to interfere with the fairness of judicial proceedings. For example, the conduct of an employer who unlawfully forbids an employee from instituting court proceedings against the employer, or a civil litigant who attempts unlawfully to influence a judicial officer, may infringe FC s 34. In addition, the obligation to provide notice of court proceedings,<sup>60</sup> which is necessary to ensure a 'fair' hearing, falls on private litigants themselves. In *Barkhuizen v Napier*, the Constitutional Court established that FC s 34 is applicable to private contractual relations, in particular in relation to time-bar clauses in contracts.<sup>61</sup> However, Ngcobo J (for the majority) held that FC s 34 should be applied to such clauses indirectly, through the medium of the common-law principle of 'public policy', of which the right of access to courts now forms a part.<sup>62</sup> (We discuss this aspect in *Barkhuizen* in more detail in § 59.4(a)(ii) in the context of prescription.) To this extent, at least, FC s 34 may apply horizontally.<sup>63</sup>

## (iii) Application to criminal law

Two decisions of the Constitutional Court have helped to set out the limits of the applicability of FC s 34 to criminal matters. In *S v Pennington*, the Court held that FC

58 *S v Zuma* 1995 (2) SA 642 (CC), 1995 (4) BCLR 401 (CC) at para 14; *S v Mhlungu* 1995 (3) SA 867 (CC), 1995 (7) BCLR 793 (CC), 1995 (2) SACR 277 (CC) at para 8; *Laugh It Off Promotions CC v SAB International (Finance) BV t/a SabMark International (Freedom of Expression Institute as Amicus Curiae)* 2006 (1) SA 144 (CC), 2005 (8) BCLR 743 (CC) at para 47.

59 On the horizontal application of rights generally, see S Woolman 'Application' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 31, § 31.4.

60 See § 59.4(b)(iv) *infra*.

61 2007 (5) SA 323 (CC), 2007 (7) BCLR 691 (CC) ('*Barkhuizen*').

62 *Ibid* at para 33.

63 For a criticism of *Barkhuizen*'s indirect application of the Bill of Rights, as opposed to the direct application of FC s 34, see S Woolman 'The Amazing Vanishing Bill of Rights' (2007) 624 *SALJ* 742. The views expressed in this article are not necessarily those of the authors.

s 34 does not apply to criminal appeals.<sup>64</sup> The Court held that the phrase 'any dispute' may be wide enough to cover criminal proceedings but that criminal proceedings were not normally described in this way. In any case, FC s 35 deals in detail with the way in which criminal proceedings must be conducted and this degree of detail led the court to the conclusion that FC s 34 has no application to criminal matters.<sup>65</sup>

When it comes to extradition proceedings, on the other hand, it is FC s 34 and not FC s 35 that is applicable. In *Geuking v President of the Republic of South Africa and Others*, the Court pointed out that a person facing extradition is not an accused person: the enquiry into extradition does not result in conviction or sentence.<sup>66</sup>

The Final Constitution provides a scheme in which both criminal and civil matters are engaged. Since there is an inevitable overlap between FC s 34 and FC s 35, it is convenient to demarcate the reach of the two sections. The line drawn by the Constitutional Court is that only in matters directly concerning

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arrest, detention, conviction or sentence of an accused person does FC s 35 apply.<sup>67</sup> In other matters that may properly be characterized as 'any dispute', of which extradition cases must clearly be examples, FC s 34 applies.

#### (iv) Application to appeals

The leading case of the Constitutional Court on the question whether the right of access to court includes the right to an appeal is *Besserglik v Minister of Trade, Industry and Tourism and Others (Minister of Justice intervening)*.<sup>68</sup> In that case, the applicant challenged the constitutionality of s 20(4)(b) of the Supreme Court Act 59 of 1959.<sup>69</sup> The applicant argued that the precondition to prosecute an appeal provided by this section — that leave to appeal be granted — violated his right to

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64 1997 (4) SA 1076 (CC), 1997 (10) BCLR 1413 (CC), 1999 (2) SACR 329 (CC) at para 46.

65 *Ibid.*

66 2003 (3) SA 34 (CC), 2004 (9) BCLR 895 (CC) at para 47.

67 FC s 35(1) applies to arrested persons, FC s 35(2) applies to detained persons and FC s 35(3) applies to accused persons. In the case of the latter, appeals and sentencing are dealt with in the same subsection (see FC s 35(3)(n) and (o)). For more on FC s 35, see F Snyckers & J le Roux 'Criminal Procedure: Rights of Arrested, Detained and Accused Persons' 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 51.

68 1996 (4) SA 331 (CC), 1996 (6) BCLR 745 (CC) ('*Besserglik*').

69 Section 20(4)(b) of the Supreme Court Act reads as follows:

No appeal shall lie against a judgment or order of the court of a provincial or local division in any civil proceedings or against any judgment or order of that court given on appeal to it except—

- (a) in the case of a judgment or order given in any civil proceedings by the full court of such a division on appeal to it in terms of subsection (3), with the special leave of the Appellate Division;

equality and his right of access to court. The matter was resolved in terms of IC s 22, the equivalent of FC s 34.<sup>70</sup>

In a very brief judgment, resolved without oral argument, the Constitutional Court rejected the applicant's IC s 22 argument:

The applicant's argument was that the purpose of section 22 was to ensure that persons have the right to have their disputes determined fairly by a court of law until final determination, which includes a right of appeal. In *Bernstein v Bester*<sup>71</sup> considerable doubts were expressed about the correctness of such an approach to section 22, although it was unnecessary for any firm decision to be made on that point. In my view, whatever the purpose and scope of section 22, it cannot be that the considerations relied upon by Madala J in *S v Rens*<sup>72</sup> would not equally be applicable to civil appeals. Even were the applicant correct in his characterisation of the scope of section 22, therefore, a matter about which there is some doubt, he would still have to persuade this court that the leave to appeal procedure, coupled with the petition procedure as provided for in section 20(4)(b), fails to provide potential appellants with an adequate right of appeal. The applicant has failed on that score.

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Whatever the scope of section 22, it cannot be said that a screening procedure which excludes unmeritorious appeals is a denial of a right of access to a court. As long as the screening procedure enables a higher court to make an informed decision as to the prospects of success upon appeal it cannot be said to be in breach of section 22.<sup>73</sup>

Madala J's apposite remarks in *S v Rens* are as follows:

In my view the petition procedure which is available to every accused whose application for leave to appeal has been refused by the supreme court in which he or she was convicted, allows such accused recourse to a higher court to review, in a broad and not a technical sense, the judgment of the trial court. The procedure involves a re-assessment of the disputed issues by two judges of the higher court, and provides a framework for that reassessment, which ensures that an informed decision is made by them as to the prospects of success.<sup>74</sup>

The procedure applicable to appeals from decisions of the High Court in civil matters is substantially similar to that applicable to appeals from the High Court in criminal matters. A litigant seeking leave to appeal against a decision of a High Court applies for leave to appeal first to the judge or judges that heard the matter.<sup>75</sup> If leave to appeal is refused, the litigant may petition the Supreme Court of Appeal for leave to appeal. Just as in the case of criminal appeals, two judges of the Supreme Court of

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(b) in any other case, with the leave of the court against whose judgment or order the appeal is to be made or, where such leave has been refused, with the leave of the Appellate Division.

70 IC s 22 reads: 'Every person shall have the right to have justiciable disputes settled by a court of law or, where appropriate, another independent and impartial forum.'

71 1996 (2) SA 751 (CC), 1996 (4) BCLR 449 (CC) ('*Bernstein*') at paras 102-106.

72 1996 (1) SA 1218 (CC), 1996 (2) BCLR 155 (CC) ('*Rens*').

73 *Besserglik* (supra) at para 10.

74 *Rens* (supra) at para 26.



Appeal consider, in chambers, petitions in civil matters.<sup>76</sup> The Constitutional Court in *Besserglik* did not decide the question whether the right of access to courts includes the right to an appeal because it held that, even if it did, the right would not be violated by the leave to appeal process provided in the Supreme Court Act. As in the case of criminal appeals, the fact that two judges of the Supreme Court of Appeal are required to consider a petition before leave to appeal is refused was considered to constitute a sufficient safeguard to the interests of litigants in a fair process.

The question, however, is whether FC s 34 does include a right to an appeal. In expressing doubt that the right of access to courts includes a right to an appeal, O'Regan J referred to *Bernstein v Bester*. The relevant part of *Bernstein* was concerned, however, with a slightly different question. Section 22 of the IC differed from FC s 34 in one material respect, it did not guarantee, expressly, the fairness of civil proceedings. The question dealt with in *Bernstein* concerned the contention that the right to fair civil proceedings was implicit in IC s 22. The Constitutional Court was not concerned, in those paragraphs, with the question whether IC s 22

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includes the right to an appeal. Furthermore, there are clear textual differences between IC s 22 and FC s 34. Whereas the latter provides for a 'fair public hearing', the former merely provides for the right to have 'justiciable disputes settled by a court of law'. So, while O'Regan J expressed doubt that IC s 22 includes a right to an appeal, the question has not been resolved conclusively in regard to FC s 34, and remains open to argument. As noted above,<sup>77</sup> art 14 of the ICCPR and Art 7 of the African Charter do not confer a right to an appeal.<sup>78</sup>

In 1999, a single judge in a provincial division, without referring to the Constitutional Court's decision in *Besserglik*, struck down a rule of the Uniform Rules that required security to be provided by an appellant for costs on appeal.<sup>79</sup> Although the respondent argued that the right to access to courts does not extend to appeals, the court upheld the applicant's access to court argument without directly responding to the respondent's contention. This judgment was reached by a single judge in a provincial division. However, because his decision was not appealed, the Uniform Rules of Court were amended to give effect to his judgment.

This decision notwithstanding, it would seem that the question whether FC s 34 extends to appeals remains open. This is particularly so because the Supreme Court of Appeal has twice recently referred to the debate surrounding a civil right to appeal without deciding the question. Furthermore, in the latter of the two cases, it expressed grave doubt about a right to appeal.

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75 The only exception, which is dealt with in s 20(4)(a) of the Supreme Court Act, is where the full bench of the High Court hears an appeal. If such a decision is to be appealed, special leave is required from the Supreme Court of Appeal.

76 Supreme Court Act s 21(3)(b).

77 See § 59.2(c) supra.

78 Although art 7 refers to an 'appeal', it does so in the sense of access at instance.

79 *Shepherd v O'Niell and Others* 1999 (11) BCLR 1304 (N). See § 59.4(a)(viii) 'Security for Costs' infra.

First, Harms JA pointed out in *New Clicks* that FC s 34 does not provide an explicit right to appeal and felt it unnecessary to decide whether a right to appeal is implicit.<sup>80</sup> He held, however, that the general right to a fair hearing provided by FC s 34 applied to a hearing envisaged by the Supreme Court Act. According to this approach, regardless of whether there is a right to appeal in civil proceedings, once the legislature provides for an appeal process, this process must be fair.

Secondly, in *National Union of Metalworkers of SA and Others v Fry's Metals (Pty) Ltd*, the issue before the Supreme Court of Appeal was whether a litigant may appeal a decision of the Labour Appeal Court to the Supreme Court of Appeal. The court held that a litigant may indeed appeal from the LAC to the SCA.<sup>81</sup> Part of the reasoning of the court rested on the proposition that legislation may not undermine the structure of the courts as established in the Final Constitution. Since the Final Constitution provides that the SCA is the final appellate court in all matters other than constitutional matters, legislation could not oust this power

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and render another tribunal the final appellate court. In reaching this conclusion, the court confronted the following argument raised by the parties: if legislation may not validly preclude appeals from the LAC to the SCA, legislation may not preclude appeals in any matter. In other words, provisions of statutes such as the Small Claims Court Act 61 of 1984 or the Arbitration Act 42 of 1965 – which provide that proceedings envisaged there are final – would be problematic. In rejecting this argument, the SCA pointed out that this line of reasoning was 'to confuse the existence of appellate jurisdiction with the question whether a right of appeal exists at all. The scope of institutional authority is one thing; the question whether and under what conditions it can be invoked is quite another'.<sup>82</sup> Therefore, FC s 168(3), which provides that the SCA is the highest court other than in constitutional matters, deals only with the scope of the SCA's institutional authority. The question whether one has a right of access to that court and, if so, the circumstances in which it may be invoked, are to be answered with reference to other provisions of the Final Constitution, such as FC s 34. As to whether there was a general right to appeal in all civil proceedings, one of the parties argued that the right of access envisaged in FC s 34 includes a right of access to all courts of appeal. In response, the SCA held:

We do not agree. The provision does not explicitly include a right of appeal. In this it stands in pronounced contrast to s 35(3)(o), which expressly entrenches within an accused person's right of fair trial a right of appeal or review to a higher Court. We do not consider that s 34 by necessary implication entails the same right; and even if it did, it would be capable of reasonable and justifiable limitation: all such decisions are in any event subject to the principle of legality, and thus to constitutional review. The suggestion that the assertion by this Court of a general appellate jurisdiction entails the appealability of all justiciable rights can therefore not be maintained.<sup>83</sup>

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80 *Pharmaceutical Society of South Africa and Others v Tshabalala-Msimang and Another NNO; New Clicks South Africa (Pty) Ltd v Minister of Health and Another* 2005 (3) SA 238 (SCA), 2005 (6) BCLR 576 (SCA) at para 30 n27.

81 2005 (5) SA 433 (SCA), 2005 (9) BCLR 879 (SCA) ('*Fry's Metals*').

82 *Fry's Metals* (supra) at para 29.

83 *Ibid* at para 31.

The SCA concluded its reasoning on this issue as follows:

The question before us is in any event not whether all constitutionally recognised rights are intrinsically appealable, but whether a provision that purports to restrict a litigant's right of appeal to a hierarchy of specialised Courts, to the exclusion of this Court, complies with the Constitution. We find only that once appellate jurisdiction falls to be exercised, this Court is empowered to exercise it finally (apart from the CC), since final appellate tribunals with authority similar to this Court are not envisaged in the Constitution. We add only the obvious corollary: that the conferral on this Court of general appellate power does not render all judgments and orders immediately appealable.<sup>84</sup>

It is apparent that the SCA's remarks on the right to an appeal in FC s 34 were *obiter*. The *ratio* of this part of the judgment is that the appellate structure envisaged by the Final Constitution gives the SCA appellate jurisdiction in all matters, including matters within the jurisdiction of the Labour Appeal Court.

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Also part of the *ratio* is that this conclusion has no bearing on the question whether there is a right to appeal in the first place. However, the SCA clearly felt sufficiently strongly about the interpretation of FC s 34 to make relatively emphatic remarks against the existence of a civil right to appeal.

What is one to make of the comparison to FC s 35(3), which entrenches the fair-trial rights of an accused person? On the one hand, it is true that FC s 35 explicitly provides a right to an appeal, and that FC s 34 does not. However, if one compares the two provisions it is apparent that there are many more detailed guarantees provided by FC s 35 than by FC s 34. Arguably, the explicit mention by FC s 35(3) of certain rights could mean that those same rights are not guaranteed by FC s 34. Such a line of argument, as apparently offered by the SCA, cannot be supported. FC s 35(3) explicitly guarantees, amongst others, the following rights: the right to have a trial begin and conclude without unreasonable delay; the right to choose, and be represented, by a legal practitioner (this is distinct from the right to legal representation at state expense); and the right to adduce and challenge evidence. As we argued above, each of these rights arguably forms part of the understanding of fairness envisaged by FC s 34.<sup>85</sup> The logical end-point of the SCA's reasoning is that none of these rights is protected by FC s 34, since they are explicitly mentioned in FC s 35 but not in FC s 34. The differences in structure of FC s 34 and FC s 35 make it dangerous, in our view, to draw inferences with regard to the content of the former by reference to the latter.<sup>86</sup>

### **(v) Disputes that can be resolved by the application of law**

The text of FC s 34 makes clear that one only has the right of access to court to resolve a dispute that can be resolved by the application of law. There is not much case law on this topic and there is no decided case of which we are aware in which a claim based on FC s 34 failed on the basis that the dispute was not capable of being resolved by the application of law. One can surmise, however, from the reluctance of

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84 Ibid at para 32.

85 See G Budlender 'Access to Courts' (2004) 121 *SALJ* 339, 342. See further § 59.2(b) *supra*.

86 We have benefited greatly from a helpful discussion with Mark Wesley, of the Johannesburg Bar, on this aspect of the chapter.

the Constitutional Court in *Prince* and *Christian Education* to make rulings on the objective legitimacy of certain religious practices, that certain religious disputes would not be capable of being resolved by the application of law.<sup>87</sup> On the other hand, it has been held that where a party seeks to review a decision of an administrator in the High Court, the review proceedings

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constitute a 'dispute' within the ambit of FC s 34.<sup>88</sup> This conclusion was unsurprising.

Another possible interpretation of this aspect of FC s 34 is that it refers to certain non-justiciable political questions that are not to be determined by the courts. The Constitutional Court, especially in high-profile, highly-charged cases involving an intersection between law and politics, has had occasion to state that the question of the merits of government policy is a political question upon which courts should not pronounce.<sup>89</sup> It could be argued that the text of FC s 34 makes clear that litigants do not have a right to have such disputes resolved by a court.

The complex question that arises from the term 'dispute' used in FC s 34 is the applicability of FC s 34 to more substantive questions. Is it merely a procedural right that protects the right to have disputes resolved by a court but says nothing about the content of the dispute? Or, does FC s 34 say something about the substantive content of disputes?

*Jooste v Score Supermarket Trading (Pty) Ltd* is authority for the proposition that FC s 34 does not apply to the removal of common-law rights.<sup>90</sup> The case concerned the constitutionality of s 35(1) of the Compensation for Occupational Injuries and Diseases Act.<sup>91</sup> The effect of s 35(1) of the Compensation Act is to remove the common-law right of employees to sue their employers for injuries arising from their employers' negligence and to replace it with a right to claim compensation in terms of the Act. In short, this precludes employees from obtaining general damages<sup>92</sup> for injuries suffered and restricts them to damages for pecuniary loss, but relieves them of the burden of proving negligence and provides a cheaper and easier procedure.

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87 See Currie & De Waal (supra) 707. See also *Prince v President, Cape Law Society, and Others* 2002 (2) SA 794 (CC) at para 42. But see *Taylor v Kurtstag* [2004] 4 All SA 317 (W)(The High Court upholds the right of Beth Din to excommunicate a member of the community who failed to follow its judgments.)

88 *National & Overseas Modular Construction (Pty) Ltd v Tender Board, Free State Provincial Government and Another* 1999 (1) SA 701 (O), 703J. See also *SAD Holdings Ltd and Another v SA Raisins Pty (Ltd) and Others* 2000 (3) SA 766 (T), 775 (Ngoepe JP held that the right to have justiciable disputes determined, in terms of FC s 34, meant that, until the Competition Appeal Court was established (it had at the time of the judgment not yet been), litigants had the right to approach the High Court to review or appeal against decisions of the Competition Tribunal.)

89 See, for example, *United Democratic Movement v President of the Republic of South Africa and Others (African Christian Democratic Party and Others Intervening; Institute for Democracy in South Africa and Another as Amici Curiae)* (No 2) 2003 (1) SA 495 (CC), 2002 (11) BCLR 1179 (CC) at para 11 (The Court said: 'This case is not about the merits or demerits of the provisions of the disputed legislation. That is a political question and is of no concern to this Court. What has to be decided is not whether the disputed provisions are appropriate or inappropriate, but whether they are constitutional or unconstitutional.')

90 1999 (2) SA 1 (CC), 1999 (2) BCLR 139 (CC) ('*Jooste*').

91 Act 130 of 1993 ('Compensation Act').

The applicant argued that the denial of the right to claim general damages violated her right of access to court. Yacoob J held, for a unanimous Court, that the right of access to court in the Constitution 'does not call for the retention of all common law rights of action which existed at any stage.'<sup>93</sup>

This conclusion is logical. The removal of a common-law right may often constitute a violation of a right protected by the Bill of Rights. If that is the case, the removal will be unconstitutional unless justified by FC s 36. However, if the removal of a common-law right is not a violation of a substantive right, it seems logically problematic to treat it as a violation of the right of access to courts. Although the right of access to courts has substantive components it is, in the end, a largely procedural right. Its purpose is to ensure that all disputes are resolved in fair proceedings and there is nothing in its text or purpose to suggest that it has a bearing on the existence of substantive legal rights. The rest of the Bill of Rights, in addition to the common law and statute, must determine whether a person has a particular right. FC s 34 guarantees to litigants that any proceedings to determine whether a particular right exists will be fair. It guarantees further that litigants cannot be barred (without justification) from having such disputes resolved by a court or alternative forum, and it entitles them to the enforcement of remedies, where such remedies have been provided by a court.<sup>94</sup> It does not, however, seek to resolve the substantive content of such disputes.<sup>95</sup>

However, it is not always possible to draw a neat line between questions of substantive rights (to which other provisions of the Bill of Rights apply but which cannot be resolved by recourse to FC s 34) and the right to have those questions resolved (which is provided by FC s 34). The facts of *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others*<sup>96</sup> demonstrate the potential overlap between questions regarding the applicability of FC s 34 and questions concerning substantive rights. The case concerned the constitutionality of s 66(1)(a) of the Magistrates' Courts Act.<sup>97</sup> In short, this provision facilitated the summary execution against immovable property of a debtor against whom judgment had been taken. The nub of the complaint was that, while the debtor would have recourse to court to

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92 This would include damages for pain and suffering, loss of amenities of life, future loss of earnings and future medical expenses.

93 *Jooste* (supra) at para 21.

94 See § 59.4(d) infra, for a discussion of *Modderklip*.

95 See Currie & De Waal (supra) at 718. The authors describe the conclusion of the court as 'somewhat odd' in that it reduces FC s 34 to no more than a procedural fairness guarantee. However, as this chapter and the authors' own chapter make clear, there is more to FC s 34 than mere procedural fairness. All that *Jooste* implicitly establishes is that FC s 34 does not say anything about the substantive content of justiciable disputes. There is nothing in the text or purpose of FC s 34 that suggests otherwise.

96 2005 (2) SA 140 (CC), 2005 (1) BCLR 78 (CC) ('*Jaftha*').

97 Act 32 of 1944.

contest his indebtedness, the debtor would have no recourse to court in regard to the question whether his immovable property ought to be executed against.<sup>98</sup>

The case was brought as a right to housing case. In particular, the case engaged the negative aspect of the right to housing in FC s 26(1). The appellants argued that they had access to housing and that the measures permitted by s 66(1)(a) of the Magistrates' Courts Act interfered with this existing access. In this sense, the provision violated the duty of the State to respect existing access to housing. The Constitutional Court agreed. Mokgoro J held that the measure limited existing access to housing and so limited the right to access to housing in FC s 26(1).<sup>99</sup> She held further that the measure did not pass limitation analysis to the extent that it allowed a debtor to lose his immovable property in unjustified circumstances. In other words, the measure was overbroad — there might be some circumstances in which it would be justified for a debtor to lose his immovable property to discharge his obligations to a creditor but there would be other circumstances in which the prejudice to the debtor in execution outweighed the benefit to the creditor and it would therefore be unjustified to permit execution.<sup>100</sup> By allowing execution in all cases, the measure went too far.

The Court's approach to remedy in *Jaftha* is of interest to us here. The court held that the best way to solve the overbreadth of the measure was to require court supervision over the execution process. Such supervision would enable the court to determine each case on its merits and to decide whether, on the facts of the case, it was justified to allow execution.<sup>101</sup> The premise of this relief is that there are many factors to be taken into account when determining whether the creditor's right to payment outweighs the debtor's interest in keeping his home. Rather than attempting to set out all of these factors in a reading-in exercise or sending the matter back to the legislature to seek to establish such factors, the Court in *Jaftha* felt it appropriate to instruct courts to supervise the process and make sure that justice is done in each case.

Courts are constrained by the way in which cases are argued. This case was argued in terms of FC s 26(1) and that was how it was resolved by the Constitutional Court. The question is whether this case also engaged FC s 34.

In *Chief Lesapo v North West Agricultural Bank & Another*, the Constitutional Court considered the validity of an ouster clause that allowed the respondent bank

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98 If, having had judgment taken against him, the debtor was unable to pay the debt, the sheriff was to visit his home and seek to attach his movable property. If the debtor had insufficient movable property to cover his debt, the sheriff was to issue a *nulla bona* return indicating this status and the creditor was then entitled to execute against the debtor's immovable property. This execution was authorized by the clerk of the court and not by the court itself. So, in the case of a default judgment, the only court supervision from beginning to end was the initial proceedings in which judgment was given, which of course did not involve input from the debtor. In the case of a debtor who entered an appearance to defend, the court would determine the dispute in regard to the debt. However, from that moment onwards, the process of execution would also take place without court supervision.

99 *Jaftha* (supra) at para 34.

100 *Ibid* at paras 43-44.

101 *Ibid* at paras 53-55.

to attach and sell its debtors' property in execution without an order of court.<sup>102</sup> The right of the bank to execute in this manner arose where the debtor was in default to repay a loan. Before the Constitutional Court, the bank argued that the execution procedure only applied where there was no dispute between the parties about the underlying indebtedness and, as such, FC s 34 could have no application: there was no dispute between the parties capable of resolution by the application of law. In rejecting this argument, Mokgoro J held as follows:

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The judicial process, guaranteed by section 34, also protects the attachment and sale of a debtor's property, even where there is no dispute concerning the underlying obligation of the debtor on the strength of which the attachment and execution takes place. That protection extends to the circumstances in which property may be seized and sold in execution, and includes the control that is exercised over sales in execution.

On this analysis, section 34 and the access to courts it guarantees for the adjudication of disputes are a manifestation of a deeper principle; one that underlies our democratic order. The effect of this underlying principle on the provisions of section 34 is that *any constraint upon a person or property shall be exercised by another only after recourse to a court recognised in terms of the law of the land.*<sup>103</sup>

It would seem that, on this reasoning, *Jaftha* did indeed engage FC s 34 and that, had the appellants relied on FC s 34, the Court would have reached a similar result. In fact, it seems as if the remedy adopted by the Court in *Jaftha*, although appropriate in the context of FC s 26(1), fits more neatly into the paradigm of FC s 34. The execution against immovable property involves, clearly, a constraint upon a person's property. Under the test as enunciated in *Chief Lesapo*, s 66(1)(a) of the Magistrates' Court Act would clearly limit FC s 34 by permitting such a constraint to be exercised without recourse to a court of law. Of course, it could be argued that the constraint was not exercised without recourse to court because the initial question whether the debtor was indeed indebted to the creditor, and hence deserved judgment to be granted against him, was determined by a court. However, *Chief Lesapo* and *Jaftha* stand for the proposition that the question of indebtedness and the question whether it is justifiable to lose one's property in respect of that indebtedness are separate enquiries and that court supervision is necessary in respect of both.

A cumulative reading of the cases discussed in this section yields the following conclusions. FC s 34 does not apply to the question whether the legislature is entitled to remove a common-law or statutory right. That is an anterior question which must be determined with reference to other substantive rights. Once it is established that a person has a common-law or statutory right, that person has a right to have disputes in respect of that right resolved by a court. Furthermore, whenever a person is entitled to impose a constraint on the person or property of another without recourse to a court (or other tribunal), FC s 34 will be limited and the constitutionality of this entitlement will need to be tested with reference to FC s 36. Lastly, a litigant is entitled to the enforcement of an appropriate remedy.<sup>104</sup> This reading of FC s 34 demonstrates that, although the word 'dispute' in FC s 34 is not wide enough to embrace any removal of rights, a narrow understanding of the term

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102 2000 (1) SA 409 (CC), 1999 (12) BCLR 1420 (CC) ('*Chief Lesapo*').

103 *Chief Lesapo* (supra) at paras 5-16 (our emphasis).

104 For more on appropriate relief and FC s 34, see the discussion of *Modderklip* at § 59.4(d) infra.

'dispute' is also inappropriate. *Chief Lesapo* establishes the proposition that whenever a constraint on a person or her property is sought to be exercised, a dispute exists: the dispute is about the extent of the constraint and the manner in which the constraint is to be imposed.

### **(b) Nature of the state's obligations/nature of the right**

FC s 34 imposes a range of positive and negative obligations on the state, and limited negative obligations on private persons. The state's negative obligations encompass the obligation not to restrict access to courts. *Beinash v Ernst & Young*, is a good example of a case that implicates the negative obligations of the state.<sup>105</sup> In *Beinash*, the court's enquiry into whether s 2(1)(b) of the Vexatious Proceedings Act<sup>106</sup> infringes FC s 34 was extremely brief:

The effect of s 2(1)(b) of the Act is to impose a procedural barrier to litigation on persons who are found to be vexatious litigants. This serves to restrict the access of such persons to courts. That is its very purpose. In so doing, it is inconsistent with s 34 of the Constitution, which protects the right of access for everyone and does not contain any internal limitation of the right. The barrier which may be imposed under s 2(1)(b) therefore does limit the right of access to court protected in s 34 of the Constitution.

Section 2(1)(b), which is discussed more fully below,<sup>107</sup> imposes a limitation on the pre-existing, largely unfettered, right of access to courts of litigants. The section may be read as an impairment of the state's negative obligation not to inhibit access to courts. The fact that the limitation was ultimately found to be reasonable and justifiable does not alter the fact that a negative obligation was found to have been breached.<sup>108</sup> However, not every apparent obstacle to access constitutes an infringement of the negative obligations of the state. For example,<sup>109</sup> in *Besserglik*, the Constitutional Court held that '[w]hatever the scope of section 22 (the predecessor to FC s 34), it cannot be said that a screening procedure which excludes unmeritorious appeals is a denial of the right of access to a court.'<sup>110</sup> It is accordingly necessary, in the first place, to interpret the negative component of FC s 34 before determining whether state action has infringed the right.

The nature of the state's *positive* obligations has been clarified in *Modderklip*. In *Modderklip*, the Constitutional Court identified two broad obligations. First, the state

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105 1999 (2) SA 116 (CC), 1999 (2) BCLR 125 (CC) ('*Beinash*').

106 Act 3 of 1956.

107 See § 59.4(a)(vi) *infra*.

108 For a critical discussion of the case, see S Woolman 'The Right Consistency: *Beinash v Ernst & Young* 1999 (2) SA 116 (CC)' (1999) 15 *SAJHR* 166, 170-175. The views expressed in that article do not necessarily reflect those of the authors.

109 See further § 59.3(a)(iii) *supra*.

110 *Besserglik v Minister of Trade, Industry and Tourism and Others (Minister of Justice intervening)* 1996 (4) SA 331 (CC), 1996 (6) BCLR 745 (CC) at para 10.



has an obligation to provide the necessary mechanisms for citizens to resolve disputes that arise between them:<sup>111</sup> a legislative framework, institutions such as the courts, and an infrastructure designed to facilitate the execution of court orders.<sup>112</sup> This obligation must be read with FC s 165(4). FC s 165(4)

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provides that organs of state, through legislative and other measures, must assist and protect the courts to ensure their independence, impartiality, dignity, accessibility and effectiveness.

Secondly, the Court in *Modderklip* held that the state is obliged to take 'reasonable steps, where possible, to ensure that large-scale disruptions in the social fabric do not occur in the wake of the execution of court orders, thus undermining the rule of law'.<sup>113</sup> The Court added that the precise nature of the state's obligation will depend on what is reasonable, having regard to the nature of the right or interest that is at risk, as well as the circumstances of each case.<sup>114</sup> In *Modderklip*, the Court applied this test to the facts of the case as follows:

The question that needs to be answered is whether the State was, in the circumstances, obliged to do more than it has done to satisfy the requirements of the rule of law and fulfil the section 34 rights of Modderklip. I find that it was unreasonable of the State to stand by and do nothing in circumstances where it was impossible for Modderklip to evict the occupiers because of the sheer magnitude of the invasion and the particular circumstances of the occupiers.<sup>115</sup>

*Modderklip* was an extraordinary case, and the Court explained that the execution of an eviction order would not normally raise problems that cannot be accommodated through the existing mechanisms established by the state.<sup>116</sup> Therefore, this second obligation to take 'reasonable steps, where possible, to ensure that large-scale disruptions in the social fabric do not occur in the wake of the execution of court orders, thus undermining the rule of law' applies only in exceptional circumstances. It is implicated only when the mechanisms established by the state in the discharge of its primary FC s 34 obligation would, if applied in the normal way, result in 'large-scale disruptions in the social fabric' and undermine the rule of law. The Court found that the state should have anticipated such consequences if the eviction order in *Modderklip* were executed.<sup>117</sup> *Modderklip* demonstrates that the discharge of this extraordinary, second obligation to take reasonable steps to ensure that large-scale disruptions in the social fabric do not take place may require extraordinary remedies.

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111 *Modderklip* (supra) at para 39.

112 *Ibid* at para 41.

113 *Modderklip* (supra) at para 43.

114 *Ibid*.

115 *Ibid* at para 48.

116 *Ibid* at para 47.

117 *Ibid*.

The Court ultimately awarded what must be regarded as *constitutional* damages. (However, the Court chose not to use this term.<sup>118</sup>)

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When does the extraordinary obligation of the state established in *Modderklip* arise? It appears to arise where normal judicial and enforcement mechanisms cannot operate, and, as a result, a polycentric conflict occurs which is likely to cause a 'large-scale disruption in the social fabric'. What are disruptions in the social fabric? The Court also used the language of 'order in society', 'societal disruptions' and 'social upheaval'.<sup>119</sup> This poetic, but vague, reference to the 'social fabric', in our view, should be taken to refer, not to the anticipated public reaction to the execution of an unpopular court order, but rather to whether it is *possible* to execute the order in the light of the exceptional consequences of execution. In *Modderklip*, the Court referred, albeit tangentially, to the obligation of the state 'progressively to ensure access to housing or land for the homeless' and by implication for the specific occupiers in that case.<sup>120</sup> Eviction in this case would have been inconsistent with the rights of occupiers and the obligations of the state under FC s 26. In our view, that fact constituted the threat of 'disruption in the social fabric'. The judgment should not be read as imposing an obligation on the state to find alternatives to the execution of every order likely to be met with a hostile public reaction.

Later in its judgment, the Court expresses the obligation of the state under the rule of law and FC s 34 in the language of 'relief' and 'remedy':

The obligation resting on the State in terms of section 34 of the Constitution was, in the circumstances, *to take reasonable steps to ensure that Modderklip was, in the final analysis, provided with effective relief*. The State could have expropriated the property in question or provided other land, a course that would have relieved Modderklip from continuing to bear the burden of providing the occupiers with accommodation. The State failed to do anything and accordingly breached Modderklip's constitutional *rights to an effective remedy* as required by the rule of law and entrenched in section 34 of the Constitution.<sup>121</sup> (our emphasis)

This obligation to take reasonable steps to ensure that a litigant is provided with effective relief is, in our view, something different from the extraordinary obligation to take reasonable steps to ensure that, in executing a court order, large-scale disruptions in the social fabric do not occur. The focus lies in two different places: in the 'relief' formulation, the focus is on the right-holder's entitlement to relief; whereas in the earlier 'social fabric' formulation, the focus is on society and the impact of execution on other persons. The answer to this apparent conundrum lies in the proposition that the rights conferred on individuals and the obligations of the state under FC s 34 and the rule of law in FC s 1(c) are neither corollaries nor contradictions. As concerns an individual who has obtained a court order, FC s 34 confers a right and imposes a concomitant

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118 Ibid at paras 59-66.

119 *Modderklip* (supra) at para 46.

120 Ibid at para 49.

121 Ibid at para 51.

obligation on the state to enforce remedies that provide 'effective relief'. However, FC s 34 read with the rule of law value in FC s 1(c) also imposes constitutional obligations on the state to prevent disruption in the social fabric that might result from the execution of court orders by the state machinery. This obligation is owed not to the holder of such a court order, whose right is a right to enforcement of an 'effective remedy', but to *other* persons (perhaps the public as a whole) whose constitutional rights would be threatened or infringed by execution. In § 59.4(d) below, we discuss the right to enforcement of an 'effective remedy' or 'effective relief' established by the Court in *Modderklip*.

The primary obligation identified in *Modderklip* — the obligation of the state to put in place mechanisms to facilitate the resolution of disputes — also contemplates the establishment, where appropriate, of alternative dispute resolution mechanisms to the ordinary courts. Furthermore, the state is obliged to ensure the 'appropriateness' and 'independence' of any tribunal or forum established to fulfil functions instead of a court and to ensure the fairness of such proceedings.<sup>122</sup>

## 59.4 The content of the right

The issues considered in the previous section are relevant to the question whether FC s 34 applies in the first place, and, if so, what its nature and character are. It is now appropriate to turn to consider the content of the right of access to courts in detail. Given the text of the right, it is convenient to identify three topics to consider: first, the provision confers a right for disputes to be 'decided before a court'; this is the component of the right that directly confers the right of access to court and, in the context of this aspect of the right, it is necessary to consider provisions that limit somehow the access to court of particular litigants or litigants in general. Secondly, the text of FC s 34 suggests that a component of the right is the right to a fair public hearing. Thirdly, FC s 34 makes clear that, where appropriate, the right to a fair public hearing may be exercised not in a court, but in an independent and impartial alternative tribunal or forum. In this section, we consider each of these three topics in turn. Since the decision of the Constitutional Court in *Modderklip*, it is now necessary to add a fourth component of the right: the right to enforcement of a remedy. The Constitutional Court has now made it clear that a component of the right of access to court is the right to enforce the right to appropriate relief.

### (a) Access to court

Perhaps the most prominent component of FC s 34 is the guarantee that litigants may bring their case before a court. A clear example of a provision that would violate this section is one that prohibits the bringing of legal proceedings against the state. Under apartheid, a decree applicable in the former homeland of

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Ciskei provided that '[n]o legal proceedings may be brought against the state in respect of any claim arising from any procedural irregularity, abuse of power, maladministration, nepotism, corruption or act of negative discrimination on the part of any member or servant of the Government of the Republic of Ciskei which was overthrown on 4 March 1990.'<sup>123</sup> Such a provision does not seek to extinguish the underlying claim but rather attempts to prevent the claim from being brought before

122 See *De Lange v Smuts NO* 1998 (3) SA 785 (CC), 1998 (7) BCLR 779 (CC).

123 Definition of State Liability Decree 34 of 1990 (Ck) s 2(1).

a court. Unsurprisingly, this provision was held to conflict with the Ciskeian equivalent of FC s 34.<sup>124</sup> In the section that follows, we consider various provisions that, far less blatantly, have the effect of limiting, or potentially limiting, access to court.

### (i) Ouster clauses

Ouster clauses were common during apartheid and were primarily used to prevent judicial review of executive conduct.<sup>125</sup> One of the reasons for entrenching FC s 34 in the Bill of Rights is to prevent such clauses from being used again.

The Constitutional Court has had a number of opportunities to consider the validity of provisions that permit disputes to be resolved without recourse to courts. These provisions differ from traditional ouster clauses because they do not concern attempts by the state to remove judicial supervision of its conduct. However, what these provisions do have in common with traditional ouster clauses is that, in both cases, the aggrieved party is denied recourse to a court in order to obtain relief. In this sense, these clauses may be considered 'implied ousters'. They have the effect of ousting the jurisdiction of the ordinary courts by establishing a parallel dispute-resolution process that lacks the protections afforded by the courts. So, although they do not expressly oust the jurisdiction of the courts, the effect is much the same.

The provision considered in *Chief Lesapo* allowed the first respondent bank to recall loans paid to debtors and, if the debtors were in default, to order the messenger of the court to attach and to sell in execution the debtors' property.<sup>126</sup> The direction given by the respondent bank to the messenger of the court was given without recourse to court.

In striking down the section, which allowed the Bank to bypass completely the scrutiny of the courts, Mokgoro J said the following:

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A trial or hearing before a court or tribunal is not an end in itself. It is a means of determining whether a legal obligation exists and whether the coercive power of the state can be invoked to enforce an obligation, or prevent an unlawful act being committed. It serves other purposes as well, including that of institutionalising the resolution of disputes, and preventing remedies being sought through self help. No one is entitled to take the law into her or his own hands. Self help, in this sense, is inimical to a society in which the rule of law prevails.<sup>127</sup>

The Court rejected the notion that the provision would only be offensive if there was a dispute about the underlying indebtedness. The right to protection against self-help extended to supervision by the court over the execution process.<sup>128</sup>

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124 See *Ntentsi v Chairman, Ciskei Council of State and Another* 1993 (4) SA 546 (CK), 1994 (1) BCLR 168, 182 (CK).

125 See C Hoexter with R Lyster *The New Constitutional and Administrative Law II — Administrative Law* (2002) 305. See § 59.2(a) *supra*.

126 North West Agricultural Bank Act 14 of 1981 s 38(2).

127 *Chief Lesapo* (*supra*) at para 11.

128 *Ibid* at para 15.

The Court's attitude to the resort to self-help facilitated by the section was expressed as follows:

Section 38(2) authorizes the Bank, an adversary of the debtor, to decide the outcome of the dispute. The Bank thus becomes a judge in its own cause. The authority to adjudicate over justiciable disputes and to order appropriate relief and the enforcement of the order by attachment and sale of the debtor's goods in a civil matter, vests in the courts of the land. Section 38(2), however, limits the debtor's rights in section 34 by vesting that authority in the Bank. The Bank itself decides whether it has an enforceable claim against the debtor; the Bank itself decides the outcome of the dispute and the subsequent relief; and the Bank itself enforces its own decision, thereby usurping the powers and functions of the courts. The fact that the debtor may have recourse to a court of law after the attachment takes place does not cure the limitation of the right; it merely restricts its duration. For the period of limitation, the debtor has been deprived of possession of the assets in question without the intervention of a court of law and in a manner inconsistent with section 34.<sup>129</sup>

As part of its limitation analysis, the Court emphasized the importance of the right of access to courts. In particular, the Court described the right as 'a bulwark against vigilantism, and the chaos and anarchy which it causes.'<sup>130</sup> The Court acknowledged the purpose behind the measure — it provided the bank with a quick way to recover money, which, after all, it held in the public interest to begin with — but emphasized that this purpose was not at odds with having justiciable disputes resolved by courts.<sup>131</sup> The Court was also of the view that the measure did not manifestly succeed in saving substantial time and money for the Bank and that, compared with the inroad into the right of access to court, this purported advantage did not justify the measure.<sup>132</sup> The provision was therefore declared unconstitutional.<sup>133</sup>

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OS 11-07, ch59-p29

In *Zondi v MEC, for Traditional and Local Government Affairs and Others*,<sup>134</sup> the applicant challenged certain provisions of a KwaZulu-Natal Pound ordinance.<sup>135</sup> The ordinance provided for the seizure of a person's livestock that trespassed on another's land. In terms of the ordinance, if a landowner found livestock that had trespassed onto his land, then he was entitled to impound it. The landowner was not obliged to give notice to the owner of the livestock unless the owner of the livestock

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129 Ibid at para 20.

130 Ibid at para 22.

131 Ibid at para 24.

132 Ibid at para 26.

133 Ibid at para 29. See also *First National Bank of South Africa Limited v Land and Agricultural Bank of South Africa and Others*; *Sheard v Land and Agricultural Bank of South Africa and Another* 2000 (3) SA 626 (CC), 2000 (8) BCLR 876 (CC) ('*Land Agricultural Bank*') (The Court struck down similar provisions of the Land Bank Act 13 of 1944. The Act has since been repealed.)

134 2005 (3) SA 589 (CC), 2005 (4) BCLR 347 (CC) ('*Zondi*').

135 Pound Ordinance 32 of 1947 (KZN). The applicant challenged ss 8, 10(2), 12, 16(1), 29(1), 33, 34, 37 and 41(4) of the Ordinance.

owned the land adjacent to the landowner's land,<sup>136</sup> in which case 12 hours' written or verbal warning would suffice.<sup>137</sup> Once the animals were seized they could be driven to a pound by the landowner. The ordinance obliged the landowner to provide various pieces of information to the poundkeeper, but not the identity of the livestock owner, even if this was known to him. The poundkeeper had to inform the livestock owner of the fact that the animals were impounded, but only if the owner's identity was known to him,<sup>138</sup> and only to facilitate a hearing to determine the quantum of damages to which the landowner was entitled as a consequence of the trespass. If the animals were not claimed, then they could be sold to defray costs and the remaining animals could be destroyed. If the livestock owner had been identified, then he could only reclaim his livestock on the payment of pound fees and any damages due to the landowner. The only notice of an impending sale of livestock by a pound was provided in local newspapers and the *Provincial Gazette*.

Having explained why access to court generally requires the prevention of self-help, Ngcobo J gave the following guidance on the application of FC s 34:

Section 34, therefore, requires not only that individuals should not be permitted to resort to self-help, but it also requires that potentially divisive social conflicts must be resolved by courts, or other independent and impartial tribunals. Section 34 recognises that it is important to do so to ensure that orderly and fair solutions to such conflicts are found, to promote social cohesion and to avoid the exacerbation of division and unfairness. Determining whether it is necessary for such conflicts to be brought before courts will require a consideration of the potential for social conflict in relation to the particular matters concerned, the equality of arms of the parties that are likely to be involved in such conflict, and the practicalities of requiring such matters to be resolved by courts, amongst other things.

In considering the constitutionality of the impounding provision, the Court in *Zondi* did not consider whether the provision also limited the right of access to courts. Ngcobo J held that, even if the provision did, it would be justifiable in terms of FC s 36: it is necessary to have a provision that allows a landowner to impound animals on an immediate basis.<sup>139</sup> Standing alone, therefore, it would not

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be improper for a provision to allow a landowner to impound animals without notifying the owner. It was necessary, however, to consider this provision in the context of the entire scheme.<sup>140</sup> Viewed in context, the entire scheme was held to limit the right of access to court.<sup>141</sup> The main problem with the scheme was not so much that the animals could be impounded without notice, but that the animals

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136 Ownership was determined by the presence of the adjacent owner's brand on the livestock.

137 See *Zondi* (supra) at paras 45ff.

138 There is no obligation to take steps to ascertain the identity of the owner.

139 *Zondi* (supra) at paras 66 and 67.

140 *Zondi* (supra) at para 73.

141 *Ibid* at para 78.

could be sold in execution and the quantum of damages suffered by the landowner would all be determined without any supervision by the courts.<sup>142</sup>

The effect of the scheme, therefore, is to remove from the court's scrutiny one of the sharpest and most divisive conflicts of our society. The problem of cattle trespassing on farmland must be seen in the context I have outlined above. It is not merely the ordinary agrarian irritation it must be in many societies. It is a constant and bitter reminder of the process of colonial dispossession and exclusion. The potential for conflict between landless stockowners, whose forebears were deprived of their land, and farmers must be acknowledged. Moreover, in many cases, landless stockowners, for whom cattle constitute not only a form of material security, but also a way of life of tremendously significant social and communal importance, will have scant ability to approach courts for relief when their cattle are impounded. The effect of the impounding scheme as described, therefore, is to effectively remove from the arena of courts the sharp conflicts which will often underlie the process of impoundment.<sup>143</sup>

In assessing the justifiability of the measure, the Court in *Zondi* held that the more potentially divisive a conflict is, the more important it is for the dispute to be resolved by a court.<sup>144</sup> While it was clearly necessary to have an efficient, immediate mechanism to impound trespassing livestock, there was no reason why the process to determine damages and the execution process could not be supervised by a court.<sup>145</sup> The potentially devastating effects that the sale of livestock could have on poor people, coupled with the fact that it would not be necessary to oust the jurisdiction of the courts once the immediate problem of trespassing animals had been solved, led the court to conclude that the legislative scheme was not justifiable in terms of FC s 36.<sup>146</sup>

By contrast, the Constitutional Court in *Metcash*<sup>147</sup> found that certain provisions of the Value-Added Tax Act<sup>148</sup> did not limit the right of access to court. The

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OS 11-07, ch59-p31

VAT Act establishes a scheme in terms of which vendors are, in the first instance, obliged to police themselves and to submit VAT payments. However, if the Commissioner of the South African Revenue Service is not satisfied with a vendor's assessment, then he is entitled to intervene and inform that vendor that he will conduct an assessment into the vendor's VAT liability. The Commissioner's assessment has the effect of a civil judgment, but remains subject to an appeal-like

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142 Ibid at paras 74-76.

143 Ibid at para 76.

144 Ibid at para 82.

145 Ibid at para 83.

146 Ibid at para 86.

147 *Metcash Trading Ltd v Commissioner, South African Revenue Service* 2001 (1) SA 1109 (CC), 2001 (1) BCLR 1 (CC) ('Metcash').

148 Act 89 of 1991 ('the VAT Act'). The provisions of the Act that were struck down by the High Court (*Metcash Trading Ltd v Commissioner for the SA Revenue Service and Another* 2000 (2) SA 232 (W), 2000 (3) BCLR 318 (W)) were ss 36(1), 40(2)(a) and 40(5) of the Act.

process.<sup>149</sup> However, unlike the ordinary approach to noting of an appeal, which suspends the operation of the judgment appealed against, the VAT Act specifically provides that the Commissioner's assessment remains in effect. The Act creates a 'pay now, argue later' approach; only if the Commissioner's assessment turns out to be wrong is the vendor entitled to repayment of the excess amount, plus interest.<sup>150</sup>

The appeal process envisaged by the VAT Act allows a vendor to appeal the Commissioner's assessment to the Special Court created by the Income Tax Act<sup>151</sup> or a board.<sup>152</sup> Thereafter, the vendor possesses a further right to appeal the decision of the Special Court to an ordinary court of law.<sup>153</sup> The Court pointed out that the Act did not in any way oust the right of access to court. Had the special appeal process not been established, the decision of the Commissioner would, in any case, have been subject to judicial review.<sup>154</sup> Furthermore, the Commissioner's discretion would have to be exercised in the light of the Final Constitution.<sup>155</sup> The provision did not, therefore, limit the right of access to court.

The applicants also challenged the following provision:

If any person fails to pay any tax, additional tax, penalty or interest payable in terms of this Act, when it becomes due or is payable by him, the Commissioner may file with the clerk or Registrar of any competent court a statement certified by him as correct and setting forth the amount thereof so due or payable by that person, and such statement shall thereupon have all the effects of, and any proceedings may be taken thereon as if it were, a civil judgment lawfully given in that court in favour of the Commissioner for a liquid debt of the amount specified in the statement.<sup>156</sup>

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The applicants argued that this provision sanctioned self-help by allowing the Commissioner to bypass the courts. The Constitutional Court rejected this

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149 The Court in *Metcash* pointed out that the process is not technically an appeal because the Commissioner performs an administrative and not judicial function. The process was therefore 'proceedings in terms of a statutory mechanism specially created for the reconsideration of this particular category of administrative decisions — and appropriate corrective action — by a specialist tribunal'. *Metcash* (supra) at para 32.

150 Also noteworthy is the fact that the Commissioner has the discretion to waive the right to immediate payment and to allow the vendor not to pay in terms of the assessment, pending the appeal process being finalized.

151 Act 58 of 1962.

152 *Metcash* (supra) at para 32.

153 See VAT Act s 34.

154 *Metcash* (supra) at para 33.

155 *Ibid* at paras 41–3.

156 VAT Act s 40(2)(a).



contention. Although the provision provided a short-cut for the Commissioner, it did not in any way oust the normal judicial supervision over the execution process.<sup>157</sup>

In *Armbruster*, the Constitutional Court rejected the appellants' FC s 34 arguments. It held that the constitutional challenge failed on grounds similar to those that disposed of *Metcash*.<sup>158</sup> The impugned regulations deal with the seizure and forfeiture of foreign currency.<sup>159</sup> In terms of the regulations, foreign currency may not leave the country without an exemption or permission from the Treasury. The impugned regulations allow a customs official to search people leaving the country and seize foreign currency found in their possession. Furthermore, the seized currency is forfeited to the state unless the Treasury exercises its discretion to return the currency.

The Court in *Armbruster* distinguished *Zondi* and *Chief Lesapo* on three broad bases. *Zondi* and *Chief Lesapo* were concerned with respondents who could resort to self-help 'in the sense that they could execute and sell property without a court order and without any judicial supervision in respect of debts.'<sup>160</sup> The types of interventions in those cases, which amounted to sales of the complainants' property, were far more drastic and required far greater judicial control than forfeiture of currency about to be removed from the country: In the present case, '[t]he property has already been seized to achieve public purposes relating to protection of foreign exchange reserves.'<sup>161</sup> Secondly, a distinguishing feature of *Zondi* was that the impugned provisions had the potential to cause social conflict, which was not so in the case of the regulations impugned in *Armbruster*. Lastly, and perhaps most importantly, the decision whether to forfeit the currency was an administrative act, which meant that the *ratio* of *Metcash* was applicable. Thus, as in *Metcash*, the regulations did not infringe FC s 34.<sup>162</sup>

In the light of the above cases, and the recent case of *Armbruster* in particular, it seems that the greater the potential for social conflict, the more likely a particular measure will be to infringe FC s 34. Likewise, the more drastic the effect on an applicant's interests, the more likely a measure will be found to limit FC s 34. Furthermore, if an impugned measure provides for an administrative process, it is unlikely to infringe FC s 34, because the administrative conduct in question will

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157 *Ibid* at paras 50-51.

158 *Armbruster and Another v Minister of Finance and Others* 2007 (6) SA 550 (CC), 2007 (12) BCLR 1283 (CC).

159 The challenged regulations were regs 3(3) and 3(5) of Exchange Control Regulations promulgated under s 9 of the Currency and Exchanges Act 9 of 1933 (the Act), which empowers the Governor-General to make Exchange Control Regulations. The regulations were published under GN R1111 in *GG Extraordinary* 123 of 1 December 1961. The appellants technically challenged only the constitutionality of reg 3(5) but a consideration of that regulation was impossible without a consideration of reg 3(3).

160 *Armbruster* (*supra*) at para 59.

161 *Ibid* at para 60.

162 *Ibid* at para 61.

be reviewable. It must be recalled that the Court, in *Zondi*, assumed that the measure limited FC s 34 and did its analysis under FC s 36. The factors that it introduced, such as the focus on the social context and divisiveness of the measure, were relevant to limitation analysis and not to whether FC s 34 had been limited. The Court was wrong in *Armbruster*, in our view, to take these factors into account when conducting its threshold analysis regarding the question whether FC s 34 had been limited. The only factor that leads to the conclusion that the impugned measures in *Metcash* and *Armbruster* did not limit FC s 34 is the fact that the administrative acts at issue are reviewable.

In another line of cases, the constitutional validity of common-law *parate executie* clauses, or summary-execution clauses, has been considered. These clauses provide for the sale of a debtor's property pursuant to a security agreement with a creditor. Before turning to those cases, it is necessary to provide some background to the common-law position. Susan Scott captures the common-law position succinctly and lucidly.<sup>163</sup> She points out that it is necessary to draw a distinction between three mechanisms that implicate a debtor's property. The first is a statutory mechanism allowing the state to seize a debtor's property without recourse to a court of law. Such mechanisms were considered in *Chief Lesapo* and *Land Agricultural Bank*. The second mechanism is a perfection clause in a contract creating a notarial bond. A notarial bond is essentially a mortgage in respect of movables. The perfection of the notarial bond creates a real right of security for the creditor.<sup>164</sup> It must be remembered that, in terms of a notarial bond, a creditor obtains a right of security in respect of the debtor's hypothecated movable without the debtor having to give possession of the movable to the creditor. (This feature reflects the most important distinction between a perfection clause and a pledge). However, in order for the creditor to obtain a real right of security, he needs to 'perfect' his claim by obtaining possession of the bonded movable.<sup>165</sup> The 'perfection clause' facilitates possession. The clause will permit the creditor to take possession of the bonded movables on the occurrence of certain events envisaged by the contract. Crucially, possession must occur either with the debtor's permission or with a court order.

The third mechanism is a summary-execution clause. In terms of such a clause, the debtor authorizes the sale of his hypothecated property by the creditor upon the debtor's default without court approval. In terms of the common law, such clauses are impermissible in respect of mortgage bonds but permissible in respect of pledges.<sup>166</sup> The crucial difference between the two is that in the case of mortgage bonds the debtor remains in possession of the property, whereas in the case of pledges, the creditor takes possession of the property in question upon conclusion of the pledge agreement.

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163 S Scott 'Summary Execution Clauses in Pledge and Perfecting Clauses in Notarial Bonds' (2002) 65 *THRHR* 656.

164 *Ibid* at 659–60.

165 *Ibid* at 660.

166 *Ibid* at 660.

In *Findevco (Pty) Ltd v Faceformat SA (Pty) Ltd*, the applicant bondholder applied to court for an order allowing it to perfect its security agreement with the respondent by taking possession of the debtor's movable property hypothecated in terms of the contract and to sell it to discharge the security obligation.<sup>167</sup> In other words, the case concerned the second mechanism described above. Froneman J, relying upon *Chief Lesapo* and *Land Agricultural Bank*, held that, if such clauses were impermissible in terms of legislation, he could not see why the common law should permit them.<sup>168</sup> It is clear, therefore, that Froneman J treated perfection clauses as analogous to the statutory mechanisms struck down in *Chief Lesapo* and *Land Agricultural Bank*. In *Senwes Ltd v Muller*, Moseneke AJ (as he then was), relying too on *Chief Lesapo*, held that certain clauses in a contract that permitted the notarial bond-holder to attach and to execute against the hypothecated movables of the debtor without notice and without legal process were unenforceable.<sup>169</sup> This case was also concerned with a perfection clause. However, these clauses contained some particularly onerous provisions: — for instance, the creditor was unilaterally entitled to determine if default had occurred.

Harms JA made strong *obiter* remarks in *Bock and Others v Duburoro Investments (Pty) Ltd* indicating that he believed that *Findevco* was wrongly decided.<sup>170</sup> He drew attention to the distinction between summary-execution clauses where the hypothecated property remains in the possession of the debtor and such clauses where the creditor takes lawful possession of the property in terms of the contract. Harms JA pointed out that *parate executie* clauses are void in the former case and enforceable, subject to a condition, in the latter case.<sup>171</sup> The condition in the latter case is that clauses that impose obligations on the debtors that are too onerous are contrary to public policy: they are, therefore, not enforceable. Harms JA held that the common law had always rejected self-help, that the distinction drawn by the common law was aimed at prohibiting self-help and that the Constitutional Court in *Chief Lesapo* and *Land Agricultural Bank* was concerned with statutory exceptions to the norm. Those statutory exemptions permitted far more 'self-help' than the common law would tolerate.<sup>172</sup> *Findevco* was, therefore, wrongly decided.<sup>173</sup>

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167 2001 (1) SA 251 (E) ('*Findevco*') (This case concerned the return day of a rule *nisi* on which the respondent was obliged to show cause why the applicant should not be entitled to take possession of its property and sell it as security in terms of the agreement.)

168 *Ibid* at 256E-G.

169 2002 (4) SA 134 (T), 142 (T).

170 2004 (2) SA 242 (SCA) ('*Bock*').

171 *Ibid* at paras 7 and 14.

172 *Ibid* at paras 14-15.

173 *Ibid* at para 15.

The Supreme Court of Appeal, in *Juglal NO and Another v Shoprite Checkers (Pty) Ltd t/a OK Franchise Division*,<sup>174</sup> approved the following summary of the common-law position, set out by Hurt J in the court below:

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In summary, the common law, insofar as stipulations for parate execution are concerned, is that stipulations, which are not so far-reaching as to be contrary to public policy, are valid and enforceable; that, as a matter of practice, creditors seeking to enforce such stipulations take the precaution of applying for judicial sanction before doing so; and that the debtor can avail himself of the court's assistance in order to protect himself against prejudice at the hands of the creditor.<sup>175</sup>

The Supreme Court of Appeal continued:

To this I would add that the 'matter of practice' referred to is in fact a constitutional requirement: creditors not in possession are obliged to apply for judicial sanction. With that qualification, Hurt J's exposition seems to me to be a correct summary of the present state of the common law.<sup>176</sup>

It is important to note that *Juglal* was concerned with a perfection clause in respect of a notarial bond.

*Van Zyl*, a third Supreme Court of Appeal judgment on this subject, concerns a contract in terms of which the debtor ceded certain insurance policies to the creditor bank in a contract that entitled the bank to sell or keep the policies upon default by the debtor.<sup>177</sup> The Supreme Court of Appeal confirmed that *parate executie* clauses had been deemed acceptable in our law so long as their terms were not too onerous. The Supreme Court of Appeal provided two examples of terms too onerous: (a) terms that would entitle the creditor unilaterally to determine default; and (b) terms that would entitle the creditor to seize the debtor's property without the permission of the court.<sup>178</sup> The Supreme Court of Appeal in *Van Zyl* also approved the dicta in *Bock and Juglal* and, on the facts, held that the clauses in question did not authorize the creditor to determine whether default had occurred. Furthermore, the clauses did not purport to authorize the creditor bank to bypass the courts in a dispute regarding the validity of the cession agreements.<sup>179</sup>

Many of these judgments, including those of the Supreme Court of Appeal, draw an inadequate distinction between perfection clauses and summary execution clauses.<sup>180</sup> Many of the cases discussed above made wide-reaching comments about

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174 2004 (5) SA 248 (SCA)('Juglal').

175 *Juglal* (supra) at para 9.

176 *Ibid.*

177 *SA Bank of Athens Ltd v Van Zyl* 2005 (5) SA 93 (SCA)('Van Zyl').

178 *Ibid* at para 10.

179 *Ibid* at paras 14-15.

180 See S Cook & G Quixley 'Parate Executie Clauses: Is the Debate Dead' (2004) 112 *SALJ* 719, 728.

all forms of *parate executie* clauses despite the fact that they were concerned only with perfection clauses. We can see nothing constitutionally objectionable about perfection clauses. In terms of such clauses, if the debtor does not give permission to the creditor to perfect his right of security (at the time at which the creditor seeks to do so), the only way for a creditor to perfect his right of security is through the courts. To the extent, therefore, that the Supreme Court of Appeal rejected the categorical reasoning of the High Courts in regard to perfection clauses, it must be supported.

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However, the really interesting constitutional question only seems to have been dealt with as part of the *ratio* of *Van Zyl*. *Van Zyl* engages the serious debate in the common law about the exact juridical definition of cessions *in securitatem debiti*.<sup>181</sup> For our purposes it is useful to see them as pledges of incorporeals. Therefore, *Van Zyl* dealt with the controversial aspect of the existing common law of *parate executie* clauses — the constitutionality of summary-execution clauses in which no court supervision is required. Although the High Court read the contract in such a way that there was no scope for the creditor unilaterally to determine default, it seems clear from the judgment that the contract allowed the creditor to sell the policies, once default had been established, *without a court order*.<sup>182</sup>

What, then, is the current position in regard to *parate executie* clauses? It seems that perfection clauses — which permit a creditor to take possession of movable property that is subject to a notarial bond, on the occurrence of events specified in the contract, provided that he obtains the debtor's permission or a court order — will be acceptable, so long as they do not contain unduly onerous terms. Furthermore, summary-execution clauses where the property remains in the possession of the debtor will only be acceptable if court supervision is required before the creditor may sell or deal with the hypothecated property. This reflects what has long been the common-law position. As far as summary-execution clauses in the case of pledges are concerned, the Supreme Court of Appeal is of the view that they are not per se inconsistent with FC s 34: the debtor must have the opportunity to approach a court to prevent prejudice and there must be no other unduly onerous clauses.

The crisp question then, is whether the Supreme Court of Appeal is correct in so far as summary-execution clauses in pledge agreements are concerned? Scott argues that summary-execution clauses in respect of pledges are constitutionally permissible. She accepts that the creditor and the debtor may not have equal bargaining positions but points out that the creditor is under no obligation to provide credit and the debtor is not compelled to seek it.<sup>183</sup> Furthermore, she points out that there will be greater costs involved for the creditor if he constantly has to approach the courts to oversee the process. Most importantly, she contends that, in terms of the common law, the pledgee is treated as a representative of the pledgor. He will therefore be bound by all the general duties of a representative.<sup>184</sup> Scott asks: 'if a person is willing to part with his/her property voluntarily to secure a debt, why

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181 See Joubert (ed) *Law of South Africa* vol 17 at para 526 n5 (Additional authorities cited there.)

182 See *Van Zyl* (supra) at para 8.

183 Scott (supra) at 663.

184 *Ibid* at 663.

should that person not be allowed to authorize the creditor to sell the property without recourse to the courts, should the debtor be in default?<sup>185</sup>

On the other hand, Cook and Quixley argue that much of the emphasis in *Bock*, in holding that *parate executie* clauses in the case of pledge will generally be acceptable, was on the fact that, since the property is already in the possession of the creditor in the case of pledge, there can be no question of self-help because there is no 'seizing' of the property.<sup>186</sup> However, Cook and Quixley correctly note that the selling of the pledged property without court supervision could ultimately amount to self help.<sup>187</sup> As a result, the fact that the debtor may approach a court in the case of alleged prejudicial conduct by the creditor may not cure the unconstitutional defect of such clauses.<sup>188</sup>

It is our view that a case-specific approach is vital in this context. Scott, Cook and Quixley all make the point that pledges are important commercial instruments. It would be unfortunate if an unduly rigid approach to their constitutionality were adopted by the courts. Such rigidity could have a chilling effect on the conclusion of these agreements. There is no doubt, however, that the constitutional enquiry cannot turn solely on the question whether the creditor is able to 'seize' the property. Self-help can also take the form of the creditor selling the property without supervision, even if the initial transfer of property (in terms of the pledge) occurs with the approval of the debtor. Context is all important. It seems that, where the parties to the contract are both powerful companies, the protection offered by the right of the debtor to approach the court in the case of prejudice ought to be sufficient to protect its interests. On the other hand, where the debtor is in a weak financial and social position, such that he may not be fully aware of his rights or may not have the resources to seek out the protection of the courts, it may be that it would be contrary to public policy (as informed by FC s 34) to allow a summary-execution clause. As will be discussed immediately below, the preferred approach of the Constitutional Court,<sup>189</sup> when considering the validity of contracts, is to see the clauses of the contract through the prism of the 'public-policy test' as informed by the Bill of Rights. This case-sensitive approach eschews the articulation of broad rules. A case-by-case approach is more likely to ensure that only those summary-execution clauses that operate unfairly in the circumstances will be set aside.

## (ii) Prescription

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185 Ibid.

186 Cook & Quixley (supra) at 726.

187 Ibid at 726-727.

188 Ibid at 726.

189 See *Barkhuizen v Napier* 2007 (5) SA 323 (CC), 2007 (7) BCLR 691 (CC).

In terms of the Prescription Act,<sup>190</sup> the standard period after which a civil debt prescribes is three years.<sup>191</sup> The Prescription Act itself creates exceptions,<sup>192</sup> but the

starting point is three years. *Mohlomi v Minister of Defence* was the first matter before the Constitutional Court in which an attempt by the legislature to shorten the period of prescription was challenged as a violation of FC s 34.<sup>193</sup>

The provision under attack was section 113(1) of the Defence Act.<sup>194</sup> Section 113(1) provided a six-month prescription of claims against the state and a requirement of notice at least one month before the commencement of an action against the state.<sup>195</sup> In *Mohlomi*, both aspects of this provision were challenged in terms of IC s 22 (FC s 34's precursor).

An important aspect of the scheme created by the Prescription Act is that prescription only begins to run once the creditor has knowledge of the debt due to him.<sup>196</sup> Although the Act speaks in terms of 'debts', 'creditors' and 'debtors', these rules apply to all claims. The basic rule is that prescription only begins to run where the plaintiff or applicant has knowledge (or reasonably ought to have had knowledge) of the existence of the cause of action, the identity of the debtor and the facts from which the debt arises.<sup>197</sup> One of the particularly harsh aspects of s 113(1) of the Defence Act, as interpreted by the courts, was that these rules of the Prescription Act did not apply to it. As a result, the six-month period was deemed a bar to the institution of an action against the state, regardless of whether the plaintiff had knowledge of his right to proceed within the six-month period or the facts necessary to proceed.<sup>198</sup>

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190 Act 68 of 1969.

191 Section 11(d) read with s 10(1).

192 See s 11 of the Act. An example is a debt secured by mortgage bond, which prescribes after only 30 years.

193 1997 (1) SA 124 (CC), 1996 (12) BCLR 1559 (CC).

194 Act 44 of 1957. This Defence Act has almost entirely been replaced by the Defence Act 42 of 2002.

195 Section 113 reads as follows:

No civil action shall be capable of being instituted against the State or any person in respect of anything done or omitted to be done in pursuance of this Act, if a period of six months ... has elapsed since the date on which the cause of action arose, and notice in writing of any such civil action and of the cause thereof shall be given to the defendant one month at least before the commencement thereof.

196 Prescription Act 68 of 1969 s 12.

197 Prescription Act s 12(3). See also *HMBMP Properties (Pty) Ltd v King* 1981 (1) SA 906 (N), 909A-B.

198 *Pizani v Minister of Defence* 1987 (4) SA 592 (A), 602D-G.

In finding that the provision violated IC s 22, Didcott J held that the inflexible requirements of the section

must be viewed against the background depicted by the state of affairs prevailing in South Africa, a land where poverty and illiteracy abound and differences of culture and language are pronounced, where such conditions isolate the people whom they handicap from the mainstream of the law, where most persons who have been injured are either unaware of or poorly informed about their legal rights and what they should do in order to enforce those, and where access to the professional advice and assistance that they need so sorely is often difficult for financial or geographical reasons. The severity of s 113(1) which then becomes conspicuous has the effect, in my opinion, that many of the claimants whom it hits are not afforded an adequate and fair opportunity to seek judicial redress for wrongs allegedly done

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to them. They are left with too short a time within which to give the requisite notices in the first place and to sue in the second. Their rights in terms of section 22 are thus, I believe, infringed.<sup>199</sup>

These remarks were made in the context of a test established by the court to determine whether a truncated prescription period violated the right of access to court. Didcott J held that it is not desirable for litigation to be drawn out forever and for cases to be determined long after the cause of action arose. It was therefore desirable for the legislature to fix a cut-off for the institution of litigation.<sup>200</sup> However, not all time-periods would be acceptable and the challenge in *Mohlomi* was to provide a test in terms of which to approach this matter. Didcott J explained that the dilemma with time-periods stems from the fact that any time period may operate to exclude, completely, the right of a plaintiff to obtain redress. Even a seven-year period of prescription could bar litigants from pursuing their actions. The court in *Mohlomi* chose not to adopt an approach in terms of which all prescription periods constitute limitations of the right of access to court, which must be justified, if possible, in terms of the limitation clause. Rather, the court in *Mohlomi* held as follows:

What counts rather, I believe, is the sufficiency or insufficiency, the adequacy or inadequacy, of the room which the limitation leaves open in the beginning for the exercise of the right. For the consistency of the limitation with the right depends upon the availability of an initial opportunity to exercise the right that amounts, in all the circumstances characterising the class of case in question, to a real and fair one. The test, thus formulated, lends itself to no hard and fast rule which shows us where to draw the line. In anybody's book, I suppose, seven years would be a period more than ample during which to set proceedings in motion, but seven days a preposterously short time. Both extremes are obviously hypothetical. But I postulate them in order to illustrate that the enquiry turns wholly on estimations of degree.<sup>201</sup>

With respect to s 113(1) of the Defence Act, the particular circumstances prevailing in South Africa suggested that the six-month time frame was too short a period in which to exercise the right. The time-period limited the right of access to courts and analysis in terms of the limitation clause would be necessary to determine the provision's constitutionality.

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199 *Mohlomi* (supra) at para 14.

200 *Ibid* at para 11.

201 *Ibid* at para 12.



The premise of the shortened period established by s 113(1) is that the state is beset by logistical obstacles which require shortened periods of time to apply in litigation initiated against it.<sup>202</sup> The Law Commission had rejected this argument in a detailed survey of prescription periods that it had conducted in the 1980s.<sup>203</sup>

It had recommended scrapping these truncated prescription periods altogether. It favoured the ordinary rules applicable in the Prescription Act coupled with a notification period applicable only to actions against the state. Didcott J did not go so far as to endorse entirely these recommendations and, instead, referred to a provision recently enacted by the legislature in the new Police Act.<sup>204</sup> In that provision, the period in which actions concerning the police had to be brought was 12 months. In addition, the Police Act contained an equivalent provision to that in the Prescription Act: the provision delays the running of prescription 'until the date upon which the claimant became aware of the alleged act or omission, or after the date upon which the claimant might be reasonably expected to have become aware of the alleged act or omission, whichever is the earlier date.'<sup>205</sup> Furthermore, courts were given a discretion to dispense with the 12-month period if in the interests of justice.<sup>206</sup>

As part of his limitation analysis, Didcott J, unsurprisingly, left open the question of the constitutionality of the new provision in the SAPS Act. However, he pointed out that the difficulties facing the police were, if anything, greater than those facing the defence force and the legislature had been satisfied that the 12-month period would be adequate to protect the state's interests.<sup>207</sup> In particular,

[t]he contrasts between section 113(1) and section 57 are striking. The time allowed by the latter for the start of any action, and accordingly for the prior notification of its imminence, is twice as long as that fixed by the former. The period begins to run not from the date when the cause of action arises, an occurrence of which a claimant may well be unaware at the time, but from the date when both the conduct in question and the identity of its perpetrator becomes or should reasonably become known to him or her. Ignorance of that second fact, more common perhaps than of the first, is easily illustrated. One thinks, for instance, of a hit and run collision caused by an unidentified motorist or an assault committed by somebody clad in battle dress of the sort worn by soldiers and the police alike which no civilian witness to the incident can tell apart. Then, in empowering the court to condone non-compliance with its requirements, section 57 permits account to be taken of the claimant's fault or the lack of that and the prejudice suffered by the state or its absence, factors that are wholly irrelevant to the operation of section 113(1). While paying due attention to the state's interests, section

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202 Ibid at para 16.

203 *Investigation into Time Limits for the Institution of Actions against the State* Project 42 (October 1985).

204 South African Police Service Act 68 of 1995 ('SAPS Act').

205 SAPS Act s 57.

206 SAPS Act s 57(5).

207 *Mohlomi* (supra) at para 18.

57 is consequently much less stringent and detrimental to the interests of claimants than section 113(1).<sup>208</sup>

Section 113(1) was therefore deemed an unjustifiable limitation on the right of

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access to court and was found unconstitutional.<sup>209</sup> Although the Court did not say much about the notice period – other than to question why the state adopted an inflexible attitude requiring compliance in all cases – it too was set aside, since the whole of the provision was declared unconstitutional.<sup>210</sup>

*Mohlomi* concerned two mechanisms that differ slightly. Notice periods do not seek to determine, directly, the period of prescription of the claim. However, they serve as a condition precedent to the institution of actions. If the notice period is not complied with, the litigation may not proceed and the practical effect is as if the debt has prescribed: although again, the two periods are not legally equivalent. The second mechanism that, in fact, attracted the bulk of the court's attention was the actual prescription provision.<sup>211</sup>

In *Moise v Transitional Local Council of Greater Germiston*, the court was concerned with a 90-day notice period applicable to proceedings against local governments.<sup>212</sup> The independent two-year prescription period that was also applicable was not considered by the Court. It did, however, see the need to consider the notice period within the context of the whole procedure adopted by the relevant statute: the Limitation of Legal Proceedings (Provincial and Local Authorities) Act.<sup>213</sup> The provision, s 2, had the following attributes: notification of an intention to institute legal proceedings against the government entity had to be given within 90 days of the debt arising. The debt was deemed to have arisen once the creditor had knowledge of the identity of the debtor and of the facts giving rise to the debt. Furthermore, once notice had been given, the claimant was barred from proceeding with the action for another 90 days and the debt was deemed to prescribe after 24 months. Another noteworthy feature of the statutory scheme was that the Act gave a claimant the right to approach a court to serve the notice after

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208 Ibid at para 19.

209 After *Mohlomi*, a High Court struck down s 32(1) of the Police Act of 1958. Section 32 was substantially similar to the provision struck down in *Mohlomi*. See *Baldeo v Minister of Safety and Security for the Republic of South Africa* 1997 (12) BCLR 1728 (D). Although, by the time of the decision in the High Court, this provision had been replaced by SAPS Act s 57, the repealed Act was applicable because of the date on which the action was instituted. Despite the fact that the case was heard in terms of the Interim Constitution, the parties agreed, in terms of IC s 101(6), that the court had jurisdiction to determine the provision's constitutionality.

210 *Mohlomi* (supra) at para 26.

211 There are a number of statutory provisions that impose limitations on the institution of civil proceedings in the form of notice requirements or prescription periods. See I Farlam et al *Erasmus's Superior Court Practice* (Service 27, 2007) E7-1-E7-36.

212 2001 (4) SA 1288 (CC), 2001 (8) BCLR 765 (CC) ('*Moise*').

213 Act 94 of 1970. This Act has since been repealed and replaced by the Institution of Legal Proceedings against certain Organs of State Act 40 of 2002. This Act seeks to standardize the period of prescription applicable to litigation against organs of state.

the expiration of the 90 days, which permission the court could grant if it was satisfied: (a) that there was no prejudice to the debtor; or (b) that special circumstances prevented the claimant from reasonably sending the notice within 90 days.

It is clear, therefore, that the provision was less harsh than the one impugned in *Mohlomi*. In particular, the power of the court to condone non-compliance, as

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well as the fact that the 90 days only began to run when the claimant had knowledge of the relevant facts, gave the provision a measure of flexibility that did not apply to the provision in *Mohlomi*. Nevertheless, the Court still struck it down as an unjustifiable limitation on the right of access to court. The limitation analysis turned on the failure of the state to justify the measure adequately. Of interest to this chapter is the analysis in respect of the content of FC s 34.

The Court in *Moise* held that the provision provided a very short period of time in which to issue the notice.<sup>214</sup> Furthermore, the condonation possibility did not remove the obstacle that the notice-period presented to access to court:

The obstacle remains regardless of this potential amelioration of its harshness. This is particularly so if one takes into account that many potential litigants (arguably the majority) are poor, sometimes illiterate and lack the resources to initiate legal proceedings within a short period of time. Many are not even aware of their rights and it takes time for them to obtain legal advice. Some come by such advice only fortuitously. For them a mere 90 days from the commission of the delict within which to serve formal notice on the debtor(s) is, in the words of Didcott J in *Mohlomi*, not a 'real and fair' 'initial opportunity' to approach the courts for relief.<sup>215</sup>

In particular, the Court in *Moise* emphasized that condonation was not there for the asking and that the considerations justifying condonation were clearly circumscribed.<sup>216</sup> The Court therefore concluded that the provision unjustifiably limited the right of access to court.<sup>217</sup>

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214 *Moise* (supra) at para 13.

215 *Ibid* at para 14.

216 *Ibid* at para 15.

217 *Ibid* at para 16.

A 90-day notice period in terms of the Mental Health Act,<sup>218</sup> similar to the one considered in *Moise*,<sup>219</sup> was also declared invalid by the Constitutional Court.<sup>220</sup> In *Potgieter* the Court held that, in the light of its judgments in *Moise* and *Mohlomi*, the 90-day period did not give litigants a fair or adequate opportunity to institute litigation.<sup>221</sup> The Court held that the time-limit was particularly outrageous and drastic given the class of person to whom it would apply.<sup>222</sup> No attempt was made by the respondents to justify the measure and it was declared unconstitutional.<sup>223</sup>

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Recently, in *Engelbrecht v Road Accident Fund and Another*,<sup>224</sup> the Constitutional Court struck down regulation 2(1)(c) of the regulations made in terms of the Road Accident Fund Act.<sup>225</sup> The RAF Act established the Road Accident Fund (RAF), the purpose of which is to compensate those who have been injured as a result of the driving of a vehicle. Section 17(1)(b) of the RAF Act provides for compensation for bodily injuries to victims of so-called hit and run accidents where the identity of the driver or owner of the offending vehicle has not been established. Regulation 2(1)(c) provided that the RAF will not be liable to compensate a person in terms of s 17(1)(b) of the RAF Act unless the victim 'submitted, if reasonably possible, within 14 days after being in a position to do so, an affidavit to the police in which particulars of the occurrence concerned were fully set out'.

The Court in *Engelbrecht* held that it was unnecessary to approach the matter, as it had done in *Mohlomi*, against the background of the state of affairs prevailing in South Africa. The period of 14 days, especially in the light of the fact that a 6-month period had been struck down in *Mohlomi*, was simply too short.<sup>226</sup> What the *Engelbrecht* Court seems to have been saying is this: in *Mohlomi*, the focus was on

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218 Act 18 of 1973.

219 The provision, s 68(4) of the Act, reads:

No such proceedings shall be commenced after the expiry of three months after the act complained of, or, in the case of a continuance of the cause of action, after the expiry of three months with effect from the termination thereof: Provided that in estimating the said period of three months so limited for the commencement of proceedings, no account shall be taken of any time or times during which the person wronged was lawfully under detention as a mentally ill person or was ignorant of the facts which constitute the cause of action.

220 *Potgieter v Lid van die Uitvoerende Raad: Gesondheid, Provinsiale Regering, Gauteng en Andere* 2001 (11) BCLR 1175 (CC).

221 *Ibid* at para 7.

222 *Ibid*.

223 *Ibid*.

224 2007 (5) BCLR 457 (CC) ('*Engelbrecht*'). The discussion of this case draws heavily from K Hofmeyr & A Friedman 'Constitutional Law' (2007) January-March *Juta's Quarterly Review of South African Law*. We are grateful to Kate Hofmeyr for giving us permission to use this work and for her invaluable input in formulating our analysis.

225 Act 56 of 1996 ('RAF Act').

the fact that there are particular difficulties facing members of South African society which make a 6-month prescription period unreasonable. In any society, 14 days would be too short and it was therefore unnecessary to rely upon the particular difficulties facing South Africa in reaching its conclusion.

Relatively soon before this matter arose, the Supreme Court of Appeal had handed down judgment in *Road Accident Fund v Makwetlane* and had upheld the constitutionality of reg 2(1)(c).<sup>227</sup> The Supreme Court of Appeal in *Makwetlane*, in a split decision, rejected the argument based on FC s 34. The majority was of the view that a victim of a hit and run accident has no action at common law and there is therefore no cause of action that is limited by the time frame imposed by reg 2(1)(c).<sup>228</sup> Without a justiciable claim, there can be no application of FC s 34.

The Constitutional Court rejected this reasoning in *Engelbrecht*. Kondile AJ held, for a unanimous court, that a victim of a hit and run accident has a common-law right to compensation. The capacity to recover damages pursuant to a hit and run claim was another matter, but the lack of good prospects of

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success does not affect the existence of the common-law right. In any case, knowing the identity of the defendant is not a guarantee to recovery, which is why the legislature enacted the RAF Act and its predecessors in the first place.<sup>229</sup> The Court held that a victim of a hit and run claim has a common-law right to compensation that has been enhanced by the legislature with a view to giving the greatest possible protection to those who have suffered loss as a consequence of negligent driving. FC s 34 therefore had application to this matter and the applicant was entitled to rely on it.<sup>230</sup>

The Constitutional Court has, until recently, only been called upon to consider the constitutionality of time-based bars to the institution of claims arising from statute. In *Barkhuizen*, the Court, in a split decision, upheld a clause in an insurance policy that excluded insured parties from instituting legal proceedings against the insurer if not instituted within 90 days of the insurer repudiating liability in terms of the insurance contract.

The case is of interest because of the majority's and the minority's reasoning on the correct approach to determining the constitutionality of clauses in contracts. That issue falls beyond the scope of this chapter and we confine ourselves to a consideration of the Court's reasoning in regard to FC s 34. The Court's conclusion in regard to the correct approach to considering contractual clauses is relevant in one respect: the Court held that it was preferable to consider FC s 34 in the context of

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226 *Engelbrecht* (supra) at para 31.

227 2005 (4) SA 51 (SCA) ('*Makwetlane*'). For a discussion of this case, and the related line of cases, see C Ala 'Submission of an Affidavit to the Police as a Prerequisite for Liability in Unidentified Vehicle Accident Claims: *Road Accident Fund v Thugwana* and *Road Accident Fund v Makwetlane*' (2006) 123 *SALJ* 573.

228 *Makwetlane* (supra) at para 17.

229 *Engelbrecht* (supra) at para 20.

230 *Ibid* at paras 23-4.

the question whether the clause was contrary to public policy, rather than applying FC s 34 directly to the clause.<sup>231</sup>

Ngcobo J, for the majority, referred to the fact, highlighted in *Mohlomi*, that time bars to the institution of actions serve an important purpose: in essence, ensuring that litigation is brought within a reasonable time, while evidence is still available, to prevent prolonged uncertainty. Ngcobo J held that there was no reason in logic or in principle to conclude that public policy would not tolerate time-limitation clauses subject to reasonableness and fairness.<sup>232</sup> Furthermore, the Final Constitution envisages that the right of access to court may be limited in terms of a law of general application where reasonable and justifiable. This too, according to Ngcobo J, reflected public policy.<sup>233</sup>

Ngcobo J held that there was no material difference between the *Mohlomi* test applicable in direct challenges based on FC s 34 and the public-policy approach adopted in *Barkhuizen*. In terms of *Mohlomi*, a time-limitation clause would limit the right of access to court if it did not give a litigant an adequate and fair

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opportunity to obtain redress. Similarly, it would be contrary to public policy to enforce a term of a contract that does not allow the person bound by it an adequate and fair opportunity to seek judicial redress.<sup>234</sup>

An interesting part of Ngcobo J's judgment is that it took one step further the debate between the Supreme Court of Appeal and the Constitutional Court on the scope of the right in FC s 34. In *Engelbrecht/Makwetlane*, the Supreme Court of Appeal found FC s 34 to be applicable only to claims that already exist. If a person has a pre-existing claim in terms of some or other law and the legislature seeks to limit the scope for prosecuting the claim by shortening the time within which to institute action, then FC s 34 becomes applicable and the question then is whether it has unjustifiably been limited. Where, however, the legislature creates the right for the first time but, at the same time, imposes a time limit on the exercise of the right, there can be no application of FC s 34 — the premise being that the legislature is free to impose conditions upon the exercise of a right which, but for the largesse of the legislature, would not have come into existence. In *Engelbrecht*, the Constitutional Court rejected this conclusion by holding that, in fact, a hit and run victim has a common-law claim and the fact whether such a person would ultimately be successful in obtaining redress does not affect this conclusion. In *Barkhuizen*, Ngcobo J went a step further:

[T]here is a conceptual difference between a statute which introduces a limitation on the period within which a pre-existing right may be prosecuted and a contract which establishes rights and time periods within which those rights must be prosecuted. That

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231 *Barkhuizen* (supra) at para 30. Langa CJ dissented on this point, holding that FC s 34 may indeed be directly applicable to contractual clauses. Ibid at para 186. For a critique of the Court's method of analyzing such contractual claims in terms of 'indirect application' see S Woolman 'The Amazing, Vanishing Bill of Rights' (2007) 124 *SALJ* 742.

232 Ibid at para 48.

233 Ibid.

234 *Barkhuizen* (supra) at para 51.

conceptual difference, however, cannot have the consequence suggested by the Supreme Court of Appeal. Such a consequence would undermine the importance of the right of access to courts. In each case, of course, the question will be whether the contract contains a time limitation clause which affords a contracting party an adequate and fair opportunity to have disputes arising from the contract resolved by a court of law. In approaching this question, a court will bear in mind the need to recognise freedom of contract but the court will not let blind reliance on the principle of freedom of contract override the need to ensure that contracting parties must have access to courts.<sup>235</sup>

Ngcobo J held that, when considering whether the time-period imposed by a contract is fair, there are two questions: (a) is the time-clause itself unreasonable; (b) if not, is it nevertheless unenforceable in the light of the circumstances which caused non-compliance?<sup>236</sup> As far as the first question is concerned, a balancing between two interests is required to determine whether the term is unreasonable: on the one hand, there is a public interest in parties complying with terms to which they have agreed and, on the other hand, all individuals have a right to obtain judicial redress.<sup>237</sup> Once the clause, in the light of this test just described, is

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held to be reasonable, the party seeking to escape its consequences has a second opportunity to prevail: he may demonstrate that although the clause ordinarily is reasonable, it would be unreasonable in the light of the particular circumstances to enforce it. The onus would be on the party seeking to escape its consequences to demonstrate that it would be unreasonable to enforce the clause.<sup>238</sup> It seems that, when considering the first question, the main focus is on whether the clause is manifestly unreasonable in the light of the approach established in *Mohlomi*. When considering the second question, the focus seems mainly to be on the circumstances in which the contract was concluded: in particular, the relative bargaining positions of the parties. However, the court will also consider whether factors beyond the control of the party seeking to escape the clause prevented him from complying with its time frame.

The time bar in *Mohlomi* operated inflexibly: regardless of whether the plaintiff had sufficient knowledge to institute his action or not. In *Barkhuizen*, the Court pointed out that the 90-day period began to run only once the insured had full knowledge of his claim and had submitted his claim to the insurer. Such a time bar was not manifestly unreasonable.<sup>239</sup> As far as the second question was concerned the Court held that, although there may often be circumstances in South Africa in which contracts of this nature are signed as a consequence of the unequal bargaining power of the parties, there was nothing on the evidence to suggest that the parties were unequal in this matter. Therefore, there was nothing contrary to

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235 Ibid at para 55.

236 Ibid at para 56.

237 Ibid at para 57.

238 *Barkhuizen* (supra) at para 58.

239 Ibid at paras 62–63.

public policy about the clause.<sup>240</sup> In addition to considering the bargaining power of the parties, the Court also considered whether there were any good reasons why the applicant had been unable to comply with the time clause: the Court again pointed out that it would be contrary to public policy to enforce compliance with a time bar where non-compliance was a product of factors beyond the insured's control. In this case, the insured failed to plead facts explaining why he did not or could not have complied with the clause.<sup>241</sup>

Moseneke DCJ and Sachs J dissented in separate judgments.<sup>242</sup> Both disagreed with the focus in Ngcobo J's judgment on the personal circumstances of the person seeking to avoid the consequences of the time bar. They both preferred objective enquiries. And, indeed, both justices found that the particular clause in issue was contrary to public policy. Moseneke DCJ's preferred approach was to examine the time bar in the context of the contract as a whole to see whether it unreasonably limits the right to judicial redress.<sup>243</sup> This objective enquiry focuses

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on the terms of the contract and is unrelated to the personal circumstances of the applicant.<sup>244</sup> Sachs J noted that the time period established in the contract was less than

ten per cent of that in respect of which either an ordinary contractual claim, or else a claim against the Road Accident Fund, would prescribe; has the effect of significantly limiting a right to have a dispute settled by a court, a right long recognised by the common law and now guaranteed as a fundamental right by the Constitution; is not subject to express qualifications in case of impossibility or difficulty of compliance, nor apparently permissive of condonation where considerations of justice would require that its harshness be tempered by prolongation of the time; [and] when invoked does not simply limit or qualify the insurance claim, but wipes the claim out altogether, enabling the insurer to keep the premium, while the insured loses the right to find out if he or she should in fact have been paid for the damage done to his car.<sup>245</sup>

Section 12 of the Prescription Act deals with the question when prescription begins to run. Section 12(3) provides that '[a] debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care.' Section 5(1)(c) of the previous Prescription Act<sup>246</sup> contained a similar provision. In *Van Zijl v Hoogenhout*, the Supreme Court of Appeal considered the question whether a claim for damages arising from sexual abuse allegedly perpetrated between 1958 and 1967, where the

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240 Ibid at para 66.

241 Ibid at para 84.

242 Mokgoro J concurred in the judgment of Moseneke DCJ. Although the unpublished version of the judgment posted on the internet reflects Mokgoro J's concurrence after the judgment of O'Regan J, and not Moseneke DCJ, the text reflects that she concurred in Moseneke DCJ's judgment.

243 *Barkhuizen* (supra) at paras 96 and 97.

244 *Barkhuizen* (supra) at para 96.

245 Ibid at para 183.



victim had attained majority in 1973 and instituted action in 1999, had prescribed.<sup>247</sup> The claim would have prescribed within three years of the complainant reaching the age of majority, unless s 5(1)(c) of the 1943 Prescription Act was applicable. The potential application of s 5(1)(c) arose from the fact that the evidence was that it may take many years before victims of sexual abuse are able to see their assailant, as opposed to themselves, as being to blame.<sup>248</sup>

The *Van Zijl* court ultimately found that there was sufficient evidence to suggest that the appellant had only come to realize that the defendant was responsible for her abuse in 1997 and that the defendant had failed, therefore, to discharge the onus of proving the special plea of prescription. Although the court did not deal in detail with FC s 34, it did, as part of its reasoning, point out that 'the plaintiff is entitled to the benefits of a constitutional dispensation that promotes, rather than inhibits, access to courts of law.'<sup>249</sup>

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In *Ditedu v Tayob*, the High Court referred to the above dictum of the Supreme Court of Appeal and applied similar reasoning to s 12(3) of the current Prescription Act.<sup>250</sup> In so doing, the High Court held that a plaintiff's claim based on the negligence of her attorney only arose when she consulted another attorney and not when the negligent conduct actually took place. The defendant's negligent conduct was a 'fact', as envisaged in s 12(3), which would only come to the attention of a layperson upon receiving adequate advice from another lawyer.<sup>251</sup>

These cases demonstrate that FC s 34 is not only of relevance when considering whether legislation unreasonably truncates the period in which a plaintiff may claim. It also speaks directly to the question whether prescription has begun to run in the first place.

### (iii) **Res judicata**

The special plea of *res judicata* arises from the common-law. In essence, it concerns a situation where the subject-matter of a dispute between the parties has already been determined previously by a court. If the requirements of the special plea are met, then the defendant who raises it will succeed in having the plaintiff's claim dismissed without engaging the merits. Furthermore, since this plea is not merely dilatory, raising it successfully should result in a final judgment in favour of the defendant. It is clear, therefore, how the doctrine could serve to limit a plaintiff's right of access to court. The constitutionality of the doctrine has not been considered

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246 Act 18 of 1943.

247 2005 (2) SA 93 (SCA).

248 *Ibid* at paras 10–14.

249 *Ibid* at para 7.

250 2006 (2) SA 176 (W).

251 *Ibid* at paras 9–12.

in detail. In the one case in which it was considered,<sup>252</sup> the High Court, acknowledging that it was required to develop the common law in the light of the Final Constitution, used FC s 34 (and IC s 22)<sup>253</sup> to inform its understanding of the elements of the special plea. The High Court was concerned with the exact requirements of the special plea and, having considered the authorities in detail, held that the elements were that the previous judgment was given by a competent court and (1) was between the same parties, (2) was based on the same cause of action and (3) was with respect to the same subject matter, or thing.<sup>254</sup> The High Court then continued, somewhat cryptically, that

[t]he subject matter claimed in the two relevant actions does not necessarily and in all circumstances have to be the same. However where there is a likelihood of a litigant being denied access to the courts in a second action, and to prevent injustice it is necessary that the said essentials of the threefold test be applied. Conversely in order to ensure overall fairness (2) or (3) above may be relaxed.<sup>255</sup>

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It did, however, continue to point out that

[a] court must have regard to the object of the *exceptio res judicata* that it was introduced with the endeavour of putting a limit to needless litigation, and in order to prevent the recapitulation of the same thing in dispute in diverse actions, with the concomitant deleterious effect of conflicting and contradictory decisions. This principle must be carefully delineated and demarcated in order to prevent hardship and actual injustice to parties.<sup>256</sup>

#### (iv) Procedural rules

O'Regan J, in *Giddey*, recently said the following:

[F]or courts to function fairly, they must have rules that regulate their proceedings. Those rules will often require parties to take certain steps on pain of being prevented from proceeding with a claim or defence. A common example is the rule regulating the notice of bar in terms of which defendants may be called upon to lodge their plea within a certain time failing which they will lose the right to raise their defence. Many of the rules of court require compliance with fixed time limits, and a failure to observe those time limits may result, in the absence of good cause shown, in a plaintiff or defendant being prevented from pursuing their claim or defence. Of course, all these rules must be compliant with the Constitution. To the extent that they do constitute a limitation on a right of access to court, that limitation must be justifiable in terms of section 36 of the Constitution. If the limitation caused by the rule is justifiable, then as long as the rules are properly applied, there can be no cause for constitutional complaint. The rules may well contemplate that at times the right of access to court will be limited. A challenge to the legitimacy of that effect, however, would require a challenge to the rule itself. In the

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252 *Bafokeng Tribe v Impala Platinum Ltd and Others* 1999 (3) SA 517 (B), 1998 (11) BCLR 1373 (B) ('Bafokeng').

253 The court held that, for the purposes of the case, there was no material difference between the provisions of IC s 22 and FC s 34. *Bafokeng* (supra) at 1417.

254 *Ibid* at 1419.

255 *Ibid*.

256 *Bafokeng* (supra) at 1419.

absence of such a challenge, a litigant's only complaint can be that the rule was not properly applied by the court. Very often the interpretation and application of the rule will require consideration of the provisions of the Constitution, as section 39(2) of the Constitution instructs. A court that fails to adequately consider the relevant constitutional provisions will not have properly applied the rules at all.<sup>257</sup>

The Constitutional Court seems to be saying that two important things must be kept in mind when considering the correct approach to the application of FC s 34 to procedural rules. First, as O'Regan J has made clear, the procedural rules are aimed at enhancing the fairness of proceedings and so the underlying rationale for the entire panoply of procedural rules is congruent with one of the aims of FC s 34.<sup>258</sup> This congruence will often make it easier to justify limiting a particular litigant's right of access in order to enhance access for all. Secondly, it is not just by way of direct challenge that the Final Constitution becomes relevant. There is much scope, within the rules, for the application of FC s 39(2). In

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particular, whenever a discretion may be exercised by a court (for example, in respect of costs), this discretion must be exercised in a way that promotes the spirit, purport and object of the Bill of Rights. FC s 39(2)'s obligation will require courts, when exercising a discretion that may have implications for a litigant's access to court, to bear the provisions of FC s 34 in mind.<sup>259</sup> Of course, since FC s 36 is also part of the Bill of Rights, it may be necessary to build the possibility of limitation into any exercise of a discretion.<sup>260</sup>

*Eke v Sugden* offers just such an example of a case in which FC s 34 was read with FC s 39(2) to interpret a particular rule in the spirit of the Bill of Rights: *Eke* concerned rule 10 of the Magistrates' Courts Rules.<sup>261</sup> Rule 10 provides that '[i]f summons in an action be not served within 12 months of the date of its issue or, having been served, the plaintiff has not within that time after service taken further steps in the prosecution of the action, the summons shall lapse.' The High Court held that the phrase 'further steps in the prosecution of the action', the meaning of which was undefined and in dispute, had to be interpreted in such a way as to impose the least possible restriction on litigants' right of access to courts.<sup>262</sup> Any act performed by a litigant that would advance the proceedings nearer to completion would evince his intention of pursuing the matter further, and would qualify as a further step as

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257 *Giddey NO v JC Barnard and Partners* 2007 (2) BCLR 125 (CC) ('*Giddey*') at para 16.

258 See also *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 8 (The Constitutional Court held that 'even the most public spirited of litigants cannot simply ignore those procedural rules which are designed to regulate the fair and orderly dispatch of Court business and the protection of the rights of all.')

259 *Giddey* (supra) at para 18.

260 See *Barkhuizen* (supra) at para 48.

261 2001 (2) SA 216 (E) ('*Sugden*').

262 *Ibid* at 221E.

envisaged by rule 10.<sup>263</sup> This approach led the High Court to conclude that the furnishing of security for costs constituted a further step in terms of rule 10.<sup>264</sup>

It is a rule of the common law that review proceedings must be instituted within a reasonable time. If such proceedings are instituted within an unreasonable period of time, the presiding officer may nevertheless, in the exercise of a discretion, condone the delay and allow the review to proceed. It is now axiomatic that this discretion must be exercised in the light of FC s 34. In *Bellocchio Trust Trustees v Engelbrecht NO and Another*,<sup>265</sup> however, the applicant challenged the constitutionality of the common-law rule and argued that it prevented his access to court. Hlophe JP rejected this view. He held that the rule does not limit the right of access to court and that, even if it did, it is reasonable and justifiable. Hlophe JP stated that the applicant's argument would enable an applicant to institute unreasonably delayed review proceedings even if such delay would cause undue prejudice to the respondent. Furthermore, litigation would never be finalized.<sup>266</sup> Neither of these consequences could have been envisaged by the drafters of FC s 34.<sup>267</sup> The existence of the discretion, and the fact that the judge considers

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all relevant circumstances before refusing to allow the review to proceed, meant that the right of access to court was merely regulated, not prohibited.<sup>268</sup>

Rule 35 of the Uniform Rules deals with discovery. In terms of the rule parties involved in a trial provide copies of relevant documents by deposing to a discovery affidavit explaining the relevance of the documents in question and detailing which documents are to be provided to the other party. If a party is of the view that the other party is withholding relevant documents from him, then he has the onus of proving that there are relevant documents in the latter party's possession that are not being disclosed. Although access to all relevant documentation is a component of a fair civil trial, the fact that the onus is on the party seeking the additional documents does not violate FC s 34.<sup>269</sup> Notwithstanding the incidence of the onus, rule 35 is a vehicle that enables litigants to gain access to the documentation that is of relevance.<sup>270</sup>

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263 Ibid at 221F.

264 Ibid at 222C.

265 2002 (3) SA 519 (C) ('*Bellocchio*').

266 Ibid at 523E-G.

267 Ibid at 523H.

268 *Bellocchio* (supra) at 523J-524C.

269 *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others* 1999 (2) SA 279 (T), 320A-E.

270 Ibid.

Although not decided on the basis of FC s 34, *Jaftha v Schoeman; Van Rooyen v Stoltz* provides an example of a case in which the procedural rules of the Magistrates' Courts did not adequately protect the right of access to court.<sup>271</sup> The two applicants were unemployed women, with few assets, living in Prince Albert. Both women faced the threat of losing their homes in sales in execution for trifling debts. In a successful constitutional challenge to the relevant provision of the Magistrates' Courts Act,<sup>272</sup> the Constitutional Court held, relying on the right to housing in FC s 26, that the failure to provide judicial oversight over sales in execution against immovable property of judgment debtors in s 66(1)(a) of the Magistrates' Courts Act was unconstitutional. To remedy the defect, the Constitutional Court read words into the Act which had the effect of imposing judicial supervision on execution against immovable property.<sup>273</sup>

FC s 34 has also underwritten a more lenient approach to the substitution of parties where the plaintiff has incorrectly cited the wrong defendant. Substitution will be allowed

unless the application to amend is *mala fide* or unless the amendment would cause such injustice or prejudice to the other side as cannot be compensated by an order for costs and, where appropriate, a postponement. A mere erroneous description of the defendant will be condoned. Even the citing of the wrong defendant will be condoned, where there is no prejudice.<sup>274</sup>

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A categorical denial of substitution where there is no prejudice would be incompatible with the right of access to courts.<sup>275</sup>

An example of a procedural rule that has the potential to limit litigants' access to court is contained in s 25(1) of the Supreme Court Act. That section provides that if a litigant wishes to sue a judge of the superior courts in any civil action he requires the leave of the court in which the action is brought.<sup>276</sup> This rule has been upheld along the same lines as the rules relating to vexatious litigants.<sup>277</sup> In *Soller*, Ngoepe JP

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271 2005 (2) SA 140 (CC), 2005 (1) BCLR 78 (CC) ('*Jaftha*').

272 Act 32 of 1944.

273 *Jaftha* (supra) at para 67.

274 *Airconditioning Design & Development (Pty) Ltd v Minister of Public Works, Gauteng Province* 2005 (4) SA 103 (T) at para 11 ('*Airconditioning Design*').

275 *Airconditioning Design* (supra) at para 8.

276 Section 25(1) reads:

Notwithstanding anything to the contrary in any law contained, no summons or subpoena against the Chief Justice, a Judge of Appeal or any other Judge of the Supreme Court shall in any civil action be issued out of any court except with the consent of that court: Provided that no such summons or subpoena shall be issued out of an inferior court unless the Provincial Division which has jurisdiction to hear and determine an appeal in a civil action from such inferior court, has consented to the issuing thereof.

277 *Soller v President of the Republic of South Africa and Others* 2005 (3) SA 567 (T) ('*Soller*').

pointed out that the rule serves a vital purpose: the independence of the judiciary, and the capacity of judges to perform their tasks fearlessly, would be severely hampered if judges were routinely required to face litigation as a consequence of their decisions.<sup>278</sup> The rule also ensured that judges would not spend more time on defending litigation than performing their function.<sup>279</sup> Important considerations leading to the conclusion that the rule is justifiable were that: first, the rule does not constitute a complete bar to the institution of proceedings — the section creates a bar only for claims without merit.<sup>280</sup> Secondly, if leave to sue the judge in question is refused, then the decision is appealable.<sup>281</sup>

*Soller* concerned an application to bring a defamation claim against a judge as a consequence of comments that he had made in one of his judgments. The considerations relating to the independence of the judiciary are particularly compelling in this context — if judges could be sued without leave as a consequence of their written judgments, there may indeed be a chilling effect on their capacity to render fearless judgments. Ngoepe JP held, however, that the rule is justified even in the context of ordinary debts and other proceedings against judges that are unrelated to their judgments.<sup>282</sup> It would seem that, in this context, the measure is justified solely on the basis that, without a screening process, judges' time would be wasted if they were required to defend litigation. While this justification is far less compelling than the first rationale, we agree that it is sufficient to justify the measure. Protecting judges from frivolous law-suits that have the potential to impede their capacity to perform their tasks properly serves the purpose of FC s 34.

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In terms of the Constitutional Court rules, a litigant may approach the Court for direct access.<sup>283</sup> It is up to the Court to decide whether it is in the interests of justice to allow such access.<sup>284</sup> The Constitutional Court has rejected the argument that the requirement that leave be obtained before the court may be approached by way of direct access unjustifiably limits the right of access to courts. It did so for three reasons.<sup>285</sup>

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278 Ibid at para 14.

279 Ibid at para 14.

280 Ibid at para 16.

281 Ibid at para 16.

282 Ibid at para 17.

283 If direct access is granted, then the Constitutional Court hears the matter as a court of first and final instance, rather than as an appellate court, which is the norm.

284 Constitutional Court Rules, 2003, Rule 18. The equivalent rule in the 1998 rules was Rule 17.

285 *Dormehl v Minister of Justice and Others* 2000 (2) SA 987 (CC), 2000 (5) BCLR 471 (CC) ('*Dormehl*') at paras 4–5.

- (a) The Constitution itself envisages that leave be obtained before a litigant may approach the Constitutional Court by way of direct access.<sup>286</sup>
- (b) FC s 34 of the Constitution does not give a litigant the right to approach any court in the court hierarchy for relief. So long as there is a court with the jurisdiction to grant the relief sought by the applicant, the requirements of FC s 34 are met. Since the High Courts have jurisdiction to decide constitutional matters, FC s 34 does not require direct access to the Constitutional Court as of right.
- (c) The Constitutional Court, as the highest court in constitutional matters, is ordinarily a court of appeal and acts as a court of first and final instance only in limited circumstances. Other than in those circumstances, it is undesirable for the Constitutional Court to sit as a court of first and final instance.<sup>287</sup> If the Court routinely had to hear constitutional matters as a court of first instance, it would be required to 'deal with disputed facts on which evidence might be necessary, to decide constitutional issues which are not decisive of the litigation and which might prove to be purely academic, and to hear cases without the benefit of the views of other courts having constitutional jurisdiction'.<sup>288</sup> Furthermore, it is generally undesirable for a litigant to have no prospect of appeal against a decision. Experience has shown that decisions are more likely to be correct if more than one court considers them, and this is not possible where the Constitutional Court grants direct access.<sup>289</sup>

It should be noted that the wording of the rule in the Constitutional Court's Rules that deals with direct access goes further than the text of the Final Constitution. The Final Constitution envisages that direct access will be granted with leave of the court when it would be in the interests of justice. The Constitutional Court's rules envisage that direct access will be granted only in 'exceptional circumstances'. Chaskalson P (as he then was) alluded to the possibility that it may be

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in the interests of justice for the court to grant direct access when the requirement of 'exceptional circumstances' is not met.<sup>290</sup> In other words, it would appear that the ambit of circumstances in which direct access may be granted by the Court in terms of its rules is narrower than that envisaged by the Final Constitution. He did not, however, decide this question. The requirement that direct access only be granted in exceptional circumstances would not, in any case, limit the right of access to court. As discussed above, the right of access to court does not include a right of access to any court.<sup>291</sup>

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286 FC s 167(6).

287 *Bruce v Fleecytex Johannesburg CC* 1998 (2) SA 1143 (CC), 1998 (4) BCLR 415 (CC) ('Bruce') at para 8.

288 *Ibid* at para 7.

289 *Ibid* at para 8.

290 *Bruce* (supra) at para 4.

The move of the Constitutional Court to restrict rather than enlarge the circumstances in which direct access will be granted reduces, Jackie Dugard argues, its capacity to serve as a forum for the poor to be heard.<sup>292</sup> In order to reach the Court through the ordinary process, starting in the High Court and possibly appealing first to the Supreme Court of Appeal, significant resources are required.<sup>293</sup> Dugard contends that, in the absence of a right to free legal representation in constitutional matters,<sup>294</sup> the only hope for greater access to justice for the poor is for the Constitutional Court to expand the circumstances in which direct access will be granted.

Dugard argues that in terms of the test applied by the Constitutional Court when deciding whether to grant direct access, the following factors are relevant: whether there are exceptional circumstances requiring the court to sit as a court of first and final instance; whether the matter is urgent; whether there are prospects of success; and whether other remedies have been exhausted.<sup>295</sup> While Dugard accepts the criteria of prospects of success and 'exhaustion of other remedies and procedures', she argues that the requirements of 'urgency' and 'exceptional circumstances' should be replaced by a consideration of whether it would be in the public interest to grant direct access.<sup>296</sup> When determining whether it would be in the public interest to grant direct access, the Court should focus on whether the matter is of general application or fundamental importance and, particularly, whether the matter engages the fundamental rights of the poor.<sup>297</sup>

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We share Dugard's concern that the poor lack meaningful access to the courts and support her attempt to devise an appropriate mechanism to enhance such access. We disagree, however, with her proposal regarding access to the Constitutional Court. We have noted at various points in this chapter that access to courts in this country is determined largely by the means of the potential litigants and that being poor makes it extremely difficult to enjoy one's right of access. The solution to this problem does not, in our view, lie in increasing the scope of the Constitutional Court's direct-access jurisdiction. Extremely good reasons exist for retaining the Constitutional Court's largely appellate function. All parties will be ill served if the Constitutional Court acts as a court of first and final instance too readily.

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291 *Dormehl* (supra).

292 J Dugard 'Court of First Instance? Towards a Pro-Poor Jurisdiction for the South African Constitutional Court' (2006) 22 *SAJHR* 261, 266 (Dugard 'Court of First Instance').

293 *Ibid*

294 *Ibid* at 268-270. See § 59.4(b)(i) *infra*. See also S Woolman and D Brand 'Is There a Constitution in this Courtroom: Constitutional Jurisdiction after *Afrox* and *Walters*' (2003) 19 *SA Public Law* 38.

295 *Ibid* at 272-273.

296 *Ibid* at 277.

297 *Ibid* at 277 n77.



We disagree with Dugard's treatment of these arguments. As far as the leading of evidence is concerned, she suggests that the cases in which evidence will need to be led will be 'minimal'.<sup>298</sup> She suggests that

Many Constitutional Court applications already are more in the form of abstract than concrete reviews, both in terms of the way the issue is framed and the relief granted, and the Court could further minimise its exposure to oral evidence and factual disputes by explicitly limiting argument to matters of law and constitutional interpretation.

In our view, the more urgent need is for constitutional litigation to be brought in line with ordinary litigation in our courts. Many constitutional challenges require the leading of evidence. The Constitutional Court has often had occasion to remark that the fact that a matter has been resolved on the papers is undesirable, given the disputes of fact that may be involved.<sup>299</sup> In particular, the Court has held that justification of a limitation will often be fact-based and that it will be necessary for the party seeking to justify a measure to lead factual evidence in support of a fact-based justification.<sup>300</sup> The truth is that thus far constitutional litigation has been treated as a special case in which litigants *repeatedly* bring applications to challenge law or conduct. These challenges often ought to be raised as constitutional matters within a trial. Litigants ought to recognize that the trial procedure is often better suited to determining constitutional challenges than the procedures of motion court. If they did, the Constitutional Court would possess far greater factual clarity in constitutional cases.

As far as the undesirability of the court being a court of first and final instance is concerned, Dugard suggests that it is the hardest argument to refute because it is the hardest argument to substantiate. She argues that this issue 'boils down to a matter of policy choices and balancing lesser harms'.<sup>301</sup> In other words, on the assumption that it would be better for the poor for the Constitutional Court to

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grant direct access more frequently, the Court would be entitled to make a policy choice to sacrifice the ordinarily desirable approach of having more than one court rule on cases in favour of a pro-poor approach. Dugard says that the Constitutional Court has shown that it is capable of acting as a court of first and final instance in those areas in which it has exclusive jurisdiction — such as disputes between national and provincial spheres of government.

Once again, we disagree. The Constitutional Court exercises exclusive jurisdiction in those rare cases, such as when the question arises whether the President has failed to discharge a constitutional obligation, in which the nature of dispute, and the organs of state involved, requires a court with the institutional status of the Constitutional Court to resolve the dispute. Other than in this narrow class of cases, which, after all, are expressly envisaged by the Final Constitution itself, it is plainly

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298 Dugard 'Court of First Instance' (supra) at 278.

299 See, for example, *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others* 2005 (2) SA 359 (CC), 2005 (4) BCLR 301 (CC) at paras 52-6.

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

301 Dugard 'Court of First Instance' (supra) at 278.

preferable for the parties to a matter to retain the possibility of an appeal. Of course, if expanding the circumstances in which direct access is to be granted by the Constitutional Court is indeed the elixir necessary to enhance the rights of the poor, perhaps the possibility of appeal ought to be sacrificed. However, it is in everyone's interest, including the poor, that the possibility of appeal exists in as many cases as possible. The decision-making process is enhanced when the possibility of appeal remains in place, and this is to the advantage of all litigants. Constitutional courts, such as the US Supreme Court, often argue that they benefit from the multiple perspectives that district and circuit courts offer on constitutional issues.

Furthermore, it is our view that it might set up something of a false dichotomy to offer a choice between expanded access and insufficient vindication of the rights of the poor. There are a range of measures that could be adopted at High Court level that would give the poor a louder voice without sacrificing the advantages that flow from the mainly appellate function exercised by the Constitutional Court. During the course of this chapter we discuss the question whether legal representation at state expense in certain civil matters is a component of the rights provided in FC s 34. We also point to the undeniable role that the approach to costs adopted by the High Court and SCA plays in inhibiting access to courts. There are a range of measures that could be adopted at High Court level to ensure greater access for the poor. These two are but examples. Another example might be for an enhanced role to be played by *amici curiae* at High Court level. We are aware of instances where judges have appointed members of the Bar to make submissions on issues implicating the rights of the poor, in circumstances where the parties themselves were inadequately represented. If this process could be adopted more often, there is no doubt that the poor's interests would be given more attention. It needs to be recognized that, ideally,

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the High Courts should be the institutions that are able to give sufficient weight to the interests of the poor. The fact that there are certain aspects of their procedure that currently inhibit that possibility does not require that the Constitutional Court should regularly be made into a court of first instance.

#### **(v) Refusing leave to appeal without reasons**

In *Mphahlele v First National Bank of South Africa Ltd*,<sup>302</sup> the applicant challenged, as a violation of access to court, the constitutionality of the practice of the Supreme Court of Appeal of refusing leave to appeal without reasons. The Court in *Mphahlele* did not consider which aspect of the right of access to court is implicated by such a challenge. It is, however, an important question. On the one hand, if there is no right of appeal in civil matters (which, as described above, is by no means a clear question), then limiting the possibility of appeal may bear no relation to the right of access to courts at all. On the other hand, it may not be conceptually legitimate to see the question of reasons as speaking to the *fairness of the hearing*, since at the leave to appeal stage we are concerned with the anterior question whether a hearing ought to be conducted in the first place. As mentioned above in the discussion on whether FC s 34 includes a right to appeal,<sup>303</sup> the Supreme Court of Appeal has treated the question of the appeal process provided in the Supreme Court Act as speaking to the fairness of the process.

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302 1999 (2) SA 667 (CC), 1999 (3) BCLR 253 (CC) ('*Mphahlele*').

303 See § 59.3(a)(iv) *supra*.

Either way, the Court in *Mphahlele* held that the practice of refusing leave without reasons did not violate the right of access to court. The Court pointed out that where a court of first instance gives a judgment, its reasons are of importance for the prosecution of an appeal. It might, therefore, be the case that there would be a failure to comply with the Final Constitution's requirements if a court of first instance failed to give reasons for its decision.<sup>304</sup> That said, the mere fact that there is no appeal against a decision of a court does not in itself justify the failure to give reasons.<sup>305</sup> The giving of reasons is not justified solely by their relevance to the appeal process. However, when dealing with appellate courts, there are other practical considerations that are relevant: it is not in the interests of justice for the rolls of appellate courts to be clogged with unmeritorious and vexatious issues of law and fact.<sup>306</sup> Since the Supreme Court of Appeal is the court of final instance in all but constitutional matters, a litigant will not be prejudiced by its failure to provide reasons. The litigant will already have received reasons from the court *a quo*, and implicit in a refusal without reasons is that there are no prospects of success on appeal.<sup>307</sup> To require full reasons from the Supreme

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Court of Appeal in this context would undermine the very reason for requiring leave in the first place<sup>308</sup>— to streamline the process in order to provide greater access for meritorious claims.

#### **(vi) Vexatious litigants**

Section 2(1)(b) of the Vexatious Proceedings Act<sup>309</sup> provides that a court may grant an order requiring a litigant to seek permission to institute legal proceedings in the following circumstances:

- On application from a person against whom proceedings have been brought or who has reason to believe that litigation is being contemplated against him;
- Where the litigant who is required to seek permission has 'persistently and without any reasonable ground instituted legal proceedings in any court or in any inferior court, whether against the same person or against different persons'; and
- Where the litigant who is required to seek permission has been given an opportunity to be heard.

Once a court has determined that a particular litigant may only institute proceedings with permission, that permission may only be granted where the court is satisfied

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304 *Mphahlele* (supra) at para 12.

305 *Ibid* at para 13.

306 *Ibid* at para 13, citing *S v Rens* 1996 (2) BCLR 155 (CC) at paras 24 and 25.

307 *Mphahlele* (supra) at paras 14–15.

308 *Mphahlele* (supra) at para 15.

309 Act 3 of 1956.

that the proceedings are not an abuse of the process of court and that there are *prima facie* grounds for the proceedings to be brought.

In *Beinash and Another v Ernst and Young and Others*, Mokgoro J, for a unanimous Court, held that, as a procedural barrier to the institution of litigation, s 2(1)(b) of the Act limited the right of access to court in terms of FC s 34.<sup>310</sup> The limitation was, however, deemed reasonable and justifiable in terms of FC s 36.<sup>311</sup> In conducting its limitation analysis, the Court pointed out that the vexatious-litigation provision protects two interests: the interests of the victim of the vexatious litigation and the public interest in ensuring that the courts are not clogged by groundless claims.<sup>312</sup> The Court wrote:

a restriction of access in the case of a vexatious litigant is in fact indispensable to protect and secure the right of access for those with meritorious disputes. Indeed, as the respondents argued, the court is under a constitutional duty to protect bona fide litigants, the processes of the courts and the administration of justice against vexatious proceedings. Section 165(3) of the Constitution requires that '[n]o person or organ of state may interfere with the functioning of the courts.' The vexatious litigant is one who manipulates the functioning of the courts so as to achieve a purpose other than that for which the courts are designed. This limitation serves an important purpose relevant to section 36(1)(b). It

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would surely be difficult to anticipate the litigious strategies upon which a determined and inventive litigator might embark. Thus there is a requirement for special authorisation for any proposed litigation.<sup>313</sup>

The Court in *Beinash* pointed out that the order rendering a person a vexatious litigant is made by a court and only where the person has persistently, and without legal grounds, initiated legal proceedings.<sup>314</sup> The extent of the limitation was not, therefore, extreme since, first, the process was subject to judicial control and, secondly, the decision of a judge to declare someone a vexatious litigant is appealable.

The *Beinash* Court also held that the provision passed the proportionality test and achieved the correct balance between the relevant interests:

The applicant's right of access to courts is regulated and not prohibited. The more remote the proposed litigation is from the causes of action giving rise to the order or the persons or institutions in whose favour it was granted, the easier it will be to prove bona fides and the less chance there is of the public interest being harmed. The closer the proposed litigation is to the abovementioned causes of action, or persons, the more difficult it will be to prove bona fides, and rightly so, because the greater will be the possibility that the public interest may be harmed. The procedure which the section contemplates therefore allows for a flexible proportionality balancing to be done, which

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310 1999 (2) SA 116 (CC), 1999 (2) BCLR 125 (CC) ('*Beinash*') at para 16.

311 *Ibid* at para 16.

312 *Ibid* at para 15.

313 *Beinash* (*supra*) at para 17.

314 *Ibid* at para 18.

is in harmony with the analysis adopted by this Court, and ensures the achievement of the snug fit to protect the interests of both applicant and the public.<sup>315</sup>

## (vii) Costs

Rule 34 of the Uniform Rules of the High Court deals with settlement offers. The general practice in the High Court, which has an express analogue in the Magistrates' Courts Rules,<sup>316</sup> is that where a defendant makes a settlement offer that exceeds the amount ultimately awarded to the plaintiff, the plaintiff is liable for the defendant's costs from the time at which the offer was made.<sup>317</sup>

In *NM and Others v Smith and Others (Freedom of Expression Institute as Amicus Curiae)*, the appellants had sued the respondents for damages arising from the publication in a book of the fact that the appellants were HIV positive.<sup>318</sup> In the High Court, the respondents had made a settlement offer that was higher than the amount ultimately awarded by the court. The court ordered the appellants to pay the respondents' costs from the date on which the offer was made. In the Constitutional Court, the majority held that each party should bear its own costs. The basis for this appears to have been that each party's conduct was blameworthy to a greater or lesser extent, and does not seem to have had anything to do with the settlement offer.<sup>319</sup> Langa CJ, however, dealt squarely with the rule relating to

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settlement offers in a minority judgment. The appellants argued that they should not have been penalized in costs by the High Court because the offer of settlement, although ultimately higher in money terms than the High Court's award, did not vindicate their constitutional rights because it did not acknowledge liability. The respondents, on the other hand, argued that the High Court's approach to costs orders in this context is important because if the approach was not followed then the defendants would be faced with a choice either to admit liability even when believing that they are not liable or to run expensive trials. Langa CJ held that the problem with the prevailing approach to rule 34 is that it failed to take cognizance of the fact that, in the context of violations of constitutional rights, sometimes more than money is necessary to vindicate the right. The acknowledgement of wrongdoing that comes in the form either of an acknowledgment of liability by the defendant or by a court order is often more valuable than money.<sup>320</sup> Langa CJ pointed out that:

There is a danger that the risk of adverse costs orders, despite ultimate success, might permit rich and powerful defendants to prevent the law from adapting to meet constitutional imperatives by throwing money at plaintiffs who cannot afford to take

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315 Ibid at para 19. See § 59.3(b) 'Nature of the State's Obligations' supra.

316 Rule 18(6).

317 See Farlam et al *Superior Court Practice* (1994) at B1-143n7 and the cases cited there.

318 2007 (5) SA 250 (CC), 2007 (7) BCLR 751 (CC) ('NM').

319 Ibid at paras 83-89.

320 *NM* (supra) at para 120.

that chance. It already takes immense courage for ordinary people to take large powerful defendants to court and the additional peril of an adverse costs order will mean even fewer plaintiffs get their day in court.<sup>321</sup>

Despite the general approach adopted by the High Court to rule 34, the question of costs always remains discretionary. The message of Langa CJ's judgment in *NM* is that this discretion must be exercised in the light of the spirit, purport and objects of the Bill of Rights.

In *Hlatshwayo & Another v Hein*<sup>322</sup> Dodson J read the Restitution of Land Act,<sup>323</sup> and the power of the Land Claims Court to make costs orders in the light of the right of access to court and held that it was necessary to interpret these powers in a way that does not deter litigants from having their justiciable claims determined by courts.<sup>324</sup> Dodson J pointed to the trend in the Constitutional Court to adopt a different approach to costs in public-interest litigation: the Constitutional Court has departed from the normal rule in civil matters that costs follow the result.<sup>325</sup> Dodson J was mindful of the potentially negative consequence of adopting an approach in terms of which costs do not necessarily follow the result in public-interest litigation — a risk of encouraging ill-founded claims and defences. However, the wide discretion retained by the court would ensure that costs would be awarded in appropriate cases.<sup>326</sup>

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*Hlatshwayo* was decided in 1997. In the intervening 10 years, the approach of Dodson J has been vindicated. The Constitutional Court has adopted an approach in terms of which a *bona fide* applicant who unsuccessfully raises an important constitutional issue will not be penalized in costs.<sup>327</sup> The Court retains a wide discretion, however, and does not hesitate to make adverse costs orders where the conduct of a party warrants it — say, for example, in the case of vexatious litigation.<sup>328</sup>

There is no doubt that the ordinary approach to costs — in which costs follow the result — implicates the right of access to courts. Experience reveals that litigation is, unfortunately, largely the preserve of the affluent in this country.<sup>329</sup> The ordinary approach to costs adopted by the High Court and the Supreme Court of Appeal

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321 Ibid

322 1998 (1) BCLR 123 (LCC) ('*Hlatshwayo*').

323 Act 22 of 1994.

324 *Hlatshwayo* (supra) at para 22.

325 Ibid at para 24.

326 Ibid at para 25.

327 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, 6-2.

328 Ibid at 6-5ff.

(coupled with the fact that, in any case, most practitioners charge far in excess of what a taxed costs order will allow) exacerbates this problem. While not linking its approach directly to FC s 34, the Constitutional Court's approach to costs is clearly aimed at enhancing access to courts in constitutional matters.

### **(viii) Security for costs**

Rule 47 of the Uniform Rules of the High Court deals with the requirement that a litigant furnish security for costs in certain circumstances.<sup>330</sup> In the Companies Act<sup>331</sup> specific provision is made for the furnishing of security by a company or a

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liquidator of a company that is being wound up.<sup>332</sup> There have been two ways in which FC s 34 has been implicated in cases concerning security for costs. As in the case of costs issues generally, these provisions give a court a discretion as to whether to require security for costs. In certain decisions, the courts have considered how this discretion must be exercised in the light of the Final Constitution.<sup>333</sup> It is easy to see how the obligation to give security for costs may implicate the right of access to court. In certain cases, the requirement to give security will prevent the party so required from proceeding with the litigation. The

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329 See G Budlender 'Access to Courts' (2004) 121 *SALJ* 339, 340-1.

330 Rule 47 of the Uniform Rules provides:

#### Security for costs

(1) A party entitled and desiring to demand security for costs from another shall, as soon as practicable after the commencement of proceedings, deliver a notice setting forth the grounds upon which such security is claimed, and the amount demanded.

(2) If the amount of security only is contested the registrar shall determine the amount to be given and his decision shall be final.

(3) If the party from whom security is demanded contests his liability to give security or if he fails or refuses to furnish security in the amount demanded or the amount fixed by the registrar within ten days of the demand or the registrar's decision, the other party may apply to court on notice for an order that such security be given and that the proceedings be stayed until such order is complied with.

(4) The court may, if security be not given within a reasonable time, dismiss any proceedings instituted or strike out any pleadings filed by the party in default, or make such other order as to it may seem meet.

(5) Any security for costs shall, unless the court otherwise directs, or the parties otherwise agree, be given in the form, amount and manner directed by the registrar.

(6) The registrar may, upon the application of the party in whose favour security is to be provided and on notice to interested parties, increase the amount thereof if he is satisfied that the amount originally furnished is no longer sufficient; and his decision shall be final.

331 Act 61 of 1973.

332 Section 13 of the Companies Act reads as follows:

Where a company or other body corporate is plaintiff or applicant in any legal proceedings, the Court may at any stage, if it appears by credible testimony that there is reason to believe that the company or body corporate or, if it is being wound up, the liquidator thereof, will be unable to pay the costs of the defendant or respondent if successful in his defence, require sufficient security to be given for those costs and may stay all proceedings till the security is given.

question, therefore, is how the discretion must be exercised in a way that gives due cognizance to FC s 34. In other cases, the requirement that security be provided has been challenged directly as violating FC s 34.

The issue of security for costs normally arises as follows: a plaintiff brings an action against a defendant in circumstances where the defendant has reason to believe that the plaintiff will be unable to pay the defendant's costs if the defendant is successful. The defendant delivers a notice in terms of rule 47(1) or, if necessary,<sup>334</sup> brings an application in terms of rule 47(3) requiring the plaintiff to give security for costs before proceeding. The general approach to costs, that an unsuccessful plaintiff must pay the defendant's costs, is designed, amongst other things, to prevent vexatious litigation. A plaintiff who anticipates being penalized in costs will think twice before proceeding with unmeritorious litigation.<sup>335</sup> The requirement of security for costs is aimed to buttress this rule:

[T]he main purpose of section 13 is to ensure that companies, who are unlikely to be able to pay costs and therefore not effectively at risk of an adverse costs order if unsuccessful, do not institute litigation vexatiously or in circumstances where they have no prospects of success thus causing their opponents unnecessary and irrecoverable legal expense.<sup>336</sup>

In *Lappeman*, Joffe J considered how the courts had, up until that case, dealt with the discretion envisaged by s 13 of the Companies Act and its predecessor. He explained that the binding authority in his division (the WLD) was that courts will lean towards the ordering of security and will only refuse to do so when special

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circumstances exist.<sup>337</sup> It was argued that, in exercising its discretion and in order to protect the right of access to court, a court should incline against the requirement of security in the absence of evidence of abuse of process. Joffe J pointed out that while the requirement of security for costs itself pursued a laudable objective, it had to be balanced against the right of access to court. Such a balance was better achieved, in his view, if the court would begin without a disposition in favour of requiring security and that the courts should possess a wide discretion to consider all relevant factors before requiring security.<sup>338</sup> This approach was approved by the Supreme Court of Appeal in *Shepstone*:

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333 *Lappeman Diamond Cutting Works (Pty) Ltd v MIB Group (Pty) LTtd (No 1)* 1997 (4) SA 908 (W) ('*Lappeman*'); *Bookworks (Pty) Ltd v Greater Johannesburg Transitional Metropolitan Council and Another* 1999 (4) SA 799 (W) ('*Bookworks*'); *Giddey NO v JC Barnard and Partners* 2007 (2) BCLR 125 (CC) ('*Giddey*').

334 The process requires the party seeking security first to deliver a notice to his opponent setting out the grounds upon which security is sought and the amount claimed. If the party receiving the notice disputes liability to give security, then the party seeking security will need to apply to court.

335 *Giddey* (supra) at para 7.

336 *Ibid* at para 7.

337 *Lappeman* (supra) at 914G.

338 *Ibid* at 919H-I.



The court must carry out a balancing exercise. On the one hand it must weigh the injustice to the plaintiff if prevented from pursuing a proper claim by an order for security. Against that, it must weigh the injustice to the defendant if no security is ordered and at the trial the plaintiff's claim fails and the defendant finds himself unable to recover from the plaintiff the costs which have been incurred by him in his defence of the claim.<sup>339</sup>

There will be cases where the requirement of giving security will not put an end to the litigation – because the plaintiff will be able to comply with the order. It is only when the litigation will be brought to an untimely end by the order that the right of access to courts becomes relevant. Although not especially concerned with FC s 34, the Supreme Court of Appeal has remarked on the potentially dispositive effect of a security order:

[T]he fact that an order of security will put an end to the litigation does not by itself provide sufficient reason for refusing it. It is a possibility inherent in the very concept of a provision like s 13 which comes into operation whenever it appears to the Court that the plaintiff or applicant will not be able to pay the defendant or respondent's costs in the event of the latter being successful in his defence. If there is no evidence either way, the mere possibility that the order will effectively terminate the litigation can plainly not affect the Court's decision. It only becomes a factor once it is established as a probability by the plaintiff or applicant. And, even if it is established, it remains no more than a factor to be taken into account; by itself it does not provide sufficient reason for refusing an order.

Whether this approach accords with the requirements of the Final Constitution was considered by the Constitutional Court in *Giddey*. The Constitutional Court in *Giddey* confirmed that, when a court exercises its discretion, it must have regard to the right of access to court.<sup>340</sup> The question was what principles ought to be applied by the court when exercising this discretion.

The applicant argued that whenever the effect of the order requiring security would be to put an end to the litigation (in the sense that the plaintiff would be unable to provide security and, hence, proceed) it would be in conflict with the

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right of access to court. Therefore, one of the overarching principles guiding the discretion ought to be that the discretion will not be exercised where it will have this effect. The Court in *Giddey* rejected this approach to the interpretation of s 13:

Section 13 contemplates that an order for security for costs will be made where a plaintiff or applicant company is in financial difficulties. The sharp commercial reality of such an order is that at times where the plaintiff or applicant cannot find security for costs it will not be able to pursue its action. This seems an inevitable and intended result of section 13. In my view, the section is not reasonably capable of being read as contended for by the applicant. The applicant did not challenge the constitutionality of the section, and in my view, it is not capable of being read, in light of the Constitution or otherwise, to mean that a court has no discretion to order security to be furnished where the effect of that order will be to terminate the litigation. The provision states the contrary quite clearly and the applicant's submissions in this regard must be rejected.<sup>341</sup>

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339 *Shepstone & Wylie and Others v Geyser NO 1998 (3) SA 1036 (SCA)*, 1046. quoting *Keary Developments Ltd v Tarmac Construction Ltd and Another* [1995] 3 All ER 534, 540 (CA).

340 *Giddey* (supra) at para 30.

341 *Giddey* (supra) at para 29.

The Court in *Giddey* held that the approach of the Supreme Court of Appeal in *Shepstone* accorded with what was required by the Final Constitution and that the courts should exercise a discretion neither inclined towards nor against requiring security.<sup>342</sup> The Court in *Giddey* stated that a court should take into account the following factors: the likelihood that the effect of an order to furnish security will be to terminate the plaintiff's action; the attempts the plaintiff has made to find financial assistance from its shareholders or creditors; the question whether it is the conduct of the defendant that has caused the financial difficulties of the plaintiff; and the nature of the plaintiff's action.<sup>343</sup>

The constitutionality of a rule was directly challenged in *Mthetwa and Others v Diedericks and Others*.<sup>344</sup> Prior to its amendment in 1997, rule 49(1) of the Magistrates' Courts Rules, read as follows:

A party to proceedings in which a default judgment has been given may within 20 days after the judgment has come to his knowledge apply to court upon notice to the other party to set aside such judgment and the court may upon good cause shown and, save where leave has been given to defend as a *pro Deo* litigant in terms of rule 53, provided the applicant has furnished to the respondent security for the costs of the default judgment plus an amount of R200 as security for the costs of the application, set aside the default judgment on such terms as it may deem fit: Provided that the respondent may by consent in writing lodged with the clerk of the court, waive compliance with the requirement of security.

Rule 53 establishes the procedure in terms of which a person may apply to litigate as a *pro Deo* litigant. In essence, if a court is satisfied that a person has a *prima facie* case and has insufficient means to enable him to pay the costs of the

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action,<sup>345</sup> then the court may appoint an attorney to act for him, free of charge, and relieve him of the need to pay other costs. In *Mthetwa*, the High Court drew attention to the Legal Aid Act,<sup>346</sup> and pointed out that it establishes a detailed mechanism for indigent potential litigants to obtain legal aid.<sup>347</sup> The Legal Aid Act was enacted with the purpose of improving on the *pro Deo* procedure and a litigant would presumably prefer to obtain legal aid in terms of the Act, than to proceed by way of the *pro Deo* procedure.<sup>348</sup> However, following the Act would require such a person to forfeit the right not to provide security, since rule 49(1) exempted only *pro*

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342 The full bench of the WLD was also of the view that, although it did not say so explicitly, the SCA had adopted the approach in *Shepstone* based on what is required by FC s 34. *Bookworks* (supra) at 810B-G.

343 *Giddey* (supra) at para 30.

344 1996 (7) BCLR 1012 (N) ('*Mthetwa*').

345 Rule 53(4).

346 Act 22 of 1969.

347 *Mthetwa* (supra) at 1013.

348 *Ibid.*

*Deo* litigants. This was unfair.<sup>349</sup> The court pointed out that people frequently have default judgments taken against them without their knowledge. If such a person had a bona fide defence but was unable to cover the costs of security, he would be unable to have the judgment set aside, unless he applied to be a *pro Deo* litigant. At the very least, the rule should cover recipients of legal aid in terms of the Act.<sup>350</sup> The High Court therefore declared the whole of rule 49(1) unconstitutional.

It is always a difficult matter when a single judge of a provincial division declares invalid a rule or law where there is no requirement that the declaration of invalidity must be confirmed by the Constitutional Court. This difficulty was avoided by a 1997 amendment to the rules, which introduced a new rule 49, without the security requirement.

Shortly after this decision was handed down, a single judge in the same division struck down rule 49(13) of the Uniform Rules of the High Court.<sup>351</sup> The rule relates to the procedure to be adopted on appeal and envisages that security will be required.<sup>352</sup> The applicant argued that the rule limited his right of access to court because his inability to provide security effectively ended his possibility of prosecuting the appeal. The applicant relied on *Mthetwa*. The respondent sought to distinguish it as follows: the rule in the Magistrates' Courts Rules had the effect of preventing access to a court of first instance, whereas this rule only affects the right to appeal.<sup>353</sup> Implicit in this argument is the contention that FC s 34 (or IC s 22 as it then was) does not apply to appeals. Without directly responding to this argument, the High Court held:

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There is much to be said for protecting a respondent in an appeal from an impecunious appellant who drags him from one court to the other. On the other hand to in effect bar access to a court of appeal because a deserving litigant is unable to put up security appears to me to be unfair and in conflict with the provisions of the Constitution. The conflicting rights of the litigants can in my view be adequately safeguarded were the court to be vested with the power to determine in the exercise of its discretion, whether a particular appellant should be compelled to put up security and in what amount. To the extent that Rule 49(13) does not embody that power I consider it to be in conflict with the Constitution and to that extent invalid.<sup>354</sup>

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349 Ibid.

350 Ibid at 1014.

351 *Shepherd v O'Niell and Others* 1999 (11) BCLR 1304 (N)('Shepherd').

352 At the time, the relevant rule read:

Unless the respondent waives his right to security, the appellant shall, before lodging copies of the record on appeal with the Registrar, enter into good and sufficient security for the respondent's costs of appeal. In the event of failure by the parties to agree on the amount of security, the Registrar shall fix the amount and his decision shall be final.

353 *Shepherd* (supra) at 1307.

354 *Shepherd* (supra) at 1310.

The High Court suspended the declaration of invalidity to provide the Rules Board with the opportunity to amend the rule. Rule 49(13) now provides a discretion to courts in regard to security for costs on appeal.<sup>355</sup>

### (ix) Champertous agreements

A champertous agreement, broadly speaking, is an agreement in terms of which one party will fund (partially or fully) the litigation of another (in which the funding party has no interest) in exchange for a share of any amount awarded to the latter upon success. Such an agreement, therefore, has the potential to enhance, rather than limit, access to court by enabling litigants to proceed in matters that, without the champertous agreement, they would be unable to fund. Until the recent decision of the Supreme Court of Appeal in *Price Waterhouse Coopers Inc and Others v National Potato Co-operative Ltd*,<sup>356</sup> champertous agreements were generally considered contrary to public policy.

In *Price Waterhouse*, the Supreme Court of Appeal pointed out that the general disapproval of champertous agreements had been subject to one exception: if a party, in good faith, assisted a poor litigant in exchange for a reasonable interest in the suit, the agreement would not be contrary to public policy and void.<sup>357</sup> This exception was based on recognition that 'in a case where an injustice would be done if a litigant was not given financial assistance to conduct his case a champertous arrangement would not be contrary to public policy.'<sup>358</sup> The Supreme Court of Appeal pointed out that, other than this exception, champertous agreements continued to be considered contrary to public policy. Changed circumstances and the Final Constitution required a reassessment of the received wisdom.<sup>359</sup>

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The Supreme Court of Appeal pointed out that the antipathy to champertous agreements arose in times when the judiciary was not independent and there were insufficient safeguards to withstand corruption that might flow from such agreements; such as pressuring witnesses to relate a particular version or bribing judges. However, developments in England (where the antipathy to these agreements arose) and South Africa were such that an independent judiciary and a profession bound by strict ethics were strong enough to withstand such pressures.<sup>360</sup> Furthermore, both England and South Africa now allowed legal practitioners to

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355 Rule 49(13)(a) reads as follows:

Unless the respondent waives his or her right to security or the court in granting leave to appeal or subsequently on application to it, has released the appellant wholly or partially from that obligation, the appellant shall, before lodging copies of the record on appeal with the registrar, enter into good and sufficient security for the respondent's costs of appeal.

356 2004 (9) BCLR 930 (SCA) ('*Price Waterhouse*').

357 *Ibid* at para 27.

358 *Ibid* at para 27.

359 *Ibid* at paras 27-28.

360 *Price Waterhouse* (*supra*) at para 39.

charge contingency fees — albeit subject to strict controls.<sup>361</sup> This shift has direct implications for the right of access to court:

As in England, this Act is designed to encourage legal practitioners to undertake speculative actions for their clients. The Legislature was obviously of the view that the conflict between the duty and interests of legal practitioners would not lead to an abuse of legal procedure. It clearly considered that it is better that people be able to take their disputes to court in this way rather than not at all.<sup>362</sup>

The Supreme Court of Appeal emphasized the importance of the right of access to court and the duty of courts to protect bona fide litigants. Allowing agreements of this sort would assist in facilitating access to court.<sup>363</sup> However, there might be circumstances in which a champertous agreement would constitute an abuse of process. Such agreements would not be enforced, notwithstanding the right of access to courts in FC s 34.<sup>364</sup>

### **(b) Fair public hearing before a court**

One express component of FC s 34 is the right to a 'fair public hearing'. 'Fair' in FC s 34 therefore qualifies 'hearing'. 'Fairness' means different things in different places in the Final Constitution. FC ss 9(3) and 9(4) prohibit *unfair discrimination*. FC s 23 confers a right to 'fair labour practices'; FC s 33 is concerned with *procedural fairness* in the context of administrative decision-making; and FC s 35 guarantees the right to a *fair criminal trial*.<sup>365</sup> Although fairness is a central theme that runs through the Final Constitution, it does not possess a single denotation. FC ss 9, 23, 33, 34 and 35 all refer to 'fairness': but each uses fairness in relation to different proceedings and sets different standards of 'fairness'.

In *Bernstein v Bester*, faced with an IC s 22 which made no reference to a 'fair hearing', the Constitutional Court suggested that its exclusion might indicate a deliberate election by the drafters *not* to constitutionalize the right to a fair civil

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trial.<sup>366</sup> FC s 34, which provides expressly for a 'fair public hearing' must be interpreted as a deliberate reaction to *Bernstein*.

In respect of FC s 34, it is clear that 'fairness' does not entail a right to legally *correct* decisions for litigants.<sup>367</sup> In our view, fairness nevertheless does have both

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361 Ibid at paras 40-1.

362 Ibid at para 42.

363 Ibid at paras 42-4.

364 Ibid at paras 50-2.

365 FC s 35(3) provides that '[e]very accused person has the right to a fair trial'.

366 *Bernstein and Others v Bester NO and Others* 1996 (2) SA 751 (CC), 1996 (4) BCLR 449 (CC) at para 106.

367 *Lane and Fey NNO v Dabelstein and Others* 2001 (2) SA 1187 (CC), 2001 (4) BCLR 312 (CC).

procedural and substantive components. In the remainder of this section, we consider specific sub-components of the right to a 'fair public hearing' under FC s 34. First, we consider whether 'fairness' under FC s 34 requires the state to provide free legal representation to some civil litigants. After that, we consider the application of the principle of 'equality of arms' to civil matters. We then consider the requirements of independence and impartiality of the courts. We also look at other requirements that go to the fairness of a hearing, in particular notice and the right to be heard. Finally, we discuss the requirement of a *public* hearing.

### (i) Legal representation<sup>368</sup>

Does FC s 34 impose positive obligations on the State to provide free legal representation to civil litigants? It does not make such a guarantee expressly, but arguably the notion of 'fairness' implies the obligation. Currie and De Waal contend that such an interpretation of FC s 34 is unlikely owing to the realities of the resource constraints faced by the state.<sup>369</sup> In our view, such an approach confuses the content of the right with the remedy that a court should (or is likely to) grant on the basis of the right.<sup>370</sup> Therefore, we consider whether FC s 34 imposes such an obligation, and then consider what remedies appropriately flow from it.

FC s 35(3)(g) provides that every accused person has a 'right to a fair trial, which includes ... the right to have a legal practitioner assigned to the accused person by the State and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly'. As discussed further below, FC s 28 makes a similarly-worded guarantee in respect of civil proceedings affecting a child. FC s 34 is silent on the matter. Nevertheless, the matter does not end there. We believe that there may be a basis on which to interpret the reference to *fairness* in FC s 34 to impose such an obligation on the state.

The major international instruments mirror the Final Constitution in guaranteeing free legal representation in criminal cases and merely a 'fair' trial in civil

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matters.<sup>371</sup> Nevertheless, the European Court of Human Rights has interpreted Art 6(1) of the European Convention on Human Rights to require a right to representation in some civil cases.<sup>372</sup> In *Airey v Ireland*, the European Court held that

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368 In the discussion that follows, we draw in part from an earlier article by one of the authors. See J Brickhill 'The Right to a Fair Civil Trial: The Duties of Lawyers and Law Students to Act *Pro Bono*' (2005) 21 *SAJHR* 293.

369 Currie & de Waal (*supra*) at 708-709.

370 See *Bel Porto School Governing Body v Premier, Western Cape and Another* 2002 (3) SA 265 (CC), 2002 (9) BCLR 891 (CC) at para 186; *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC), 1997 (7) BCLR 851 (CC) at para 69; *Sanderson v Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC), 1997 (12) BCLR 1675 (CC) at para 27.

371 See, for example, Art 14(1) and Art 14(3)(d) International Covenant on Civil and Political Rights (1966); Art 6(1) and Art 6(3) European Convention on Human Rights (1950); Art 7 and Art 8(2)(e) American Convention on Human Rights (1969); Art 26 African Charter on Human and People's Rights (1981).

372 *Airey v Ireland* (1979) 2 EHRR 305 ('*Airey*'). Article 6(1) refers to a 'fair and public hearing', while FC s 34 guarantees a 'fair public hearing'.

the Irish government's failure to provide Mrs Airey with free representation for the purpose of securing a judicial separation violated her right of access to court in Art 6(1).<sup>373</sup> Research presented as evidence could not provide a single instance in which a decree of judicial separation had been obtained in Ireland without legal representation.<sup>374</sup> The effect of *Airey* is that a fair civil hearing may, in certain circumstances, require the provision of legal representation at state expense. Article 6 of the European Convention is almost identical to FC s 34. This similarity provides a basis for interpreting FC s 34 in a manner that imposes a similar duty on government in circumstances where a litigant is unlikely to be able to obtain relief without representation. That said, *Airey* held that Art 6(1) does not guarantee a right to free civil legal aid. It merely obliges states parties to take steps to ensure the progressive realization of such a right.<sup>375</sup>

In *G (J)*, the Canadian Supreme Court confronted the question of a right to free representation in civil suits in the context of s 7 of the Canadian Charter of Rights and Freedoms.<sup>376</sup> Section 7 reads: 'Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.'<sup>377</sup> The *G (J)* Court held that the combination of stigmatization, loss of privacy and disruption of family life that might result from a custody suit are sufficient to constitute a restriction of security of the person.<sup>378</sup> In deciding whether 'fundamental justice' necessitated the provision of legal representation in a particular case, the court referred to 'the best interests of the child' as the paramount consideration.<sup>379</sup> Provided these are not compromised, a court should then consider the interests at stake, the complexity of proceedings and the capacities of the parent.<sup>380</sup> In the circumstances of the case, the Supreme Court held that the government was under an obligation to provide the appellant with state-funded counsel.<sup>381</sup> It is worth noting that this right to free legal representation under s 7 of the Canadian Charter, which arises only in respect of threats to 'life, liberty and security of the person', is significantly narrower than the right that we argue arises under FC s 34, which encompasses all civil matters.

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373 *Airey* (supra) at para 28.

374 *Ibid* at para 24.

375 *Ibid* at para 26.

376 *New Brunswick (Minister of Health and Community Services) v G (J)* 66 CRR (2nd) 267 (1999) ('*G(J)*').

377 Canadian Charter of Rights and Freedoms, Constitution Act 1982.

378 *G (J)* (supra) at 289.

379 *Ibid* at 291.

380 *Ibid* at 292-3.

381 *Ibid* at 296.

The position under the Final Constitution is slightly different, because FC s 28 deals specifically with legal representation in matters affecting children. Under the Final Constitution, the Canadian case of *G (J)* might have been considered an appropriate case for the appointment of a legal representative to act for the child concerned. In the case of children's rights in civil suits, which are distinct from the right of all persons under FC s 34, FC s 28(1)(h) guarantees a child's right to 'have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result.' FC s 28, therefore, expressly guarantees legal representation for children. The right appears not to be limited by the state's resource constraints: it is, however, subject to a significant constraint. It can only be invoked where 'substantial injustice' would result if representation at state expense were not provided. The provision is applicable not only to matters in which a child is a party to a civil suit, but in any matter 'affecting' the child, which would include adoption, custody, maintenance and possibly even divorce matters. In such matters, the representative would be 'assigned to the child', and directly represent him or her.<sup>382</sup> In *Christian Education SA v Minister of Education*, Liebenberg J held that FC s 28 makes it clear that the state is responsible for the expenses of a legal representative appointed in terms of FC s 28(1)(h).<sup>383</sup> However, this right does not cater for the interests of parents. Their claim to state-funded legal aid falls under FC s 34. FC s 28 is concerned solely with the child's right to legal representation.

In *Nkuzi Development Association v Government of South Africa*, the Land Claims Court held that the Final Constitution does confer a right to legal representation at state expense in civil suits, at least in respect of land tenants in the circumstances of that case.<sup>384</sup> The court, in a judgment delivered by Moloto AJ, held that there is no logical basis for distinguishing between criminal and civil matters, as civil matters are equally complex.<sup>385</sup> The court held that persons who have a right to security of tenure under the Extension of Security of Tenure Act,<sup>386</sup> whose security of tenure is threatened or infringed, have a right to legal representation or legal aid at state expense if substantial injustice would otherwise result, and if they cannot afford the cost of representation.<sup>387</sup> The court held that substantial injustice would result where the potential consequences of the matter are severe and the person concerned is not likely to be able to present his or her case effectively without representation.<sup>388</sup>

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382 The role of such a FC s 28 legal representative was usefully discussed in *Soller NO v G* 2003 (5) SA 430 (W) at para 27 (Satchwell J explained: 'The legal practitioner stands squarely in the corner of the child and has the task of presenting and arguing the wishes and desires of that child ... . The legal practitioner does not only represent the perspective of the child concerned. The legal practitioner should also provide adult insight into those wishes and desires which have been confided and entrusted to him or her as well as apply legal knowledge and expertise to the child's perspective.')

383 1999 (4) SA 1092 (SE) at 1097.

384 2002 (2) SA 733 (LCC) ('*Nkuzi*').

385 *Ibid* at 737.

386 Act 62 of 1997.

387 Order at para 1.1.



The court in *Nkuzi* grounded the right to representation at state expense in the property right, specifically in FC s 25(6), which guarantees legally secure tenure 'or comparable redress'.<sup>389</sup> The court seemed to assume a right to representation where 'substantial injustice' would otherwise result. The criterion of 'substantial injustice', which is contained in FC s 35 is, however, applicable only to criminal trials. Therefore, the decision in *Nkuzi* does not have an express constitutional basis, either in respect of the constitutional provision in which the court located the right to representation or in terms of the threshold standard for determining when civil legal aid ought to be given.

While the *Nkuzi* decision may be correct in holding that there is no principled reason to distinguish between civil and criminal matters in relation to the importance of legal representation, the textual distinction in the Constitution cannot be ignored. FC s 35 refers explicitly to legal representation as an aspect of a fair criminal trial where 'substantial injustice' would otherwise result. FC s 34 makes no such guarantee in relation to a fair civil hearing. In *Legal Aid Board v Msila*, the court endorsed the principle, originally laid down in Legal Aid Board guidelines and adopted by the courts, that the substantial injustice test is satisfied where the applicant for legal aid is criminally charged and faces the danger of imprisonment without the option of a fine.<sup>390</sup> This test clearly cannot apply to civil matters.

However, the concepts of fairness in criminal and civil trials might still overlap. The Constitutional Court has held that the right to a fair criminal trial is not limited to the specific rights listed in FC s 35.<sup>391</sup> Therefore, if FC s 34 contains a similarly open-ended concept of 'fairness', the fact that legal representation is listed as an element of a fair criminal trial but is not expressly mentioned as an aspect of the right to a fair civil hearing does not preclude the courts from interpreting FC s 34 to include such a right.<sup>392</sup> This gloss on FC s 34 requires us to consider what 'fairness' requires in each civil case. For starters, fairness in the civil context requires consideration of factors different to those that apply when determining whether 'substantial injustice' will result in the criminal context.

In our view, FC s 34 does impose limited positive obligations on the state to provide free legal representation to civil litigants where the failure to provide such assistance would render a hearing 'unfair'. Factors relevant to this enquiry may include the interests at stake, the complexity of proceedings and the capacities of the individuals concerned to litigate without assistance. Evidence to the effect that the particular type of proceedings may not, in reality, be conducted without legal assistance, as was adduced in *Nkuzi*, will also be relevant.

The state has already established the mechanism by which to discharge its constitutional obligations to provide legal aid: the Legal Aid Board, established

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388 Order at para 1.3.

389 *Nkuzi* (supra) at 734.

390 1997 (2) BCLR 229 (E) at 236.

391 *S v Zuma* 1995 (2) SA 642 (CC), 1995 (4) BCLR 401 (CC) at para 16.

392 See § 59.3(a)(iv) supra.

in terms of the Legal Aid Act.<sup>393</sup> The Legal Aid Board prioritizes criminal legal aid, and currently provides far less assistance in civil matters. Its policy approach to the provision of legal aid is set out in the Legal Aid Guide, which is published by the Legal Aid Board in consultation with the Minister of Justice and Constitutional Development and revised periodically.<sup>394</sup> To receive legal assistance through any of the legal service providers funded by the Legal Aid Board, an applicant must meet certain criteria. In terms of the Legal Aid Board Act, legal aid is only rendered to 'indigent' persons.<sup>395</sup> The term is not defined in the Act, but has been defined, although not in the context of the Act, in *Smith v Mutual & Federal Insurance Co Ltd*, where the judge distinguished 'indigent' from 'poor'.<sup>396</sup> The judge stated that 'to be *indigent* means to be in extreme need or want whereas to be *poor* means having few things or nothing'.<sup>397</sup>

The Legal Aid Board has established a number of Justice Centres, Satellite Offices and High Court Units through which it dispenses legal aid.<sup>398</sup> Presumably on the basis of the term 'indigent', the Board has laid down a financial means test. This test, which is revised from time to time, remains low enough to exclude a large group. At present, the means test provides that to qualify one must earn less than R2 000 a month if single or less than R2 500 for a 'household'.<sup>399</sup> However, this threshold excludes a large proportion of the population — people who earn above this threshold but are still unable to afford private representation. This strict threshold limits the provision of legal aid to those persons in extreme need or want for the basic necessities of life. It certainly excludes the working poor and middle class. The provision of legal aid by the Board is also restricted according to the type of matter for which assistance is sought. Defamation matters, 'undeserving' divorce cases, most maintenance matters and family violence are excluded.<sup>400</sup> The Board largely prioritizes criminal matters over civil legal aid: 87% of the latest Board budget for new matters was spent on criminal legal aid.<sup>401</sup>

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393 Act 22 of 1969.

394 Section 3A(1) of the Act.

395 See the long title of the Legal Aid Act 22 of 1969.

396 1998 (4) SA 626 (C) at 632.

397 *Ibid.*

398 There are currently 58 Justice Centres, 33 Satellite Offices and 13 High Court Units, according to the Legal Aid Board *Annual Report 2005/6* (2006), available at <http://www.legal-aid.co.za/images/publications/annual-reports/Legal%20Aid%20Board%20Annual%20Report%202005-06%20p%2001-120.pdf> (accessed on 10 March 2009) 23.

399 See Legal Aid Board *Circular No. 4 of 2006* (2 October 2006).

400 PJ Brits *Legal Aid Guide 2002* (10th Edition, 2002) 49ff.

401 Legal Aid Board *Annual Report 2005/6* (*supra*) at 25, Table 5.

The Legal Aid Guide, which is prepared by the Legal Aid Board in consultation with the Minister, who must table it in Parliament for ratification,<sup>402</sup> may constitute a 'law of general application'. Accordingly, if the Guide curtails the entitlement to civil legal aid that arises out of FC s 34, that limitation may be saved under FC s 36.<sup>403</sup> Ellmann contends that costs and resource constraints are likely to play a greater role in limiting the state's obligations in the context of civil legal aid under FC s 34 than in respect of criminal legal aid under FC s 35.<sup>404</sup> Budlender, noting certain conceptual difficulties with allowing resource constraints to justify a limitation under FC s 36, suggests that this factor should be considered in deciding on remedy.<sup>405</sup>

## (ii) Equality of arms

In the previous section, we have considered whether FC s 34 confers a right to state-funded legal aid in civil matters. We have contended that, in at least some civil matters, it does create such a right. The principle of 'equality of arms' takes the issue a step further. The principle essentially entails that, where parties *are* legally represented in litigious proceedings, their representation should be commensurate.

In *Shilubana v Nwamitwa*,<sup>406</sup> the Constitutional Court was faced with an eleventh-hour application by the respondent to postpone the hearing of the matter. One of the grounds of the application was that the respondent contended that he should receive funding from the State Attorney towards his legal expenses.<sup>407</sup> We have considered the state's obligations in that regard above.<sup>408</sup> However, the argument went further: the respondent contended that, because the State Attorney had refused to fund the respondent, the parties were not 'represented on an equal basis' before the Court. The Court characterized the respondent's submission as 'faced with applicants unfairly represented by the State Attorney who briefed senior counsel, as well as two amici curiae who broadly support the applicants' case — six

402 Legal Aid Act s 3A(2).

403 See *Legal Aid Board (Ex Parte) v Pretorius and Another* [2007] 1 All SA 458 (SCA) (The SCA dismissed an application for leave to appeal against an order directing the Legal Aid Board to provide alternative representation to certain criminal accused in one of the so-called 'Boeremag' trials. Although the judgment applied the FC s 35 criterion of 'substantial injustice' (rather than FC s 34) to determine the entitlement of the accused to representation, the judgment is relevant in that the SCA confirmed that the Legal Aid Guide gives effect to the constitutional right (para 36), must be interpreted in light of the provisions of the Constitution (para 25), and that the ultimate question is whether the constitutional requirement of fairness has been met (paras 36–41). These principles will apply equally to an entitlement to legal aid in civil matters under FC s 34.

404 S Ellmann 'Weighing and Implementing the Right to Counsel' (2004) 121 *SALJ* 318, 328–329.

405 G Budlender 'Access to Courts' (2004) 121 *SALJ* 339, 353.

406 [2007] ZACC 14 ('*Shilubana*').

407 *Ibid* at para 6.

408 See § 59.4 (b)(i) *supra*.

advocates in total — and hampered by insufficient funds, there was not an 'equality of arms' between the parties.<sup>409</sup>

The issue of equality of arms has been raised previously in the Constitutional Court, in the criminal context. In *Ex Parte Institute for Security Studies: In re S v Basson*,<sup>410</sup> the Court was faced with an application by the Institute for Security Studies (ISS) to be admitted as an *amicus curiae*. It was apparent from the application that the ISS would make submissions that broadly supported the state's case and were adverse to the interests of the respondent (Basson, the accused in the High Court proceedings). It was submitted at the hearing by counsel appearing for Basson that they would struggle to deal with additional issues and argument in the limited time available for preparation, given the size of the appeal record. Counsel also referred to the large number of advocates who would be arguing for the other side if the ISS were admitted, stating that Basson was represented by only two counsel. One of the court's reasons for dismissing the ISS' application was that admitting the ISS as an *amicus* might lead to an inequality of arms:

As a general matter, in criminal matters a court should be astute not to allow the submissions of an *amicus* to stack the odds against an accused person. Ordinarily, an accused in criminal matters is entitled to a well-defined case emanating from the State. If the submissions of an *amicus* tend to strengthen the case against the accused, this is cause for caution. This, however, is not an inflexible rule. But it is a consideration based on fairness, equality of arms, and more importantly, what is in the interests of justice.<sup>411</sup>

The principle of equality of arms was also briefly referred to in *Bernstein v Bester*. The Court in *Bernstein* stated that '[t]he principle of "equality of arms"', implicit in the right to a fair trial, has not been applied to situations such as the one we are considering in the case before us.<sup>412</sup> In *Shilubana*, the Court stated *obiter* that the concept of equality of arms 'has its constitutional basis, in the civil context, in section 34's guarantee of a fair public hearing.'<sup>413</sup> However, the Court held that, in the absence of submissions by all concerned parties, it was not appropriate to consider whether the alleged imbalance was 'constitutionally cognisable or problematic', and accordingly did not need to consider whether an imbalance actually existed in that matter, and if so, what an appropriate ratio of representatives would be or whether it necessitated a postponement.<sup>414</sup> The Court held that the relevant question in considering the postponement was what the interests of justice required. Part of that enquiry, however, required asking whether the parties were 'effectively represented'.<sup>415</sup> The Court, which ultimately granted the requested postponement, held:<sup>416</sup>

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409 *Shilubana* (supra) at para 21.

410 2006 (6) SA 195 (CC), 2006 (2) SACR 350 (CC).

411 *Ibid* at para 15.

412 1996 (2) SA 751 (CC), 1996 (4) BCLR 449 (CC) at fn 154.

413 *Shilubana* (supra) at para 21.

414 *Ibid*.

When considering the interests of justice there is room to consider the alignment of both amici with the applicant, the one-to-six counsel ratio in this case and the fact that senior counsel could be helpful in wading through difficult and important constitutional issues.

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Where does that leave the status of the principle of 'equality of arms'? The Constitutional Court has, as yet, only considered the issue of equality of arms in interlocutory proceedings, never as the principal claim. The Court's *dicta* in *Basson (ISS amicus application)*, *Bernstein* and *Shilubana* all purported to leave open the question whether an inequality of arms gives rise to a constitutional cause of action. However, both *Basson (ISS amicus application)* and *Shilubana* gave weight to alleged imbalances in representation, in the context of an *amicus* application and a postponement application respectively. Both interlocutory applications were decided under the umbrella standard of 'the interests of justice'. Accordingly, equality of arms (regardless of nomenclature) is a factor relevant to the interests of justice, wherever that standard applies. This leaves open the question whether a free-standing substantive right to equality of arms arises in criminal proceedings (under FC s 35) or civil proceedings (under FC s 34). When *Shilubana* is heard on the merits, the question is likely again to go unanswered, unless the respondent presses the issue.

In our view, the principle of the equality of arms must flow from the right to legal representation in at least *some* civil matters that we argue above is conferred by FC s 34. For the right to legal representation to be meaningful, it must not result in an extreme imbalance in representation — for that would amount to a constitutional right to second-grade justice. If a right to legal representation in some civil matters exists, it must be a right to *effective* representation that is generally commensurate with the representation of the opposing parties. In this sense, equality of arms is a subsidiary concept to the right to legal representation. We have argued that the right to legal representation arises only in matters where the failure to provide such assistance would render a hearing 'unfair', taking into account factors such as the interests at stake, the complexity of proceedings and the capacities of the individuals concerned to litigate without assistance, as well as evidence to the effect that the particular type of proceedings may not, in reality, be conducted without legal assistance. Where these factors lead to the conclusion that free legal representation must be provided to secure a 'fair' hearing, a secondary question will arise in crafting an order: what type and scale of free representation must be provided to ensure fairness? In our view, this is where equality of arms must be considered: where FC s 34 requires free legal representation. Where FC s 34 does *not* require free legal representation at all, it would be premature for a free-standing claim to equality of arms to arise.<sup>417</sup>

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There is a risk that equality of arms, applied rigidly, would degenerate into counting heads and years of experience. In our view, even where FC s 34 does require legal representation to ensure fairness of civil proceedings, the right does not contemplate an absolute equality of arms. Rather, it requires representation that is substantially commensurate to that of opposing parties and sufficient to ensure effective representation in the particular proceedings. Head-counting will be, at

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415 *Ibid.*

416 *Ibid* at para 22.

most, a rough guide, because the fact that one party is represented by six counsel does not necessarily mean that every party requires six counsel to represent it effectively. Only in extreme cases, for example where the record in a matter is so bulky that numerical differences in representation will have a significant impact (such as, for example, in *Basson (ISS amicus application)*), should the courts give weight to such numbers concerns.

### (iii) Independence and Impartiality

FC s 34 provides for a right to a fair public hearing 'before a court or, where appropriate, another independent and impartial tribunal or forum'. Therefore, both the courts and, where it is appropriate to resolve disputes before them, other tribunals or fora must be *independent* and *impartial*.<sup>418</sup> In our view, these related requirements go to securing the *fairness* of dispute resolution proceedings. Below we look first at independence and then consider impartiality.

Independence is a structural or institutional requirement, as opposed to impartiality, which is concerned with actual or perceived bias in respect of specific judicial officers. In *De Lange v Smuts NO*, Ackermann J clearly articulated the basis for the distinction between independence and impartiality when he wrote:

When the above principles are applied to the present case it illustrates even more clearly why officers in the public service do not enjoy the necessary independence, notwithstanding their actual competence and impartiality, for making the judicial decision to commit a recalcitrant examinee to prison. I am far from convinced that the first two essential requirements for independence referred to in the Canadian cases, namely those of security of tenure and a basic degree of financial security free from arbitrary interference by the Executive in a manner that could affect judicial independence, are present in the case of officers in the public service. It is unnecessary, however, to pronounce definitively on these requirements, for such officers undoubtedly lack the required objective structural independence and are not reasonably perceived to possess it.<sup>419</sup>

FC s 165(2) provides that '[t]he courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.' FC s 165(3) provides further that no person or organ of state may interfere with the functioning of the courts. In *Beinash v Ernst & Young*, Mokgoro J referred to this provision and, implying that it was violated by the

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417 The European Court on Human Rights adopts a concept of equality of arms that applies more broadly than equality of arms with respect to legal representation. So, for instance, equality of arms has been held to require that each party should be given the opportunity to have knowledge of and to comment on the observations filed or evidence adduced by the other party. See *Buchberger v Austria* (2003) 37 EHRR 13 at para 50. The principle has been stated thus: 'Equality of arms' implies that each party must be afforded a reasonable opportunity to present his case — including his evidence — under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent.' *Dombo Beheer v. Netherlands* (1994) 18 EHRR 213 at para 33. While this approach seems logical, no South African court has yet adopted it.

418 See *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 1999 (4) SA 147 (CC), 1999 (7) BCLR 725 (CC) at para 30; *Sager v Smith* 2001 (3) SA 1004 (SCA) at para 15.

419 *De Lange v Smuts NO* 1998 (3) SA 785 (CC), 1998 (7) BCLR 779 (CC) at para 73.

conduct of the applicant, stated that a vexatious litigant manipulates the functioning of the courts so as to achieve a purpose other than that for which the courts are designed.<sup>420</sup> The key institutional guarantors of judicial independence include the process for the appointment of judicial officers,<sup>421</sup> the judicial oath,<sup>422</sup> security of tenure,<sup>423</sup> financial security<sup>424</sup> and the limitation of civil liability of judges.<sup>425</sup>

Impartiality, by contrast, relates to the particular presiding officer, and is the constitutional basis for her recusal. In *S v Basson* ('*Basson II*'),<sup>426</sup> the Constitutional Court considered an appeal by the state against the decision of the trial judge, Hartzenberg J, not to recuse himself. The Court noted that access to courts that function fairly and in public is a basic right guaranteed in FC s 34.<sup>427</sup> The Court stated that the impartiality of judicial officers is essential to a constitutional democracy, and is closely linked to the independence of courts,<sup>428</sup> which is guaranteed in FC s 165(2).

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420 1999 (2) SA 116 (CC), 1999 (2) BCLR 125 (CC) at para 17.

421 FC s 174 governs the appointment of judicial officers, providing both substantive criteria for appointment and a process, in which the Judicial Service Commission (JSC) plays a critical role. The JSC is established in terms of FC s 178. Its members include judges, practising lawyers, academics and politicians. FC s 174(7) governs the appointment of Magistrates. Magistrates are appointed by a Magistrates' Commission established in terms of the Magistrates' Courts Act 90 of 1993.

422 FC item 6(1) of Schedule 2 requires judges to take a prescribed oath, swearing or affirming that they will be 'faithful to the Republic of South Africa, will uphold and protect the Constitution and the human rights entrenched in it, and will administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law.'

423 Security of tenure is protected by FC s 177. FC s 177 provides for the dismissal of judges by the President on the basis of a finding by the JSC or upon the passing of a resolution by two thirds of the members of the National Assembly.

424 FC s 176(3) precludes the reduction of judges' salaries, allowances and benefits, which are determined in terms of the Judges' Remuneration and Conditions of Employment Act 88 of 1989. Section 10 of the Supreme Court Act 59 of 1959 repeats this prohibition on reduction.

425 At common law, judicial officers may not be sued in delict for their judgments. See *Penrice v Dickinson* 1945 AD 6; *May v Udwin* 1981 (1) SA 1 (A). In addition, s 25(1) of the Supreme Court Act 59 of 1959 provides that no civil process may be issued against a judge without the consent of that court: that is, the consent of the Judge President of the relevant division or the President of the Supreme Court of Appeal, as the case may be. Section 5 of the Constitutional Court Complementary Act 13 of 1995 imposes an equivalent requirement in respect of judges of the Constitutional Court.

426 2005 (12) BCLR 1192 (CC).

427 *Ibid* at para 23.

428 *Ibid* at para 24.

The Court in *Basson II* confirmed<sup>429</sup> the following finding in *President of the Republic of South Africa v South African Rugby Football Union ('SARFU II')*:<sup>430</sup> a judge who sits in a case in which she or he is disqualified from sitting because, seen objectively, there exists a reasonable apprehension that the judge may be biased, acts in a manner inconsistent with FC s 34 and in breach of the requirements of FC s 165(2) and the prescribed oath of office.<sup>431</sup> The Court in *SARFU II* framed the test for recusal as follows:

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The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the Judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the Judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial Judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial.<sup>432</sup> (Footnotes omitted.)

In *SARFU II*, the Court identified two different approaches for determining 'the appearance of bias'. The focus of the one is 'real likelihood of bias' and of the other 'a reasonable suspicion or apprehension of bias'.<sup>433</sup> The court preferred the latter approach, and, to avoid the potentially inappropriate connotations that the word 'suspicion' might carry, preferred the phrase 'reasonable apprehension of bias' to 'reasonable suspicion of bias'.<sup>434</sup> The Court also acknowledged that all judges as human beings bring to their work their life experience – that they are not neutral in an absolute sense. The Court held that it is not improper for judges to have individual perspectives and for these perspectives to be brought to bear on their adjudication of cases.<sup>435</sup>

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429 Ibid at para 25.

430 1999 (4) SA 147 (CC), 1999 (7) BCLR 725 (CC) ('*SARFU II*') (This case concerned an application for the recusal of five judges of the Constitutional Court in a matter concerning a challenge to a decision of the President to appoint a commission of inquiry into rugby in South Africa. The recusal application failed.)

431 Ibid at para 30.

432 *SARFU II* (supra) at para 48.

433 Ibid at para 36.

434 Ibid at para 38.

435 Ibid at paras 42-43.



In *South African Commercial Catering and Allied Workers Union and Others v Irvin & Johnson Ltd (Seafoods Division Fish Processing)*,<sup>436</sup> the Constitutional Court held that not only is there a presumption in favour of the impartiality of the court, but it is a presumption which is not easily dislodged. Cogent and convincing evidence is required to rebut the presumption.<sup>437</sup> The bar is also raised by the requirement that a *reasonable* person would *reasonably* apprehend judicial partiality. In *SACCAWU*, Cameron AJ discussed the double requirement of reasonableness of the *SARFU II* recusal test:

It is no doubt possible to compact the 'double' aspect of reasonableness inasmuch as the reasonable person should not be supposed to entertain unreasonable or ill-informed apprehensions. But the twofold emphasis does serve to underscore the weight of the burden resting on a person alleging judicial bias or its appearance. As Cory J stated in a related context on behalf of the Supreme Court of Canada:

'Regardless of the precise words used to describe the test, the object of the different formulations is to emphasize that the threshold for a finding of real or perceived bias is high. It is a finding that must be carefully considered since it calls into question an element of judicial integrity.'<sup>438</sup>

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In *Basson II*, the court held in the criminal context that the right to a fair trial requires fairness to the accused, as well as fairness to the public as represented by the state.<sup>439</sup> This conclusion leads to the question whether, in civil matters, public-interest standing might entitle non-parties to apply for recusal of a presiding officer. While one can envisage a matter in which such an interest would be sufficient to grant standing, it would have to be a compelling interest, not only in the resolution of the underlying substantive dispute, but also in the public perceptions of the partiality of the court.

The Court in *Basson II* noted that both *SACCAWU* and *SARFU II* were concerned with perceived bias in appellate courts where the bench is composed of more than one judge. The *Basson II* court explained:

In evaluating the situation regarding a trial before a single judge, a court must be sensitive to the different nuances of such a 'live' situation in a court of first instance, where demeanour or body language, tone of voice, the timing of remarks and the emotional response of participants in exchanges to one another may play a role. The context of the proceedings will be relevant to the determination of the apprehensions of a reasonable person. However, in principle, the test remains the same.<sup>440</sup>

The Court went on to distinguish between grounding a complaint of bias on the conduct of the judge in hearing the case and grounding such a complaint on the relationship between the judge and one of the parties or witnesses, and held that it was more difficult to establish a reasonable apprehension of bias based on the

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436 2000 (3) SA 705 (CC), 2000 (8) BCLR 886 (CC) ('*SACCAWU*').

437 *Ibid* at para 12.

438 *Ibid* at para 15. The quote is from *R v S (RD)* [1997] 3 SCR 484 (SCC) at para 113.

439 *Basson (II)* (*supra*) at para 26.

440 *Ibid* at para 32.

conduct of the judge.<sup>441</sup> The Court referred with approval to the dictum of Harms JA in the Supreme Court of Appeal that 'a Judge is not simply a 'silent umpire'.<sup>442</sup> The Court stated that inappropriate behaviour by a judge is unacceptable and may, in certain circumstances, warrant a complaint to the appropriate authorities. It will not, however, ordinarily give rise to a reasonable apprehension of bias. It will only do so where an applicant for recusal can show that it arises not from irritation or impatience with the way in which a case is being litigated, but from what may reasonably be perceived to be bias.<sup>443</sup> Ultimately, in *Basson II*, the Court held that although 'some of the rulings made by the judge were mistaken, and that some of his remarks were ill-considered', they did not give rise to a reasonable apprehension of bias.<sup>444</sup>

#### (iv) Notice and hearing requirements

One of the fundamental aspects of the *audi alteram partem* principle is that both sides in a dispute must be heard. This principle is the basis for the detailed rules

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of service and notice that are applicable in all civil proceedings.<sup>445</sup> A rule or a provision that does away with the ordinary principles of notice may be seen to implicate the fairness of any subsequent hearing. Such a rule or provision could also implicate the right to have a justiciable dispute determined by a court if the rule or provision provides for an invasive measure to be granted against a respondent on an *ex parte* basis. Therefore, a measure that allows a hearing to take place with little or no notice to the other side, but where that side is still represented at the hearing, would implicate the fairness aspect of FC s 34. A measure that does not even entitle a respondent to be represented at a hearing that affects his rights would implicate the access component of FC s 34. For convenience, both types of measure will be discussed here.

In *De Beer NO v North-Central Local Council & South-Central Local Council and Others (Umhlatuzana Civic Association Intervening)*, the Constitutional Court located the requirement of a hearing in the 'fairness' contemplated in FC s 34, and explained that reasonable notice was necessary to facilitate a hearing.<sup>446</sup> It wrote:

This s 34 fair hearing right affirms the rule of law which is a founding value of our Constitution. The right to a fair hearing before a court lies at the heart of the rule of law. A fair hearing before a court as a prerequisite to an order being made against anyone is

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441 Ibid at para 33. See also *R v Silber* 1952 (2) SA 475 (A) at 481C-H.

442 *Greenfield Manufacturers (Temba) (Pty) Ltd v Royton Electrical Engineering (Pty) Ltd* 1976 (2) SA 565 (A), 570.

443 Ibid at para 36.

444 Ibid at para 102.

445 See, for example, *Davids and Others v Van Straaten and Others* 2005 (4) SA 468 (C)(HJ Erasmus J held that the principles of *audi alteram partem*, as required by s 34 of the Constitution, were so fundamental to the fairness of a hearing that it was inappropriate to review a decision of an inferior court without notice to all parties, including the magistrate. Ibid at 486D-G).

446 2002 (1) SA 429 (CC), 2001 (11) BCLR 1109 (CC).

fundamental to a just and credible legal order. Courts in our country are obliged to ensure that the proceedings before them are always fair... . It is a crucial aspect of the rule of law that court orders should not be made without affording the other side a reasonable opportunity to state their case. That reasonable opportunity can usually only be given by ensuring that reasonable steps are taken to bring the hearing to the attention of the person affected.<sup>447</sup>

In *National Director of Public Prosecutions and Another v Mohamed NO*,<sup>448</sup> the Constitutional Court (in a judgment of Ackermann J) referred with approval to the above passage from *De Beer*.<sup>449</sup> It confirmed the principle that, as a matter of statutory construction, the *audi* rule should be enforced unless it is clear that the Legislature has expressly or by necessary implication enacted that it should not apply or that there are exceptional circumstances which would justify a court not giving effect to it.<sup>450</sup> In *NDPP v Mohamed*, a High Court had granted an order declaring the provision in s 38 of the Prevention of Organised Crime Act,<sup>451</sup> that permitted the National Director of Public Prosecutions to apply 'by way of an *ex parte* application' to a High Court for a preservation of property, unconstitutional. It ordered that s 38 was to be read as if the words 'by way of an *ex parte* application' did not

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appear in the provision.<sup>452</sup> The basis of the High Court's decision was that s 38 did not provide for a rule nisi procedure that would allow interested parties to oppose the confirmation of a preservation order obtained *ex parte*. Accordingly, the provision limited FC s 34 and the limitation could not be saved under FC s 36.

The Constitutional Court disagreed. It held that s 38 should be interpreted to include a right to be heard, that is, to include the ordinary rule nisi procedures, although the section did not expressly provide for them. The Court concluded that there was only one proper construction of s 38: namely, that the *audi* rule had not been excluded and that the principles relating to the issuing of rules nisi and the making of interim preservation orders by the High Courts were applicable to the s 38 procedures.<sup>453</sup> Ackermann J was prepared to assume that the temporary deprivation

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447 *Ibid* at para 11.

448 2003 (4) SA 1 (CC), 2003 (5) BCLR 476 (CC) ('*NDPP v Mohamed*').

449 *Ibid* at para 36.

450 *Ibid* at para 37.

451 Act 121 of 1998.

452 *NDPP v Mohamed* (*supra*) at paras 5-8. There were two High Court decisions. *Mohamed NO and Others v National Director of Public Prosecutions and Another* 2002 (4) SA 366 (W). The High Court reached this conclusion regarding the constitutionality of s 38 without considering certain issues. Accordingly, the Constitutional Court set aside the High Court's order and remitted the matter to the High Court. *National Director of Public Prosecutions and Another v Mohamed NO and Others* 2002 (4) SA 843 (CC), 2002 (9) BCLR 970 (CC). In a second unreported judgment delivered on 16 October 2002, the High Court reconsidered the matter and came to the same conclusion in respect of s 38.

453 *NDPP v Mohamed* (*supra*) at para 51.

before the return day constitutes a limitation of FC s 34, but held that any such limitation would be justifiable under FC s 36.<sup>454</sup> *NDPP v Mohamed* is therefore authority for a presumptive principle of statutory interpretation in favour of the right to be heard, which must be discovered in the interpretation of legislation unless it is expressly or by necessary implication excluded, or there are exceptional circumstances which would justify not giving effect to it.

The Domestic Violence Act<sup>455</sup> contains various provisions that could be said to limit the right of access to court.<sup>456</sup> The aim of the Act is, of course, to provide protection for victims of domestic violence. It provides, amongst other things, for the issuing by a court of a protection order against a respondent suspected of committing domestic violence against an applicant. In terms of DVA s 4, an applicant may approach a court for an interim protection order without notice to a respondent. Section 5 determines the circumstances in which the interim order may be granted.<sup>457</sup> For our purposes, it is important to note that, if the court issues the interim order, the respondent must be given notice of this order and notice of a return day at which he may resist the finalization of the order. The respondent must be given at least 10-days' notice of the return day, but is entitled to anticipate it.<sup>458</sup> Section 5 also provides that a court may refuse to

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grant an interim order but put the respondent on notice that there will be a return day on which the question as to whether to issue an order will be determined. Where a court adopts this approach, there will be no limitation on the fairness of the proceedings since no justiciable dispute will have been determined without notice. DVA s 6 provides for the issuing of final orders. If the respondent does not appear on the return date, the court may grant the order if it is satisfied that proper service took place. If the respondent does appear, it must conduct a full hearing at which the respondent may present evidence.

In *Omar v Government of the RSA and Others*, the applicant challenged the constitutionality of DVA s 8. This provision gives a court the power, when issuing a protection order, to issue a warrant of arrest against a respondent. The idea is that the operation of the warrant will be suspended. However, if the respondent breaches the protection order (which, in terms of the Act, is a criminal offence),<sup>459</sup> the complainant may present the warrant to a member of the police service who must arrest the respondent if it appears to him that there are reasonable grounds to believe that the complainant will suffer imminent harm as a result of the

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454 Ibid at para 52.

455 Act 118 of 1998('DVA').

456 The scheme of the Act is summarized in *Omar v Government of the Republic of South Africa and Others*. 2006 (2) SA 289 (CC), 2006 (2) BCLR 253 (CC)('Omar') at paras 20-31.

457 A court will grant an order if there is a *prima facie* case that the respondent is committing or has committed an act of domestic violence and undue hardship may be suffered by the applicant if the interim order is not granted.

458 DVA s 5(5).

459 DVA s 17(a).

respondent's breach of the protection order.<sup>460</sup> There is also provision for the police officer to decline to arrest the respondent there and then but to put the respondent on notice of a hearing at which the question as to whether he has breached the protection order will be determined.<sup>461</sup>

The question whether the court may issue a warrant of arrest along with an interim order, as opposed to a final order, is important to the determination of the question whether s 8 limits the right of access to court. If the warrant of arrest is only issued along with the final protection order, there can be little complaint from an access to courts point of view, since the respondent is put on notice in regards to the final order. The Court in *Omar* did not directly consider this matter but it would seem from the definition of 'protection order' in the Act, read with s 8, that an arrest warrant may accompany an interim order. The question, therefore, was whether this limited the right of access to court.

One might have expected the respondent to challenge the whole scheme providing for protection orders. He did not, for example, challenge s 5, which provides for the issuing of an interim order without notice. Not much turned on this, in the end, because the reasons given by the court for rejecting his challenge based on s 8 apply to s 5 as well. They may, for that matter, apply to many emergency provisions that allow interim relief to be granted without notice. It must be noted, however, that the court explicitly limited its ruling to s 8.<sup>462</sup>

The Court in *Omar* held that the procedure for warrants of arrest did not limit the right in FC s 34. The Court pointed out that it would defeat the purpose of the Act if notice had to be given to the respondent in advance of the issuance of

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the interim order. However, despite the fact that the order could be issued without notice, it would only begin to operate once notice of it had been given to the respondent and, furthermore, would only be confirmed on the return day after notice had been given to the respondent. These procedures would enable him to make representations at the hearing for more permanent relief.<sup>463</sup> The Court explained:

The procedure provided for to obtain a protection order is not uncommon for situations where a party who feels threatened by the immediate conduct of another approaches a court for urgent relief without giving notice to the respondent. Interim relief is granted by courts on a daily basis and respondents are called upon to appear before the court on a specified return date to show cause why the interim relief should not be made final. On the return date the court, after a proper hearing, decides whether to discharge an interim order or to grant final relief. It is also quite common that the return date may be anticipated by the respondent and that an interim order can be varied or set aside. It is not surprising that the legislature has opted to utilise established and well-known procedures for dealing with emergency situations, to adapt these to meet the needs related to domestic violence and to codify them in a statute. Section 8 does not deny a respondent access to the courts.<sup>464</sup>

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460 DVA s 8(4)(b).

461 DVA s 8(5).

462 *Omar* (supra) at para 33.

463 *Omar* (supra) at para 37.

The implication of this approach is that any 'justiciable dispute' that is determined by the court only takes place on the return day of the interim order. Since proper notice of the return day is given to the respondent and he may make representations on the return day, his right of access to court is not limited.<sup>465</sup>

### (v) Public hearing

FC s 34 does not contain any internal limitations of the right to a *public* hearing. Therefore, any such limitations must survive limitations analysis under FC s 36. FC s 36 will, therefore, require that the publicity requirement be departed from only in terms of a law of general application. Useful guidance as to when the right to a public hearing may justifiably be limited may be drawn from art 14 of the ICCPR<sup>466</sup> which provides for exceptions

for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice....

The Constitutional Court has recently endorsed the 'principle of open justice', a constitutional principle that flows from, among other provisions, the right to a

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fair *public* hearing in FC s 34 and the right to a *public* trial under FC s 35. In *South African Broadcasting Corp Ltd v National Director of Public Prosecutions* ('SABC'),<sup>467</sup> the Court held that 'open justice' is an important part of those rights,<sup>468</sup> and explained the rationale for the principle:

Courts should in principle welcome public exposure of their work in the courtroom, subject, of course to their obligation to ensure that proceedings are fair. The foundational constitutional values of accountability, responsiveness and openness apply to the functioning of the Judiciary as much as to other branches of government. These values underpin both the right to a fair trial and the right to a public hearing (ie the principle of open courtrooms). The public is entitled to know exactly how the Judiciary works and to be reassured that it always functions within the terms of the law and according to time-honoured standards of independence, integrity, impartiality and fairness.<sup>469</sup>

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464 Ibid at para 38.

465 Another approach is to conclude that even an interim order constitutes a limitation of the right of access to court. However, the extent of the limitation is not severe (because of the return day at which submissions may be made) and the purpose of the limitation is very important (to prevent the respondent frustrating the order) and so such limitation will likely be found justifiable in terms of FC s 36.

466 See § 59.2(c) *supra*.

467 2007 (1) SA 523 (CC), 2007 (2) BCLR 167 (CC).

468 Ibid at para 30.

469 Ibid at para 32.

SABC concerned an application for leave to appeal against the order of the SCA refusing to allow the applicant to be present at and to record for the purpose of live broadcast the proceedings of the SCA in the high-profile criminal appeal of Mr Shaik. The majority ultimately held that there was no basis to interfere with the exercise of the SCA's discretion in refusing such access on the facts of this matter.<sup>470</sup>

In the subsequent judgment in *Shinga v The State & Another (Society of Advocates, Pietermaritzburg Bar, as Amicus Curiae); O'Connell and Others v The State*,<sup>471</sup> Yacoob J (for a unanimous Court) endorsed the above dictum in the context of a challenge to a provision of the Criminal Procedure Act.<sup>472</sup> The provision allowed criminal appeals to be held in chambers rather than in open court. Yacoob J wrote:

It is important that the significance of this deviation from the rule of law, fairness and justice be fully understood. The section makes dangerous inroads into our system of justice which ordinarily requires court proceedings that affect the rights of parties to be heard in public. It provides that an appeal can be determined by a Judge behind closed doors. No member of the public will know what transpired; nobody can be present at the hearing. Far from having any merit, the provision is inimical to the rule of law, to the constitutional mandate of transparency and to justice itself. And the danger must not be underestimated. Closed court proceedings carry within them the seeds for serious potential damage to every pillar on which every constitutional democracy is based.<sup>473</sup>

Yacoob J added that the principle of open justice is 'not without exception'.<sup>474</sup> In our view, examples of cases in which it would be appropriate to limit the right to

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a *public* hearing include such matters as: testimony of child witnesses; sensitive family law matters;<sup>475</sup> confidential information implicating national security or public security interests;<sup>476</sup> and criminal matters (in particular, sexual offences) in which the complainant prefers privacy. In each case, the departure from the requirement of

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470 Ibid at paras 61–67. For criticism of this decision see R Danay & J Foster 'The Sins of the Media: The SABC Decision and the Erosion of Free Press Rights' (2006) 22 *SAJHR* 563.

471 2007 (4) SA 611 (CC), 2007 (5) BCLR 474 (CC) ('*Shinga*').

472 Act 51 of 1977.

473 Ibid at para 25.

474 Ibid at para 27.

475 *W v W* 1976 (2) SA 308 (W), 310 (Evidence was permitted to be given in camera in this divorce case).

476 See *R v Muzorori* 1967 (2) SA 177 (RA). See also *Masetlha v President of the Republic of South Africa and Others (Independent Newspapers (Pty) Ltd and Minister for Intelligence Services Intervening)*, (Unreported, CCT 38/07, 22 August 2007) (The First Intervening Party, Independent Newspapers (Pty) Ltd, made application for parts of the record that had been removed from the public domain to again be made public. It also made an interlocutory application for its legal representatives and senior editors to have access to the record in the main proceedings so that they could properly prepare for the primary application. The First Intervening Party contended that the right in FC s 34 to a 'public hearing' extends to the documents contained in the appeal record. A majority of the Court issued an order dismissing the interlocutory application without reasons. The main application was heard in November 2007.)

open justice must be justified by means of a law of general application. Therefore, a law of general application must ordinarily permit a judicial officer to hold a hearing behind closed doors. The absence of such a law would deny the court any discretion to hold in camera proceedings. In criminal proceedings, s 153 of the Criminal Procedure Act provides the statutory basis for a trial not to be held in open court.<sup>477</sup> The provision is concerned mainly with witness safety, sexual offences and offences involving 'inspiring fear' and with children involved in criminal proceedings. As a general rule, all High Court civil proceedings must be conducted in open court.<sup>478</sup> The High Court has a discretion to order otherwise in special cases.<sup>479</sup> These departures, in appropriate cases, will be reasonable and justifiable limitations of the right to have a hearing in open court.

Parties often agree that private arbitrations should be held behind closed doors. Christie contends that such agreements constitute a waiver of the right to a public hearing in FC s 34.<sup>480</sup> He further refers to the Supreme CA decision in *Total Support Management (Pty) Ltd v Diversified Health Systems (SA) (Pty) Ltd*<sup>481</sup> as authority for the proposition that FC s 34 probably does not apply to consensual arbitration — although it may apply to statutorily imposed arbitration.<sup>482</sup> We have argued above that FC s 34 may apply horizontally, at least when private parties litigate in the state courts.<sup>483</sup> In addition, however, FC s 34 is arguably capable of horizontal application in the context of private arbitration. The mere existence of

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a contract is not sufficient to exclude its application. In *Telcordia Technologies Inc v Telkom SA Ltd*, the Supreme Court of Appeal held that FC s 34 does apply to consensual arbitration proceedings, but that its requirements may be waived by parties entering into an arbitration agreement.<sup>484</sup> In our view, and as we discuss immediately below, arbitration may constitute dispute resolution in alternative independent and impartial fora, and, to that extent, will be regulated by FC s 34.

### **(c) Another independent and impartial tribunal or forum**

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477 Act 51 of 1977.

478 Supreme Court Act 59 of 1959 s 16.

479 Ibid. See also *Cerebos Food Corporation Ltd v Diverse Foods SA (Pty) Ltd* 1984 (4) SA 149 (T); *Botha v Minister van Wet and Orde* 1990 (3) SA 937 (W), 944; *S v Mothopeng* 1978 (4) SA 874 (T); *S v Sekete* 1980 (1) SA 171 (N).

480 For a critique of the notion of constitutional waiver, see S Woolman 'Category Mistakes and the Waiver of Constitutional Rights: A Reply to Deeksha Bhana' (2008) 125 SALJ -. This article does not necessarily reflect the views of the authors.

481 2002 (4) SA 661 (SCA) at paras 27-8.

482 See RH Christie 'The Law of Contract and the Bill of Rights' in *Bill of Rights Compendium* (1996) 3H38.

483 See § 59.3(a)(ii) supra.

484 2007 (3) SA 266 (SCA) at para 47.



The possibility of justiciable disputes being determined by alternative fora to courts has not been considered extensively by our courts. There are, however, various contexts in which, it seems, it will be acceptable for an alternative forum to determine a justiciable dispute. For example, the Value Added Tax Act, discussed above, creates a Special Court that resolves certain disputes. It is appropriate for this independent and impartial tribunal to be used in tax cases.<sup>485</sup> Since the resolution of disputes in alternative fora will only comply with FC s 34 where it is 'appropriate', the question whether an alternative forum may be used is clearly justiciable. But the nature of such 'appropriateness' has not yet been considered in detail. The other important question that arises is how the fair public hearing requirement of FC s 34 will be applied in fora other than courts. In the discussion that follows, we consider the application of FC s 34 to particular types of proceedings and proceedings held in special alternative fora and tribunals.

### (i) Extradition hearings

In *Geuking v President, RSA and Others*<sup>486</sup> the applicant challenged the constitutionality of s 10(2) of the Extradition Act.<sup>487</sup> In order to understand this challenge it is necessary, briefly, to consider the mechanism for extradition provided in the Act.

Where a foreign state requests the extradition of a person present in South Africa a detailed procedure is invoked. For our purposes, it is necessary to note that, when a person is arrested pursuant to an extradition request, he is brought before a magistrate for a hearing.<sup>488</sup> The purpose of the hearing is to determine whether the person is 'extraditable'. If the person is found not to be extraditable, then he is released.<sup>489</sup> However, even if he is found to be extraditable, the process does not end there. The Minister must make the final determination whether to extradite him.<sup>490</sup>

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Moreover, in order for a person to be extradited, the principle of 'double criminality' is applicable. The offence must constitute a crime both in South Africa and the country that seeks extradition.<sup>491</sup> Whether the offence, if proved, would constitute an offence here is an issue that is clearly within the expertise of the magistrate and he must hear evidence and submissions in this regard. However, the question whether the offence would constitute an offence in the foreign country is

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485 *Metcash Trading Ltd v Commissioner, South African Revenue Service* 2001 (1) SA 1109 (CC), 2001 (1) BCLR 1 (CC) at para 47.

486 2003 (3) SA 34 (CC), 2004 (9) BCLR 895 (CC) ('*Geuking*').

487 Act 67 of 1962.

488 Extradition Act s 9(1).

489 Extradition Act s 10(3).

490 See Extradition Act ss 10(1) and 11 .

491 For the definition of 'extraditable offence', see Extradition Act s 1.

not within the expertise of local judicial officers and the Act provides that a certificate from the authorities of the foreign state to the effect that the offence, if proved, would indeed be an offence in the foreign country is conclusive proof of this fact.<sup>492</sup> So, a number of considerations must be taken into account by a magistrate before he may conclude that a person is extraditable. A full hearing, with evidence, takes place in respect of all of them. The exception is proof of the crime's status in the foreign country. The applicant in *Geuking* argued that this part of the process violated his right of access to court.

In rejecting his argument, the Court pointed out that the magistrate's hearing was merely a step on the way to the determination whether the person ought to be extradited. The Minister makes the final decision.<sup>493</sup> The Court held that it was not inappropriate or unfair of the legislature to relieve the magistrate of having to make a determination in respect of which South African lawyers would usually have no knowledge.<sup>494</sup> Furthermore, an appeal exists against the decision of the magistrate to a High Court.<sup>495</sup> In any case, before the Minister makes a final decision, she is obliged to take representations from the prospective extraditee and might, in appropriate cases, be called upon to determine whether the certificate issued by the foreign authorities was indeed sufficient evidence of the status of the alleged offence in foreign law.<sup>496</sup> The implication of this obligation is that the affected person will have the opportunity to lead evidence to the Minister before the decision is made and will have the opportunity to argue that the certificate issued by the foreign authorities should not be considered an accurate reflection of the status of the crime in that jurisdiction.

Implicit in the court's reasoning is that the provision for a hearing before the Minister constitutes an appropriate use of an alternative tribunal or forum. In determining whether the right of access to court had been violated the Court placed great stock in the fact that the Minister hears from the affected person and has a discretion whether to order extradition or not. The question whether a person ought to be extradited is clearly a justiciable dispute within the ambit of FC s 34. Therefore, *Geuking* could be understood in terms of that part of FC s 34 that allows for an alternative forum in appropriate cases. Of course, since the

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attack was against the hearing before the magistrate, and not the Minister, the compliance of the hearing before the Minister with FC s 34 was not raised by the applicants. The Court did not directly consider this question and so the answer to the question as to whether the Minister is an 'independent and impartial' tribunal will have to wait for resolution in some future dispute.

## **(ii) Arbitration**

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492 Extradition Act s 10(2).

493 *Geuking* (supra) at para 44.

494 *Ibid* at para 45.

495 *Ibid* at para 42.

496 *Ibid* at paras 42 and 46.

There are two forms of arbitration proceedings: those that result as a consequence of agreement between the parties in terms of the Arbitration Act<sup>497</sup> and those that are compulsory in terms of legislation. An example of the latter is arbitration of disputes referred to the Commission for Conciliation, Mediation and Arbitration (CCMA). The CCMA, established by the Labour Relations Act,<sup>498</sup> is not a court of law.<sup>499</sup> In terms of the LRA, certain labour disputes must be determined by arbitration in the CCMA and there is no right to appeal.<sup>500</sup> There is, however, a right to review on limited grounds.<sup>501</sup> This structure envisages that the CCMA will be the final arbiter of certain disputes of fact or law. The Labour Appeal Court has held that this arrangement does not violate the right of access to court:

There is no constitutional right to have matters capable of being decided by the application of law determined by a court of law. It may be done by another independent and impartial tribunal (section 34 of the Constitution). The Commission is such a tribunal. It is (and was, see *Hira v Booysen* 1992 (4) SA 69 (A) at 91E-I) quite proper to give an independent and impartial administrative tribunal the exclusive competence to decide not only matters of fact, but also of law, with no right of appeal to a court.<sup>502</sup>

It was previously unclear whether arbitration proceedings of the CCMA constitute administrative action under FC s 33 (and PAJA) and/or whether they fall under FC s 34 and are to be deemed proceedings conducted in another independent and impartial forum or tribunal. The Constitutional Court, in *Sidumo*, has resolved this uncertainty. The majority held that CCMA arbitrations constitute administrative action under FC s 33. However, they are not reviewable under PAJA, but must comply with the requirements of a 'fair public hearing' under FC s 34. In addition to clarifying the application of FC s 34 to CCMA arbitration proceedings, the reasoning of the Court, and the divergent views among its members, sheds light on the relationship between FC s 34 and other constitutional rights.

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Navsa AJ noted in his majority judgment that compulsory arbitrations by the CCMA under the LRA are distinct from private arbitrations.<sup>503</sup> CCMA commissioners exercise public power of a character which, under the pre-constitutional approach to categorisation of functions, would have been regarded as 'an administrative body

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497 Act 42 of 1965.

498 Act 66 of 1995 ('LRA').

499 *Carephone (Pty) Ltd v Marcus NO and Others* 1999 (3) SA 304 (LAC), 1998 (10) BCLR 1326 (LAC) ('*Carephone*') at para 18.

500 LRA s 143(1).

501 LRA s 145.

502 *Carephone* (supra) at para 33.

503 *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* [2007] ZACC 22 at para 88. Moseneke DCJ, Madala J, O'Regan J and Van der Westhuizen J concurred in the judgment of Navsa AJ. The bench of ten judges split 5-4 in this matter, with Sachs J filing a judgment that purports to agree with both of the main divergent judgments. The judgment of Navsa AJ accordingly constitutes the majority judgment.

exercising a quasi-judicial function'.<sup>504</sup> He concluded, therefore, that a commissioner conducting a CCMA arbitration is performing an administrative function.<sup>505</sup> However, he held that PAJA does not apply to the review of CCMA awards because they are reviewable under s 145 of the LRA — the specific, constitutionally-mandated legislation enacted to govern labour disputes.<sup>506</sup>

Against this background, Navsa AJ considered an argument advanced by counsel for the employee, in support of the argument that PAJA ought not to apply to the review of CCMA awards, that 'the rights sought to be vindicated in arbitrations conducted under the LRA are linked to the fundamental rights provided for in ss 23 and 34 and not to the right to just administrative action contained in s 33 of the Constitution'.<sup>507</sup> Navsa JA rejected this argument, and his reasoning sheds light on the Court's understanding of the relationship that the right of access to courts bears to other rights, in particular the labour and administrative justice rights in FC ss 23 and 33:

This submission is based on the misconception that the rights in sections 23, 33 and 34 are necessarily exclusive and have to be dealt with in sealed compartments. The right to fair labour practices, in the present context, is consonant with the right to administrative action that is lawful, reasonable and procedurally fair. Everyone has the right to have these rights enforced before the CCMA acting as an impartial tribunal. In the present context, these rights in part overlap and are interconnected.<sup>508</sup> (Footnotes omitted)

In a separate concurring judgment, O'Regan J agreed with Navsa AJ that a CCMA arbitration constitutes administrative action that is subject to the requirements of FC s 33, and concluded that the CCMA constitutes an independent and impartial forum under FC s 34.<sup>509</sup> Her judgment is animated by a concern that

if we understand section 33 and section 34 to be mutually exclusive constitutional provisions, we may end up with a formalist jurisprudence based on a distinction between 'administrative' in section 33 and 'judicial' or 'adjudicative' decisions by tribunals governed only by section 34 which is at odds with the substantive vision of our Constitution.<sup>510</sup>

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In a minority judgment, Ngcobo J (Mokgoro, Nkabinde and Skweyiya JJ concurring) classified the function performed by the CCMA as judicial, identified it as an

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504 Ibid

505 Ibid

506 Ibid at para 104. Navsa AJ held, further, that the reasonableness standard embodied in FC s 33 now infuses review under s 145 of the LRA, Ibid para 106.

507 Ibid at para 111.

508 Ibid at para 112.

509 Ibid at para 124.

510 Ibid at para 135.

'independent and impartial tribunal' within the scope of FC s 34 and concluded, therefore, that its decisions do not constitute administrative action as contemplated by FC s 33.<sup>511</sup>

In a judgment in which he claims to align himself with the positions of both Navsa AJ and Ngcobo J, Sachs J emphasized the hybridity of the rights relationship at issue and contended that FC ss 23, 33 and 34 apply to CCMA arbitrations.<sup>512</sup> Sachs J appears to believe that CCMA awards do constitute administrative action under FC s 33, that PAJA should nevertheless not apply to their review, and that CCMA arbitrations are subject to the 'fairness' requirements of FC s 34.<sup>513</sup> Sachs J holds that FC s 33 requires 'fair dealing'; FC s 23 requires that the 'arbitration process must not fall outside the bounds of reason [because] to accept it doing so would hardly represent a fair outcome'; and FC s 34 requires fairness which, according to Sachs J, entails 'some reasonably sustainable fit between the evidence and the outcome'.<sup>514</sup> Sachs J appears to have been alive to the criticism that this approach, emphasizing hybridity and permeability could conduce to imprecision. He defends his mode of reasoning as follows:

Seepage should be understood not as a form of analytical blurring to be avoided, but rather as a desirable mechanism for ensuring that constitutional interests in appropriate cases are properly protected, and constitutional justice fully achieved.<sup>515</sup>

We share the concern expressed by Navsa AJ, O'Regan J and Sachs J as to the dangers of compartmentalizing FC ss 33 and 34 (and FC s 23). However, to subsume the requirements of the provisions of FC ss 23, 33 and 34 under a generalized standard of fairness-cum-reasonableness, as Sachs J seems to propose, cannot be supported. Fairness, as embodied in various rights in the Bill of Rights, is not a one-size-fits-all concept. Nor is it readily interchangeable with concepts such as reasonableness or rationality. Legal realists might contend that judges in any event exercise a wide discretion when they apply pliable standards such as reasonableness or fairness to decide particular cases and merely rationalize their decisions by applying specific legal rules. We do not wish to enter that complex jurisprudential debate here. Suffice it to say that, in our view, it remains important that the Constitutional Court, as an apex court, delivers judgments that provide lower courts and practitioners with sufficient guidance to take reasoned decisions on how to approach particular cases.

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The majority in *Sidumo* enunciates at least the following two principles:

- (i) CCMA arbitrations constitute administrative action under FC s 33, but are reviewable under s 145 of the LRA, infused with the reasonableness standard of FC s 33. They are not reviewable under PAJA.

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511 *Sidumo* (supra) at paras 160–289, especially para 238.

512 *Ibid* at paras 156–7.

513 *Ibid* at para 158.

514 *Ibid*.

515 *Ibid* at para 151.

- (ii) The CCMA constitutes an independent and impartial forum under FC s 34, and a CCMA arbitration must therefore (also) satisfy the requirements of a 'fair public hearing' in terms of FC s 34.

It is beyond the scope of this chapter to engage with the principles governing the review of CCMA awards under the LRA and FC s 33. From an access to courts perspective, however, we note that the application of the fair public hearing requirement of FC s 34 to CCMA arbitration proceedings will obviously not entail transposing the FC s 34 requirements for judicial proceedings onto the CCMA. We explore the issue of the flexible nature of fairness under FC s 34 in § 59.4(c)(v) and (vi) below. A similar approach is likely to be taken when fairness is applied to CCMA arbitrations.

When it comes to consensual arbitrations in terms of the Arbitration Act, there are two ways to view them: one could see them as constituting alternative independent and impartial fora, or one could see the parties to them as having waived their right of access to court.<sup>516</sup> The Supreme Court of Appeal in *Total Support Management*<sup>517</sup> left open the question whether the right of access to court may be waived.<sup>518</sup> It also did not directly decide that an arbitration proceeding constitutes an appropriate alternative forum.<sup>519</sup> It held, instead, that the fairness requirement of FC s 34 is, in any case, satisfied where the parties by mutual agreement define what is fair in their arbitration agreement.<sup>520</sup> In *Patcor Quarries CC v Issroff and Others*,<sup>521</sup> Mpati J (as he then was) progressed on the assumption that IC s 22 includes a right to appeal. It was argued that s 28 of the Arbitration Act, which provides that arbitration awards are final and not subject to appeal, violated the right of access to court. Mpati J pointed out that the Act provides that parties may agree to an appeal in their contract. Parties who signed arbitration agreements without providing for appeals could be said to have abandoned their right to appeal.<sup>522</sup>

This debate has now been resolved – at least until the matter comes before the Constitutional Court. In the recent case of *Telcordia Technologies Inc v Telkom SA Ltd*, the Supreme Court of Appeal unanimously held that FC s 34 applies to

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arbitrations in terms of the Arbitration Act: however it also held that the requirements of FC s 34 may be waived.<sup>523</sup> Harms JA held that there was nothing

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516 See Christie (supra) at 3H38.

517 *Total Support Management (Pty) Ltd & Another v Diversified Health Systems (SA) (Pty) Ltd and Another* 2002 (4) SA 661 (SCA) ('Total Support').

518 Ibid at para 27.

519 Ibid at para 27.

520 Ibid at para 28.

521 1998 (4) BCLR 467 (SE).

522 Ibid at 481.

preventing the parties from defining what is 'fair' for the purposes of their dispute.<sup>524</sup> Furthermore, Harms JA, referring to the Supreme Court of Appeal judgment in *Napier v Barkhuizen*,<sup>525</sup> held that the Final Constitution prizes the values of autonomy and dignity and that these values 'find expression in the liberty to regulate one's life by freely engaged contractual arrangements.'<sup>526</sup> Harms JA therefore held that the rights contained in FC s 34 could be waived unless the waiver was in conflict with another constitutional provision or was otherwise *contra bonos mores*.<sup>527</sup>

### (iii) Parliamentary disciplinary proceedings

*De Lille v Speaker of the National Assembly*<sup>528</sup> concerned the decision of an *ad hoc* committee of Parliament to suspend the applicant and demand a formal apology from her for remarks made during a session of the National Assembly that were considered 'unparliamentary'. In short, the applicant had made remarks to the effect that certain senior members of the African National Congress (ANC) were spies during apartheid. Having been asked to withdraw these remarks she unconditionally did so, but was later punished by an *ad hoc* disciplinary committee. The relevant facts regarding the committee were as follows:<sup>529</sup>

- It was convened with proportionate representation of the National Assembly and was therefore dominated by ANC members.
- The chair of the committee was also a member of the ANC.
- The chair conducted himself in a way that suggested that the ANC had already come to a decision in regard to the appropriate sanction before the committee had begun its deliberations.
- The committee did not formally reach a conclusion that the applicant was guilty of the offence with which she was charged but, nevertheless, proceeded to consider the appropriate sanction.

The High Court found that the committee had acted in a biased and *mala fide* manner.<sup>530</sup> It therefore held that

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523 2007 (3) SA 266 (SCA) ('*Telcordia*')

524 *Ibid* at para 47.

525 *Napier v Barkhuizen* 2006 (4) SA 1 (SCA), 2006 (9) BCLR 1011 (SCA), [2006] 2 All SA 469 (SCA).

526 *Telcordia* (supra) at para 47.

527 *Ibid* at para 48.

528 *De Lille and Another v Speaker of the National Assembly* 1998 (7) BCLR 916 (C) ('*De Lille*').

529 *Ibid* at para 6.

530 *Ibid* at para 18.

it was incumbent on the National Assembly to create a disciplinary mechanism which is consonant with the Constitution. The *ad hoc* committee was not and could not be an independent and impartial forum for purposes of s 34 because, unlike the disciplinary

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committee envisaged in the rules [of Parliament], it was dominated by the majority party. Its independence or impartiality was significantly compromised.<sup>531</sup>

#### (iv) The status of refugees and immigrants

Prior to the enactment of the Refugees Act,<sup>532</sup> decisions as to refugee status were taken by the Refugee Affairs Standing Committee. There was however a right to appeal to a Refugee Affairs Appeal Board. In *Baramoto and Others v Minister of Home Affairs and Others*,<sup>533</sup> this set-up was alleged to violate the right of access to court because, as alternative tribunals, these boards were neither impartial nor independent. The High Court held that there was nothing to suggest that, on the facts of the case, the Committee and Board were neither independent nor impartial.<sup>534</sup> The focus was not on whether there was some form of institutional bias inherent in these tribunals but rather whether, in the context of the particular matter, the potential for bias existed.

In terms of the Refugees Act, decisions regarding applicants' refugee status are taken, at first instance, by a Refugee Status Determination Officer.<sup>535</sup> The Act establishes a Standing Committee for Refugee Affairs.<sup>536</sup> The Committee reviews the decisions of Refugee Status Determination Officers in certain cases.<sup>537</sup> The Act provides for appeals from decisions of the Standing Committee to an Appeal Board.<sup>538</sup> The same question engaged by *Baramoto* arises under the Refugees Act — is the Appeal Board an independent and impartial alternative forum to a court?<sup>539</sup>

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531 *DeLille* (supra) at para 36.

532 Act 130 of 1998.

533 1998 (5) BCLR 562 (W).

534 *Ibid* at 576.

535 Refugees Act s 21.

536 Refugees Act s 9(1).

537 Refugees Act ss 11 and 25.

538 Refugees Act s 26.

539 It should be noted that the Immigration Act 13 of 2002 sought to amend s 26 of the Refugees Act to replace the appeal to the Appeal Board with an appeal to a court. This would have rendered the debate about whether the Appeal Board is an independent and impartial alternative forum somewhat moot, because a full appeal would be available before an ordinary court. This amendment has not, as yet, come into force. It should also be noted that if one consults Juta's versions of the statutes, it seems as if the amendment has indeed come into force. This is not, in fact, so and the Butterworths version reflects this.



Other similar tribunals, established in terms of legislation, exist and raise similar issues. For instance, in terms of the Immigration Act,<sup>540</sup> decisions as to immigration status are made, in the first instance, by immigration officers. Decisions of immigration officers may be reviewed by the Minister in certain cases and reviewed or appealed to the Director-General in others.<sup>541</sup> The latter may be appealed or reviewed further to the Minister. There is no right of appeal to a court. This arrangement naturally raises the question whether the Director-General and the Minister constitute independent and impartial tribunals.

### (v) Commissions of inquiry

In *Mbebe and Others v Chairman, White Commission and Others*, the applicants had been members of the Transkeian police force and, just prior to the advent of democracy, had received promotions.<sup>542</sup> In 1998, the White Commission, which had been appointed by the President in terms of IC s 236(6), found that the promotions had been irregular and, as a result, the promotions were either set aside or altered.<sup>543</sup> The applicants sought to have the findings of the White Commission set aside for various reasons. Of interest for our purposes is an amendment to the applicants' pleadings, which sought to challenge IC s 236(6) as being 'unconstitutional' for violating FC s 34. Although this contention may seem strange, it was a plausible argument to advance. Item 24 of Schedule 6 to the Final Constitution, which deals with transitional arrangements, preserved IC s 236(6) 'subject to consistency with the new Constitution'. It was therefore open to the applicants to argue that IC s 236(6) was inconsistent with FC s 34 and, therefore, invalid.

The High Court rejected this argument. It proceeded on the assumption that a commission envisaged by IC s 236(6) was not a court of law, but a *sui generis* tribunal.<sup>544</sup> The High Court held that this tribunal satisfied the criteria of independence and impartiality required by the Final Constitution. The commission was headed by a judicial officer and a judicial officer appointed in terms of the Constitution is in all material respects an 'impartial entity, independent of the executive and the legislature' who is 'to act as arbiter between the individual and

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540 Act 13 of 2002.

541 See, generally, Immigration Act s 8.

542 2000 (7) BCLR 754 (Tk) ('*Mbebe*').

543 IC s 236(6) provided:

Notwithstanding the provisions of this section, the conclusion or amendment of a contract, the appointment or promotion, or the award of a term or condition of service or other benefit, which occurred between 27 April 1993 and 30 September 1994 in respect of any person employed at any time during the said period by an institution referred to in subsection (1), or any class of such persons, may, at the instance of any interested party, before 31 December 1996 be referred to a commission appointed by the President and presided over by a judge, for review, and if not proper or justifiable in the circumstances of the case, the commission may reverse or alter the contract, appointment, promotion or award before a date to be determined by the Minister for the Public Service and Administration.

544 *Mbebe* (supra) at 773.

the State'.<sup>545</sup> The High Court held, further, that the proceedings in an alternative forum or tribunal did not need to be identical to those conducted in court, but that, in any case,

the procedures that were adopted by the first respondent were largely consistent with those employed in an ordinary court of law. The applicants were given the right to legal representation, the right to cross-examine the witnesses who were called by the official appointed by the Commission to perform such function and the right to give evidence and to call witnesses. In practice therefore the applicants were afforded the same rights as those enjoyed by a litigant in ordinary civil proceedings.<sup>546</sup>

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The Commission appointed by the President in this matter was therefore compliant with FC s 34. The court deemed it unnecessary to decide whether, in all such cases, a commissioner appointed in terms of IC s 236(6) had to be a judge.<sup>547</sup>

In *Bongoza v Minister of Correctional Services and Others*, the High Court reached a similar conclusion in respect of the same commission of inquiry as that considered in *Mbebe*.<sup>548</sup> Unlike the court in *Mbebe*, which focused on the similarities between the procedures adopted by the White Commission and those procedures used in a court of law, the court in *Bongoza* confronted the differences: in particular, it confirmed that the rules of evidence applicable to the commission differed from a court of law in that the commission could have regard to a wider range of evidence, such as hearsay evidence, and was not obliged to allow cross-examination of witnesses.<sup>549</sup> The *Bongoza* court confirmed that the requirements of fairness are flexible and that FC s 34 envisages that courts do not have a monopoly on independence and impartiality: an independent and impartial hearing is possible in a forum other than a court. The commission of inquiry at issue qualified as such.<sup>550</sup>

## (vi) Specialist complaints tribunals

Statutes often establish tribunals the function of which is to determine the validity of specific complaints that fall within the scope of operation of a particular piece of legislation.<sup>551</sup> At times, these complaints embrace disputes that ought to be resolved by the application of the law as contemplated in FC s 34. At others, the tribunals are best understood as administrative decision-makers whose decisions may constitute 'administrative action', subject to PAJA review but not to FC s 34.

In *Islamic Unity Convention v Minister of Telecommunications and Others*,<sup>552</sup> the applicant challenged certain provisions of the now repealed Independent Broadcasting

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545 Ibid at 775, relying on *Nel v Le Roux NO and Others* 1996 (3) SA 562 (CC) at para 15.

546 *Mbebe* (supra) at 776.

547 *Mbebe* (supra) at 775 and 776.

548 2002 (6) SA 330 (TkH) ('*Bongoza*').

549 Ibid at paras 17-18.

550 Ibid at paras 22-5.

Act<sup>553</sup> (and regulations made under it) and its successor statute, the Independent Communications Authority of South Africa Act.<sup>554</sup> The challenge relied on FC s 34. It focused on the powers and functions of the Broadcasting Monitoring and Complaints Committee (BMCC), and had its origins in a complaint lodged against the applicant for broadcasting a programme concerning Zionism and Israel that contravened the Code of Conduct for Broadcasting Services contained in the IBA Act.<sup>555</sup> The applicant noted that the impugned provisions conferred monitorial, investigative and adjudicative powers on a single body, the BMCC — and it contended that the concatenation of such powers was inconsistent with FC ss 33 and 34.

The Court in *Islamic Unity* noted that '[t]he intermingling of these powers brings into question the impartiality of the BMCC'.<sup>556</sup> It stated that the appropriate test was to ask whether a reasonable apprehension of partiality and therefore bias existed in the scheme provided for under the impugned provisions. Van Oosten J referred with approval to the decision of the Canadian Federal Court of Appeal in *MacBain v Canadian Human Rights Commission et al, MacBain v Lederman et al.*<sup>557</sup> In *MacBain*, the fairness of proceedings arising from a complaint filed with the Canadian Human Rights Commission was in issue. Van Oosten J noted that the procedure adopted by the Commission, like that of the BMCC, involved it assuming the role of investigator, prosecutor and adjudicator of complaints.<sup>558</sup> In *MacBain*, the court found that this arrangement 'easily gives rise ... to a suspicion of influence or dependency'. Van Oosten J approved of the reasoning in *MacBain* and adopted it in deciding *Islamic Unity*. After noting the separation of roles of investigator, prosecutor and decision-maker in criminal proceedings, Van Oosten J held:

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551 Chapter 9 of the Final Constitution establishes certain institutions whose functions include the investigation and adjudication of complaints: the Public Protector, Human Rights Commission and Commission for Gender Equality. For more on the Chapter 9 Institutions, see S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS) Chapters 24A-F. Statutory examples include the Inspector-General of Intelligence established in terms of the Intelligence Services Control (Oversight) Act 40 of 1994, which investigates complaints against members of the intelligence services; the Independent Complaints Directorate established in terms of the South African Police Service Act 68 of 1995, which investigates complaints against members of the South African Police Service; and professional boards established to consider complaints against health professionals in terms of the Health Professions Act 56 of 1974. On oversight of the police and intelligence services see December 2007) Chapter 23B.

552 Unreported WLD case no 3431/06, 26 April 2007 ('*Islamic Unity Convention*'). At the time of writing, the confirmation proceedings in this matter were pending before the Constitutional Court.

553 Act 153 of 1993 ('IBA Act').

554 Act 13 of 2000 ('the ICASA Act').

555 *Ibid* at para 3.

556 *Ibid* at para 16.

557 22 DLR (4th) 119 (FedCA).

558 *Islamic Unity Convention* (supra) at para 18.

I can see no reason why the principles underscoring fundamental concepts such as independence, impartiality and resulting fairness should not with equal force apply to administrative bodies like the BMCC. It is accordingly my finding that a reasonable suspicion of influence, dependency or bias arising from the direct connection between the prosecutor of the complaint (the chairperson of the BMCC) and the decision maker (the BMCC) cannot be excluded. It follows that the constitutional challenge of the impugned provisions of the IBA Act must be upheld. The impugned provisions of the ICASA Act, which are similar to the impugned provisions of the IBA Act, must accordingly suffer the same fate.

We note that the court did not indicate whether the basis of its finding was FC s 33 and/or FC s 34, but its references to a 'fair hearing' in its reasons suggest that FC s 34 was applied. The High Court then turned to consider the constitutionality of regulations regarding the powers of the BMCC. The regulations

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allowed for witnesses to be questioned through the Chairperson and to be cross-examined only if the Chairperson deemed it necessary and in the interests of the functions of the BMCC. The High Court held that these regulations were at odds with the 'normal rights of cross-examination' and unreasonably curtailed the right of a party to conduct its case.<sup>559</sup> Accordingly, the regulations were inconsistent with the right to a fair hearing in FC s 34.<sup>560</sup>

In our view, *Islamic Unity* erred in two respects. First, it is not clear that complaints referred to the BMCC constitute 'disputes that can be resolved by the application of law'. They may be. For example, the subject of a complaint could constitute actionable defamation and the outcome of the complaints process would be dispositive of such a civil claim. However, breaches of a broadcasting code of conduct will not necessarily constitute disputes falling within the ambit of FC s 34. As noted above, the question whether a dispute of law exists at all is one requirement for the application of FC s 34.

Secondly, and more fundamentally, however, the judgment rigidly equates the normal procedures applicable in courts to the *fairness* of a hearing in a complaints tribunal. We think that the approach adopted in *Bongoza*,<sup>561</sup> which acknowledges that fairness is a flexible concept that varies depending on a number of factors, and that it is not necessarily unfair to depart from the ordinary procedures of the courts, is to be preferred. We would also endorse the dicta of Van Niekerk AJ in *Avril Elizabeth Home for the Mentally Handicapped v Commission For Conciliation, Mediation & Arbitration and Others*.<sup>562</sup> Of procedural fairness as it applies in CCMA proceedings in terms of the LRA, the judge wrote:

Where a commissioner is obliged (as commissioners are) to arbitrate dismissal disputes on the basis of the evidence presented at the arbitration proceedings, procedural requirements in the form that they developed under the criminal justice model are applied ultimately only for the sake of procedure, since the record of a workplace disciplinary hearing presented to the commissioners at any subsequent arbitration is

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559 *Islamic Unity Convention* (supra) at para 23.

560 Ibid

561 *Bongoza* (supra).

562 (2006) 27 ILJ 1644 (LC).

presented only for the purpose of establishing that the dismissal was procedurally fair. The continued application of the criminal justice model of workplace procedure therefore results in a duplication of process, with no tangible benefit to either employer or employee.

The signal of a move to an informal approach to procedural fairness is clearly presaged by the explanatory memorandum that accompanied the draft Labour Relations Bill. The memorandum stated the following:

"The draft Bill requires a fair, but brief, pre-dismissal procedure... [It] opts for this more flexible, less onerous, approach to procedural fairness for various reasons: small employers, of whom there are a very large number, are often not able to follow elaborate pre-dismissal procedures; and not all procedural defects result in substantial prejudice to the employee.'

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On this approach, there is clearly no place for formal disciplinary procedures that incorporate all of the accoutrements of a criminal trial, including the leading of witnesses, technical and complex 'charge-sheets', requests for particulars, the application of the rules of evidence, legal arguments, and the like.

In our view, FC s 34 requires a similarly flexible approach to fairness when disputes are resolved in an alternative forum or tribunal. Although criminal justice procedures may be followed as a matter of convenience, what is unfair in a court is not necessarily unfair in another forum.

#### **(d) Right to enforcement of an effective remedy**

In *Jooste v Score Supermarket*, the Constitutional Court held that the predecessor to FC s 34, IC s 22, did not call for the retention of all common law rights of action which existed at any stage of the litigation.<sup>563</sup> FC s 34 also provides no protection against legally incorrect judicial decision-making.<sup>564</sup> FC s 34 is therefore not concerned at all with the content of the substantive law: that is, what causes of action, defences and rules may exist at common law or in legislation. But where causes of action *do* exist under the substantive law, including but not limited to those founded on the specific terms within the Bill of Rights, FC s 34 entitles persons not only to have access to courts for the sake of access, but to meaningful access that leads ultimately to enforcement of an 'effective remedy'. In *Modderklip*, the Constitutional Court concluded, in the face of the intractable legal stalemate that gave rise to the dispute before it, that:

The obligation resting on the State in terms of section 34 of the Constitution was, in the circumstances, to take reasonable steps to ensure that Modderklip was, in the final analysis, provided with effective relief. The State could have expropriated the property in question or provided other land, a course that would have relieved Modderklip from continuing to bear the burden of providing the occupiers with accommodation. The State failed to do anything and accordingly breached Modderklip's constitutional rights to an effective remedy as required by the rule of law and entrenched in section 34 of the Constitution.

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563 *Jooste v Score Supermarket Trading (Pty) Ltd* 1999 (2) SA 1 (CC), 1999 (2) BCLR 139 (CC) at para 21.

564 *Lane & Fey NNO v Dabelstein and Others* 2001 (2) SA 1187 (CC), 2001 (4) BCLR 312 (CC).

In *Fose v Minsiter of Safety and Security*,<sup>565</sup> without reference to FC s 34, the Constitutional Court discussed the right to 'appropriate relief' in terms of IC s 7(4)(a) as follows:

Appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a *mandamus* or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all-important rights.<sup>566</sup>

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Other provisions of the Final Constitution refer to relief and remedial entitlements. FC s 172(1)(b) provides that a court deciding a constitutional matter may make 'any order that is just and equitable'. FC s 38 provides that a court may 'grant appropriate relief' to a person entitled to approach it. *Modderklip* has drawn a new and powerful link between the entitlement to relief in these non-rights provisions of the Final Constitution and the rights that the Final Constitution confers. The judgment is authority for the proposition that from FC s 34 flows an entitlement to judicial and enforcement mechanisms that allow persons to vindicate their substantive rights. This entitlement, which flows from the rule of law doctrine embraced in FC s 1(c), extends beyond merely obtaining a court order. It requires its actual enforcement. It would seem, therefore, that FC s 38 entrenches the right to appropriate relief when a substantive provision of the Bill of Rights is infringed and that FC s 34 entrenches the right to the *enforcement* of a court order providing that relief in whichever way is most appropriate.<sup>567</sup> In most cases, the ordinary mechanisms of execution will suffice to discharge the state's obligations. But *Modderklip* is an example of a case in which they did not, owing to its exceptional facts.<sup>568</sup> In *Modderklip*, the Court vindicated the applicant's right by awarding damages, in lieu of execution of the eviction order that the applicant had obtained.<sup>569</sup> Although the Court used the mechanism of the Expropriation Act as a formula to calculate these damages, given that they arose out of the applicant's right in FC s 34, the damages may appropriately be described as 'constitutional'.

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*Modderklip* has established that the relief or the remedy-enforcement component of FC s 34 may be engaged during the execution stage of proceedings. In *Modderklip*, the obstacles to execution arose from the facts, not from the law. However, provisions that limit the rights of litigants to execute court orders may also infringe this component of FC s 34. A prime example is s 3 of the State Liability Act.<sup>570</sup> The Act prohibits execution against property of the State, providing:

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565 1997 (3) SA 786 (CC), 1997 (7) BCLR 851 (CC).

566 *Ibid* at para 19.

567 See K Hofmeyr *Understanding Constitutional Remedial Power* (Unpublished MPhil thesis, University of Oxford, 2007)(The author draws attention to John Austin's two-tiered structure of rights in which a distinction is drawn between secondary, remedial rights (ie, the rights to relief following from violations of substantive rights) and primary rights, such as those deriving from a judgment of a court, from which secondary rights arise. Based on this distinction, Hofmeyr argues that FC s 34, as interpreted in *Modderklip*, entrenches the right to enforcement of a primary right provided by a judgment of a court (in this case, an eviction order). FC s 38, by contrast, gives rise to secondary rights to 'appropriate relief' for violations of constitutional rights.)

3. Satisfaction of judgment.–No execution, attachment or like process shall be issued against the defendant or respondent in any such action or proceedings or against any property of the State, but the amount, if any, which may be required to satisfy any judgment or order given or made against the nominal defendant or respondent in any such action or proceedings may be paid out of the National Revenue Fund or a Provincial Revenue Fund, as the case may be.

In *Nyathi v MEC for the Department of Health, Gauteng and Another*, the Pretoria High Court declared s 3 inconsistent with the Final Constitution and invalid.<sup>571</sup> The applicant, Dingaani Nyathi, had a delictual claim against the state that arose out of the negligence of hospital staff who treated him for burns.<sup>572</sup> As a result of their negligence, he had suffered a stroke and severe left hemiplegia. He instituted action and claimed damages in the amount of R1 496 000. When he instituted action, the respondent MEC conceded the merits and the matter was set down for hearing on the quantum of damages. Mr Nyathi successfully applied for an order directing the MEC to make an interim payment of R317 700 to enable him to meet his medical and legal expenses, pending the determination of quantum. The MEC failed to pay.<sup>573</sup> Mr Nyathi then made urgent application for an order declaring s 3 of the State Liability Act inconsistent with the Final Constitution and invalid.<sup>574</sup> The MEC did not oppose the application: but the state still failed to pay.

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568 An example of a case in which it was held that there were *not* exceptional facts such as would impose *Modderklip*-type obligations on the State is *Rootman v President of the RSA* [2006] SCA 80 (RSA). Mr Rootman sought an order against the President and the Minister of Justice compelling them to take steps to assist him in enforcing a money judgment against the Government of the Democratic Republic of Congo (the DRC). The DRC had refused to make payment and Rootman had succeeded in recovering only a small portion of the judgment debt. The Pretoria High Court dismissed Rootman's application for an order compelling the state to take steps to assist him to recover, and he appealed to the SCA. In the SCA, he sought only a declaratory order that the state has an obligation to take reasonable steps to assist him in achieving compliance with the court order. He relied, in part, on FC s 34 which, he argued, conferred a right to execute the judgment in his favour and imposed an obligation on the state to ensure the effectiveness of court orders. The SCA dismissed his appeal. Its main reason was that the Constitution does not apply extra-territorially. It relied on *Kaunda v President of the Republic of South Africa* 2005 (4) SA 235 (CC), 2004 (10) BCLR 1009 (CC) at paras 11-12. The court held further, in relation to the argument that the DRC's evasion of the debt threatened the rule of law, that the DRC was no different in this respect to any other (South African) commercial debtor. *Rootman* (supra) at para 12. Finally, the court noted that an order declaring that the state was required to take reasonable steps to assist Mr Rootman to recover the judgment debt would be satisfied by a mere request by the state to the DRC that it comply with the order, which would not constitute 'effective relief' for Mr Rootman. *Ibid* at 14.

569 *President of the RSA v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC), 2005 (8) BCLR 786 (CC) at paras 59-66.

570 Act 20 of 1957.

571 Unreported, TPD case no 26014/2005, (30 March 2007) ('*Nyathi*'). At the time of writing, the confirmation proceedings in this matter were pending in the Constitutional Court. (Constitutional Court case since reported as *Nyathi v MEC for Department of Health, Gauteng and Another* (2008 (5) SA 94 (CC), 2008 (9) BCLR 865 (CC).)

572 *Ibid* at para 2.

573 *Ibid* at para 3.1.

574 *Ibid* at para 3.3.

Davis AJ noted that, at common law, a distinction is made between two types of civil orders: orders *ad factum praestandum* and orders *ad pecuniam solvendam* — that is, orders to do (or refrain from doing) something and orders to pay an amount of money.<sup>575</sup> The former may be enforced by civil contempt proceedings, and the latter by the issue of a writ of attachment followed by the attachment and sale in execution of the assets of the debtor. Arguably, s 3 of the State Liability Act prevents litigants from enforcing either type of order against the State. As concerns the possibility of contempt orders against organs of state, the case law is divided.<sup>576</sup> In *Jayiya v Member of the Executive Council For Welfare, Eastern Cape and*

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*Another*,<sup>577</sup> the Supreme Court of Appeal held that, save for a maintenance order, a money judgment is not enforced by contempt proceedings, but by execution. The State Liability Act precluded execution against the property of a provincial government, therefore closing that avenue of obtaining satisfaction of the appellant's debt. However, the prohibition against execution against the state or a provincial government did not allow, as an alternative, the introduction of civil imprisonment for officials who failed to carry out obligations resting upon the state.<sup>578</sup> However, the Supreme Court of Appeal in *MEC, Department of Welfare, Eastern Cape v Kate* has now clarified its earlier decision in *Jayiya*. It wrote:

[m]uch of what was said in *Jayiya* was indeed *obiter* and the *ratio* in that case was decidedly narrow. *Jayiya* decided only that a money judgment given against a provincial government (which is the construction that was placed upon the relevant order) is not enforceable by incarcerating for contempt a defendant who has been cited nominally for the government if the government fails to comply with the order.<sup>579</sup>

Later in the judgment, the *Kate* court added the following in respect of orders to do or refrain from doing something:

Moreover, there ought to be no doubt that a public official who is ordered by a court to do or to refrain from doing a particular act, and fails to do so, is liable to be committed for contempt, in accordance with ordinary principles, and there is nothing in *Jayiya* that suggests the contrary.<sup>580</sup>

In *Kate*, the Supreme Court of Appeal ultimately awarded constitutional damages to vindicate the rights of the particular litigant. The court in *Kate* held that the state's unreasonable delay in discharging its obligation under FC s 33 (the right to just administrative action) to decide the applicant's application for social assistance led to a violation of her substantive right to social assistance.<sup>581</sup> In the circumstances, the court held, referring to the decision of the Constitutional Court in *Modderklip*,

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575 Ibid at para 4.

576 See P Hoffman 'Civil Servants can Commit Contempt of Court' (2006, October) *De Rebus* 45.

577 2004 (2) SA 611 (SCA), 2004 (8) BCLR 821 (SCA) at paras 15-16.

578 Ibid

579 2006 (4) SA 478 (SCA) at para 19.

580 Ibid at para 30.



that the 'appropriate remedy' under FC s 38 was an award of constitutional damages.<sup>582</sup>

The challenge of crafting enforceable orders against the state has been met with other, similarly thoughtful, judicial approaches. In *Magidimisi and Others v MEC and Others*,<sup>583</sup> which also concerned non-compliance with an order sounding in money, Froneman J crafted an order that combined a declarator (of non-compliance with constitutional duties and an obligation to comply), a mandamus to take all necessary steps to ensure compliance, a supervisory order requiring a report to the court on progress in complying with the court order and an order requiring the State Attorney to hand the judgment personally to the individual state respondents and to report to court that this had been done.

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Given that the Supreme Court of Appeal in *Kate* was not faced with a frontal constitutional challenge to s 3 of the State Liability Act, its award of constitutional damages was appropriate. However, owing to the way the case was pleaded, the court was deprived of the opportunity to consider the constitutionality of s 3. That opportunity arose for the Pretoria High Court in *Nyathi*.

In upholding the constitutional challenge, Davis AJ held that s 3 infringed FC s 34 in two ways. First, because the failure to make the interim payment (which would go, in part, towards legal expenses) prevented Mr Nyathi from preparing for the quantum portion of his trial, there was a 'consequential encroachment' on FC s 34, which was particular to the facts of the case.<sup>584</sup> Secondly, however, the 'blanket ban' on executing an order sounding in money against the state contained in s 3

constitutes a material limitation of the right of access to court and the consequent right to have the effects of such successful access implemented. The section therefore also offends against the provisions of section 34 of the Constitution.<sup>585</sup>

The court ordered that the following portion of s 3 is inconsistent with the Final Constitution and invalid: 'No execution, attachment or like process shall be issued against the defendant or respondent in any such action or proceedings or against any property of the State'.<sup>586</sup>

Section 3 is, potentially, capable of an interpretation that does not preclude orders of contempt of court against state officials who wilfully and in bad faith fail to comply with an order directing them to do or refrain from doing something. Moreover, the latter part of s 3, which was not declared unconstitutional in *Nyathi*, provides that, although the normal execution procedures are precluded, a claim

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581 Ibid at para 22.

582 Ibid at paras 23-7.

583 Unreported, SECLC case no 2180/04, 13 April 2006.

584 *Nyathi* (supra) at para 13.

585 Ibid at para 19.

586 Ibid at para 30.

against the state sounding in money may be paid out of the National Revenue Fund or a Provincial Revenue Fund. On this reading, s 3 may not be inconsistent with the Final Constitution at all. It may, in fact, constitute a justifiable limitation of the right of access to court. The challenge may be to craft orders that are practicable in light of the proper construction of s 3. As concerns orders for performance, a supervisory order (such as was granted in *Magidimisi*) may often be appropriate, followed by a contempt order, where necessary. As concerns claims sounding in money, while s 3 provides the source of funds to satisfy such judgments (the National or relevant Provincial Revenue Fund), the same combination of supervisory and contempt orders may provide the practical mechanism with which to secure payment.

## 59.5 Reasonable limitations of the right

*Azanian People's Organisation and Others v President of the Republic of South Africa and Others* ('AZAPO') concerned the constitutionality of s 20(7) of the Promotion of

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National Unity and Reconciliation Act.<sup>587</sup> The Act provided for amnesty to be granted to perpetrators of gross violations of human rights in certain circumstances. The main issue, as far as this chapter is concerned, was the civil consequences of such amnesties. In short, a person who was granted amnesty could not be held civilly liable in damages for the act, omission or offence for which he was given amnesty.<sup>588</sup> Furthermore, the state could not be held civilly liable in damages for the same act, omission or offence by virtue of the principles of vicarious liability.<sup>589</sup> Lastly, all other persons (natural or juristic) could not be held vicariously liable for acts for which amnesty was given.

The applicants challenged the Act as, amongst other things, violating their right of access to court in IC s 22 and argued that the state and individual perpetrators should be potentially liable in damages for the murdering and maiming of activists during apartheid.<sup>590</sup> The Court in *AZAPO* held that the extinction of civil liability clearly limited the right of access to court. The question was whether this limitation was envisaged by other provisions of the Interim Constitution or whether the limitation was reasonable and justifiable in terms of IC s 33 (the IC equivalent of FC s 36).

The conclusion that the provisions of the Reconciliation Act described above limit the right of access to court was inescapable. At the beginning of this chapter we gave the example of the Ciskeian decree that prevented the state from being held liable for certain unlawful acts. That decree was held to be clearly unconstitutional.<sup>591</sup> In substance, there is little difference between that provision and

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587 Act 34 of 1995 (Reconciliation Act).

588 Reconciliation Act s 20(7)(a).

589 Reconciliation Act s 20(7)(c).

590 *Azanian Peoples Organisation (AZAPO) v President of the Republic of South Africa* 1996 (4) SA 671 (CC), 1996 (8) BCLR 1015 (CC) ('AZAPO') at para 8.

591 See § 59.4(a) supra.

the provisions of the Reconciliation Act. One would assume, therefore, that it would be quite hard to justify such a limitation in terms of FC s 36 or IC 33. If one considers the dicta of the courts about the importance of the right of access to court, it would seem hard to imagine the circumstances in which it would be reasonable to obliterate the right in this manner. The Court in *AZAPO* was, however, spared the dilemma of having to subject the provisions to justification in terms of IC s 33. It held that other provisions of the Interim Constitution itself limited the right of access to court in this context. The advantage of this approach was that a full proportionality enquiry was rendered unnecessary.

The epilogue of the Interim Constitution referred broadly to the possibility of amnesty. Section 232(4) of the Interim Constitution provided that the epilogue was deemed to form part of the substantive provisions of the Interim Constitution. Mahomed DP, for the majority, held that, as a consequence of IC s 232(4), it was as if IC s 22 had, within its text, a subsection that read as follows:

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Nothing contained in this sub-section shall preclude Parliament from adopting a law providing for amnesty to be granted in respect of acts, omissions and offences associated with political objectives committed during a defined period and providing for the mechanisms, criteria and procedures, including tribunals, if any, through which such amnesty shall be dealt with at any time after the law has been passed.<sup>592</sup>

In fact, Parliament not only had a right but an obligation to pass a law facilitating amnesty.<sup>593</sup> It was argued by the applicants that the word 'amnesty', as used in the epilogue, envisaged immunity from criminal prosecution but not civil liability.<sup>594</sup> The Court in *AZAPO* accepted that certain dictionaries contain definitions of amnesty that suggest that it applies to criminal proceedings only.<sup>595</sup> However, it held further that the term 'amnesty' has no technical and fixed meaning:

Its origin is to be found from the Greek concept of 'amnestia' and it indicates what is described by Webster's Dictionary as 'an act of oblivion'. The degree of oblivion or obliteration must depend on the circumstances. It can, in certain circumstances, be confined to immunity from criminal prosecutions and in other circumstances be extended also to civil liability.<sup>596</sup>

As part of its reasoning in regard to criminal amnesties, the Court pointed out that one of the objectives of the amnesty process was to obtain the truth about atrocities committed during apartheid. Without a criminal amnesty, perpetrators would not be induced into making disclosure about the past and many facts would remain obscured. The Court held that this purpose was equally applicable to civil amnesties.<sup>597</sup> The Court was fortified in its conclusion by the fact that the epilogue

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592 *AZAPO* (supra) at para 14.

593 *Ibid* at para 14.

594 *Ibid* at para 33.

595 *Ibid* at para 34.

596 *Ibid* at para 35.

597 *Ibid* at para 36.

envisaged amnesty for 'acts, omissions or offences'. Had the drafters intended to provide amnesty only for criminal prosecutions, they could simply have referred to 'offences'.<sup>598</sup>

As far as the amnesty for civil liability of the state by virtue of vicarious liability was concerned, it was argued by the applicants that it was not necessary to extinguish vicarious liability on the part of the state in order to facilitate the 'truth-seeking' objective. While a person might be inspired to keep silent for fear of facing a delictual claim against him personally, he would not be similarly reticent when the only possible consequence of his testimony might be liability in damages on the part of the state.<sup>599</sup>

The Court in *AZAPO* accepted that the truth-seeking objective that was vindicated by giving personal amnesties to those with information would be less

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applicable in the case of an immunity for the state.<sup>600</sup> The Court held, however, that the bigger question related to the vision of transformation and how the drafters of the Interim Constitution envisaged this transformation taking place:

Those negotiators of the Constitution and leaders of the nation who were required to address themselves to these agonising problems must have been compelled to make hard choices. They could have chosen to direct that the limited resources of the state be spent by giving preference to the formidable delictual claims of those who had suffered from acts of murder, torture or assault perpetrated by servants of the state, diverting to that extent, desperately needed funds in the crucial areas of education, housing and primary health care. They were entitled to permit a different choice to be made between competing demands inherent in the problem. They could have chosen to direct that the potential liability of the state be limited in respect of any civil claims by differentiating between those against whom prescription could have been pleaded as a defence and those whose claims were of such recent origin that a defence of prescription would have failed. They were entitled to reject such a choice on the grounds that it was irrational. They could have chosen to saddle the state with liability for claims made by insurance companies which had compensated institutions for delictual acts performed by the servants of the state and to that extent again divert funds otherwise desperately needed to provide food for the hungry, roofs for the homeless and black boards and desks for those struggling to obtain admission to desperately overcrowded schools. They were entitled to permit the claims of such school children and the poor and the homeless to be preferred.<sup>601</sup>

The crux of the Court's reasoning is to be found in the following passage:

The election made by the makers of the Constitution was to permit Parliament to favour 'the reconstruction of society' involving in the process a wider concept of 'reparation', which would allow the state to take into account the competing claims on its resources but, at the same time, to have regard to the 'untold suffering' of individuals and families whose fundamental human rights had been invaded during the conflict of the past. In some cases such a family may best be assisted by a reparation which allows the young

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598 Ibid at para 37.

599 Ibid at paras 39 and 40.

600 *AZAPO* (supra) at para 41.

601 Ibid at para 43.

in this family to maximise their potential through bursaries and scholarships; in other cases the most effective reparation might take the form of occupational training and rehabilitation; in still other cases complex surgical interventions and medical help may be facilitated; still others might need subsidies to prevent eviction from homes they can no longer maintain and in suitable cases the deep grief of the traumatised may most effectively be assuaged by facilitating the erection of a tombstone on the grave of a departed one with a public acknowledgement of his or her valour and nobility. There might have to be differentiation between the form and quality of the reparations made to two persons who have suffered exactly the same damage in consequence of the same unlawful act but where one person now enjoys lucrative employment from the state and the other lives in penury.<sup>602</sup>

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The Court concluded that there was a range of options that could have been adopted to facilitate the reconstruction of society other than to allow those with provable delictual claims to proceed with them. The Court was of the view that the epilogue, with its reference simply to 'amnesty' and the 'need for reparation', envisaged that the details were to be determined by an Act of Parliament.

As far as vicarious liability for other organizations was concerned, there were two justifications for excluding it: in the first place, the truth-seeking objective might well be undermined by not providing immunity from vicarious liability to such organizations because individuals with information might well still be reliant on such organisations for support and thus be induced not to reveal the truth. Secondly, those in power would never have agreed to the transformation in the first place if they were not guaranteed that their organizations (such as political parties) would not be hit with delictual claims after the transition.<sup>603</sup>

The decision in *AZAPO* has been discussed in great detail elsewhere and many criticisms have been levelled against the judgment.<sup>604</sup> We do not seek to add to, or endorse, the comments on this case or to discuss it with a particular political purpose in mind. Although the Court in *AZAPO* relied on the epilogue to the Interim Constitution as justification for the Act, there is no doubt that the Court read a lot into the epilogue to reach its result. Certain of the factors discussed in terms of the epilogue would have been better suited to limitation analysis. So, despite the Court's reliance on the epilogue of the Interim Constitution — and the unique status of that provision in our constitutional history — *AZAPO* still gives us an indication of the types of justification that will be necessary to save a provision that effectively obliterates the right of access to court in FC s 34.

Whether one accepts the reasoning of the Court, it is clear that the Court saw the amnesty provisions as constitutionally-envisaged mechanisms to facilitate reconciliation and balance various interests. At the time at which the judgment was written, there could be no social imperative and legislative purpose more important

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602 Ibid at para 45.

603 *AZAPO* (supra) at para 49.

604 See, for example, J Dugard 'Is the Truth and Reconciliation Process Compatible with International Law? An Unanswered Question' (1997) 13 *SAJHR* 258; D Moellendorf 'Amnesty, Truth and Justice: *AZAPO*' (1997) 13 *SAJHR* 283; A O'Shea 'Should Amnesty be Granted to Individuals who are Guilty of Grave Breaches of Humanitarian Law? A Reflection on the Constitutional Court's Approach' (1997) 1 *HRCLJSA* 24. For a recent collection of discussions of *AZAPO*, see W le Roux & K van Marle (eds) *Law, Memory and the Legacy of Apartheid: Ten Years after AZAPO v President of South Africa* (2007).

than reconciliation. Therefore, it is unsurprising that the Court in *AZAPO* refused to strike down the provisions of the Act facilitating amnesty, despite the fact that they effectively extinguished any common-law claims that victims might have had.

*AZAPO*, therefore, constitutes an exception that can be explained by the moment in history at which it occurred. The limitation of the right of access to Courts that was tolerated in that case could only possibly be acceptable in the

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context in which *AZAPO* was decided. Generally, the Court has been unsympathetic towards provisions that have the potential to oust access to court altogether. In the context of time bars, for example, the only case in which the shortened period in which to institute the action was upheld involved a contract.<sup>605</sup>

Equally difficult, if not impossible, to justify are provisions that allow self-help. The Constitutional Court has made clear that such provisions are the antithesis of the right of access to court and, as such, require compelling justification to be saved. Outside of an emergency situation, it is difficult to imagine a provision that truly warrants self-help being upheld.

On the other hand, the Court has been far more accepting of purported limitations of access to court which themselves facilitate greater access. Thus, provisions such as those governing vexatious litigants, as in *Beinash v Ernst & Young*, are far easier to justify because they have the effect of freeing the courts to adjudicate deserving cases.<sup>606</sup> This theme underlies most of the procedural rules that potentially limit access: although these rules were mainly introduced before the advent of the Final Constitution, most of them have, as their rationale, the aim of enhancing access to court.

When it comes to justification of limitations of the right of access to court, a broad spectrum of positions exist. On one side of the spectrum are limitations, such as those considered in *Chief Lesapo* and *AZAPO*, which not only obliterate the right but undermine its very purpose. Justification of such limitations will prove extremely difficult. On the other side of the spectrum are those provisions that limit access to a particular litigant, but have, as their underlying rationale, the aim of improving the functioning of the courts. The provisions at issue in *Beinash v Ernst & Young* are an example of justifiable limitations.<sup>607</sup> If such provisions actually achieve this purpose, they will almost always be upheld as reasonable limitations.

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605 See § 59.4 (a)(ii) supra.

606 See § 59.4 (a)(vi) supra.

607 *Beinash v Ernst & Young* 1999 (2) SA 116 (CC), 1999 (2) BCLR 125 (CC).