CONSTITUTIONAL COURT OF SOUTH AFRICA

CHAMBERS OF JUSTICE M MOGOENG

Mr Sello Chiloane

Secretary, Judicial Services Commission

ACCEPTANCE OF NOMINATION FOR THE POSITION OF CHIEF JUSTICE OF THE REPUBLIC OF SOUTH AFRICA

I hereby accept the nomination by Honourable President J. G. Zuma as candidate for the position of Chief Justice of the Republic of South Africa.

With kind regards,

M. T. R. MOGOENG

Judge of the Constitutional Court of South Africa

CONSTITUTIONAL COURT - CONSTITUTION HILL
PRIVATE BAG X1, BRAAMFONTEIN 2017
Telephone: +27 11 359 7415 Fax: +27 11 403 8898 Facsimail: 086 640 2406
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JUDICIAL SERVICE COMMISSION

Private Bag X 1
Constitution Hill
Braamfontein
Johannesburg
2017

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QUESTIONNAIRE FOR JUDGES

SECTION 1: PERSONAL

1. **What are your full names and surname**

   1.1 **Surname** - Mogoeng

   1.2 **Full names** – Mogoeng Thomas Reetsang

   1.3 **Maiden name** – Not applicable

2. **What is your address?**

   2.1. **Residential** – 4252 Miller Street, Leopard Park, Mafikeng

   2.2 **Postal** – P.O. Box 24382, Mafikeng 2745

   2.3 **Telephone Number** – 011 359 7414

   Chambers – 011 359 7414

   Secretary – 011 359 7414

   Mobile –

   Fax - 011 403 8898 / 086 649 3304

   E-mail – Mogoeng@concourt.org

3. **What is your date and place of birth?**

   3.1. **Date of birth** – 14 January 1961

   3.2 **Place of birth** – Goo-Mokgatlha (Koffiekraal) Village

   3.3 **Citizenship** – Republic of South Africa

   3.4 **Identity Number** - 6101145916086

4. **What is your marital status?**

4.1 (Indicate with an "X")

Married	Single	Divorced	Widower	Widow

4.2 My wife's name is Mmaphefo

4.3 Particulars of children - number and ages of children

1. Johanna – 23 years old
2. Mogaetsho – 20 years old
3. Oteng – 15 years old

5. **Please furnish particulars of your tertiary education.**

5.1 Qualifications –

1. B Juris
2. LLB
3. LLM

5.2 Name of institution(s)

1. University of Zululand
2. University of Natal
3. University of South Africa

5.3 Dates acquired

1. 1983
2. 1985
3. 1989

6. **Please furnish chronological particulars of employment since leaving school or university**

Name of employer	*Position held*	*Period*
Bophuthatswana Government	Supreme Court Prosecutor	April 1986 to February 1990
Self	Advocate	June 1990 to June 1997
SA Government	Judge	June 1997 to 2002
SA Government	Judge President	October 2002 to October 2009
SA Government	Judge of the Constitutional Court	October 2009 to date

7. **Please furnish chronological particulars of your membership of legal organizations – Past and Present.**

Name of organisation	*Position held*	*Period*
Lawyers for Human Rights (the former Bophuthatswana Chapter)	Chairperson	1991 to 1996
Black Lawyers Association	Member	1990 to 1997

8. **Please furnish particulars of community and other organizations of which you are or have been a member in the past ten years.**

Name of organisation	*Position held*	*Period*
CHURCH		
Winners Chapel International	Member	2006 to date
	Pastor	March 2011 to date
Victory Celebration Centre	Member	2006 to 2009
EDUCATIONAL		
South African Judicial Education Institute	Member of Council representing Judges President	May 2009 to October 2009
OTHER		
North West Caseflow Management: Chairperson: 2003 to 2009		
National Judges Caseflow Management Committee: Chairperson: 2010 to date		
Access to Justice Conference Planning Committee: Chairperson: 2010 to July 2011		

9. **Are you now or have you ever been a member of a secret organization?**
(Indicate with an "X") YES [ ]
If so, please identify the organization and the dates of membership.
Not applicable

10. Is there anything about the state of your health which should be disclosed to the Commission? (Indicate with an "X")

YES	NO
	X

If so, please state:

Not applicable

SECTION 2: JUDICIAL AND LEGAL BACKGROUND

11 Please furnish particulars of your appointment.

11.1 To which court were you appointed?

The High Court, Labour Appeal Court, Constitutional Court

11.2 In which division were you appointed?

North West. The Labour Appeal Court and the Constitutional Court have national jurisdiction.

11.3 Please give the date of your appointment.

1 June 1997, April 2000 and October 2009.

12. **If you have any publications in the field of law please list them and identify those which you regard as most significant and state shortly why you regard them as significant.**

I don't have any.

13. **In regard to major publications indicate by whom they have been reviewed.**

Not applicable

14. **If any of your writings have been cited in judicial decisions please identify those decisions and indicate whether the citing was with approval.**

Not applicable

15. **If you have any publications outside the field of law please list them.**

Not applicable

15.1 In regard to these publications please indicate by whom they have been reviewed.

Not applicable

16. Cases

16.1 **List the cases where you have written the judgment (not more than ten) which you regard as being the most significant and why?**

Please refer to the typed document attached hereto.

16.2 **Which of these cases has been reported?**

Please see the attachment.

16.3 **Please list cases in which you gave judgment that were unsuccessfully appealed against (not more than ten).**

1. *Chief Lesapo v North West Agricultural Bank and Another* 1999 (10) BCLR 1195 (B).
2. *Kurumbi v MEC for Health, NW*

16.4 **Please list cases in which you gave judgment that were successfully appealed against (not more than ten).**

1. *Jointshelf 1175 and Another v Close-by Security CC and Others*
2. *Matlholwa v Mahuma and Others*
3. *DBV Behuiging (Pty) Ltd v North West Provincial Government and Another*

16.5 **Please list any reserved judgments still outstanding and the date(s) on which judgment was reserved.**

F v Minister of Safety and Security CCT 30/2011.

Judgment was reserved on 4 August 2011.

17 **What would you regard as your most significant contribution to the law and the pursuit of justice in South Africa?**

Please see the attached document.

SECTION 3: GENERAL

18. **Are there any circumstances known to you which may cause you embarrassment in seeking the appointment for which you have been nominated?**

YES	NO
	X

If so, please furnish particulars.

Not applicable

19. Is there any other relevant matter which you should bring to the attention of the Commission?

YES	NO
	X

If so, please furnish particulars.

Not applicable

20 Do you hold or have you ever held any other office of profit? If your answer is yes have you divested yourself of those assets? Kindly furnish details if applicable.

I have never held any office of profit. I, however, still have some cattle.

SIGNATURE

8 August 2011

DATE

MY MOST SIGNIFICANT CONTRIBUTIONS TO THE LAW AND THE PURSUIT OF JUSTICE

I believe that my most significant contribution to the law and the pursuit of justice has been through, among other things, the ten cases and a series of other projects and activities outlined below:

A. CASES

1. *Chief D. Lesapo v North West Agricultural Bank & Another* 1999 (10) BCLR 1195 (B)

As far as I know, the case of *Lesapo* was the very first to address the fundamental right of access to justice. The Constitutional Court decision that confirmed its correctness, and subsequent Constitutional Court decisions on access to courts, bear out the crucial role that this decision played, not only in championing and emphasising the importance of access to courts and justice, but also in facilitating a better understanding of what this right entails and how it is to be exercised.

2. *The State v Lazarus Booi & Another* 2005 (1) SACR 599 (B).

Prior to *Booi*, there was some uncertainty among many Magistrates and practitioners regarding when, especially in cases of sexual abuse of young children, to use an intermediary and when not to. The uncertainty also existed in relation to the administration of an oath or affirmation. This case contributed significantly to shedding some light on this matter.

3. *Walter Balatseng v The State 2005 (1) SACR 28 (B).*

This case addresses the need for a presiding officer to be courteous to, and patient with, unrepresented accused persons and to encourage and enable accused persons to enlist the services of a legal representative, particularly when they are likely to be sentenced to a very long term of imprisonment when convicted. It is about ensuring that an accused person gets a fair trial.

4. *Jeffrey Kgotleng Montshioa & Another v Othusitse Israel Motshegare 2001 (8) BCLR 833 (B).*

The transfer of power by a Premier from one MEC to another, the procedure to be followed, in terms of section 137 of the Constitution, and whether this can be validly done retrospectively, was discussed and pronounced upon.

5. *BMW Financial Services (South Africa) (Pty) Ltd v Dr M.B. Mulaudzi Inc. 2009 (3) SA 348 BPD.*

The prevailing economic recession makes the importance of this decision even more pronounced. This case deals with what needs to be done by credit providers to give substance to those provisions of the National Credit Act which are intended to make life bearable for those who are exposed to the risk of losing their houses, and other properties, as a result of being in arrears with payment, often to a very insignificant extent. The decision has the potential to discourage some institutions' apparent lack of enthusiasm for making it possible for the debtor to avoid losing his/her property. The decision encourages credit providers to at least see it as their co-responsibility with the debtor to enable the debtor to renegotiate the periodical payment of the instalment, to know what debt counselling entails and where counsellors can be found, thus making the provisions of the Act worth the paper they are written on, rather than simply sending a notice in terms of the Act which is nothing more than a repetition of

the provisions of the relevant section(s), which boils down to going through the motions.

The practice and the inclination by some credit providers to repossess at the slightest provocation, is implicitly sought to be arrested.

6. ***Malachi v Cape Dance Academy International (Pty) Ltd and Others 2011 (3) BCLR 276 (CC)***

This matter is about the constitutional validity of section 30(1) and (3) of the Magistrate's Courts Act. The section empowers a magistrate to issue an order for the arrest and detention of a debtor in circumstances where a creditor reasonably believes that a debtor is about to flee the country in order to avoid paying what is owed, or allegedly owed, to the creditor. The order is sometimes issued without prior service on the alleged debtor. The Constitutional Court confirmed the High Court order declaring the subsections constitutionally invalid.

7. ***Viking Pony Africa Pumps (Pty) Ltd v Hidro-Tech Systems (Pty) Ltd and Another 2011 (2) BCLR 207 (CC)***

The main issue in this matter was what the obligations of an organ of state are in circumstances where an enterprise which had been awarded a tender is plausibly accused of having been successful merely because of the fraudulent representations it made. The alleged misrepresentation in this case related to the enterprise's high profile of historically disadvantaged individuals, which earned the enterprise higher points in the assessment of its tender. Furthermore, the challenge was that the enterprise should not have been given preferential points because its historically disadvantaged shareholders did not actively participate in the running of, and exercise of control over, the tendering enterprise to the extent commensurate with their shareholding. It was held that the tender-awarding State organ should have, but failed to, investigate the allegations properly.

8. *Kabelo Bellane v Shelly Court* CC 2011 BCLR 264 (CC)

This matter raises two issues. First, it addresses how a court should approach documents prepared by an unrepresented litigant, particularly where there is a lack of clarity in relation to what exactly that party's case is about. Second, it addresses issues relating to the execution of an eviction order while the application for leave to appeal is still pending. In passing it also deals with what the effect of a court ordering a litigant not to approach a court in relation to a matter before that court, until costs previously ordered by the same court have been paid is, and the effect of such an order on that litigant's constitutional right of access to courts.

9. *The Citizen (1978) (Pty) Ltd and Others v McBride (Lara Johnstone; Freedom of Expression Institute; South African National Editors' Forum; Joyce Sibanyoni Mbizana; Mbasa Mxenge as Amici Curiae)* CCT23/10

This dissent seeks to strike a balance between the right to freedom of expression and the right to dignity, having regard to *ubuntu*. This is done within the context of the interim Constitution and the Promotion of National Unity and Reconciliation Act, which was intended to pave the way for national unity, reconstruction of society and reconciliation.

10. *Minister for Safety and Security v Van Der Merwe and Others* CCT90/10

This case addresses the question of whether a search and seizure warrant would be valid, even if it does not stipulate the offence(s) which was foundational to the issuing of the warrant. It was decided that the common law intelligibility principle requires that the offences be specified so that the searched person would know, at the time of the search, why his or her constitutional rights to privacy and dignity were being violated. The requirements for intelligibility were

laid down and the guidelines on the correct approach to the determination of the constitutional validity of the warrant issued in terms of section 20, read with 21, of the Criminal Procedure Act were also developed.

B. LEADERSHIP AND CAPACITY BUILDING

1. My role in Judicial Education

From 2000 I have, at the request of the Judicial Education Committee, been involved in training aspirant Judges on Constitutional Law. I have also been involved in the orientation of newly appointed Judges on Constitutional Law.

I was humbled by the privilege of having been unanimously nominated by fellow Judges President to co-represent them in the council of the South African Judicial Education Institute (SAJEI), which was launched in May 2009. It afforded me the opportunity to continue to make the above contribution that I had been making over the years, on a broader scale and in a much more structured way.

2. Caseflow Management Forum

I initiated the establishment of the North West Provincial Caseflow Management Forum ("the Forum") within a few months of taking over as Judge President of the North West. This Forum brings together all the role-players in the Justice System. Its members are representatives of Judges, Magistrates, Prosecutors, Legal Aid Board, Police, Correctional Services, Advocates and Attorneys in private practice, Probation Officers and Social Workers, Justice Administration, Family Advocates and Master's Office. All the problems within the justice system which cannot be appropriately and effectively raised and addressed by way of written communication are raised and addressed at that Forum on a levelled

playing field. Different units or Departments are represented by people with decision-making powers.

I was the Chairperson of this Forum from its inception, in 2003, until May 2009, when I handed the chair over to a colleague whom I had been mentoring for approximately the past four years. Our activities and projects which made a difference to the justice system follow below:

a) **An efficiency and effectiveness conference in 2006**

We organised a conference attended by 300 delegates representing the aforementioned role-players as well as law lecturers and law students in July 2006. The theme was, "**Efficiency and Effectiveness within the Justice System in the North West Province**". All the steps that needed to be taken to address the bottlenecks within the court system and all other problems that inhibit the wheels of justice from turning as smoothly and as speedily as they should, to deliver quality justice to the public, were identified and a commitment was secured to implement measures to reduce backlogs and delays where they exist.

b) **The celebration of the 10th anniversary of the Constitution in 2006**

The Chief Justice, Pius Langa, together with the other Heads of Courts decided that the 10th anniversary of our Constitution be celebrated by the Judiciary. The Forum decided that we should do everything possible to reach out to as many members of the public as our resources could allow.

The event was attended by 1 500 members of the public and among others, the Premier, Mayors, Provincial Commissioners of Police and Corrections, the DPP, Judges, Magistrates, Private Practitioners and all other heads of units and institutions that have a direct role to play in the justice system.

All these people spoke very briefly, explaining what the institutions they represent are about and how they are supposed to serve the public. We then gave the rest of the time to the public to ask questions, raise concerns, and make comments. Each of us had to account to the public for, how we have served them or have failed to serve them, and no government employee could shift the blame due to him/her to another, since we were all there. People were given the particulars of contact persons in the various institutions. We undertook to address those problems capable of speedy resolution within 3 weeks and for the rest to keep them informed of the progress. We kept our promise and the Forum monitored implementation. The results were humbling. The radio, the local print media, the public and the Premier were so happy that they kept on asking us to host a similar event annually so that the people can speak directly to those responsible for the administration of justice.

This meeting underlined the importance of the Judiciary loosening up a bit and reaching out to the public to tell them what they (the judiciary) are about, and affording them the opportunity to hear how they are rated (not by themselves) but by the public who are their clients.

We are indebted to the Honourable former Chief Justice, Pius Langa, for having funded this project.

c) **The Forum's training projects in 2007**

We embarked on three capacity-building workshops and held one conference in 2007.

1) Judges and Magistrates were trained jointly on **cultural diversity and sensitivity.**

2) Judges and Magistrates were trained jointly on **leadership**.

3) Training for Magistrates was arranged on:

(i) the role of a judicial officer in a constitutional democracy;

(ii) the management of a civil and a criminal trial;

(iii) judgment writing.

I will forever be indebted to the former Chief Justice Sandile Ngcobo and Mr Justice Fritz Brand of the Supreme Court of Appeal for having acceded to my request to train our Magistrates in Mafikeng. It humbles me more that they came twice.

As a result of this training, the performance of our Magistrates changed significantly, particularly in the areas of trial management and judgment writing. Their outlook and understanding of their role in a constitutional democracy also changed. The reviews that we receive daily and the appeals bear testimony to the vast improvement in the quality of their judgments and their effectiveness and efficiency in ensuring that those appearing before them get a fair and speedy trial.

This training did not just end in the North West Province. I was reliably informed by USAID and Judges Ngcobo and Brand that other Provinces saw the good in the idea and asked to be trained by the same team and were in fact trained.

4) A conference on **restorative justice and non-custodial sentences** was held in Mafikeng. It was attended by all of the abovementioned role-players, as well as NGO's, Traditional Leaders and the Executive of the North West House of Traditional Leaders, representatives of Faith-based Organisations,

representatives from the National Department of Justice and Constitutional Development, the Office of the Premier, NICRO, Human Rights Commission, Gender Commission, the Faculty of Law, including Law students, etc. About 350 delegates attended. The then Inspector of Prisons, Judge Nathan Erasmus, Judge Bertelsmann, Mr Jody Kollapen, DDG Simon Jiyane of Department of Justice & Constitutional Development, Chair of the North West House of Traditional Leaders, Kgosi Mabe, representative of Mayors, representatives of Faith-based organisations, myself, are some of those who presented papers.

All these conferences were preceded by my radio interview to explain to the public why these conferences and the celebration of the 10th anniversary of the Constitution had to take place. People called from as far as Limpopo, Gauteng, Free State, North West and Northern Cape, wanting answers to some of the most basic concerns and problems they had about the functioning of the justice system. I realised during those interviews that even Judges need to interact more with the public and get to know what the people are going through and what they think about the quality of the service we render to them.

Other Provinces also got to know about our initiative and did likewise. I know that my colleagues Kgomo JP and Somyalo JP called me seeking some guidance regarding the logistical arrangements for a similar conference.

Implementation has been taking place ever since and it is being monitored.

d) Building the resource team in 2008

I was told that the leadership role I was privileged to play in caseflow management through the Forum, moved the Department of Justice and Constitutional Development to select me and some Magistrates, Prosecutors, Registrars, Clerks, Court Managers, Legal Aid Board representatives and some officials from the national office of the Department of Justice and Constitutional Development, to go to the USA to study their judicial case management system in April 2008. Upon my return, I assembled that team, from all the Provinces as a resource team.

e) Sub-cluster workshops

Upon my return from the US, the starting point was to brief my colleagues on the Bench, and to find agreement on how to proceed with the matter. Thereafter I briefed the Forum. Since most of the capacity problems are in the Magistrates' Courts, we planned with the leadership of the Magistracy that judicial case management workshops based on the US model, be held in all six sub-clusters of the North West Province. This generated so much interest that we had Magistrates from Gauteng, Limpopo, Mpumalanga and the Free State attending some of our sub-cluster workshops. This took place between May and June 2008. We then had what we loosely referred to as "the mother of all workshops" in the form of a conference on 05 September 2008.

f) The judicial caseflow management conference

The Forum organised a conference on 05 September 2008. Other Provinces got to know about it and asked to be invited, and we obliged. About 450 delegates from across South Africa attended the conference in Mmabatho. We talked

broadly about the need to have judicial officers take control of cases from as early as when the accused is charged and when a notice of intention to defend is filed in civil matters, and about how to ensure that cases are disposed of speedily and in the most cost-effective way. This was followed by meetings at which implementation of what was agreed upon was discussed.

We are again indebted to the former Chief Justice, Pius Langa, the Department of Justice and Constitutional Development and USAID for co-funding.

g) **Judicial case management workshops in other Provinces in 2009**

I was subsequently asked by the Washington DC Office of USAID if I would be willing to be assisted by Judge André Davis, a US Federal Judge for the district of Maryland to further conscientise role-players in the justice system about the need to finalise cases speedily, to significantly reduce the backlog and also to deepen our understanding of the judicial case management system. We took advantage of the opportunity.

Though this was meant to benefit the North West Province only, the Forum decided to spread this across the country. We did this because we knew the benefits it has yielded in the USA and Botswana. We were certain that it would benefit our country. These workshops took place during the last two weeks of January 2009. Judge Davis and I criss-crossed South Africa holding workshops on the judicial case management system which, by the way, had reduced case backlogs in the neighbouring Botswana by about 60% to 70% in 18 months and has **virtually** wiped off backlogs in the US. These workshops were held in all the Provinces except Gauteng and the Western Cape where they could not take place due to circumstances beyond their control.

I was pleasantly surprised to learn later from the protocols produced by the committee responsible for the criminal justice review, that the system they sought to introduce is what we have already started to implement, albeit in a small measure. In my subsequent informal discussions with the former Minister and Deputy Minister of Justice and Constitutional Development, I was informed that the civil justice reform protocols will also be along the lines of judicial case management simply customised to the demands and unique circumstances of our country.

The impact of the North West Provincial Caseflow Management Forum was felt more in the reduction of the case backlogs, and the speedy finalisation of cases, which, according to the National Prosecuting Authority statistics, has often resulted in that High Court occupying position one in terms of performance countrywide, the latest being in May 2009.

We have, through the activities of the Forum, managed to generate discussions about the role that the stakeholders in the justice system need to play to:

a) reduce crime;
b) speed up trials without compromising the quality of justice;
c) reduce the costs of both criminal and civil litigation by inspiring and nudging everybody into preparing ahead of the trial;
d) help solve or address the incapacities of other role-players (like probation officers) instead of demoralising them by going public about unsatisfactory performance or being too critical of them in our judgments;
e) ensure that nobody gets a trial date unless there is a fair indication of trial-readiness (e.g. prior to the holding of a proper pre-trial conference);
f) open ourselves up to the public to answer their concerns and to direct them where to go to have their concerns properly addressed;

g) conscientise everybody of the role that they could play to enhance the functionality and effectiveness of the justice system;

h) alleviate overcrowding of the correctional facilities, through the correct application of the plea bargaining system, restorative justice and diversion programmes, as well as the non-custodial sentences provided for by the Criminal Procedure Act;

i) enhance access to justice by restructuring Small Claims Courts and relaunching properly capacitated and reasonably resourced tribal courts.

Programmes, materials and reports of all these meetings are available should anybody be interested to assess their worth, or simply want to know more.

h) Conclusion

Although the original plan would have been to focus on the North West Province, the desire to share with others the little good that our ideas and projects had the potential to do was just too strong to resist. Progress has been made in sabotaging the "silo mentality", which has, over the years, given rise to a duplication of outreach and other projects to the same community and an unwise spending of scarce resources. Members of what I prefer to refer to as the "broader justice family" have each found their place in the justice family tree and they are doing their utmost to recapture the public confidence, without which the justice machinery cannot be effective.

We were indeed humbled by the fact that judicial case management shared centre-stage with other core issues that define the role of the judiciary, at the second post-democracy National Judges' Conference, and that the North West Provincial Caseflow Management Forum, through its Chair, made a contribution, albeit indirectly, to making that a notable agenda item by, *inter alia*, identifying a suitably qualified speaker, Judge David Campbell from Arizona, USA, urging him to attend and helping him with his preparation.

In all such conferences, and in line with the partnership we had built with the University of North West, we ensured that members of the Faculty of Law and a good number of Law students attended. We saw it as a priceless investment in the students who are our future judges, magistrates, prosecutors and lawyers in private practice and the corporate world. We also wanted to ensure that lecturers familiarise themselves with the practical side of the law.

C. SINCE MY APPOINTMENT TO THE CONSTITUTIONAL COURT

1. A national Judges' Conference was held in July 2009. Resolutions were passed and Justice Sandile Ngcobo and I were elected to see to it that conference resolutions were implemented.

2. He and I set up a Monitoring Committee, comprising eight subcommittees, to address various issues, ranging from court administration, ethics, transformation and caseflow management, to mention but some. I became the Chairperson of the Caseflow Management Subcommittee.

3. In this capacity we organised a workshop on judicial case management in 2010. It was attended by officials from the Department of Justice and Constitutional Development, judges from all courts, as well as representatives of the Magistracy. This model of caseflow management is designed to ensure that judicial officers determine the pace of litigation, rather than leaving it to the parties or counsel to control the speed at which cases are processed, as they are doing now.

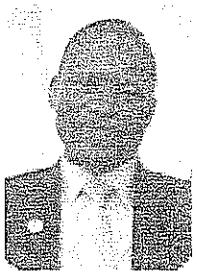
4. This was followed by an Access to Justice Conference, which was held in July 2011. This conference was attended, and addressed, by, among many others, the leadership of the Judiciary, the Executive and Parliament.

Decisions which are critical to court efficiency, the independence of the Judiciary, judicial education, access to justice, etc, were taken. A structure is to be put in place to deal with these issues and to ensure the implementation of conference decisions.

M.T.R. MOGOENG
JUDGE OF THE CONSTITUTIONAL COURT

JUDGES | Justice Mogoeng Mogoeng

Personal details



Mogoeng Mogoeng was born in Goo-Mokgatha (Koffiekraal) village, which is located north east of Zeerust, on 14 January 1961. He is married to Mmaphefo and they have been blessed with three children: two daughters, Johanna and Oteng, and one son, Mogaetsho.

Education

In 1983, Mogoeng graduated from the University of Zululand with a B Juris. In 1985 he completed his LLB at the University of Natal, Durban. In 1989, he completed his studies at the University of South Africa, where he studied an LLM concentrating on labour law, the law of property, the law of insurance, the law of evidence and the law of criminal procedure.

Professional history

Mogoeng started his professional career as a Supreme Court (now High Court) prosecutor in Mafikeng, holding this position between March 1986 to February 1990, when he resigned to do pupillage at the Johannesburg Bar.

After completing pupillage, he practised as an advocate in Johannesburg until the end of 1991. He then terminated his membership of the Johannesburg Bar and immediately became a member of the Mafikeng Bar Association (now known as North West Bar Association) until May 1997.

Whilst at the Mafikeng Bar, Mogoeng served as the Deputy Chairperson of the Bar Council and as the Chairperson of the Bophuthatswana chapter of Lawyers for Human Rights. He was also a part-time senior lecturer in criminal law and criminal procedure at the University of the North West, Mafikeng Campus, from 1992 to 1993.

Mogoeng was a member of the Industrial Court from 1989 until it ceased to exist.

In 1994 he served in the legal section of the Independent Electoral Commission in the North West province.

In June 1997 he was appointed a judge of the North West High Court, Mafikeng. He was also appointed a judge of the Labour Appeal Court in April 2000. In October 2002 he was appointed Judge President of the North West High Court.

Mogoeng was a member of the five member committee, led by Chief Justice Pius Langa, which investigated racism and gender discrimination within the Judiciary.

He was nominated by the Judges President to represent them in the Council of the South African Judicial Education Institute in 2009.

In his capacity as the Chairperson of the North West Provincial Caseflow Management Forum, Mogoeng hosted annual conferences attended by key role players in the justice system. These conferences addressed issues like the efficiency and effectiveness of the justice system, restorative justice and non-custodial sentences, access to quality justice and building the capacity of intermediaries and probation officers.

He also organised joint workshops for judges and magistrates on leadership and sensitivity training as well as workshops for magistrates on judgment writing and trial administration. In January 2009, Mogoeng and Judge Andre Davis, Judge of the Federal District Court for the District of Maryland, USA, co-hosted s series of workshops on judicial case management throughout South Africa. He now chairs the Caseflow Management Committee, which reports to the Chief Justice and the Heads of Courts. In this capacity, he led the team that organised the historic Access to Justice Conference, which was held from 8 to 10 July 2011.

Mogoeng was appointed to the Constitutional Court in October 2009

Other activities

Mogoeng is an ordained pastor and he serves in several church structures.

Prior to joining the judiciary in 1997, Mogoeng also served in the following capacities, from which he has resigned:

- Chairperson: North West Parks Board
- Chairperson: Agricultural Services Cooperation of the North West Province
- Chairperson: Agricultural College and the Agricultural School of the North West Province
- Chairperson: Agricultrual Marketing Board of the North West Province
- Chairperson: Dirapeng (Pty) Ltd
- Chairperson: Golden Leopards Resorts (Pty) Ltd
- Member: Black Lawyers Association

CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 05/10
[2010] ZACC 13

In the matter between:

TATIANA MALACHI	Applicant
and	
CAPE DANCE ACADEMY INTERNATIONAL (PTY) LTD	First Respondent
HOUSE OF RASPUTIN PROPERTIES (PTY) LTD	Second Respondent
ADDITIONAL MAGISTRATE, DISTRICT OF CAPE TOWN	Third Respondent
MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Fourth Respondent
MINISTER FOR HOME AFFAIRS	Fifth Respondent
COMMANDING OFFICER, POLLSMOOR PRISON	Sixth Respondent

Heard on : 25 March 2010

Decided on : 24 August 2010

JUDGMENT

MOGOENG J:

Introduction

[1] This is an application for the confirmation of an order of constitutional invalidity made by Hlophe JP in the Western Cape High Court, Cape Town (High Court).[1]

[2] The declaration of constitutional invalidity relates to section 30(1) and (3)[2] (impugned provisions) of the Magistrates' Courts Act (Act). This section empowers a magistrate to issue an order for the arrest and detention of a debtor in circumstances where a creditor reasonably believes that a debtor is about to flee the country in order to avoid paying what is owed to a creditor. That procedure is known as arrest *tanquam suspectus de fuga*.[3]

[3] The High Court referred its order declaring both the common law and section 30(1) and (3) constitutionally invalid to this Court for confirmation in terms of section 167(5) and section 172(2) of the Constitution.[4] However, the Registrar of the

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[1] *Malachi v Cape Dance Academy International (Pty) Ltd and Others* 2010 (7) BCLR 678 (WCC).

[2] The text of section 30 of the Magistrates' Courts Act 32 of 1944 (Act) is set out in [19] below.

[3] It appears that some commentators prefer to refer to it as "*tamquam suspectus de fuga*", however for the sake of consistency we will use "*tanquam*" as it appears in the Act and in the cases. See an explanation of what arrest *tanquam suspectus de fuga* means at [17] and [21] below.

[4] Section 167(5) reads:

> "The Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, a High Court, or a court of similar status, before that order has any force."

Section 172(2) reads:

> "(a) The Supreme Court of Appeal, a High Court or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court.

High Court failed to lodge a copy of the order with the Registrar of this Court as required by rule 16(1) of the Rules of this Court.[5] The applicant rescued the situation by bringing an application to this Court for the confirmation of the order of invalidity[6] only in so far as it relates to the impugned provisions, and supplied the necessary order. The Constitution does not make provision for the confirmation of an order of constitutional invalidity of the common law. The applicant's approach is, therefore, the correct one.

[4] It is convenient at this stage to set out the factual background.

(b) A court which makes an order of constitutional invalidity may grant a temporary interdict or other temporary relief to a party, or may adjourn the proceedings, pending a decision of the Constitutional Court on the validity of that Act or conduct.

(c) National legislation must provide for the referral of an order of constitutional invalidity to the Constitutional Court.

(d) Any person or organ of state with a sufficient interest may appeal, or apply, directly to the Constitutional Court to confirm or vary an order of constitutional invalidity by a court in terms of this subsection."

[5] Rule 16(1) of the Constitutional Court Rules, 2003 reads:

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

[6] Rule 16(4) of the Constitutional Court Rules reads:

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

Had the applicant not applied to this Court for the confirmation of the order of invalidity, the High Court order would have been without any force since it would not have been confirmed by this Court. See section 167(5) read with section 172(2)(a) of the Constitution.

Factual background

[5] The applicant, Ms Tatiana Malachi, is a citizen of the Republic of Moldova. She was recruited from Moldova and employed by Cape Dance Academy International (Pty) Ltd (first respondent) and House of Rasputin Properties (Pty) Ltd (second respondent), as an exotic dancer. The first and second respondents are jointly referred to as "the employers".

[6] Upon the applicant's arrival in South Africa, a representative of the employers caused her to surrender her passport to him. When she subsequently asked for it, he refused to give it back to her unless she reimbursed her employers the money they had allegedly spent on her pursuant to the terms of the contract of employment.

[7] In terms of the contract of employment, the employers were to make and pay for all of the applicant's visa and travel arrangements. They also had to provide her with rented accommodation. The applicant was in turn obliged to reimburse them. A cursory reading of the contract of employment reveals that more is said about her duties and what she was required to pay to her employers than about the benefits that would accrue to her for services rendered. After working for several months, the applicant expressed dissatisfaction to her employers with her conditions of employment.

[8] Eventually, she enlisted the assistance of the Consul General of Russia to secure an air ticket to return to her country of origin.[7] She was scheduled to depart on 9 July 2009. Somehow her employers got to know about her plans. They then applied for and were granted an order by the Magistrates' Court, Cape Town, to have the applicant arrested in terms of the impugned provisions. The basis for the application, and for the granting of the arrest order, was that the applicant owed her employers about R100 000 and that they reasonably suspected that she was about to flee the country permanently in order to escape payment of the debt.

[9] On the same day, the applicant was arrested and detained in Pollsmoor Correctional Centre. She was incarcerated from 9 to 24 July 2009. Aggrieved by the order for her arrest, she approached the High Court to secure her liberty.

Proceedings in the High Court

[10] The applicant challenged the constitutional validity of both the impugned provisions and the common law in so far as they empower a court to make an order for arrest *tanquam suspectus de fuga*.

[7] It is not clear whether the applicant had a passport when she returned to Moldova.

[11] By agreement between the parties, the applicant was released before the application was heard. She, however, insisted on the determination of the constitutional issues raised in her application.[8]

[12] The High Court held that the common law and the impugned provisions infringed the applicant's constitutional rights.[9] It made the following order:

> "1. The words "arrest *tanquam suspectus de fuga*" as contained in section 30(1) of the Magistrates' Courts Act 32 of 1944 are declared unconstitutional and invalid and must therefore be deleted.
> 2. The whole of section 30(3) of the Magistrates' Courts Act 32 of 1944 is declared to be inconsistent with the Constitution and invalid.
> 3. The common law which authorises arrests *tanquam suspectus de fuga* is declared to be inconsistent with the Constitution and invalid.
> 4. [The Minister for Justice and Constitutional Development] is to pay the costs of this application including the costs of two counsel."

The issues

[13] The applicant attacks the validity of the impugned provisions on the basis that they violate her rights.

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[8] In the High Court the applicant alleged that her arrest violated her rights, among others, to equality (section 9), dignity (section 10), freedom and security of the person (section 12) and freedom of movement (section 21).

[9] These rights are equality (section 9), dignity (section 10), freedom and security of the person (section 12) and freedom of movement (section 21).

[14] Of the constitutional rights allegedly infringed by the impugned provisions,[10] the most directly implicated is the right to freedom and security of the person in terms of section 12(1) of the Constitution which provides:

> "Everyone has the right to freedom and security of the person, which includes the right—
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> (a) not to be deprived of freedom arbitrarily or without just cause;
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> (b) not to be detained without trial;
>
> (c) to be free from all forms of violence from either public or private sources;
>
> (d) not to be tortured in any way; and
>
> (e) not to be treated or punished in a cruel, inhuman or degrading way."

[15] The main issue that arises in this matter is thus whether arrest *tanquam suspectus de fuga* as authorised by the impugned provisions is consistent with the Constitution. This issue is broken down as follows:

(i) Does the arrest of a potential debtor in terms of the impugned provisions limit the arrestee's right to freedom of the person? More specifically, is it "arbitrary" or "without just cause"?

(ii) If the right is limited, is the limitation justifiable?

(iii) If not, what is the appropriate remedy?

[16] Before I consider the constitutional validity of section 30, it is necessary to set out the history of arrest *tanquam suspectus de fuga*.

[10] Id.

The history of arrest tanquam suspectus de fuga

[17] Arrest *tanquam suspectus de fuga* owes its origin to Roman law.[11] It was introduced in South Africa as part of Roman-Dutch law[12] and was first reported as a part of the rules of court from as early as 1842. The procedure existed at common law as well

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[11] Van Zyl *The Theory of the Judicial Practice of the Colony of the Cape of Good Hope* 2 ed (Juta, Cape Town 1902) at 129. While our law of arrest *tanquam suspectus de fuga* has its origins in Roman and Roman-Dutch law, it should be noted that imprisonment for debt was also adopted into the law of England as early as the 13th century. See Cole "A Modest Proposal for Bankruptcy Reform" (2002) 5 *Green Bag* 2d 269 at 271-2. Cole describes the historical origins of this procedure in English law:

> "In 1267, the Statute of Marlbridge created the first form of imprisonment for debt. This form of imprisonment was limited, however, to holding the debtor over until a trial could establish the obligation. This interlocutory form of detention came to be known as imprisonment upon mesne process, and was largely intended to prevent flight.
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> Civil imprisonment was extended to merchants' debtors with the Statute of Acton Burnell in 1283. . . . The creditor could insist upon the continued confinement of the debtor until he 'made agreement (to satisfy the debt) or his friends for him.' . . . The Statute of Merchants, passed in 1285, permitted debtors to be incarcerated after judgment for the first time. It was this structure of imprisonment for debt, coercive before judgment and punitive after judgment, which remained relatively unchanged until its abolition in the nineteenth century." (Footnotes omitted.)

See also Aird "The Scottish Arrestment and the English Freezing Order" (2002) 51(1) *International and Comparative Law Quarterly* 155 at 156.

According to Aird, another English law mechanism designed to assist creditors was later developed. It is known as the Mareva Injunction. This injunction (also known as a freezing order) prevents an asset from being removed from the jurisdiction of a court so as to ensure that a future judgment is effective. This type of order was first given in the English case of *Nippon Yusen Kaisha* (1975) 1 WLR 1093, but it was the case of *Mareva Compania Naviera SA v International Bulk Carriers SA* (1975) 2 Lloyd's Rep 509 which provided the name by which it is commonly referred. The Mareva Injunction was initially restricted to cases where it was likely that a foreign debtor would remove his or her assets from the jurisdiction of a court which would make those assets incapable of being attached to satisfy a judgment debt. However, the Mareva Injunction has since been widened in its application and has subsequently been codified in section 37(3) of the English Supreme Court Act, 1981. See Aird at 156-7.

Despite the existence of section 37(3) of the Supreme Court Act, 1981 the arrest of a debtor is still possible in English law, although a high standard of evidence is required to succeed with such an arrest order. Furthermore, the English courts have followed a strict interpretation of the requirements. The requirements for an arrest order are: "that the action must be good [in law], that there is a probable cause for believing that the [debtor] is about to quit the English jurisdiction unless arrested and that his departure will necessarily prejudice the [creditor] in the prosecution of his case." Germany has a similar procedure known as the Persönlicher Arrest whereby a debtor is detained until he or she has deposited or provided security for a claim. However, this procedure is rarely used. See Aird at 160-1.

[12] Voet *His Commentary on the Pandects* translated by Buchanan (Juta, Cape Town 1880) at 227; and van der Linden *Institutes of Holland* translated by Juta 3 ed (Juta, Cape Town 1897) at 288.

as in a codified form in various rules of court.[13] Arrest *tanquam suspectus de fuga* is ordered when a creditor on reasonable grounds suspects that a debtor, whose liability has not yet been acknowledged or proven in a court of law, is about to flee the country in order to prevent the adjudication of the dispute in this country.[14] Only a court of law is, in terms of the common law as well as section 30(1) and (3) of the Act read with rule 56 of the Magistrates' Courts Rules[15] and section 19 of the Supreme Court Act[16] read with rule 9 of the Uniform Rules of Court,[17] entrusted with the authority to order arrest *tanquam suspectus de fuga.*

[18] Even at the inception of a debtor's arrest, the courts were reluctant to grant orders of arrest because of their interference with the arrestee's right to personal freedom.[18] In *Chaloner v Corrie* it was held that to grant an order of arrest on poorly reasoned grounds was not right as this would be "carrying the law to great extremes" and that it was "an

[13] See in this regard *Salm v Kohn* 1914 TPD 55; *Robertson v Wilkinson* 1877 Buch 43; *Thompson v Andrews* (1842) 3 Menz 128; and *Roberts v Tucker* (1842) 3 Menz 130. See for instance rule 12 of the Rules of the Court of the Cape of Good Hope Provincial Division, *Government Gazette* 2493 GN 41, 13 January 1938; rule 16 of the Rules of Superior Courts of the Transvaal in Rorke *Rules of the Superior Courts of the Transvaal* (African Book Company, Grahamstown 1906) at 128-32; Order VIII of the Rules of the Supreme and Circuit Courts of the Colony of Natal, in Civil and Criminal Cases, *The Natal Government Gazette* 3593 GN 79, 5 February 1907; and rule 16 of the Rules and Regulations of the High Court of the Orange River Colony, *Government Gazette of the Orange River Colony* 124 GN 221, 23 July 1902.

[14] Erasmus and van Loggerenberg *Jones & Buckle: The Civil Practice of the Magistrates' Courts in South Africa – Volume I: The Act* 9 ed (Juta, Cape Town 1996) at 82.

[15] *Government Gazette* 2103 GN R1108, 21 June 1968.

[16] 59 of 1959.

[17] *Government Gazette* 999 GN R48, 12 January 1965.

[18] See *Segal v Diners Club South Africa (Pty) Ltd* 1974 (1) SA 273 (T) at 275E; and *Chaloner v Corrie* (1887) 8 NLR 42.

undue interference with a man's liberty to adopt that course."[19] Ninety years on the sentiment of the courts had not changed. In *Segal v Diners Club South Africa* the court warned that "[i]f the debtor has been wrongly deprived of his freedom it cannot be put right in the subsequent suit. The harm to him is irreparable."[20] This historical perspective leads to a discussion on the constitutionality of the arrest.

Constitutional validity of the impugned provisions

[19] Section 30 of the Act provides:

> "(1) Subject to the limits of jurisdiction prescribed by this Act, the court may grant against persons and things orders for arrest *tanquam suspectus de fuga*, attachments, interdicts and *mandamenten van spolie*.
>
> (2) Confirmation by the court of any such attachment or interdict in the judgment in the action shall operate as an extension of the attachment or interdict until execution or further order of the court.
>
> (3) No order of personal arrest *tanquam suspectus de fuga* shall be made unless—
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> (a) the cause of action appears to amount, exclusive of costs, to at least forty rand;
>
> (b) the applicant appears to have no security for the debt or only security falling short of the amount of the debt by at least forty rand; and
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> (c) it appears that the respondent is about to remove from the Republic."

[19] *Chaloner v Corrie* above n 18 at 44. See also *Stayn v Bolus and Co* 1915 EDL 60 at 62; and *African Realty Trust v Sherman* 1907 TH 34 at 36.

[20] *Segal v Diners Club South Africa* above n 18.

[20] An order in terms of the impugned provisions, as interpreted by the courts,[21] must be aimed at the debtor who: (i) allegedly owes the creditor at least R40 excluding costs; (ii) is reasonably believed to be about to leave the Republic, but not one who appears to be leaving one part of the country for another;[22] and (iii) intends leaving permanently and whose departure is imminent.[23] Furthermore, the creditor must appear to have no, or insufficient, security for the debt.[24]

[21] The impugned provisions empower a magistrate to issue an order for the arrest of a debtor even though the debtor's liability has not been acknowledged or proven in a court of law. Peté *et al* describe arrest *tanquam suspectus de fuga* as follows:[25]

> "In a situation where a debtor owes money to a creditor, who holds no security for the payment of the debt, and there are reasonable grounds for believing that the debtor is about to leave the country in order to avoid paying creditors, the creditor may make use of a procedure known as arrest *ta[n]quam suspectus de fuga*. This literally translated, means 'an arrest as if being suspected of being a fugitive'. The purpose of the procedure is to prevent a person against whom a creditor intends to institute, or has already instituted, an action, from fleeing from the jurisdiction of the court, with the purpose of avoiding or delaying payment of the claim. The object of the arrest is not to force the debtor to pay the claim. The object is to ensure that he remains within the jurisdiction of

[21] The requirements for the granting of the order for the arrest *tanquam suspectus de fuga* are set out in section 30(3) of the Act. Erasmus and van Loggerenberg above n 14 at 84-6 also set out the requirements including those which were developed by the courts as and when they interpreted the section.

[22] See *Segal v Diners Club South Africa* above n 18 at 275H; and *Taylor Brothers Limited v Blackhurst (II)* (1917) 38 NLR 69 at 78.

[23] See *Norden v Sutherland* (1845) 3 Menz 133 at 139; *Taylor Brothers Limited v Blackhurst (II)* above n 22 at 76; and *Frazer v Sievewright* (1885) 3 SC 342 at 343.

[24] Section 30(3)(b) of the Act.

[25] Peté *et al Civil Procedure: A Practical Guide* (New Africa Books, Claremont 2005) at 418.

> the court until the court has given judgment in the matter. The phrase generally used is to 'abide the judgment of the court'. Of course, if the debtor gives sufficient security for the claim, it does not matter if he leaves the country." (Footnotes omitted.)

These views capture the essence of the nature and purpose of this arrest, which is to stop an alleged debtor from fleeing this country with the intention of preventing the adjudication of the dispute within it.[26] As Wunsh J correctly pointed out, the object of the arrest "is to enable the plaintiff to obtain a judgment against the defendant, not to keep him or her in custody until payment is made."[27]

[22] The procedure to be followed in applying for the order of arrest is set out in the Magistrates' Courts Rules.[28] Rule 56 regulates the section 30 process by providing that an application for an arrest *tanquam suspectus de fuga* may be made *ex parte*.[29] An order made *ex parte* shall call upon the debtor to show cause against its grant on the first court day after its service on the debtor,[30] which may be anticipated by the debtor upon

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[26] Van Winsen *et al Herbstein and Van Winsen: The Civil Practice of the Supreme Court of South Africa* 4 ed (Juta, Cape Town 1997) at 112 reads:

> "It is of prime importance to a creditor to obtain a valid judgment against his debtor. Such a step would enable the creditor to seek satisfaction of the judgment in most of the civilized countries of the world. The court will accordingly assist the creditor to keep the debtor within its jurisdiction until such time as it has given judgment against him, but for no longer. The debtor is arrested, not to perform the judgment, but to abide the judgment of the court." (Footnote omitted.)

[27] *Alliance Corporation Ltd v Blogg: In re Alliance Corporation Ltd v Blogg and Others* [1999] 3 All SA 262 (W) at 266B.

[28] Above n 15.

[29] Rule 56(1).

[30] Rule 56(5)(b).

12 hours' notice to the creditor.[31] A copy of the order obtained *ex parte* and of the affidavit, if any, on which it was based must be served forthwith on the debtor.[32]

[23] Although section 30(1) and section 30(3) refer only to arrest and not to detention, the process of arrest is always effected by the police and thus prevents flight by actually limiting the arrestee's freedom until the debt is paid, adequate security is furnished or judgment is handed down.

[24] There can be no doubt that section 12 is designed to bury our painful history of random, unjust and arbitrary deprivation of physical liberty and to ensure that abuse of state power never again rears its ugly head.[33] Section 12(1)(a) was discussed in *De Lange v Smuts NO*.[34]

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[31] Rule 56(6).

[32] Rule 56(7).

[33] In *De Lange v Smuts NO and Others* [1998] ZACC 6; 1998 (3) SA 785 (CC); 1998 (7) BCLR 779 (CC) this Court held at paras 26-7:

> "When viewed against its historical background, the first and most egregious form of deprivation of physical liberty which springs to mind when considering the construction of the expression 'detained without trial' in s 12(1)(b) is the notorious administrative detention without trial for purposes of political control. This took place during the previous constitutional dispensation under various statutory provisions which were effectively insulated against meaningful judicial control. Effective judicial control was excluded prior to the commencement of the detention and throughout its duration. During such detention, and facilitated by this exclusion of judicial control, the grossest violations of the life and the bodily, mental and spiritual integrity of detainees occurred. This manifestation of detention without trial was a virtual negation of the rule of law and had serious negative consequences for the credibility and status of the judiciary in this country.
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> Even where a derogation from a s 12(1)(b) right has validly taken place in consequence of a state of emergency duly declared under the provisions of the 1996 Constitution, and such derogation has excluded a trial prior to detention, detailed and stringent provisions are made for the protection of the detainee and in particular for subsequent judicial control by the courts over the detention. It is difficult to imagine that any form of detention without trial which takes place for purposes of political control and is not constitutionally sanctioned under the state of emergency

[25] The protection of the right to freedom of the person in terms of section 12(1)(a) has both a substantive and a procedural dimension. The substantive aspect ensures that a deprivation of liberty cannot take place arbitrarily or without just cause whereas the procedural element ensures that the deprivation will only take place in terms of a fair procedure.[35] O'Regan J outlined the two interrelated constitutional aspects in *Bernstein v Bester*:[36]

> "In my view, freedom has two interrelated constitutional aspects: the first is a procedural aspect which requires that no one be deprived of physical freedom unless fair and lawful procedures have been followed. Requiring deprivation of freedom to be in accordance with procedural fairness is a substantive commitment in the Constitution. The other constitutional aspect of freedom lies in a recognition that, in certain circumstances, even when fair and lawful procedures have been followed, the deprivation of freedom will not be constitutional, because the grounds upon which freedom has been curtailed are unacceptable."

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provisions of s 37 could properly be justified under s 36. It is, however, unnecessary to decide that issue in the present case. History nevertheless emphasises how important the right not to be detained without trial is and how important proper judicial control is in order to prevent the abuses which must almost inevitably flow from such judicially uncontrolled detention." (Footnotes omitted.)

See also para 115.

[34] Id at para 23, quoted at [27] below.

[35] See *S v Coetzee and Others* [1997] ZACC 2; 1997 (3) SA 527 (CC); 1997 (4) BCLR 437 (CC) at para 159; and *Bernstein and Others v Bester and Others NNO* [1996] ZACC 2; 1996 (2) SA 751 (CC); 1996 (4) BCLR 449 (CC) at para 145.

[36] *Bernstein v Bester* above n 35.

[26] This foundation was built upon in *S v Coetzee*[37] where O'Regan J said that the state may not deprive its citizens of liberty for reasons that are not acceptable, nor, when it deprives its citizens of freedom for acceptable reasons, may it do so in a manner which is procedurally unfair. I will deal only with the first of the two constitutional aspects of freedom, namely the substantive, since that will dispose of the matter.

Substantive aspect

[27] Ackermann J explained the substantive aspect of freedom in *De Lange v Smuts NO*[38] as follows:

> "The substantive and the procedural aspects of the protection of freedom are different, serve different purposes and have to be satisfied conjunctively. The substantive aspect ensures that a deprivation of liberty cannot take place without satisfactory or adequate reasons for doing so. In the first place it may not occur 'arbitrarily'; there must, in other words, be a rational connection between the deprivation and some objectively determinable purpose. If such rational connection does not exist the substantive aspect of the protection of freedom has by that fact alone been denied. But even if such rational connection exists, it is by itself insufficient; the purpose, reason or 'cause' for the deprivation must be a 'just' one."

[28] An arrest and detention, by its nature, limits the freedom of a person. The right to freedom of the person is limited if the deprivation is done arbitrarily, or without just cause. The question is whether the deprivation or limitation of freedom authorised by the

[37] *S v Coetzee* above n 35.

[38] *De Lange v Smuts NO* above n 33 at para 23.

impugned provisions is arbitrary or without a just cause. In the view I take of the matter, I choose to deal with just cause.

Just cause

[29] In *De Lange v Smuts NO*,[39] Ackermann J had the following to say about just cause:

> "It is not possible to attempt, in advance, a comprehensive definition of what would constitute a 'just cause' for the deprivation of freedom in all imaginable circumstances. The law in this regard must be developed incrementally and on a case by case basis. Suffice it to say that the concept of 'just cause' must be grounded upon and consonant with the values expressed in section 1 of the 1996 Constitution and gathered from the provisions of the Constitution as a whole." (Footnote omitted.)

[30] In *Bid Industrial Holdings*,[40] which dealt with arrest to found jurisdiction, Howie P found that the section 12(1)(a) right is infringed where there is an absence of just cause or fair trial. Since there was no question of a trial in that case, he addressed just cause in the following terms:

> "In assessing whether establishing jurisdiction for purposes of a civil claim can be 'just cause' it is necessary, first, to consider whether arresting the defendant can enable the giving of an effective judgment. There is a crucial difference between attaching property and arresting a person. . . . [T]he property attached will, unless essentially worthless, obviously provide some measure of security or some prospect of successful execution. Arrest, purely by itself, achieves neither. Security or payment will only be forthcoming if the defendant chooses to offer one or other in order to avoid arrest and ensure liberty.

[39] Id at para 30.

[40] *Bid Industrial Holdings (Pty) Ltd v Strang and Another (Minister of Justice and Constitutional Development, Third Party)* 2008 (3) SA 355 (SCA) at para 37.

> It is therefore not the arrest which might render any subsequent judgment effective but the defendant's coerced response.
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> The impotence of an arrest itself to bring about effectiveness is illustrated by the result that would ensue were the arrested defendant to do nothing either before, or in answer to, judgment for the plaintiff. Pending judgment there is no legal mechanism to enforce security or payment and failure to pay the judgment debt does not expose the defendant to civil imprisonment. Consequently, deprivation of liberty does not of itself serve to attain effectiveness."[41] (Footnote omitted.)

[31] Although *Bid Industrial Holdings* did not deal with arrest *tanquam suspectus de fuga*, the observations relating to what would constitute just cause for the purpose of the arrest apply with equal force to this matter. There can be no doubt that arrest *tanquam suspectus de fuga* has the effect of limiting the arrestee's fundamental right to freedom.[42]

[32] The object of the arrest "is to ensure that [the potential debtor] remains within the jurisdiction of the court until the court has given judgment in the matter."[43] As soon as judgment is given, a debtor would, however, be free to catch the next flight to any foreign destination even if this is done to evade payment and no realisable asset exists in the country, from the proceeds of which payment may be effected. Arrest does not, therefore, ensure the satisfaction of the judgment debt. Admittedly, the unfairly exerted pressure of incarceration may at times force the arrestee to pay the debt or provide security. But, that does not detract from the fact that the arrest does not necessarily

[41] Id at paras 38-9.

[42] Id at para 36.

[43] Peté *et al* above n 25.

render the judgment any more executable or beneficial to the creditor than would have been the case had the debtor left the country. It simply limits the fundamental right to freedom of the person for no just reason.

[33] The order for the arrest of persons *tanquam suspectus de fuga* under the impugned provisions is ordinarily made at the time when their civil liability has not yet been established.[44] Their debt is only alleged on affidavit, often in an urgent application brought *ex parte*. The potential debtor is often only afforded the opportunity to resist the severe curtailment of the right to freedom, by the order, on the return date. Potentially the detention may endure for as long as the action is pending.[45] The effect of this deprivation was more aptly captured in *Segal v Diners Club South Africa* where we are warned that "[i]f the debtor has been wrongly deprived of his freedom it cannot be put right in the subsequent suit. The harm is irreparable."[46] Nothing can undo the degrading effect of incarceration, particularly if the order were obtained *ex parte*. This is the position in which the applicant in this matter found herself for 16 days.

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[44] See Mathopo J's remarks in *Amrich 159 Property Holding CC v van Wesembeeck* 2010 (1) SA 117 (GSJ) at paras 28 and 31.

[45] Id at para 31.

[46] *Segal v Diners Club South Africa* above n 18.

[34] Since there is no legal basis for the imprisonment of someone who has been found civilly liable,[47] it is inconceivable that any legal justification can ever exist for putting behind bars a person whose civil liability is yet to, or will possibly never, be proven. Although an order for arrest is granted by a court, the intervention of the judicial process can not legitimise the deprivation of freedom, since the arrest may stem from a debt which has itself not been established through the judicial process. I therefore conclude that there is no just cause for the arrest in terms of the impugned provisions.[48]

[35] Having found that the right to freedom is limited, I will now consider whether such limitation is justifiable in terms of section 36 of the Constitution.

Justification analysis

[36] The dictum in *Makwanyane*[49] has essentially been codified in section 36(1) which provides:

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[47] Abolition of Civil Imprisonment Act 2 of 1977. See also *Gouveia v Da Silva* 1988 (4) SA 55 (W) at 62F-G. Further, see article 11 of the International Covenant on Civil and Political Rights and article 1 of Protocol 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

[48] See also the remarks in *Bid Industrial Holdings* above n 40 at para 41 which reads as follows:

> "Apart from the fact that arrest does not serve to attain jurisdictional effectiveness it cannot be 'just cause' to coerce security or, more especially, payment, from a defendant who does not owe what is claimed or who, at least, is entitled to the opportunity to raise non-liability in the proposed trial. If there is no legal justification for incarcerating a defendant who has been found civilly liable there cannot be any for putting a defendant in prison whose liability has not yet been proved. And as to the function of arrest to enable the court to take cognisance of the suit, that could be appropriately achieved if the defendant were in this country when served with the summons and there were, in addition, significant factual links between the suit and South Africa. . . . Accordingly, there is no 'just cause' for the arrests sought."

[49] *S v Makwanyane and Another* [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at para 104.

"The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

(a) the nature of the right;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the relation between the limitation and its purpose; and

(e) less restrictive means to achieve the purpose."

What falls to be considered is the justification of the limitation of freedom.

[37] Section 30(1) and section 30(3) are laws of general application. Arrest *tanquam suspectus de fuga*, which they authorise, plays a role in facilitating debt collection. Unfortunately, the impugned provisions go further than is necessary to achieve the objective. They do so without any regard to less invasive options that are available. They also do not insist on the exhaustion of less restrictive remedies before pursuing the option of arrest and detention.[50]

[38] As was found in *Coetzee v Government*, albeit in a different context, the impugned provisions are overbroad.[51] Although they are meant to facilitate the adjudication of the

[50] *Coetzee v Government of the Republic of South Africa; Matiso and Others v Commanding Officer, Port Elizabeth Prison, and Others* [1995] ZACC 7; 1995 (4) SA 631 (CC); 1995 (10) BCLR 1382 (CC) at para 22. The first less invasive option is to sue the debtor in the country to which the debtor has fled. The other less intrusive alternative, provided for by section 30(1), is that a creditor may apply for an interdict restricting a debtor from leaving the country, subject to appropriate conditions. Those conditions could, for example, include that the debtor stays either where he or she has been staying all along or at some other address within the court's jurisdiction, which should be made known to the creditor or the sheriff.

[51] Id at para 13.

dispute in the country and the effective execution of a subsequent judgment debt against a debtor who has the means to pay but refuses to do so, they also strike at debtors, like the applicant, who cannot pay. This is what led this Court in *Coetzee v Government* to find that a similar limitation cannot be justified as reasonable.[52]

[39] Even in the writings of the first Roman-Dutch authors, arrest *tanquam suspectus de fuga* was treated as an extraordinary remedy[53] and the rules of court originally set a high monetary threshold for the granting of this remedy.[54] A paltry amount of R40, which is the threshold for the deprivation of a person's liberty, probably the cost of two small chickens, highlights the disproportionality of the means and the purpose. Although the employers' claim is about R100 000, this does not detract from the fact that a debtor could potentially be deprived of freedom for being suspected of intending to flee the country to avoid the adjudication of a claim for R40.[55]

[40] Freedom is an important right. The detention of any person without just cause is a severe and egregious limitation of that right. It is difficult to imagine the circumstances in which a law that allows detention without just cause could ever be justifiable.

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[52] Id at paras 13-4.

[53] Van der Linden above n 12 at 292.

[54] For instance the cause of action must have been in the amount of £25 or more under rule 12(1) of the Rules of the Cape of Good Hope Provincial Division above n 13; £20 or more under rule 16 of the Rules of the Supreme Court of the Transvaal above n 13 at 128; more than £20 under rule 16 of the Rules and Regulations of the High Court of the Orange River Colony above n 13; and more than £15 under order VIII of the Rules of the Supreme and Circuit Courts of the Colony of Natal, in Civil and Criminal Cases above n 13.

[55] In the High Court this amount is R400. See rule 9 of the Uniform Rules of Court.

[41] Other comparable jurisdictions have done away with arrest and detention that aims to prevent flight or to recover civil debts.[56] I therefore conclude that the limitation is not reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

[42] For these reasons the order of constitutional invalidity stands to be confirmed. It is necessary to say something about the High Court order relating to the common law.

[43] The impugned provisions are essentially a codified version of the common law. There is no real difference between the two. The High Court has already declared the common law equivalent of the impugned provisions unconstitutional. Although this Court is seized with the impugned provisions and not with the common law, our finding that the impugned provisions are unconstitutional is not at odds with that of the High Court that the common law is unconstitutional.

[44] The appropriate remedy is next in line for consideration.

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[56] England, Australia and New Zealand retain the procedure for the imprisonment of a fleeing debtor in very limited and clearly demarcated circumstances. With regard to the practice in England and Germany see Aird above n 11 at fns 44-7. Australia retains the English mechanism of the Mareva Injunction, however, it is seldom used. See Kercher "Legal History and the Study of Remedies" (2001) 39 *Brandeis Law Journal* 619 at 627-8. In New Zealand, section 55 of the Judicature Act, 1908 read with Part 17 Subpart 8, 17.88-9 of the Judicature (High Court Rules) Amendment Act, 2008 provides the legal mechanism for arresting an absconding debtor. In a query we conducted through our involvement in the European Commission for Democracy through Law (the Venice Commission) it emerged that of the 14 countries that submitted replies only three allow for the detention of fleeing debtors. These countries are Georgia, Norway and Sweden. The countries which did not have similar provisions are Poland, Slovenia, Bosnia and Herzegovina, Hungary, Bulgaria, Croatia, Lithuania, Brazil, Luxembourg, Switzerland and Belarus.

Severability

[45] The appropriate way to remedy the unconstitutionality is to sever the offensive parts of subsection (1) and to strike out subsection (3) in its entirety.

[46] As in *Coetzee v Government*, severability of the impugned provisions presents itself for consideration in this matter. The test for severability as developed by this Court is:

> "Although severability in the context of constitutional law may often require special treatment, in the present case the trite test can properly be applied: if the good is not dependent on the bad and can be separated from it, one gives effect to the good that remains after the separation if it still gives effect to the main objective of the statute. The test has two parts: first, is it possible to sever the invalid provisions and, second, if so, is what remains giving effect to the purpose of the legislative scheme?"[57] (Footnote omitted.)

[47] The impugned provisions do not insist on the exhaustion of alternatives that are less extensive and yet effective before an order that infringes the potential debtor's right could be resorted to. Any attempt by this Court to ensure that the constitutional invalidity is cured, would be nothing short of legislating. And that would fall foul of the separation of powers doctrine. The impugned subsections of section 30 can be severed from the section and what remains will still give effect to the purpose of section 30 and the purpose of the legislative scheme. As Hlophe JP correctly held, the words "arrest

[57] *Coetzee v Government* above n 50 at para 16.

tanquam suspectus de fuga" must be excised from section 30(1) of the Act. Similarly, the whole of subsection (3) must be severed from section 30 of the Act.[58]

Retrospectivity

[48] The intricate question that arises in this matter is whether the retrospective effect of the declaration of invalidity should be limited; and if so, to what extent? The High Court simply declared the impugned provisions invalid. This means that, in terms of the doctrine of objective constitutional invalidity, the impugned provisions become invalid from the date on which the Constitution came into operation.[59]

[49] This issue was not debated at the hearing and we did not have the benefit of the parties' submissions on it. It is necessary to limit the retrospective application of the order. The order should apply to all pending cases. In other words, the declaration will not apply to cases where the review and appeal processes have been finalised. Consequently those potential debtors who are presently incarcerated in terms of this law will have to be released with immediate effect.

Costs

[50] The Minister for Justice and Constitutional Development (fourth respondent) is enjoined by the constitutional development leg of his portfolio to ensure that pre-

[58] *Malachi v Cape Dance Academy* above n 1 at para 66.

[59] *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) at para 27. The Constitution came into effect on 4 February 1997.

Constitution laws which are inconsistent with the Constitution are identified for repeal or suitable amendment. The impugned provisions are in point. The fourth respondent omitted to amend or repeal section 30(1) and (3). The ill effects are evident in this case. Not only was the applicant struck by the provisions, but she had to approach both the High Court and this Court to ensure that these unconstitutional provisions are removed from the statute books. For that reason her costs must, at least to some extent, be borne by the fourth respondent who correctly conceded such an order.

[51] Mr Katz, for the applicant, sought a costs order against the employers on the basis that the employment arrangement with the applicant amounts, for all intents and purposes, to human trafficking. The employers were not notified that an order for costs would be sought against them on this basis. It was a novel point. To have them mulcted in costs on the basis that they were involved in human trafficking, would not be just and equitable. The application for costs on this basis must therefore be dismissed.

[52] Ordinarily, costs follow the result. The applicant is the successful party and would ordinarily be entitled to costs against the first and second respondents as well. Nevertheless, Mr Katz informed this Court that the applicant and the employers agreed that the applicant would not seek costs against them even if her application for the confirmation of the order of constitutional invalidity succeeds. Consequently, Mr Katz did not ask for costs against the first and second respondents except on the basis of human trafficking. This Court is, however, not bound by that agreement. Costs are a

matter which lies entirely within the discretion of this Court, to be exercised with due regard to the particular circumstances of each case.[60] The first and second respondents launched an application against the applicant and obtained an order for her arrest and detention in terms of the impugned provisions. When the order was challenged they failed to offer any justification for the order or for the statutory provisions invoked to obtain it, in either the High Court or in this Court, choosing instead to abide the decision of both courts. Sight should not be lost of the fact that had they not initiated those proceedings, it would not have been necessary for the applicant to approach this Court.

[53] In these circumstances, despite the agreement on costs referred to above, it appears that it may be just and equitable to order the first and second respondents to pay half of the applicant's costs in this Court. Since this issue was not debated during the hearing, all the parties will be afforded the opportunity to make submissions on the appropriateness of the costs order. A provisional order for costs will now be issued ordering the fourth respondent to pay half of the costs of the proceedings in this Court and the first and second respondents to pay the other half.

Order

[54] In the result, the following order is made:

[60] See *Chonco and Others v President of the Republic of South Africa* [2010] ZACC 7; 2010 (6) BCLR 511 (CC) per Khampepe J at para 6 and the authorities cited therein.

(a) The order of constitutional invalidity made by the Western Cape High Court, Cape Town is confirmed to the following extent:

(i) The words "arrest *tanquam suspectus de fuga*" as contained in section 30(1) of the Magistrates' Courts Act 32 of 1944 are declared unconstitutional and invalid.

(ii) The whole of section 30(3) of the Magistrates' Courts Act 32 of 1944 is declared to be inconsistent with the Constitution and invalid.

(b) The Minister for Justice and Constitutional Development is to pay the costs of the applicant in the High Court.

(c) The Minister for Justice and Constitutional Development is ordered to pay half of the costs of the proceedings in this Court.

(d) The Cape Dance Academy International (Pty) Ltd and House of Rasputin Properties (Pty) Ltd are ordered jointly and severally to pay half of the costs of the proceedings in this Court.

(e) The orders in subparagraphs (c) and (d) are provisional.

(f) The parties are invited to make representations as to the appropriateness or otherwise of these orders before Tuesday, 28 September 2010 and before a final order is made.

Ngcobo CJ, Moseneke DCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Nkabinde J, Skweyiya J, Van der Westhuizen J and Yacoob J concur in the judgment of Mogoeng J.

For the applicant:	Advocate A Katz SC and Advocate R Garland instructed by Eisenberg & Associates.
For the fourth respondent:	Advocate P Bezuidenhout instructed by the State Attorney, Cape Town.

CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 34/10
[2010] ZACC 21

In the matter between:

VIKING PONY AFRICA PUMPS (PTY) LTD
t/a TRICOM AFRICA — Applicant

and

HIDRO-TECH SYSTEMS (PTY) LTD — First Respondent

CITY OF CAPE TOWN — Second Respondent

Heard on : 10 August 2010

Decided on : 23 November 2010

JUDGMENT

MOGOENG J:

Introduction

[1] One of the most vicious and degrading effects of racial discrimination in South Africa was the economic exclusion and exploitation of black people. Whether the origins of racism are to be found in the eighteenth and nineteenth century frontier or in the subsequent development of industrial capitalism, the fact remains that our history excluded black people from access to productive economic assets. After 1948, this

exclusion from economic power was accentuated and institutionalised on explicitly racially discriminatory grounds, further relegating most black people to abject poverty.

[2] Driven by the imperative to redress the imbalances of the past, the people of South Africa, through their democratic government, developed, among others, the broad-based black economic empowerment programme[1] and the preferential procurement policy.[2] Relevant to this case are the legislative and other regulatory measures which were put in place to enable organs of state to award tenders on the basis of a preferential point system to service providers or enterprises which have a significant shareholding by the previously marginalised. Those enterprises are given preferential points on condition that the historically disadvantaged shareholders actively participate in the running of, and exercise control over, the tendering enterprise to the extent commensurate with their ownership.[3]

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[1] Section 9(2) of the Constitution mandates the enactment of, among others, measures designed to protect and advance persons disadvantaged by unfair discrimination.

[2] Section 217 of the Constitution makes provision for this. Its provisions are quoted at n 16 below. The preferential procurement policy is provided for in the Preferential Procurement Policy Framework Act 5 of 2000 (Procurement Act). Further see Penfold and Reyburn "Public Procurement" in Woolman *et al* (eds) *Constitutional Law of South Africa* 2 ed Original Service: 12-03 (Juta, Cape Town 2008) at 25-13 which reads:

> "The design of the South African preferential procurement framework is located within the history of apartheid. It is aimed at redressing historical disadvantage and increasing opportunities for those previously prevented from actively participating in the country's mainstream economy."

[3] For the meaning of historically disadvantaged individuals see [25] and n 21 below. See also regulation 13(4) of the Preferential Procurement Regulations, 2001, Government Gazette 22549 GN R725, 10 August 2001 (regulations) fully quoted at [46] below.

[3] This is an application for leave to appeal, against the judgment of the Supreme Court of Appeal.[4] It hinges on the correct application of the preferential procurement policy. This Court is required to clarify the nature and extent of the duty of an organ of state when presented with ostensibly true allegations that an enterprise to which a tender was awarded, fraudulently manipulated a preferential procurement scheme for the purpose of securing a preference. A proper determination of this issue depends primarily on the meaning of the words "detect" and "act against" in regulation 15(1) of the Preferential Procurement Regulations, 2001[5] (regulations).

Parties

[4] The applicant, Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa (Viking), is a company that supplies and installs mechanical and electrical equipment for water and sewerage treatment works. The first respondent is Hidro-Tech Systems (Pty) Ltd (Hidro-Tech), a company which carries on substantially the same business as Viking. The second respondent is the City of Cape Town (City).[6] The City participated in the proceedings in the Western Cape High Court, Cape Town[7] (High Court) but elected to abide the decisions of both the Supreme Court of Appeal and this Court.

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[4] *Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa, and Another v Hidro-Tech Systems (Pty) Ltd* 2010 (3) SA 365 (SCA) *per* Heher JA with Mpati P, Mlambo, Bosielo JJA and Saldulker AJA concurring (*Viking Pony SCA*).

[5] Above n 3. Regulation 15(1) is quoted at [28] below.

[6] The City of Cape Town is a metropolitan municipality established in terms of the Local Government: Municipal Structures Act 117 of 1998 read with Establishment of the City of Cape Town, Western Cape Provincial Gazette 5588 PN 479, 22 September 2000.

[7] *Hidro-Tech Systems (Pty) Ltd v City of Cape Town and Others* 2010 (1) SA 483 (C).

Factual background

[5] Over the years Viking and Hidro-Tech received much work from the City and other municipalities in the Western Cape, Northern Cape as well as the Eastern Cape provinces. According to Hidro-Tech, Viking was awarded approximately 80% more tenders than Hidro-Tech. This was a source of concern to Hidro-Tech, as it believed that on at least three occasions it submitted a lower tender than Viking but still lost. This allegation is disputed by Viking.[8]

[6] Hidro-Tech's concern prompted it to investigate the reason behind Viking's unabating competitive edge over it. It found that Viking won most of these tenders because of its higher historically disadvantaged individual profile. Historically disadvantaged individuals held 70% of Viking's shares whereas the converse obtained in Hidro-Tech. Consequently, Viking was always given higher preference points which resulted in the tenders often being awarded to it.[9]

[7] At the heart of this case is the complaint by Hidro-Tech that historically disadvantaged individuals were neither remunerated nor allowed to participate in the management of Viking to the degree commensurate with their shareholding and their

[8] However, as the High Court found, it is not necessary to determine how many tenders were awarded to Viking. Of significance is the City and Viking's acknowledgement that the historically disadvantaged individual status of Viking had resulted in Viking obtaining an overall higher ranking, and consequently receiving more tenders, than Hidro-Tech.

[9] Regulations 3(4), 4(4), 5(4), 6(4) and 8(8) provide that only the tenderer with the highest number of preference points may be awarded a tender. Regulation 9 provides that the tender may be awarded to a tenderer who did not have the highest preference points where reasonable and justifiable grounds exist.

positions as directors.[10] Hidro-Tech further believes that the benefits that Viking received from tenders awarded by reason of its seemingly progressive shareholding profile, were being routed to its sister company, Bunker Hills Pumps (Pty) Ltd t/a Tricom Systems (Bunker Hills), which is a wholly white-owned company.

[8] This information was furnished to Hidro-Tech by Mr Zandberg and Mr James. Mr Zandberg is a white male who was an employee of Viking, and a director and 10% shareholder in Bunker Hills. Mr James is a historically disadvantaged individual who owned 35% of Viking's shares while Mr Mosea was the holder of the other 35%. Mr Zandberg and Mr James parted ways with Viking under unpleasant circumstances and joined the ranks of Hidro-Tech. After taking up employment with Hidro-Tech, they disclosed detailed information on the extent of the historically disadvantaged individuals' control over Viking and of their involvement in its management. Their disclosures reinforced Hidro-Tech's suspicion that the historically disadvantaged individuals' shareholding was not legitimate and that their black shareholders were mere tokens used to secure business deals.

[9] Another concern raised about Viking was that it was an instrument used by Bunker Hills to reap tender benefits which it would otherwise not have enjoyed, given its all-white shareholding and executive structures. Hidro-Tech's attorney characterised Viking

[10] This is based on regulation 13(4) which is quoted at [46] below. A historically disadvantaged individual is described at [25] and n 21 below.

as an opportunistic intermediary for tender procurement whilst the actual benefit derived from the tenders awarded to Viking were channelled to Bunker Hills. Mr Zandberg said that the benefits are then used to pay the directors of Bunker Hills handsomely whereas those of Viking earn a pittance.

[10] Mr Zandberg also alleged that while he was employed by Viking his monthly remuneration package was R23 500 plus medical aid, a petrol card and a credit card. At that time one of his bosses, Mr James who had a 35% stake in Viking, earned a meagre R5 600 per month and was entitled to medical aid but neither to a credit card nor a petrol card.

[11] Armed with these revelations Hidro-Tech lodged a complaint with the City. The complaint was that Viking had, over the years, made fraudulent misrepresentations in its tender documents to the City about its profile of historically disadvantaged individuals, for the purpose of securing a preference. A letter was sent by Hidro-Tech's attorneys to Mr Bindeman, the City's Head of Tenders and Contracts: Supply Chain Management Directorate. In that letter, Hidro-Tech alleged that the remuneration, dividends and benefits given to Viking's historically disadvantaged shareholders were negligible compared to those of its white shareholders, especially those of its sister company which benefitted the most from tenders awarded to Viking. It was accompanied by another letter in which Hidro-Tech set out the information which it had obtained from Mr James and Mr Zandberg. It was alleged, in this letter, that Mr James did not exercise control

over the company and did not actively participate in its management to the degree proportionate to his shareholding.

[12] The City asked external database managers, Quadrem t/a Tradeworld (Tradeworld), to investigate these allegations. Tradeworld performed a verification exercise which confirmed that the shareholding as reflected in Viking's tender documents was correct. A follow-up letter was written to the City by Hidro-Tech's attorneys. They expressed the view that the investigation conducted by Tradeworld was inadequate owing to Tradeworld's incapacity to investigate allegations of fronting.[11]

[13] Hidro-Tech's attorney subsequently held talks with a senior City official, Mr Schnaps. He is Mr Bindeman's boss. Mr Schnaps told him that the City was unable to take action against Viking at that stage. This discussion was followed by a letter written on behalf of Hidro-Tech to the City. In that letter, Hidro-Tech once again lamented the inadequacy of the investigation conducted by Tradeworld and requested an urgent and presumably proper investigation by the City. It also demanded the suspension of the work which Viking was doing for the City and a halt to the award of any further tenders to Viking. Hidro-Tech threatened legal action against the City, if its demands were not met.

[11] Also known as "window dressing" or "tokenism". Bolton *The Law of Government Procurement in South Africa* (LexisNexis Butterworths, Durban 2007) at 293-4 describes fronting as "the practice of black people being signed up as fictitious shareholders in essentially 'white' companies."

[14] When a favourable response was not forthcoming, it approached the High Court for relief.

Proceedings in the High Court

[15] The order sought in the High Court was that the City be directed to "act against" Viking in accordance with regulation 15[12] and in accordance with section 9.4 of the City's Procurement Policy Initiative.[13] The alternative order sought was that in the event of the High Court finding that there was a need for further investigation, the City be directed to conduct or cause to be conducted a sufficiently thorough investigation into the complaint of fronting and that the investigation be concluded within two months of the order. The order for further investigation was to be coupled with the order restraining the City from awarding contracts to Viking pending the finalisation of the investigation.

[16] The High Court made the following key findings: (i) the investigation conducted by Tradeworld was inadequate since that investigation did not address the real issues which are the inner workings of Viking and the actual status of its historically disadvantaged directors; (ii) Hidro-Tech was justified in forming the opinion that the City's response to its complaint was inadequate to safeguard its constitutional rights and legitimate commercial interest; (iii) the City was obliged to "act against" Viking; (iv) the content of the letter written at the instance of Hidro-Tech was true and it was in the

[12] Regulation 15(1) and (2) is respectively quoted at [28] and [50] below.

[13] The full text is available at http://www.capetown.gov.za/en/SupplyChainManagement/Documents/ProcurementPolicy-final.pdf accessed on 31 August 2010. Section 9.4 is quoted at [49] below.

public's, as well as Hidro-Tech's, interest; (v) the City's persistent opposition to the relief sought on the face of the totality of the evidence before the court, justified a mandatory order against it; (vi) on the probabilities neither Mr James nor Mr Mosea were actually involved in the management of, or exercised control over, Viking to the extent commensurate with their respective shareholding at the time of Viking's submission of the tenders awarded in 2006 and 2007; and (vii) Viking is guilty of a fraudulent misrepresentation.

[17] Having found Viking guilty of a fraudulent misrepresentation, the High Court ordered the City to "act against" Viking in accordance with regulation 15. The City, Viking and Bunker Hills were ordered to pay the costs of the application.[14] This order displeased Viking. As a result, it sought and obtained leave from the High Court to appeal to the Supreme Court of Appeal.

Proceedings in the Supreme Court of Appeal

[18] Before the Supreme Court of Appeal, Viking and Hidro-Tech agreed that the High Court ought not to have assessed the probabilities and made some of the factual findings set out above on the papers in motion proceedings. The Supreme Court of Appeal also

[14] The High Court ordered at para 84:

> "1. The [City] is ordered to act against [Viking] in accordance with regulation 15 of the regulations promulgated in terms of the Preferential Procurement Policy Framework Act 5 of 2000;
>
> 2. The [City], [Viking] and [Bunker Hills] are ordered, jointly and severally, to pay the costs of the application, including the costs occasioned by the amendment of the notice of motion".

chose not to align itself with those factual findings. It addressed only the question whether the City conducted the kind of investigation which the serious allegations levelled against Viking cried out for, and found that the City was in breach of its duty to investigate. The Supreme Court of Appeal concluded that the High Court did not err in granting the relief, and dismissed the appeal with costs. Viking then approached this Court for leave to appeal against the decision of the Supreme Court of Appeal. It is convenient to deal with the preliminary issue first.

Leave to appeal

[19] It is trite that the granting of leave to appeal, in this Court, depends on whether the following two key requirements are met: (i) does the application raise a constitutional issue; and (ii) if it does, is it in the interests of justice to grant leave? This application for leave to appeal is about the City's constitutional and statutory obligations to take appropriate action against a tenderer who was awarded a contract allegedly on account of the false information it furnished, in respect of its historically disadvantaged individual profile, to secure preference. Both parties agree that this matter raises a constitutional issue of some importance.

[20] It follows that not only the City and the Department of Trade and Industry (DTI), but other organs of state too, would benefit from the guidance that this Court will provide on what constitutes appropriate action to take, in circumstances where credible

allegations of fraud or corruption are levelled against an enterprise to which a tender has been awarded. There can be no doubt that this issue has a significant public interest.

[21] For these reasons, I am satisfied that it is in the interests of justice to grant leave to appeal. An order to this effect will be made.

The issues in this Court

[22] The main issue is what the obligations of an organ of state are in circumstances where an enterprise which has been awarded a tender is plausibly accused of having been successful only because of the fraudulent representations it made. In this matter the misrepresentation is about the enterprise's profile of historically disadvantaged individuals. Out of the main issue the following subsidiary matters arise:

(a) the source of an organ of state's obligation to investigate;

(b) the meaning of "detect" in regulation 15(1);

(c) the meaning of "act against" in regulation 15(1);

(d) the applicability of the Promotion of Administrative Justice Act[15] (PAJA);

(e) the adequacy of the steps taken by the City to address the complaint; and

(f) the meaning and effect of the Supreme Court of Appeal order.

[15] 3 of 2000.

The source of an organ of state's obligation to investigate

[23] Section 217 of the Constitution sets out the basis on which organs of state may enter into contracts for the procurement of goods and services. It also allows for the preferential allocation of contracts for the advancement of persons previously disadvantaged by unfair discrimination and provides for the enactment of national legislation that would lay down the framework within which a procurement policy, which is designed to favour historically disadvantaged individuals, is to be implemented.[16]

[24] The Preferential Procurement Policy Framework Act[17] (Procurement Act) owes its existence to section 217.[18] Some of the specific goals of the Procurement Act are to (i) have an organ of state contract with persons, or categories of persons, historically disadvantaged by unfair discrimination on the basis of race, gender or disability; and (ii) give the organ of state the discretion to cancel any contract awarded as a result of the

[16] Section 217 of the Constitution provides:

> "(1) When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.
>
> (2) Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for—
>
> (a) categories of preference in the allocation of contracts; and
>
> (b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.
>
> (3) National legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented."

[17] Above n 2.

[18] Bolton "The regulation of preferential procurement in state-owned enterprises" (2010) 1 *TSAR* 101 at 102.

false information supplied by the tenderer for the purpose of securing preference, without prejudice to any other remedies the organ of state may have.[19]

[25] The Minister of Finance is empowered to make and did make regulations on certain matters in order to facilitate the achievement of the objects of the Procurement Act.[20] These regulations: (i) describe a historically disadvantaged individual[21] as a South African citizen who was disenfranchised during apartheid South Africa, a female or a disabled person; (ii) set out the principles which regulate the preferential point system;[22] (iii) underline the importance of truthful and correct information in submitting tender

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[19] Section 2(1) of the Procurement Act provides that:

> "An organ of state must determine its preferential procurement policy and implement it within the following framework:
>
> ....
>
> (d) the specific goals may include—
>
> (i) contracting with persons, or categories of persons, historically disadvantaged by unfair discrimination on the basis of race, gender or disability;
>
> ....
>
> (g) any contract awarded on account of false information furnished by the tenderer in order to secure preference in terms of this Act, may be cancelled at the sole discretion of the organ of state without prejudice to any other remedies the organ of state may have."

[20] Section 5 of the Procurement Act.

[21] Regulation 1(h) of the regulations provides that:

> "'Historically Disadvantaged Individual (HDI)' means a South African citizen—
>
> (1) who, due to the apartheid policy that had been in place, had no franchise in national elections prior to the introduction of the Constitution of the Republic of South Africa, 1983 (Act No 110 of 1983) or the Constitution of the Republic of South Africa, 1993 (Act No 200 of 1993) ("the Interim Constitution"); and/or
>
> (2) who is a female; and/or
>
> (3) who has a disability:
>
> Provided that a person who obtained South African citizenship on or after the coming to effect of the Interim Constitution, is deemed not to be an HDI".

[22] Regulations 3-13.

documents;[23] and (iv) provide for the obligations and powers of an organ of state to "act against" any person who was awarded a tender, as a consequence of a fraudulent misrepresentation of the facts that earned him or her preference points in terms of the Procurement Act or the regulations, when the fraud is detected.[24]

[26] Organs of state routinely procure goods and services.[25] This is generally done through a tender system.[26] It is the responsibility of the procuring organ of state to invite for, evaluate and award tenders and also to monitor the implementation of what was tendered for.[27] When any service provider, who did not secure a tender, cries foul and registers its complaint with the relevant organ of state, an appropriate response or action would naturally be called for. As to what kind of response would be appropriate depends on the particular circumstances of each case, and on the obligations imposed on the organ of state.

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[23] Regulation 14 provides:

> "A tenderer must, in the stipulated manner, declare that—
>
> (a) the information provided is true and correct;
>
> (b) the signatory to the tender document is duly authorised; and
>
> (c) documentary proof regarding any tendering issue will, when required, be submitted to the satisfaction of the relevant organ of state."

[24] See regulations 14(c) and 15(1).

[25] Bolton "The use of government procurement as an instrument of policy" (2004) 121 *SALJ* 619 at 619.

[26] See generally the Procurement Act, the regulations and section 112 of the Local Government: Municipal Finance Management Act 56 of 2003 (MFMA).

[27] See section 2(1)(f) of the Procurement Act; regulations 8, 9, 11 and 17(4) of the regulations; and section 112(1)(g) and (h) of the MFMA.

[27] There are different statutory sources for the obligation of an organ of state to investigate allegations of impropriety in municipal tendering processes. One is the Local Government: Municipal Finance Management Act[28] (MFMA) and the regulations promulgated under it.[29] Another is regulation 15 of the regulations. It is the latter

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[28] Above n 26.

[29] See section 112(1) of the MFMA which provides:

> "The supply chain management policy of a municipality or municipal entity must be fair, equitable, transparent, competitive and cost-effective and comply with a prescribed regulatory framework for municipal supply chain management, which must cover at least the following:
>
> . . . .
>
> (m) measures for—
>
> (i) combating fraud, corruption, favouritism and unfair and irregular practices in municipal supply chain management; and
>
> (ii) promoting ethics of officials and other role players involved in municipal supply chain management".

Further see regulation 38 of the Municipal Supply Chain Management Regulations, Government Gazette 27636 GN R868, 30 May 2005 which reads:

> "(1) A supply chain management policy must provide measures for the combating of abuse of the supply chain management system, and must enable the accounting officer—
>
> (a) to take all reasonable steps to prevent such abuse;
>
> (b) to investigate any allegations against an official or other role player of fraud, corruption, favouritism, unfair or irregular practices or failure to comply with the supply chain management policy, and when justified—
>
> (i) take appropriate steps against such official or other role player; or
>
> (ii) report any alleged criminal conduct to the South African Police Service;
>
> . . . .
>
> (f) to cancel a contract awarded to a person if—
>
> (i) the person committed any corrupt or fraudulent act during the bidding process or the execution of the contract; or
>
> (ii) an official or other role player committed any corrupt or fraudulent act during the bidding process or the execution of the contract that benefited that person".

Lastly see article 430 of the City's Supply Chain Management Policy available at http://www.capetown.gov.za/en/Budget/Documents/2010%20-

regulation that formed the subject of debate in these court proceedings, and which must, therefore, be given special attention.

The nature of the obligation imposed

[28] Hidro-Tech lodged a complaint with the City about Viking's alleged manipulation of the tender system. The question is whether the City has discharged its obligations to investigate the complaint satisfactorily in terms of the regulatory framework provided for that purpose. This issue cannot be properly resolved until the nature of the obligation, which in turn depends on the meaning of "detect" and "act against" in regulation 15(1), is determined.[30] The meaning of these words must be determined within the context of the Procurement Act and the regulations. These legislative measures are, after all, a mechanism through which the constitutional imperative of empowering the historically disadvantaged individuals is sought to be realised. This can be done by rooting out any fraudulent scheme designed to divert the economic benefits primarily reserved for historically disadvantaged individuals, to historically empowered individuals.[31] Regulation 15(1) provides:

%202011%20Budget%20final/Annexure%2012%20SupplyChainManagementPolicy%201011Budget%20May2010.pdf accessed on 7 September 2010.

[30] The provisions of article 430 of the City's Supply Chain Management Policy above n 29 are similar to the provisions of regulation 15.

[31] It was said in *West Rand Estates Ltd v New Zealand Insurance Co Ltd* 1925 AD 245 at 261 and *Secretary for Inland Revenue v Brey* 1980 (1) SA 472 (A) at 478A-B that the purpose of legislation is to be considered when interpreting it.

> "An organ of state must, upon detecting that a preference in terms of the Act and these regulations has been obtained on a fraudulent basis, or any specified goals are not attained in the performance of the contract, act against the person awarded the contract."

Taking into account the context and purpose of the Procurement Act and the regulations, the Supreme Court of Appeal correctly held that regulation 15(1) "ensures that no organ of state will remain passive in the face of evidence of fraudulent preferment but is obliged to take appropriate steps to correct the situation."[32]

[29] The importance of context in statutory construction was aptly articulated by Ngcobo J in *Bato Star* in the following terms:

> "The technique of paying attention to context in statutory construction is now required by the Constitution, in particular, section 39(2). As pointed out above, that provision introduces a mandatory requirement to construe every piece of legislation in a manner that promotes the 'spirit, purport and objects of the Bill of Rights'."[33]

It is with this approach in mind that regulation 15(1) must be interpreted.

The meaning of "detect"

[30] There is a particular meaning of "detect" that Viking contends for. It is that "detect" presupposes the existence of conclusive evidence or satisfactory proof of the matter after investigation. Viking therefore argues that detection implies more than a

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[32] *Viking Pony SCA* above n 4 at para 32.

[33] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) at para 91.

suspicion or *prima facie* proof. On the contrary, counsel for Hidro-Tech submits that "detect" means no more than a suspicion or a provisional unilateral opinion.

[31] I am satisfied that "detect" generally means no more than discovering, getting to know, coming to the realisation, being informed, having reason to believe, entertaining a reasonable suspicion, that allegations, of a fraudulent misrepresentation by the successful tenderer, so as to profit from preference points, are plausible. In other words it is not the existence of conclusive evidence of a fraudulent misrepresentation that should trigger responsive action from an organ of state. It is the awareness of information which, if verified through proper investigation, could potentially expose a fraudulent scheme.

[32] The context within which "detect" is used in regulation 15(1) dictates that the word be interpreted broadly.[34] It would be incorrect to construe it to mean that something is

[34] See *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* [2007] ZACC 12; 2007 (6) SA 199 (CC); 2007 (10) BCLR 1027 (CC) where this Court emphasised that the Constitution as well as remedial legislation "umbilically linked" to the Constitution must be interpreted in a purposive and contextual manner. This Court held at para 53:

> "[W]e are obliged to scrutinise its purpose. As we do so, we must seek to promote the spirit, purport and objects of the Bill of Rights. We must prefer a generous construction over a merely textual or legalistic one in order to afford claimants the fullest possible protection of their constitutional guarantees. In searching for the purpose, it is legitimate to seek to identify the mischief sought to be remedied. In part, that is why it is helpful, where appropriate, to pay due attention to the social and historical background of the legislation. We must understand the provision within the context of the grid, if any, of related provisions and of the statute as a whole, including its underlying values. Although the text is often the starting point of any statutory construction, the meaning it bears must pay due regard to context. This is so even when the ordinary meaning of the provision to be construed is clear and unambiguous."

Further, the Supreme Court of Appeal, in *Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province and Others* 2008 (2) SA 481 (SCA), a judgment that considered the definition of tender as contained in the Procurement Act, held at para 18:

detected only when its existence has already been conclusively established as a fact. Obtaining any information that gives rise to a reasonable suspicion that preference points might have been fraudulently awarded does amount to a detection.[35] There are, however, different degrees and levels of detection. At the one level the information might be somewhat scanty yet capable of exposing corruption in a particular tender. At times the information detected might be conclusive. It is the level of detection that determines the appropriateness of the action to be taken against the alleged offending party.

The meaning of "act against"

[33] Viking maintains that "act against" does not encompass investigation. It contends that "act against" only has to do with the imposition of penalties such as those set out in regulation 15(2).[36] Hidro-Tech on the other hand supports a more liberal construction of "act against", which includes investigation.

[34] Whenever an enterprise is plausibly accused of having furnished false information in its tender documents, the organ of state responsible for the tender is, upon becoming aware of the alleged misrepresentation, under an obligation to investigate the matter. This stems from the tenderer's obligation to vouch for the truthfulness and correctness of

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"[T]he definition in the statute must be construed within the context of the entire section 217 while striving for an interpretation which promotes 'the spirit, purport and objects of the Bill of Rights' as required by section 39(2) of the Constitution."

[35] See *Viking Pony SCA* above n 4 at para 31.

[36] Regulation 15(2) is quoted at [50] below.

the information provided in terms of regulation 14.[37] Furthermore, the organ of state has the power to call upon any tendering enterprise to submit satisfactory documentary proof of any issue relating to the tender. This would be done to enable the organ of state to investigate and satisfy itself about the correctness or otherwise of the issues relating to the tender. In sum, regulation 14 enjoins the organ of state to "act against" any tenderer that seems to have flouted the law.

[35] "Act against" in a situation where the allegations of fraud are somewhat superficial might require an in-depth investigation by a suitably qualified person or institution. The organ of state may conduct the investigation itself or it may refer it to any other competent person or institution. When conclusive evidence is available to the organ of state, the appropriate action to take might be no more than affording the party accused of wrongdoing the opportunity to present its side of the story. In due course, a pronouncement might have to be made on the guilt or otherwise of the party accused of wrongdoing. That would be another incident of acting against. "Act against" also extends to the determination of the appropriate penalty to impose on the party found to have acted fraudulently.

[36] It follows that "act against" includes conducting an appropriate investigation which is designed to respond adequately to the complaint lodged, as well as the determination of both culpability and penalty. All these things, however, depend on the circumstances of

[37] Above n 23.

each case. The question whether PAJA applies to "detect" or "act against" or both needs to be addressed. This is done below.

The applicability of PAJA

[37] PAJA defines administrative action as a decision or failure to take a decision that adversely affects the rights of any person, which has a direct, external legal effect.[38] This includes "action that has the capacity to affect legal rights".[39] Whether or not administrative action, which would make PAJA applicable, has been taken cannot be determined in the abstract. Regard must always be had to the facts of each case.[40]

[38] Detecting a reasonable possibility of a fraudulent misrepresentation of facts, as in this case, could hardly be said to constitute an administrative action. It is what the organ of state decides to do and actually does with the information it has become aware of which could potentially trigger the applicability of PAJA. It is unlikely that a decision to

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[38] Section 1 provides that "administrative action"—

"means any decision taken, or any failure to take a decision, by—

(a) an organ of state, when—

(i) exercising a power in terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation; or

(b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision,

which adversely affects the rights of any person and which has a direct, external legal effect".

[39] *Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others* 2005 (6) SA 313 (SCA) at para 23.

[40] *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* [1999] ZACC 11; 2000 (1) SA 1 (CC); 1999 (10) BCLR 1059 (CC) at para 143.

investigate and the process of investigation, which excludes a determination of culpability could itself adversely affect the rights of any person, in a manner that has a direct and external legal effect.

[39] If the City were about to pronounce on the culpability or otherwise of Viking, Hidro-Tech and Viking would have to be afforded the opportunity, in terms of PAJA, to make whatever representations they may wish to make. Similarly, if Viking were found guilty, then the relevant provisions of PAJA would have to be invoked before an appropriate sanction is considered and imposed by the City.[41] This case has not,

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[41] See section 3 of PAJA which provides:

"(1) Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.

(2) (a) A fair administrative procedure depends on the circumstances of each case.

(b) In order to give effect to the right to procedurally fair administrative action, an administrator, subject to subsection (4), must give a person referred to in subsection (1)—

(i) adequate notice of the nature and purpose of the proposed administrative action;

(ii) a reasonable opportunity to make representations;

(iii) a clear statement of the administrative action;

(iv) adequate notice of any right of review or internal appeal, where applicable; and

(v) adequate notice of the right to request reasons in terms of section 5.

(3) In order to give effect to the right to procedurally fair administrative action, an administrator may, in his or her or its discretion, also give a person referred to in subsection (1) an opportunity to—

(a) obtain assistance and, in serious or complex cases, legal representation;

(b) present and dispute information and arguments; and

(c) appear in person.

(4) (a) If it is reasonable and justifiable in the circumstances, an administrator may depart from any of the requirements referred to in subsection (2).

however, reached that stage yet. The need to give some guidance is accentuated by the apparent lack of clarity and direction displayed by the City and the DTI. The next question relates to the adequacy of the steps taken by the City.

The adequacy of the steps taken by the City

[40] In order to address the question whether the City took appropriate action in response to Hidro-Tech's complaint, the steps taken by the City must be tracked from the lodging of the complaint all the way through to just before Hidro-Tech launched the application for a mandatory order. Those steps follow below.

[41] Mr Viljoen of Hidro-Tech went to Mr Bindeman's office to lodge a verbal complaint against Viking on 5 December 2007. His complaint was that Viking was awarded most of the tenders because of its fronting practices. In response, Mr Bindeman requested Tradeworld to investigate Hidro-Tech's complaint. He also conducted his own

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(b) In determining whether a departure as contemplated in paragraph (a) is reasonable and justifiable, an administrator must take into account all relevant factors, including—

(i) the objects of the empowering provision;

(ii) the nature and purpose of, and the need to take, the administrative action;

(iii) the likely effect of the administrative action;

(iv) the urgency of taking the administrative action or the urgency of the matter; and

(v) the need to promote an efficient administration and good governance.

(5) Where an administrator is empowered by any empowering provision to follow a procedure which is fair but different from the provisions of subsection (2), the administrator may act in accordance with that different procedure."

internal investigation and was satisfied that if Viking's historically disadvantaged individual status were a sham, it would indeed have resulted in an unfair award of tenders to Viking. He communicated his findings on the possible implications of a fraudulent misrepresentation by Viking, to Tradeworld and impressed on it to investigate properly. He informed his superior, Mr Schnaps, of the allegations. Tradeworld concluded its investigation on 14 December 2007. It found that Viking's shareholding was correctly reflected in the proof of shareholding which was submitted with Viking's tender documents. It said nothing about the fronting allegations. On 20 December 2007, Mr Bindeman thanked Tradeworld for the report. He also informed them that the City's legal advisers had advised him not to involve the City in any further attempt by Hidro-Tech to resolve issues around Viking's alleged fronting practices, but rather to refer the complaint to the DTI.

[42] Hidro-Tech was not told of any steps taken to address its oral complaint. Accordingly, it caused two letters, both dated 17 January 2008, to be delivered to the City. These letters added more substance to Hidro-Tech's verbal allegations. A receipt of these letters triggered a meeting between Mr Bindeman and Mr Schnaps. They decided to refer the matter to Tradeworld again, to investigate thoroughly and confirm the historically disadvantaged individual status of Viking. In a subsequent discussion with the attorney for Hidro-Tech, Mr Bindeman informed him that the matter had been referred to Tradeworld, which had since established that Viking and its sister company, Bunker Hills, were in the process of changing their shareholding.

[43] The attorney for Hidro-Tech addressed a letter to the City dated 8 February 2008. He queried the adequacy of the investigation conducted by Tradeworld since he believed that Tradeworld lacked the capacity to investigate properly the allegations of fronting. He expressed the view that it was for the City to investigate these allegations, to find out if these practices existed and if they did to act appropriately. Hidro-Tech demanded that the City urgently investigate the alleged fronting practices by Viking or else the High Court would be approached to compel the City to do so.

[44] The attorney for Hidro-Tech had a discussion with Mr Schnaps on 11 February 2008. Mr Schnaps told him that the City was unable to take action against Viking and Bunker Hills at that stage and advised Hidro-Tech to rather approach the High Court for a remedy. This discussion prompted a letter by Hidro-Tech's attorneys dated 19 February 2008 again calling upon the City to investigate expeditiously the allegations of fronting. Tradeworld, who had already confirmed to Hidro-Tech's attorneys that their investigation could not go beyond the verification of shareholding, was again rejected on the basis that it was ill-equipped to investigate properly. The City was asked to suspend immediately all the work on the project that Viking was doing for the City and the finalisation of the tender process in respect of another project, pending the outcome of the investigation. Hidro-Tech threatened that failure to do so would result in an application to the High Court for a mandatory order compelling the City to investigate, and a restraining order putting the project and the tender process on hold.

[45] The City gave no assurance. Instead, it advised Hidro-Tech's attorney to speak to one of its internal legal advisers. The legal adviser refused to speak to Hidro-Tech's attorney on the ground that the City's policy forbade their direct engagement with members of the public. Again on the advice of the City, Hidro-Tech referred its complaint to the DTI for investigation. The DTI did not respond to Hidro-Tech's complaint. Hidro-Tech then launched the threatened application in the High Court on 6 March 2008.

[46] The nature and seriousness of the complaint and the details provided in its support impose an obligation on the City, to investigate allegations of non-compliance with the provisions of the regulations. The provisions which lie at the heart of Hidro-Tech's complaint to the City are set out in regulation 13 in these terms:

> "(1) Preference points stipulated in respect of a tender must include preference points for equity ownership by [historically disadvantaged individuals].
>
> ....
>
> (4) Preference points may not be claimed in respect of individuals who are not actively involved in the management of an enterprise or business and who do not exercise control over an enterprise or business commensurate with their degree of ownership."

The complaint is that the historically disadvantaged individuals neither exercised control over the tendering enterprise nor were they actively involved in its management, to the extent commensurate with their degree of ownership. The converse is the requirement

for awarding preference points in terms of regulation 13. It follows from this regulation that it is not enough merely to have the historically disadvantaged individuals holding the majority shares in a tendering enterprise. The exercise of control and the managerial power actually wielded by the historically disadvantaged individuals, in proportion to their shareholding, is what matters. The complaint was not that the shareholding was incorrectly reflected in Viking's tender papers.

[47] For an effective investigation to be conducted, the City needs an entity or person who, unlike Tradeworld, can in fact go behind the shareholding. More importantly, whatever investigation the City opts for, would probably have to address the following questions which flow from, among others, regulation 13(1) and (4): (i) were Mr Mosea and Mr James genuine 70% shareholders of Viking; (ii) did their salary package and benefits correspond with their majority shareholding; (iii) did these historically disadvantaged individuals exercise control over Viking and participate actively in its management in proportion to their shareholding; and (iv) what is the true nature of the relationship between Viking and Bunker Hills? This list is not exhaustive. It, however, underscores the point that the verification of the correct shareholding in the company register is irrelevant to the complaint. What happens behind the scenes matters the most when the shareholding is said to be a façade.

[48] Communication between the City officials and Hidro-Tech's attorneys afforded the City the opportunity to understand what the complaint was really about, assess whether

the allegations warranted serious attention, and determine which action would be appropriate in the circumstances. The steps taken by the City to investigate, namely the referral of the complaint to its indifferent lawyers, Tradeworld and the DTI, amount to a failure by the City to respond appropriately to the demands of the complaint. The City was duty-bound to "act against" Viking by investigating the matter properly. It could do so itself, or refer the matter to, say, the Commercial Crimes Unit of the South African Police Service, the Directorate for Priority Crime Investigations, the National Prosecuting Authority or a firm of forensic accountants. There is some uncertainty about whether or not the order of the Supreme Court of Appeal is similar to that of the High Court. This concern is addressed below.

The meaning and effect of the High Court order

[49] The High Court found that Viking has committed fraud. This left it with no choice but to impose a sanction which obviated the need for further investigations.[42] It, however, refused to grant an order in terms of section 9.4 of the City's Procurement Policy Initiative which provides:

> "Notwithstanding the imposition of any penalties that may be applied in terms of section 7.4.7 of this guide, where a contractor is found guilty of misrepresenting any facts in respect of either ownership or empowerment indicator, either in a tender submission, or on the supplier database, in order to [a]ffect the outcome of a tender, either before or after the award of a contract, then that contractor shall, with the approval of the Implementing

[42] See the essence of the order that was applied for at [15] above.

> Agent, be blacklisted on the supplier database for a period of twelve months and shall be notified accordingly.
>
> The [e]ffect of such blacklisting is that absolutely no further work may be awarded to that contractor for the duration of the blacklisting."[43]

The High Court reasoned that the City never made a finding that Viking was guilty of misrepresenting the facts, which must precede the decision to blacklist. It therefore held that a case had not been made out for an order in terms of section 9.4.

[50] The penalty which the High Court ordered the City to impose was to "act against" Viking in terms of regulation 15. Given its finding that Viking had acted fraudulently, it follows that the High Court had regulation 15(2) in mind, which sets out these punitive measures:

> "An organ of state may, in addition to any other remedy it may have against the person contemplated in sub-regulation (1)—
>
> (a) recover all costs, losses or damages it has incurred or suffered as a result of that person's conduct;
>
> (b) cancel the contract and claim any damages which it has suffered as a result of having to make less favourable arrangements due to such cancellation;
>
> (c) impose a financial penalty more severe than the theoretical financial preference associated with the claim which was made in the tender; and
>
> (d) restrict the contractor, its shareholders and directors from obtaining business from any organ of state for a period not exceeding 10 years."

[43] Above n 13.

It follows that the City was directed to impose any or all of the penalties set out in regulation 15(2) on Viking.

The meaning and effect of the Supreme Court of Appeal order

[51] Consistently with the agreement between the parties, the Supreme Court of Appeal distanced itself from the findings of fraud made by the High Court. It however expressed its finding that the City had breached its duty to investigate in these terms:

> "Since the allegation of fraudulent procurement was serious, clear, particularised, supported by cogent sworn statements and stood uncontradicted, only an official who was unreasonably cautious could have neglected to take appropriate action. The City was in breach of its duty from, at least, the time of receiving the affidavits of James and Zandberg on about 19 February.
>
> I conclude that the court *a quo* did not err in granting the relief it did. The appeal is accordingly dismissed with costs."[44]

[52] These factual findings as well as the rejection of the finding of culpability for fraud, provide the context within which the order of the Supreme Court of Appeal must be understood. A mere reading of the order may convey the unintended meaning that, just like the High Court, the Supreme Court of Appeal had ordered the City to punish Viking in terms of regulation 15(2). Clarification is therefore called for.

[44] *Viking Pony SCA* above n 4 at paras 36-7.

[53] An organ of state can punish an offending tenderer only if a finding of prohibited conduct has been made. The Supreme Court of Appeal did not make or endorse the High Court's finding to that effect. It only found that the City breached its duty to investigate Hidro-Tech's allegations of fronting. Read within this context, the Supreme Court of Appeal order cannot be understood to mean that a penalty must be imposed on Viking as the High Court had ordered. The Supreme Court of Appeal order was intended to do no more than direct the City to "act against" Viking, by launching a proper and effective investigation against it. This is the only remedy which the facts of this case justify.

Costs

[54] The meaning of "detect" and "act against" contended for by Viking have been rejected. The construction placed on these words by Hidro-Tech is the one this Court has found to be correct. Viking's contentions with regard to PAJA have suffered the same fate. In all these issues Hidro-Tech is the successful party.

[55] The only point on which Viking was successful relates to the kind of action the City should take against it. Hidro-Tech supported the decision of the High Court for immediate sanction and the unclarified order of the Supreme Court of Appeal which seemed to be similar to the High Court order. In this Court, Viking was not opposed to an investigation being conducted. This was so even in the Supreme Court of Appeal. Since this Court holds that nothing more than a proper investigation is called for at this stage Viking is the successful party on this point.

[56] Both parties being partially successful, it would be just and equitable to order that, unless there is a party who could be held liable for their costs, each party be ordered to pay its own costs. One matter of considerable concern has been the effect of the City's attitude towards its legal obligations in relation to the complaint, as well as its non-participation in the proceedings in this Court, when the facts of this case required its participation.

[57] The City's dereliction of duty is largely responsible for this protracted and expensive litigation. The fact that the City quietly slid away into the remotest backroom of litigation ought not to be enough to exonerate it from the consequences of its failure to honour its constitutional and statutory obligations.[45] It may not be an inappropriate response to its generally lackadaisical attitude, to mulct it with the costs of this appeal. In the exercise of our discretion, we consider that it may be just and equitable that the City be ordered to pay the parties' costs. The difficulty is that the City chose to abide the decision of the Supreme Court of Appeal and of this Court.

[58] As a result, it made no appearance in this Court and the question of its possible liability for costs was not debated with the parties and with the City itself. A provisional order that the City pays both Hidro-Tech and Viking's costs will be issued. And the

[45] See *Biowatch Trust v Registrar, Genetic Resources, and Others* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) at para 28.

parties, including the City, will be afforded the opportunity to make representations on whether the provisional costs order should be made final.

Order

[59] In the result the following order is made:

1. Leave to appeal is granted.
2. The appeal is dismissed save as is indicated below.
3. The order of the Supreme Court of Appeal is set aside and replaced with the following:

> "(a) The City of Cape Town is directed to investigate the allegations made by Hidro-Tech Systems (Pty) Ltd against Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa and Bunker Hills Pumps (Pty) Ltd t/a Tricom Systems, including whether or not the historically disadvantaged individuals who held the majority of the shares in Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa, were at the time referred to in the complaint actively involved in the management of the company and exercised control over the company, commensurate with the degree of their ownership.

(b) The order for costs made by the Western Cape High Court, Cape Town, is confirmed.

(c) The appeal is otherwise dismissed with costs."

4. The City of Cape Town is ordered to pay the costs of Hidro-Tech Systems (Pty) Ltd and Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa in this Court, including the costs of two counsel.

5. The order in sub-paragraph 4 is provisional.

6. The parties and the City of Cape Town are invited to make representations within 10 days of the date of delivery of this judgment on whether the provisional order should be made final.

Ngcobo CJ, Moseneke DCJ, Brand AJ, Cameron J, Froneman J, Khampepe J, Nkabinde J, Skweyiya J, and Yacoob J concur in the judgment of Mogoeng J.

For the Applicant:	Advocate JG Dickerson SC and Advocate AM Smalberger instructed by Rabie & Rabie.
For the First Respondent:	Advocate DC Joubert instructed by Jacques Viljoen Attorneys.

CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 90/10
[2011] ZACC 19

In the matter between:

MINISTER FOR SAFETY AND SECURITY	Applicant
and	
GARY WALTER VAN DER MERWE	First Respondent
MONIQUE VAN DER MERWE	Second Respondent
FERN CAMERON (formerly VAN DER MERWE)	Third Respondent
ALAN RAYMOND FANAROFF	Fourth Respondent
TANTCO GLOBAL (PTY) LTD	Fifth Respondent
EXECUTIVE HELICOPTERS (PTY) LTD	Sixth Respondent
EXEL AVIATION (PTY) LTD (formerly AIRCRAFT SUPPORT (PTY) LTD)	Seventh Respondent
MADIBA AIR AND SEA (PTY) LTD	Eighth Respondent
HELICOPTER AND MARINE SERVICES (PTY) LTD	Ninth Respondent
ZONNEKUS MANSIONS (PTY) LTD	Tenth Respondent
SUMMER DAZE TRADING 712 (PTY) LTD	Eleventh Respondent
WESTSIDE TRADING (PTY) LTD	Twelfth Respondent
SA BARTER (PTY) LTD	Thirteenth Respondent
TWO OCEANS AVIATION (PTY) LTD	Fourteenth Respondent
HELIBASE (PTY) LTD	Fifteenth Respondent

Heard on : 3 March 2011

Decided on : 7 June 2011

JUDGMENT

MOGOENG J:

Introduction

[1] The main question in this application for leave to appeal is whether search and seizure warrants are valid despite their failure to mention the offences to which the search relates. The answer depends on whether the common law intelligibility principle, properly understood, requires that the offence be specified in the search and seizure warrants issued in terms of section 21 of the Criminal Procedure Act[1] (CPA).

Parties

[2] The applicant is the Minister for Police (Minister).[2] The first respondent is Mr Gary Walter van der Merwe. He is the general manager of the sixth and tenth respondents and a director of the eighth, ninth, thirteenth and fifteenth respondents. The second and third respondents are his wife and mother respectively. The fourth

[1] 51 of 1977.

[2] The Minister for Police was formerly called the Minister for Safety and Security.

respondent is a director of some of the respondent companies and the fifth to fifteenth respondents are companies in which the first respondent has a financial interest.

Factual background

[3] The Criminal Investigations Unit of the South African Revenue Service (SARS) suspected some of the respondents of having committed financial irregularities and of involvement in criminal activities. In collaboration with the Director of Public Prosecutions for the Western Cape Province, SARS caused the Commercial Branch of the South African Police Service (SAPS) to investigate possible violations of the Income Tax Act,[3] fraudulent claims in contravention of the Value-Added Tax Act,[4] and money laundering in violation of the Prevention of Organised Crime Act.[5]

[4] Superintendent Kotze was assigned the case for investigation. When the need arose for search and seizure operations to be conducted at the premises linked to the respondents, Superintendent Kotze and employees of SARS deposed to affidavits in support of the issuing of the search and seizure warrants in terms of section 21 read with section 20 of the CPA.[6]

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[3] 58 of 1962.

[4] 89 of 1991.

[5] 121 of 1998.

[6] Section 20 of the CPA provides:

> "The State may, in accordance with the provisions of this Chapter, seize anything (in this Chapter referred to as an article)—

[5] Armed with these affidavits, which set out the offences which the respondents were suspected of having committed, Superintendent Kotze successfully approached a magistrate at the Magistrates' Court, Cape Town for the issuing of three warrants. The first was for the Zonnekus home of the first respondent, which he shares with his wife and mother, the second for the business premises of various respondents at Helibase and the third for the residential premises of the fourth respondent at Royal Ascot. These warrants are at times collectively referred to as the Cape Town warrants.

[6] The fourth and fifth warrants were issued by magistrates who serve in courts which have jurisdiction over the Bellville and Randburg premises of Carrim, Maritz and

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(a) which is concerned in or is on reasonable grounds believed to be concerned in the commission or suspected commission of an offence whether within the Republic or elsewhere;

(b) which may afford evidence of the commission or suspected commission of an offence whether within the Republic or elsewhere; or

(c) which is intended to be used or is on reasonable grounds believed to be intended to be used in the commission of an offence."

Section 21 provides, in part:

"(1) Subject to the provisions of sections 22, 24 and 25, an article referred to in section 20 shall be seized only by virtue of a search warrant issued—

(a) by a magistrate or justice, if it appears to such magistrate or justice from information on oath that there are reasonable grounds for believing that any such article is in the possession or under the control of or upon any person or upon or at any premises within his area of jurisdiction; or

(b) by a judge or judicial officer presiding at criminal proceedings, if it appears to such judge or judicial officer that any such article in the possession or under the control of any person or upon or at any premises is required in evidence of such proceedings.

(2) A search warrant issued under subsection (1) shall require a police official to seize the article in question and shall to that end authorize such police official to search any person identified in the warrant, or to enter and search any premises identified in the warrant and to search any person found on or at such premises."

Associates, the accountants for a number of the respondents. Since the validity of these warrants does not fall for determination in this Court, nothing more need be said about them.

[7] The Cape Town warrants were, but for the naming of the person and the description of the property to be searched, phrased in identical terms. Each was titled "Search Warrant [Section 20, 21 and/or 25 of the Criminal Procedure Act, (Act 51 of 1977)]" and had three identical annexures. Annexure A consisted of the names of individuals who were authorised to conduct the search. Annexure B specified the articles that could be seized during the investigation. This annexure set out 18 items. Items numbered 13, 16, 17 and 18 allowed for the seizure of articles relevant to the investigation. Annexure C authorised the seizure and duplication of electronic devices which had a bearing on the investigation. The warrants and their annexures were made available to persons present at the Zonnekus, Helibase and Royal Ascot properties prior to the commencement of the search.

[8] Importantly, neither the warrants nor their annexures specified the offences under investigation. Nor did they describe the nature of the investigation.

[9] Members of SAPS and SARS conducted the search and seizure operations in terms of the warrants and removed several items from the targeted premises.

Proceedings in the High Court

[10] The respondents were displeased with these operations. Consequently, they approached the Western Cape High Court, Cape Town[7] (High Court) to challenge the validity of the warrants on the following grounds:

(a) the suspected offences were not stipulated in the warrants; and

(b) the magistrates failed to apply their minds to the applications for the warrants and this rendered them fatally defective in law.

[11] In relation to the first ground, the High Court observed that the Constitution requires the specification of the offence in a warrant. Relying on *Magajane*,[8] it further said that a person's privacy may be impaired by a warrant only in the least intrusive manner and on justifiable grounds. In that case this Court stated:

> "Exceptions to the warrant requirement should not become the rule. A warrant is not a mere formality. It is the method tried and tested in our criminal procedure to defend the individual against the power of the state, ensuring that police cannot invade private homes and businesses upon a whim, or to terrorise. Open democratic societies elsewhere in the world have fashioned the warrant as the mechanism to balance the public interest in combating crime with the individual's right to privacy. The warrant guarantees that the State must justify and support intrusions upon individuals' privacy under oath before a neutral officer of the court prior to the intrusion. It furthermore governs the time, place and scope of the search, limiting the privacy intrusion, guiding the State in the conduct of the inspection and informing the subject of the legality and limits of the search. Our

[7] *Van der Merwe and Others v Additional Magistrate, Cape Town and Others* 2010 (1) SACR 470 (C).

[8] *Magajane v Chairperson, North West Gambling Board and Others* [2006] ZACC 8; 2006 (5) SA 250 (CC); 2006 (10) BCLR 1133 (CC). (The correct spelling of this name is Mogajane.)

history provides much evidence for the need to adhere strictly to the warrant requirement."[9] (Footnote omitted.)

[12] The High Court did not follow the majority decision in *Pullen*[10] which rejected the requirement that the offence has to be mentioned in a warrant for it to be valid. Instead it relied on *Hertzfelder*[11] and the minority in *Pullen* for the conclusion that the warrant would be invalid if the offence were not stipulated in it. *Powell*[12] was also relied on in support of this conclusion. Based on these cases, the Court declared the three Cape Town warrants invalid and set them aside on the ground that they did not stipulate the offence.[13]

[13] The challenge to the validity of the Randburg warrant was not entertained for want of jurisdiction, whereas the validity of the Bellville warrant was attacked on the basis that it was overbroad.[14] The Court found no merit in that challenge and dismissed it.

[14] The assertion that the magistrates failed to apply their minds to the application was also found to be without merit.

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[9] Id at para 74.

[10] *Pullen, N.O., Bartman, N.O. & Orr, N.O. v Waja.* 1929 TPD 838.

[11] *Hertzfelder v Attorney-General.* 1907 TS 403.

[12] *Powell NO and Others v Van der Merwe NO and Others* 2005 (5) SA 62 (SCA); 2005 (1) SACR 371 (SCA).

[13] It quoted this Court's decision in *Thint (Pty) Ltd v National Director of Public Prosecutions and Others; Zuma and Another v National Director of Public Prosecutions and Others* [2008] ZACC 13; 2009 (1) SA 1 (CC); 2008 (12) BCLR 1197 (CC) extensively, although it does not seem to have relied on it for the conclusion that the omission of the offence is fatal to the validity of the warrant.

[14] See [17] below for the meaning of vague and overbroad. It follows from that meaning that the terminology that the High Court ought to have used is vagueness instead of overbreadth.

[15] Since the respondents had attained substantial success, the High Court made a costs order in their favour. The Minister took the matter on appeal to the Supreme Court of Appeal and the respondents cross-appealed the decision relating to the Bellville warrant, with leave of the High Court.

Proceedings in the Supreme Court of Appeal

[16] The Supreme Court of Appeal upheld the decision of the High Court in respect of the Cape Town search warrants. Nevertheless, it rejected the High Court's reliance on *Hertzfelder* for the proposition that intelligibility requires the specification of the offence. The reason advanced for the rejection was that the warrant in *Hertzfelder* was set aside because of its vague description of the articles to be seized. The Court also held that *Powell* is not authority for the offence-specification requirement because the warrant in *Powell* was set aside for its overbreadth. Despite its observation that this issue was not before this Court in *Thint*[15] when it pronounced itself on this requirement, the Court did rely on *Thint*[16] as authority for its conclusion that a warrant should specify the offence.

[17] In dealing with the cross-appeal, a useful distinction was drawn between vagueness and overbreadth in the following terms:

[15] *Minister of Safety and Security v Van der Merwe* [2011] 1 All SA 260 (SCA); 2011 (1) SACR 211 (SCA) (*Van der Merwe SCA*) at paras 28 and 33.

[16] *Thint* above n 13 at para 159 quoted below at [48].

> "Questions that arise in relation to [whether a warrant authorises more than is permitted by statute] will generally fall into either of two different categories. The first is whether the warrant is sufficiently clear as to the acts that it permits. For where the warrant is vague it follows that it will not be possible to demonstrate that it goes no further than is permitted by the statute. If a warrant is clear in its terms a second, and different, question might arise, which is whether the acts that it permits go beyond what is permitted by the statute. If it does then the warrant is often said to be 'overbroad' and will be invalid so far as it purports to authorise acts in excess of what the statute permits. A warrant that is overbroad might, depending upon the extent of its invalidity, be set aside in whole, or the bad might be severed from the good."[17]

The Court then concluded that the Bellville warrant was neither vague nor overbroad.[18]

[18] For these reasons, the appeal and cross-appeal were dismissed with costs. Dissatisfied with the decision of the Supreme Court of Appeal, the Minister approached this Court for leave to appeal on the grounds set out below.

Issues

[19] The preliminary issue to be determined is the application for leave to appeal and the main issue is the alleged invalidity of the search warrants. Several subsidiary questions flow from the main issue and they are whether:

(a) the common law intelligibility principle requires that the offence be specified in a warrant issued in terms of section 21 of the CPA;

[17] *Van der Merwe SCA* above n 15 at para 14.

[18] The Court held that this was so as there was no difficulty in establishing the ambit of the search if the warrant and the annexures thereto were read together.

(b) the search warrants are vague or overbroad;

(c) the order of invalidity should apply retrospectively in the event of the warrants being declared invalid; and

(d) any party should be held liable for costs?

I deal first with the application for leave to appeal.

Application for leave to appeal

[20] Two questions must be answered in the affirmative before an application for leave to appeal to this Court may be granted. They are whether the application raises a constitutional issue and whether it is in the interests of justice to grant leave to appeal. The interests of justice entail, in addition to other factors, the public interest in deciding the matter, the importance of the constitutional issue raised and the prospects of success.

[21] Search and seizure warrants by their very nature implicate at least two constitutional rights, namely the rights to dignity and privacy.[19] It follows therefore that constitutional issues of significance arise in this matter. Added to this is a long history of legal uncertainty about whether it is a requirement for the validity of a CPA search and seizure warrant that the offence, to which the search relates, be mentioned in the

[19] The right to dignity (section 10) and the right to privacy (section 14).

warrant.[20] This uncertainty cries out for a definitive and authoritative pronouncement on the issue.[21]

[22] In addition, the Minister has an arguable case since neither *Powell* nor *Thint* turned on the stipulation of the offence in the warrant as a requirement for the validity of a warrant. Both were decided on the overbreadth of the warrant.

[23] There are further considerations weighing in favour of granting leave. First, important constitutional issues are raised. Second, more than eighty years of legal uncertainty about whether failure to stipulate the offence in a warrant issued in terms of the CPA[22] is fatal to its validity requires clarification. Third, there are reasonable prospects of success. Leave will thus be granted. Having crossed this hurdle, I will now deal briefly with the history of search and seizure warrants.

The history of search and seizure warrants

[24] Section 49[23] of the 1917 CPA[24] empowered a magistrate, justice of the peace or judge to issue a search warrant. This section, which foreshadowed sections 20 and 21 of

[20] This has been the case since *Hertzfelder* was decided in 1907 and *Pullen* in 1928. See also the discussion of the legal history commencing at [24] below.

[21] Compare *Hertzfelder*, *Pullen* and *Powell*.

[22] This includes the Criminal Procedure and Evidence Act 31 of 1917 (1917 CPA) and the Criminal Procedure Act 56 of 1955 (1955 CPA).

[23] Section 49 of the 1917 CPA provides:

the CPA, was given conflicting interpretations in relation to whether the stipulation of an offence in a warrant is a requirement for the validity of a warrant. *Hertzfelder*[25] was generally regarded as the first reported case to set aside a warrant on the ground that it was unintelligible owing to, amongst others, its failure to specify the offence.

[25] The significance of the history of search and seizure warrants is that even as early as 1907[26] to 1919,[27] the courts and the authorities vested with the power to issue search warrants were alive to the need to specify the offence to which the search related.[28] The need to do so finds direct support from the decision of the minority and indirect support from that of the majority in *Pullen*.

"(1) If it appears to a judge of a superior court, a magistrate or a justice on complaint made on oath that there are reasonable grounds for suspecting that there is upon any premises within his jurisdiction—

(a) stolen property or anything with respect to which any offence has been, or is suspected on reasonable grounds to have been, committed; or

(b) anything as to which there are reasonable grounds for believing that it will afford evidence as to the commission of any such offence; or

(c) anything as to which there are reasonable grounds for believing that it is intended to be used for the purpose of committing any such offence,

he may issue his warrant directing a policeman or policemen named therein or all policemen to search such premises and to seize any such thing if found, and to take it before a magistrate to be dealt with according to law.

(2) Any such warrant shall be executed by day, unless the judge, magistrate or justice, by the warrant, specially authorizes it to be executed by night in which case it may be so executed. Such warrant may be issued and executed on Sunday as on any other day."

[24] The provisions of the 1955 CPA were not materially different from those of section 49 of the 1917 CPA.

[25] The warrant in *Hertzfelder* was issued in terms of section 45 of Ordinance 1 of 1903 which was similar to section 49 of the 1917 CPA.

[26] 1907 is when *Hertzfelder* was decided.

[27] See *Seccombe and Others v Attorney-General and Others*, 1919 TPD 270 at 276-7, where the offence was specified in the warrant.

[28] Id.

[26] *Pullen* sheds light on the specification of the offence in a warrant as a possible requirement for the common law intelligibility principle. In that case the validity of the warrant was challenged before a single judge. The Court held that a search warrant must set out with reasonable particularity the offence which underlies the search and the article the police officer is directed to search for and seize. That requirement was reversed on appeal on the basis that the 1917 CPA equivalent of sections 20 and 21 of the CPA did not require the specification of the offence in the warrant.

[27] Relevant to the determination of the main issue in this matter is the appreciation by the majority that: (i) it is desirable that a search warrant specifies the offence; (ii) if a satisfactory reason were to be found for holding that the Court has the power to lay down a rule which renders the mention of the offence essential to the validity of a search warrant, the Court would happily lay down that rule; (iii) for obvious reasons it is desirable that the owner of the searched premises should know the reason why her premises ought to be so invaded; (iv) officials issuing warrants would be well advised to use forms which mention the offence in every case; and (v) in a case where the article to be searched for is specified or clearly described in the warrant there would be no need to refer to the offence.[29]

[29] *Pullen* above n 10 at 849-50 held:

> "It seems to me highly desirable that a search-warrant ought to mention the alleged offence, and if I could find a satisfactory reason for holding that this Court has the power to lay down that mention of the offence is essential to the validity of a search warrant I should willingly lay down such a rule. It is desirable that the person whose premises are being invaded should know the reason why; the arguments in favour of the desirability of such a practice are obvious. But in my opinion there is nothing in section 49 which justifies the Court in laying down such a rule.

[28] In a minority judgment, it was held that a search warrant is invalid if it makes no reference to a specific crime or specific crimes.[30]

[29] *Powell* is the next enlightening case on this subject. Cameron JA discussed a number of very helpful authorities on warrants. Although the case was decided on overbreadth, when the learned Judge was addressing the validity of the warrant he did allude to the warrant's failure to specify the crime or irregularity.[31] He then distilled the following principles from the authorities:

> "(a) Because of the great danger of misuse in the exercise of authority under search warrants, the courts examine their validity with a jealous regard for the liberty of the subject and his or her rights to privacy and property.
>
> (b) This applies to both the authority under which a warrant is issued, and the ambit of its terms.

> . . . .
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> I have come to the conclusion, therefore, that the absence of mention of the offence in the warrant is not fatal to its validity; I think a search-warrant is valid if it either describes the specific thing or things to be searched for or identifies them, as in the *Seccombe's* case, by reference to the offence. Further than that I do not think the Court would be justified in going. . . . At the same time I think that, in the absence of the forms prescribed by rules of Court, officers issuing warrants would be well advised to use forms mentioning the offence in every case rather than continue the undesirable practice of adapting to every case the old form used for the search of stolen goods by eliminating certain words in the form.
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> The conclusion I have arrived at makes no inroad on the doctrine that a warrant must not be in general terms, but it does conflict with the decision in *Hertzfelder's* case . . . . In that case, however, counsel for the respondent admitted that the warrant was invalid and the question was not argued."

[30] *Pullen* above n 10 at 861-4. The minority relied on *Hertzfelder*.

[31] This appears from the repeated reference to the failure to mention the offence in the warrant in *Powell* above n 12 at paras 45 and 60. That is probably why the High Court relied on *Powell* as an authority for its answer to the core question before this Court.

(c) The terms of a search warrant must be construed with reasonable strictness. Ordinarily there is no reason why it should be read otherwise than in the terms in which it is expressed.

(d) A warrant must convey intelligibly to both searcher and searched the ambit of the search it authorises.

(e) If a warrant is too general, or if its terms go beyond those the authorising statute permits, the Courts will refuse to recognise it as valid, and it will be set aside.

(f) It is no cure for an overbroad warrant to say that the subject of the search knew or ought to have known what was being looked for: The warrant must itself specify its object, and must do so intelligibly and narrowly within the bounds of the empowering statute."[32]

These principles were approved by this Court in *Thint*.[33]

[30] The relevance of the approach elucidated in *Powell* and approved in *Thint* is that the specification of the offence in the warrant facilitates intelligibility, while its absence hinders it.

Parties' submissions

[31] The Minister contends that the *Thint* decision, which made it a requirement that a warrant issued in terms of section 29 of the National Prosecuting Authority Act[34] (NPA Act) should stipulate the offence for it to be valid, does not apply since it was based on the specific wording of that section read contextually. He bases this on the words

[32] *Powell* above n 12 at para 59.

[33] *Thint* above n 13 at paras 88 and 137.

[34] 32 of 1998.

"specified offence"[35] in this section coupled with the searched person's entitlement to a copy of the warrant before the commencement of the search. He argues that the obligation to give a copy to the searched person before the commencement of the search is designed to enable the searched person to satisfy herself, prior to the search, that the warrant does relate to a "specified offence" and does not exceed the bounds of the limited investigative authority contemplated by section 29 of the NPA Act. He further submits that these considerations do not arise to justify the stipulation of the offence in the CPA warrant, contended for by the respondents, since there is no reference to a specified offence in section 21 of the CPA and the searched person is entitled to a copy of the warrant only after the search has been completed.[36]

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[35] Section 29 of the NPA Act does not make reference to the specification of the offence in the warrant. However, section 29(5) reads:

> "A warrant contemplated in subsection (4) may only be issued if it appears to the magistrate, regional magistrate or judge from information on oath or affirmation, stating—
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> (a) the nature of the *investigation* in terms of section 28;
>
> (b) that there exists a reasonable suspicion that an offence, which might be a *specified offence*, has been or is being committed, or that an attempt was or had been made to commit such an offence; and
>
> (c) the need, in regard to the *investigation*, for a search and seizure in terms of this section,
>
> that there are reasonable grounds for believing that anything referred to in subsection (1) is on or in such premises or suspected to be on or in such premises."

[36] Section 21(4) of the CPA reads as follows:

> "A police official executing a warrant under this section or section 25 shall, after such execution, upon demand of any person whose rights in respect of any search or article seized under the warrant have been affected, hand to him a copy of the warrant."

[32] To distinguish *Thint* from this case, the Minister also cites the complexity, seriousness and specialised nature of the crimes investigated in terms of the NPA Act, as opposed to those investigated in terms of the CPA.

[33] In response, the respondents contend that the Minister's submissions are ill-conceived and that the warrants are invalid as a result of their failure to mention the offence and their overbreadth.

[34] This Court has not considered a challenge to the validity of the warrants issued in terms of sections 20 and 21 before. It is therefore a necessary and fruitful exercise to give an overview of these warrants before the intelligibility principle is discussed in relation to these provisions.

An overview of the search and seizure warrants

[35] All law-abiding citizens of this country are deeply concerned about the scourge of crime. In order to address this problem effectively, every lawful means must be employed to enhance the capacity of the police to root out crime or at least reduce it significantly. Warrants issued in terms of section 21 of the CPA are important weapons designed to help the police to carry out efficiently their constitutional mandate of, amongst others, preventing, combating, and investigating crime.[37] In the course of

[37] Section 205(3) of the Constitution.

employing this tool, they inevitably interfere with the equally important constitutional rights of individuals[38] who are targeted by these warrants.

[36] Safeguards are therefore necessary to ameliorate the effect of this interference. This they do by limiting the extent to which rights are impaired.[39] That limitation may in turn be achieved by specifying a procedure for the issuing of warrants and by reducing the potential for abuse in their execution. Safeguards also ensure that the power to issue and execute warrants is exercised within the confines of the authorising legislation and the Constitution.

[37] These safeguards are: first, the significance of vesting the authority to issue warrants in judicial officers; second, the jurisdictional requirements for issuing warrants; third, the ambit of the terms of the warrants; and fourth, the bases on which a court may set warrants aside.[40] It is fitting to discuss the significance of the issuing authority first.

[38] Sections 20 and 21 of the CPA give authority to judicial officers to issue search and seizure warrants.[41] The judicious exercise of this power by them enhances protection

[38] The right to dignity (section 10) and the right to privacy (section 14).

[39] *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) at paras 54-5 and *Thint* above n 13 at paras 74-5.

[40] These four safeguards are found in *Thint* above n 13 at para 81.

[41] I say this aware that section 21 also empowers justices of the peace to issue warrants. Since all the warrants were issued by magistrates the discussion of this safeguard is confined to judicial officers.

against unnecessary infringement. They possess qualities and skills essential for the proper exercise of this power, like independence and the ability to evaluate relevant information so as to make an informed decision.[42]

[39] Secondly, the section requires that the decision to issue a warrant be made only if the affidavit in support of the application contains the following objective jurisdictional facts: (i) the existence of a reasonable suspicion that a crime has been committed and (ii) the existence of reasonable grounds to believe that objects connected with the offence may be found on the premises or persons intended to be searched.[43] Both jurisdictional facts play a critical role in ensuring that the rights of a searched person are not lightly interfered with. When even one of them is missing that should spell doom to the application for a warrant.

[40] The third safeguard relates to the terms of a warrant. They should not be too general. To achieve this, the scope of the search must be defined with adequate particularity to avoid vagueness or overbreadth.[44] The search and seizure operation must thus be confined to those premises and articles which have a bearing on the offence under investigation.

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[42] *Thint* above n 13 at para 83. See also *South African Association of Personal Injury Lawyers v Heath and Others* [2000] ZACC 22; 2001 (1) SA 883 (CC); 2001 (1) BCLR 77 (CC) at para 34.

[43] *Hyundai* above n 39 at para 52; *Thint* above n 13 at paras 85-6.

[44] *Powell* above n 12 at para 59; *Thint* above n 13 at para 88.

[41] The last safeguard comprises the grounds on which an aggrieved searched person may rely in a court challenge to the validity of a warrant. The challenge could be based[45] on vagueness, overbreadth or the absence of jurisdictional facts that are foundational to the issuing of a warrant.[46]

[42] A discussion of these safeguards highlights the centrality of the offence in the issuing of the warrant and sets the stage for the analysis of the intelligibility principle.

The intelligibility principle

[43] The intelligibility requirement is a common law principle introduced by the courts and is quite separate and distinct from the requirements of sections 20 and 21. As the name suggests, intelligibility is on the one hand about ensuring that the police officer understands fully the authority in the warrant to enable her to carry out the duty required of her, and on the other that the searched person also understands the reasons for the invasion of his privacy.

[44] The core issue is whether the warrant would be reasonably capable of that clear understanding even if the offence were not mentioned in it. Put differently, does the

[45] This may be done either in motion proceedings or during a criminal trial when an attempt is made to rely on the articles seized on the authority of a warrant.

[46] In addition, the validity of a warrant may also be challenged on the bases set out in [55] below, with due regard to the guidelines in [56] below of this judgment.

intelligibility principle require the specification of the offence in the section 21 warrant for its validity?

[45] Innes CJ appears to have been the first to allude to the specification of the crime in the warrant as an integral part of the common law intelligibility requirement. He did so by declaring a warrant invalid and setting it aside as a result of, amongst others, its failure to state the offence.[47] As indicated above, this principle was subsequently reversed by the majority in *Pullen*.[48]

[46] In reasoning its way to that reversal, the majority articulated the ideal role of the offence-specification requirement in facilitating the intelligibility of a warrant.[49] The minority's endorsement of the principle that the specification of the offence in the warrant is a requirement for its validity is also significant.[50] This is relevant to the determination of the main issue and also sheds light on the soundness of the dictum in *Thint*.[51] What was merely desirable or advisable at the time has since been accepted as law in *Thint*.

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[47] *Hertzfelder* above n 11 at 405. I say this aware of the strongly held divergent views on the significance of the dictum in *Hertzfelder*.

[48] *Pullen* above n 10 at 849-50.

[49] The majority decision in *Pullen* expressed the view that (i) it was highly desirable that a search warrant mentions the alleged offence, (ii) the searched person should know the reason why her premises are being invaded, (iii) it was obvious why this should be so, and that (iv) officials issuing warrants would do well to ensure that the offence is stated in every case.

[50] *Pullen* above n 10 at 862-4.

[51] *Thint* above n 13 at para 159.

[47] As Langa CJ observed, the most relevant requirement in relation to the principle of intelligibility is that a warrant must convey intelligibly, to both the searcher and the searched person, the ambit of the search it authorises.[52] Intelligibility also requires that a warrant be reasonably intelligible in the sense that it is reasonably capable of being understood by a reasonably well-informed person who understands the relevant empowering legislation and the nature of the offences under investigation.[53]

[48] *Thint* laid down the offence-specification requirement for the intelligibility of the NPA Act warrant. It did so in the following terms:

> "A section 29 warrant should state at least the following, in a manner that is reasonably intelligible without recourse to external sources of information: the statutory provision in terms whereof it is issued; to whom it is addressed; the powers it confers upon the addressee; *the suspected offences that are under investigation*; the premises to be searched; and the classes of items that are reasonably suspected to be on or in that premises. It may therefore be said that the warrant should itself define the scope of the investigation and authorised search in a reasonably intelligible manner."[54] (Emphasis added.)

[49] In contending that *Thint* did not govern the CPA, the Minister referred to the observation by Langa CJ that the intelligibility principle lacks precision and that it had to

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[52] *Thint* above n 13 at paras 137 and 151. See also *Powell* above n 12 at para 59.

[53] *Thint* above n 13 at para 154.

[54] Id at para 159.

be given content to determine what it requires specifically in relation to warrants issued under section 29 of the NPA Act.[55]

[50] *Thint* imposed the offence-specification requirement as an integral part of the intelligibility principle in relation to the NPA Act. The question is whether that requirement applies also to the CPA. I find that it does.

[51] I can see no material difference between these pieces of legislation to explain why these aspects of the intelligibility principle cannot apply with equal force to warrants issued in terms of the CPA. Under either Act, a searched person ought to enjoy the same constitutional protection in relation to search and seizure warrants and both Acts are open to a construction that permits this to be done. As Nugent JA correctly pointed out:

> "[T]he requirement that the offence must be specified was laid down unequivocally and without qualification in *Thint* in the context of the intelligibility of the warrant, and in that respect I see no material distinction between a warrant that is issued under that statute and a warrant that is issued under the Criminal Procedure Act."[56]

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[55] Id at para 151. In support of this position, *Thint*, at fn 112, placed reliance on *Rudolph and Another v Commissioner for Inland Revenue and Others* 1997 (4) SA 391 (SCA) at 397 in holding that—

> "[t]here is no reason to hold that this intelligibility principle should impose exactly the same requirements for all search and seizure warrants, no matter the statutory provision in terms whereof they are issued."

[56] *Van der Merwe SCA* above n 15 at para 32.

[52] The intelligibility requirement has its roots in the rule of law which is a founding value of our Constitution.[57] Some of the essential attributes of the rule of law are comprehensibility, accountability and predictability in the exercise of all power, including the power to issue warrants. It is essential therefore that the warrant be crafted in a way that enables the person on the receiving end of the exercise of this authority to know why her rights have to be interfered with in the manner authorised by the warrant. A warrant can thus not be reasonably intelligible if the empowering legislation and the offence are not stated in it.[58]

[53] It is also consistent with both common sense and logic that the searched person's knowledge of the purpose or the reason for the search would enhance intelligibility and that its omission would reduce it. It follows that the baseline requirement for intelligibility in relation to a CPA warrant is that the offence must be mentioned.

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[57] Section 1 of the Constitution reads, in part:

> "The Republic of South Africa is one, sovereign, democratic state founded on the following values:
>
> . . . .
>
> (c) Supremacy of the Constitution and the rule of law."

[58] Many foreign jurisdictions also require search warrants to specify the offence under investigation. In a query conducted through this Court's involvement in the European Commission for Democracy through Law (the Venice Commission) it emerged that, of the 13 countries that submitted replies, eight countries' laws directly required the specification of the offence in a search warrant and five countries held that it was not a requirement to specify the offence. Countries within the Venice Commission that require the offence be mentioned are the Czech Republic, Estonia, Finland, Germany, Latvia, Norway, Poland and Slovakia. Bosnia and Herzegovina, Bulgaria, Georgia, Lithuania and Mexico all reported that their legal system does not require the mentioning of the offence in a search warrant. Further, Australia (*Australian Broadcasting Corporation and Another v Cloran and Others* (1984) 4 FCR 151; 57 ALR 742 at para 7), Canada (section 487 of the Canadian Criminal Code), New Zealand (*Auckland Medical Aid Trust v Taylor and Others* [1975] 1 NZLR 728 (CA) at 736-7) and Nigeria (section 22(2) of the Criminal Procedure Act, Chapter 80 of the Laws of the Federation of Nigeria 1990) also require the specification of the alleged offence in search warrants.

[54] The principle of intelligibility requires that, even in the case of a CPA warrant, "the person whose premises are being invaded should know the reason why".[59] As Tindall J correctly observed, "the arguments in favour of the desirability of such a practice are obvious."[60] *Thint* is authority for the proposition that the common law intelligibility principle requires warrants issued in terms of section 21 of the CPA to specify the offence.

[55] What emerges from this analysis is that a valid warrant is one that, in a reasonably intelligible manner:

(a) states the statutory provision in terms of which it is issued;

(b) identifies the searcher;

(c) clearly mentions the authority it confers upon the searcher;

(d) identifies the person, container or premises to be searched;

(e) describes the article to be searched for and seized, with sufficient particularity; and

(f) specifies the offence[61] which triggered the criminal investigation and names the suspected offender.

[59] *Pullen* above n 10 at 849.

[60] Id.

[61] Stated somewhat differently in *Thint* above n 13 at para 159.

[56] In addition, the guidelines to be observed by a court considering the validity of the warrants include the following:[62]

(a) the person issuing the warrant must have authority and jurisdiction;

(b) the person authorising the warrant must satisfy herself that the affidavit contains sufficient information on the existence of the jurisdictional facts;[63]

(c) the terms of the warrant must be neither vague nor overbroad;[64]

(d) a warrant must be reasonably intelligible to both the searcher and the searched person;

(e) the court must always consider the validity of the warrants with a jealous regard for the searched person's constitutional rights; and

(f) the terms of the warrant must be construed with reasonable strictness.

[57] Based on the elements of the intelligibility requirement[65] and the approach to adopt in considering the validity of the warrants[66] the Minister's contentions must fail, for none of the Cape Town warrants mentioned the offence. This conclusion obviates the need to address the question of vagueness or overbreadth.

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[62] Most of these guidelines were gleaned from both *Powell* above n 12 at para 59 and *Thint* above n 13 at paras 85-6 and 159.

[63] The jurisdictional facts are reasonably believing that (i) a specific offence has been committed or is suspected of being committed and (ii) the article to be searched for is in the possession of or under the control of a particular person or at specified premises.

[64] See the meaning of vagueness and overbreadth at [17] above.

[65] Set out at [55] above.

[66] Set out at [56] above.

Retrospectivity

[58] The question arises whether or not the order declaring the warrants invalid should operate retrospectively. In support of his contention that it should not, the Minister said there are many CPA warrants in the criminal justice system which fall foul of the offence-specification requirement. He added that a retrospective operation of the order would prejudice the criminal justice system. The respondents opposed this submission on the basis that the declaration of invalidity contended for would apply only to the impugned warrants since no legislation or conduct is required to be declared constitutionally invalid. They also contend that any other warrant which suffers from the same defect as the warrants in this matter would remain valid until otherwise declared invalid by a court of law. A resolution of these opposing positions depends on what a just and equitable order is in the circumstances.

[59] The constitutional validity of section 21 was not challenged. I am instead considering a remedy flowing from the declaration of invalidity of search and seizure warrants owing to their failure to comply with the offence-specification requirement. Since neither a section nor any conduct was declared invalid, the provisions of section 172(1)(a)[67] of the Constitution do not apply. This however is no impediment to crafting a remedy envisaged by section 172(1)(b).[68] As Moseneke DCJ pointed out:

[67] Section 172(1) states:

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

> "It is clear that section 172(1)(b) confers wide remedial powers on a competent court adjudicating a constitutional matter. The remedial power envisaged in section 172(1)(b) is not only available when a court makes an order of constitutional invalidity of a law or conduct under section 172(1)(a). A just and equitable order may be made even in instances where the outcome of a constitutional dispute does not hinge on constitutional invalidity of legislation or conduct."[69]

[60] What then is a just and equitable order to make? The order invalidating the impugned warrants applies only to those warrants. Any attempt to define preemptively situations to which the order applies or to extend its applicability to all defective warrants might give rise to undesirable consequences. The order we grant should thus be structured in a way that avoids unnecessary dislocation and uncertainty in the criminal justice process.[70] The least disruptive way of giving relief to persons affected by warrants that fall foul of the offence-specification requirement is through the established court structures.[71]

(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency."

[68] Section 172(1) states:

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

...

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

(i) an order limiting the retrospective effect of the declaration of invalidity; and

(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

[69] *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* [2009] ZACC 32; 2010 (2) SA 415 (CC); 2010 (3) BCLR 177 (CC) at para 97.

[70] *S v Bhulwana, S v Gwadiso* [1995] ZACC 11; 1996 (1) SA 388 (CC); 1995 (12) BCLR 1579 (CC) at para 32.

[71] *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* [1998] ZACC 15; 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC) at para 97; *Centre for Child Law v Minister for Justice and*

[61] A just and equitable order to be made is therefore one that allows effective judicial control to be exercised[72] over all challenges to the validity of warrants other than those that were declared invalid in this matter. When courts have control they would then deal with matters on a case by case basis having regard to the interests of justice.[73]

Costs

[62] The Minister is the unsuccessful party. He should therefore be ordered to pay the respondents' costs including costs occasioned by the employment of two counsel.

Order

[63] In the result the following order is made:

(a) Leave to appeal is granted.

(b) The appeal is dismissed with costs including the costs of two counsel.

Constitutional Development and Others [2009] ZACC 18; 2009 (6) SA 632 (CC); 2009 (11) BCLR 1105 (CC) at para 75.

[72] Section 35(5) of the Constitution states:

> "Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice."

[73] *National Coalition* above n 71 at para 97 and *Centre for Child Law* above n 71 at para 75.

Ngcobo CJ, Moseneke DCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Mthiyane AJ, Nkabinde J, Van der Westhuizen J and Yacoob J concur in the judgment of Mogoeng J.

For the Applicant:	Adv RF van Rooyen SC, Adv A Erasmus and Adv G Goosen instructed by the State Attorney.
For the Respondents:	Adv A Katz SC and Adv N Lewis instructed by Cornel Stander Attorneys.

CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 23/10
[2011] ZACC 11

THE CITIZEN 1978 (PTY) LTD	First Applicant
KEVIN KEOGH	Second Applicant
MARTIN WILLIAMS	Third Applicant
ANDREW KENNY	Fourth Applicant
and	
ROBERT JOHN MCBRIDE	Respondent
together with	
LARA JOHNSTONE	First Amicus Curiae
FREEDOM OF EXPRESSION INSTITUTE	Second Amicus Curiae
SOUTH AFRICAN NATIONAL EDITORS' FORUM	Third Amicus Curiae
JOYCE SIBANYONI MBIZANA	Fourth Amicus Curiae
MBASA MXENGE	Fifth Amicus Curiae

Heard on : 30 September 2010

Decided on : 8 April 2011

JUDGMENT

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[205] In assessing damages, I would have regard to the fact that, in relation to both the statement that Mr McBride was not contrite and the statement that he had a "dubious flirtation with gun dealers" in Mozambique, the newspaper and the journalists had every opportunity both to verify the facts and to state them accurately but they nevertheless failed to do so. For this reason, I would award Mr McBride damages in the amount of R 75 000.

[206] In relation to costs, Mr McBride's success is substantial and, in the circumstances, he is entitled to costs, which must include those consequent upon the employment of three counsel. In this case, the applicants were also represented by four counsel including two senior counsel. Mr McBride was therefore entitled to be represented by three counsel.

Khampepe J concurs in the judgment of Ngcobo CJ.

MOGOENG J:

Introduction

[207] I have had the benefit of reading the judgments of my Colleagues Ngcobo CJ and Cameron J. I agree with their judgments in so far as they conclude that the Citizen is liable for the false assertion that Mr McBride showed no contrition for the offences he was convicted of and subsequently granted amnesty and with Ngcobo CJ's findings in relation to Mr McBride's so-called "dubious flirtation with alleged gun dealers in Mozambique." I, however, part ways with Ngcobo CJ and Cameron J with regard to their conclusion that statements that Mr McBride is a murderer and a criminal are protected by fair comment and are not malicious. In my view these statements are part of a well-orchestrated character assassination campaign waged by the Citizen against Mr McBride.

[208] Whether or not the Citizen should be held liable for the balance of the defamatory statements it made about Mr McBride must be determined within the context of, among others, the objective sought to be achieved through the amnesty process discussed below.

The purpose of amnesty

[209] Mahomed DP captured the need for the amnesty process identified by those involved in the negotiations that culminated in this country's democratic political dispensation in these terms:

> "It was wisely appreciated by those involved in the preceding negotiations that the task of building such a new democratic order was a very difficult task because of the previous history and the deep emotions and indefensible inequities it had generated; and that this could not be achieved without a firm and generous commitment to reconciliation and national unity .... It might be necessary in crucial areas to close the book on that past."[1]

Leaders across the political divide deeply appreciated the need for all South Africans to commit to reconciliation and national unity. To this end they sounded a clarion call to a firm and generous commitment, beginning with the amnesty process.[2]

[210] Amnesty owes its origin to the epilogue to the interim Constitution.[3] It follows from the epilogue that our political leaders committed the nation to the pursuit of a future

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[1] *Azanian Peoples Organisation (AZAPO) and Others v President of the Republic of South Africa and Others* [1996] ZACC 16; 1996 (4) SA 671 (CC); 1996 (8) BCLR 1015 (CC) (*AZAPO*) at para 2.

[2] Addressing this issue in respect of a related but somewhat different process, Ngcobo CJ said, in *Albutt v Centre for the Study of Violence and Reconciliation, and Others* [2010] ZACC 4; 2010 (3) SA 293 (CC); 2010 (5) BCLR 391 (CC) (*Albutt*) at paras 53-4:

> "The objectives that the special dispensation sought to achieve were national unity and national reconciliation. These objectives were to be achieved through the application of the 'principles and values which underpin the Constitution', including the 'principles, criteria and spirit that inspired and underpinned the process of the Truth and Reconciliation Commission, especially as they relate to the amnesty process'. But what are the principles, criteria and spirit that inspired and underpinned the amnesty process?
>
> These emerge from the fundamental philosophy of our negotiated transition to a new democratic order. It was recognised early on, during the negotiation process, that the task of building a new democratic society would be very difficult because of our history, and that this could not be achieved without a firm and generous commitment to reconciliation and national unity." (Footnote omitted.)

[3] Act 200 of 1993. The epilogue captures the vision of our Constitution, highlights the essence of the amnesty process, and specifies who would qualify for amnesty as follows:

> "This Constitution provides a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.
>
> The pursuit of national unity, the well-being of all South African citizens and peace require reconciliation between the people of South Africa and the reconstruction of society.

founded on peaceful co-existence, a recognition of human rights, national unity, reconciliation of the people of South Africa and reconstruction of society. It dawned on them that this dream could only become a reality if black and white South Africans, who had been at war with each other, would embrace "a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimisation."

[211] In order to take this painful and yet necessary national project forward the Promotion of National Unity and Reconciliation Act[4] (Reconciliation Act), alluded to in the epilogue, was enacted. It established the Truth and Reconciliation Commission whose primary purpose was "to promote national unity and reconciliation in a spirit of understanding which transcends the conflicts and divisions of the past . . . ."[5] While it is true that the amnesty process was a vehicle through which the truth was uncovered and that this truth would, in many cases, otherwise never have been known,[6] truth-telling was but one of the key instruments through which objectives of a fundamental nature were to

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> The adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past . . . and a legacy of hatred, fear, guilt and revenge.
>
> These can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimisation.
>
> In order to advance such reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past. To this end, Parliament . . . shall adopt a law . . . providing for the mechanisms . . . through which such amnesty shall be dealt with . . . ."

[4] 34 of 1995.

[5] Section 3(1) of the Reconciliation Act. See also *AZAPO* above n 1 at para 4.

[6] See *Albutt* above n 2 at para 56.

be achieved.[7] Apart from being one of the prerequisites for granting amnesty to political offenders, the truth was also meant to help the victims of gross human rights violations to know what happened to their loved ones and to set them on a path towards healing. Additionally, it was intended to lay a firm foundation for the challenging process of national unity, reconciliation and reconstruction.[8]

[212] In line with these observations, Mahomed DP saw the objective of amnesty as being to ensure that the country—

> "begins the long and necessary process of healing the wounds of the past, transforming anger and grief into a mature understanding and creating the emotional and structural climate essential for the 'reconciliation and reconstruction' which informs the very difficult and sometimes painful objectives of the amnesty articulated in the epilogue."[9]

A mature understanding, a commitment to reconciliation and an ever-abiding national consciousness of the collective responsibility to extinguish the raging flames of racial hatred are all necessary to create a climate for the actualisation of the healing which is in turn critical for the attainment of lasting peace, prosperity and stability of this nation.

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[7] See *AZAPO* above n 1 at para 17 and *Du Toit v Minister for Safety and Security and Another* [2009] ZACC 22; 2009 (6) SA 128 (CC); 2009 (12) BCLR 1171 (CC) (*Du Toit*), where this Court held at para 20:

> "The amnesty process was an important mechanism that allowed those who otherwise would have had to deal with their convictions or secret guilt to come clean and be allowed to start their lives anew. The process was a necessary tool in a larger scheme of things."

[8] See *Albutt* above n 2 at para 59:

> "The participation of victims is not only crucial to establishing the truth of what happened, but is also crucial to the twin objectives of nation-building and national reconciliation. In this regard, the TRC makes the following comment in its report: 'In some cases . . . the Commission assisted in laying the foundation for reconciliation. Although truth does not necessarily lead to healing, it is often a first step towards reconciliation.'" (Footnote omitted.)

[9] *AZAPO* above n 1 at para 17.

[213] What the epilogue seeks to achieve through amnesty is the facilitation of "reconciliation and reconstruction" by the creation of mechanisms and procedures which make it possible for the truth about our past to be uncovered.[10] Amnesty was dependent upon truth-telling fundamentally for the purpose of making healing possible and for the advancement of a core national imperative of unity, reconciliation and reconstruction.

[214] *Du Toit*[11] highlights the crucial role that the truth told during the amnesty process was intended to play in creating the desired future.[12] The mere telling of truth did not amount to national reconciliation and reconstruction.[13] Truth-telling merely supplied some of the material necessary to put an end to the strife and hatred that characterised race relations in South Africa for centuries. The primary objective of the Reconciliation Act was thus to use the amnesty process "as a stepping stone to reconciliation for the future."[14] The perpetrators are given—

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[10] Id at para 36.

[11] Above n 7.

[12] Section 20(10) of the Reconciliation Act, which expunges the offender's criminal record upon the granting of amnesty, was not enacted to provide people convicted of gross human rights violations with a remedy. Just as the termination of Mr Du Toit's employment, by reason of his conviction, could not be undone by the subsequent granting of amnesty, Mr McBride could not, for example, sue the state for malicious prosecution and unlawful detention on the basis that he has since been granted amnesty.

This is so because at the time when Mr Du Toit's employment was terminated and Mr McBride was incarcerated and prosecuted, these were the permissible and legal consequences of their actions. The subsequent granting of amnesty could not nullify the previous lawful consequences of their illegal activities. I hold the view that it is inimical to nation-building, reconciliation and reconstruction to label human rights violators across the political divide who were granted amnesty.

[13] See *Albutt* above n 2 at para 59.

[14] *Du Toit* above n 7 at para 55. See also *Albutt* above n 2 at para 59.

> "freedom to go forth and contribute to society. Amnesty may forgive the past, but in South Africa it is intended to have the inherently prospective effect of national reconciliation and nation-building, for the past can never be undone. Only the future may be forged as desired."[15]

[215] Truth-telling during the amnesty process was thus not intended to lay the foundation for the endless vilification of South Africans who grossly violated human rights, either in the furtherance of the crime of apartheid or the struggle for freedom from apartheid, in the name of freedom of expression. Nor was the truth, uncovered during the amnesty hearings or even during the trials of those who committed gross human rights violations, intended to be used to undermine the pursuit of national unity and reconciliation.[16] On the contrary, this truth was supposed to be used as the brick and mortar for laying a firm foundation for enduring peace, national unity and reconciliation. Amnesty was, so to speak, designed to help level the playing field and enable all South Africans to make a new beginning.

[216] Bridge-building, national unity and reconciliation are essential to the destination to which all South Africans should forge if the glorious future mapped out in our Constitution and the epilogue to the interim Constitution were to become a reality. Added to this is the special recognition given in the epilogue to the important role that ubuntu or *botho* could play in healing the wounds we have inflicted on each other.

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[15] *Du Toit* above n 7 at para 56.

[16] See *Islamic Unity Convention v Independent Broadcasting Authority and Others* [2002] ZACC 3; 2002 (4) SA 294 (CC); 2002 (5) BCLR 433 (CC) (*Islamic Unity*) at paras 29-30.

[217] We live in an African country which is rapidly being denuded of the values and moral standards which once characterised and defined the very nature of who a substantial majority of its citizens were and what they stood for. *Botho* or ubuntu is the embodiment of a set of values and moral principles which informed the peaceful co-existence of the African people in this country who espoused ubuntu based on, among other things, mutual respect.[17] Language was used in moderation and foul language was frowned upon by the overwhelming majority. A forgiving and generous spirit, the readiness to embrace and apply restorative justice, as well as a courteous interaction with others, were instilled even in the young ones in the ordinary course of daily discourse. The unforgiving, the arrogant and the unduly abusive were described by the Batswana, and presumably other African communities, as those who are bereft of *botho*.

[218] Ubuntu gives expression to, among others, a biblical injunction that one should do unto others as he or she would have them do unto him or her.[18] The law, order, generosity, peace and common decency that previously characterised many communities in South Africa were attributed to an unwavering commitment to the philosophy of

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[17] In *S v Makwanyane and Another* [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC), Mokgoro J defined ubuntu at para 308 as follows:

> "Generally, ubuntu translates as 'humaneness'. In its most fundamental sense it translates as personhood and 'morality'. Metaphorically, it expresses itself in *umuntu ngumuntu ngabantu*, describing the significance of group solidarity on survival issues so central to the survival of communities. While it envelops the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, in its fundamental sense it denotes humanity and morality."

[18] Matthew 7:12 (New International Version).

ubuntu. No wonder the drafters of our interim Constitution deemed it meet to cite ubuntu as one of the ingredients essential to the healing of our country. Sadly, a new culture has taken root and continues to cancerously eat at *botho*.

[219] Bearing this in mind, it appears that the truth told during the amnesty process was not meant to be used in a manner that undermines the fundamental objective of amnesty, which is national reconciliation and reconstruction. That truth was rather intended to be the launching pad for that objective.[19]

[220] People are free to express themselves on the gross violation of the rights of their loved ones without being unduly restrained, provided they do so within constitutionally acceptable bounds.[20] What is impermissible is the use of truth revealed to insult, demonise and run down the dignity of self-confessed human rights violators. This could never have been the purpose of the Reconciliation Act read with the epilogue. For it is inimical to truth-telling for the purpose of advancing national unity, reconciliation and reconstruction to be publicly labelling as criminals and murderers, those who committed human rights violations some 17 years prior to the labelling and who were subsequently granted amnesty. It ought to make no difference that amnesty had just been granted and was somewhat topical when the labelling took place. The age of the violation, the

[19] See generally *AZAPO* above n 1 at para 36.

[20] In relation to amnesty matters, the constitutionally acceptable bounds would be the right to dignity (section 10 of the Constitution), the pursuit of national unity and reconciliation (See *Islamic Unity* above n 16) and section 16(2) of the Constitution.

granting of amnesty, the political background and underlying purpose of amnesty, coupled with the absence of any genuine public interest being advanced by the branding, should make all the difference.

[221] None of this, however, precludes anybody from freely accessing information relevant to perpetrators' convictions and expressing themselves freely within permissible constitutional bounds. To suggest otherwise would be to deny South Africans the exercise and enjoyment of their right to freedom of expression.

[222] This notwithstanding, the right to human dignity must always be allowed to assume its rightful place even when the right to freedom of expression enters the equation. Sufficient room and flexibility has in any event always been allowed to accommodate truthful yet defamatory remarks made in the heat of the moment,[21] in jest[22] and even in circumstances where a somewhat strong language is essential for the effective communication of the message.[23]

[223] The truth does not however draw its force from insults or a highly inflammatory language. For indeed, freedom of expression is not so much in the vitriol as it is in the clear and logical articulation of one's viewpoint without trumping the intrinsic worth of

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[21] See *Bester v Calitz* 1982 (3) SA 864 (O) at 881E-G.

[22] See *Le Roux and Others v Dey* 2010 (4) SA 210 (SCA) at paras 9-10; *Peck v Katz* 1957 (2) SA 567 (T) at 572H-573A; *Glass v Perl* 1928 TPD 264 at 267; and *Masch v Leask* 1916 TPD 114 at 116.

[23] See *Pienaar and Another v. Argus Printing and Publishing Co. Ltd.* 1956 (4) SA 310 (W) at 318C-D; *Young v. Kemsley and Others* 1940 AD 258 at 278; and *Rubel v Katzenellenbogen* 1915 CPD 627 at 635.

others. Bearing this in mind, discussions about amnesty ought to take place with due sensitivity to the national project that was triggered by the amnesty process. This leads me to the analysis of the defamatory statements.

The defamatory statements

[224] The Citizen contends that the articles it published contained comments on a matter of public interest and that the comments are not malicious, but fair. Malice is sought to be discounted on the further basis that the Citizen was merely expressing an honestly held opinion based on the truth.[24] Whether the Citizen merely sought to, and did, exercise its right to freedom of expression within constitutionally permissible bounds or abused this right, falls to be determined with reference to a series of articles it published.

[225] The first article was written by Mr Mabuza and the second by the South African Press Association. They were both factual and balanced. Subsequent articles were written by Mr Williams and Mr Kenny whilst the editorials were written by Mr Williams. The nature of the comments and the language employed bear highlighting.

[24] It is trite that the defence of fair comment is negated by malicious comments. See *Johnson v Beckett and Another* 1992 (1) SA 762 (A) at 783B; *Marais v Richard en 'n Ander* 1981 (1) SA 1157 (A) at 1167E and 1170B-C; *Moolman v. Cull* 1939 AD 213 at 224; *Waring v. Mervis and Others.* 1969 (4) SA 542 (W) at 545H; *Brill v. Madeley.* 1937 TPD 106 at 111; and *Coetzee v Union Periodicals Limited and Others* 1931 WLD 37 at 43-4.

[226] The first editorial stated that Mr McBride's candidacy "is indicative of the ANC's attitude to crime." Mr McBride is said to be blatantly unsuited for the post that he was rumoured to be earmarked for, unless his backers believe in setting "a criminal to catch a criminal." It went on to say:

> "Make no mistake, that's what he is. The cold-blooded multiple murders which he committed . . . put him firmly in that category. Never mind his dubious flirtation with alleged gun dealers in Mozambique. Those who recommended him should have their heads read."

To the Citizen, Mr McBride is as dangerous a criminal as he was 17 years before the articles were published. His cold-bloodedness has not abated. If anything, it is reinforced by his dubious flirtation with alleged gun dealers in Mozambique. Any support for his appointment to the position of Metro Police Chief would be so outrageous as to suggest possible mental instability.

[227] An allegation is then made that he is an unrepentant criminal who thinks he is a hero for blowing up a civilian bar. In order to underscore these assertions, the publication likens Mr McBride to Dr Allan Boesak and Ms Winnie Madikizela-Mandela, who reportedly did not ask for forgiveness in respect of the offences of which they were convicted.

[228] The next article reiterates Mr McBride's killing of three women, that he was a suspect in a gun running case some five years prior to the publication, and that his arrest and release were never fully explained.

[229] President Mbeki then expressed the view that it would be fundamentally wrong to deny Mr McBride the possibility to be appointed to any position simply because of what he did during the struggle for liberation, for which he apologised and was granted amnesty. The President also noted that the amnesty process was meant to set the nation on a path to national reconciliation. In his opinion the Citizen appeared to be urging the country to reopen the wounds of the past that were healing.[25] These remarks triggered amongst others a spirited editorial from the Citizen in which it poured scorn on the President's views.

[230] The next article addressed Mr McBride's alleged unsuitability for appointment as a Metro Police Chief, likening him to Mr Barend Strydom and Mr Clive Derby-Lewis. The three of them were dubbed the "most notorious non-governmental killers of the late apartheid period" and each was labelled a "wicked coward who obstructed the road to democracy." What Mr McBride did was described as an "act of human scum." The vitriolic nature of the attack is laid bare by the following comment:

[25] Mbeki "We will not abandon reconciliation" *ANC Today* Vol. 3 No. 41 (17 October 2003), http://www.anc.org.za/docs/anctoday/2003/at41.htm, accessed on 25 February 2011.

> "If the ANC regards Robert McBride as a hero of the struggle, it should erect a statue of him—perhaps standing majestically over the mangled remains of the women he slaughtered."

Although reference is made to the ANC, Mr McBride is also the target of attack and derision here. Another article, which described Mr McBride as "Bomber McBride", reinforces the conclusion that this was not just a series of articles intended to expose an ill-considered attempt to appoint a person to a position for which he is "blatantly unsuited". They are an outward manifestation of a well-orchestrated character assassination mission.

The effect of the false allegations

[231] The Citizen's statements about the kind of person they believed Mr McBride to be and his alleged unsuitability for appointment, published in a series of articles and editorials, must be read and understood as one message and not be dealt with as individual statements independent of each other.[26] The comments are premised on the undisputed truth that Mr McBride killed three women and injured about 69 other people some 17 years before the publication of the articles.[27] This truth is planted in a thicket of assertions which are either untrue or half true and whose veracity could have been ascertained by any person who was interested in finding out the whole truth.

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[26] See *Tonsbergs Blad AS v Norway* (2008) 46 E.H.R.R. 40 at para 94; *Bergens Tidende and Others v Norway* (2001) 31 E.H.R.R. 16 at para 51; and *Bladet Tromso v Norway* (2000) 29 E.H.R.R. 125 at para 63.

[27] See *Khumalo and Others v Holomisa* [2002] ZACC 12; 2002 (5) SA 401 (CC); 2002 (8) BCLR 771 (CC) (*Khumalo*) which held at fn 38:

> "However, it has long been recognised that past mistakes should not be raked up after a long period of time has elapsed. See *Graham v Ker* (1892) 9 SC 185."

[232] Anyone genuinely driven by a civic duty to prevent the subversion of metropolitan security, consequent upon the appointment of a Metro Police Chief who is disqualified for the job, would have checked the facts before the articles were published. Surprisingly, the Citizen chose not to undertake this simple verification exercise to satisfy itself whether (i) Mr McBride ever expressed contrition for what he did and (ii) the arrest and failure to prosecute Mr McBride for his alleged association with alleged gun dealers were fully explained before, at the time of or after the quashing of charges against Mr McBride by the Supreme Court of Mozambique, or at the press conference at the airport which has since become known as OR Tambo International, and whether information in this regard was available.[28] This conduct lines up with the Citizen's apparent determination to depict Mr McBride as being amongst the dregs of humanity. And this level of bitterness evinces a desperate effort to crush Mr McBride for some deliberately withheld reason, somehow linked to the bombing, under the guise of an honest attempt to merely oppose his appointment by reason of his alleged unsuitability.

[233] Freedom of expression is a right to be exercised with due deference to, among others, the pursuit of national unity and reconciliation.[29] It cannot be the ground for

[28] Even if Mr Williams was desk-bound and had no authority to send a journalist to the press conference as he says, nothing forbade him from getting that information after the press conference especially prior to the publication, if he was interested.

[29] See *Islamic Unity* above n 1616, where it held at paras 29-30:

> "The pluralism and broadmindedness that is central to an open and democratic society can, however, be undermined by speech which seriously threatens democratic pluralism itself. Section 1 of the Constitution declares that South Africa is founded on the values of 'human dignity, the

excusing the Citizen from liability that it made the defamatory statements in the course of exercising its right to freedom of expression, whereas it did so in a manner that infringes the dignity of Mr McBride and impairs the pursuit of national unity and reconciliation.[30]

Should the Citizen's appeal be upheld?

[234] The Citizen can only escape liability on the same basis it sought to defend itself all the way from the High Court through the Supreme Court of Appeal and to this Court. That basis is fair comment.

[235] Against this defence stands the collective impact of the false assertions in relation to contrition, allegations of gun running in Mozambique, raking up the past which serves

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achievement of equality and the advancement of human rights and freedoms'. Thus, open and democratic societies permit reasonable proscription of activities and expressions that pose a real and substantial threat to such values and to the constitutional order itself. Many societies also accept limits on free speech in order to protect the fairness of trials. Speech of an inflammatory or unduly abusive kind may be restricted so as to guarantee free and fair elections in a tranquil atmosphere.

There is thus recognition of the potential that expression has to impair the exercise and enjoyment of other important rights, such as the right to dignity, as well as other State interests, such as the pursuit of national unity and reconciliation. The right is accordingly not absolute; it is, like other rights, subject to limitation under section 36(1) of the Constitution. Determining its parameters in any given case is therefore important, particularly where its exercise might intersect with other interests. Thus in *Mamabolo* the following was said in the context of the hierarchical relationship between the rights to dignity and freedom of expression:

> 'With us the right to freedom of expression cannot be said automatically to trump the right to human dignity. The right to dignity is at least as worthy of protection as the right to freedom of expression. How these two rights are to be balanced, in principle and in any particular set of circumstances, is not a question that can or should be addressed here. What is clear though and must be stated, is that freedom of expression does not enjoy superior status in our law.'" (Emphasis added.) (Footnotes omitted.)

[30] Id.

no real public interest, the pursuit of national unity and reconciliation[31] and the vitriolic attacks launched by the Citizen against Mr McBride.

[236] When the Citizen asserted that Mr McBride is not contrite, it was, in my view, stating a fact and not merely making a comment. To support this false factual allegation it went on to cite Dr Boesak and Ms Madikizela-Mandela as other people who, like him, did not show contrition. Even if this contrition issue were a comment, it would still not escape a finding that it is malicious. For if all that Mr Williams wanted to achieve were purely to prevent the appointment of Mr McBride owing to the murders he had committed, he would have ensured that this serious comment about this lack of contrition is correct. Instead he went ahead and published the "comment" in reckless disregard for its potential falsehood. I infer from Mr Williams' evidence that he essentially shut his mind to the possibility that this serious comment, with far reaching implications on the life of Mr McBride, could be false. This gross recklessness by a media outlet[32] that ought to know its own responsibilities to the public and to those it chooses to write about, can

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[31] Id.

[32] See section 4.3 of the South African Press Code on "Comment" which reads as follows: "Comment by the press shall be an honest expression of opinion, without malice or dishonest motives, and shall take fair account of all available facts which are material to the matter commented upon." See also *Khumalo* above n 27 which had this to say about the media at para 24:

> "They bear an obligation to provide citizens both with information and with a platform for the exchange of ideas which is crucial to the development of a democratic culture. As primary agents of the dissemination of information and ideas, they are, inevitably, extremely powerful institutions in a democracy and they have a constitutional duty to act with vigour, courage, integrity and responsibility. The manner in which the media carry out their constitutional mandate will have a significant impact on the development of our democratic society. If the media are scrupulous and reliable in the performance of their constitutional obligations, they will invigorate and strengthen our fledgling democracy. If they vacillate in the performance of their duties, the constitutional goals will be imperilled."

only be traceable to a blind and malicious desire to savage the dignity of its target with everything within its reach, including unchecked and false comments.

[237] Added to this are the allegations of Mr McBride's dubious flirtations with alleged gun dealers. The publications are marred by falsities that substantially water down the little truth that is left. More importantly, these statements coupled with the vitriol firmly establish the malice in the publications.

[238] The Citizen could have expressed itself freely on the possible appointment of Mr McBride without maligning him in the manner it did. The bitterness in the editorial comments and the articles betray the mission to undermine the intrinsic dignity of Mr McBride for a reason that runs deeper than the mere objection to his appointment. He is, according to the Citizen, a cold-blooded multiple murderer, human scum and a wicked coward who would probably feel highly honoured if a statue of him standing majestically over the mangled remains of the three women he killed, were to be erected.

[239] The campaign waged by the Citizen in a long chain of articles and editorial comments vilified Mr McBride and severely undermined his reputation and right to dignity. Along the way, the Citizen told untruths and used inflammatory and unduly abusive language. It did so claiming that it merely wanted to inform the public about the detrimental effect Mr McBride's appointment would have on the security of the

Ekurhuleni Metro, but the viciousness and brutality of the attack demonstrates the contrary. Joubert JA must have had this in mind when he said:

> "In my opinion *Voet's* criterion must be accepted as being consistent with the position where a judicial officer, under the guise of performing his judicial functions, has been actuated by *personal spite*, *ill will*, *improper motive*, *unlawful motive* (*ongeoorloofde oogmerk of motief*) or *ulterior motive*, that is to say, by *malice*, in his publication of the defamatory matter in order to expose the defamed person to odium, or ill will, and disgrace."[33]

The Citizen's statements and comments were, in my view, calculated to expose Mr McBride to odium, ill will and disgrace and are malicious. The malice renders the comments wrongful.

[240] I would have granted damages on the basis that the Citizen was wrong in the respects set out in this judgment. This being a minority judgment, it is unnecessary to determine the amount of the damages.

Conclusion

[241] Black South Africans have been subjected to untold indignities for centuries. It is partly for this reason that the value of human dignity and the right of all to have their dignity respected and protected features so prominently in our Constitution.[34] This right

[33] *May v Udwin* 1981 (1) SA 1 (A) at 19A-B.

[34] See section 1 of the Constitution which reads:

is just as important as the right to freedom of expression and should not be relegated to near insignificance at the appearance of the right to freedom of expression.

[242] The right to free expression must be balanced against the individual's right to human dignity.[35] The recognition and protection of human dignity is a foundational constitutional value under our democratic order.[36] This was re-affirmed in these terms:

> "The value of dignity in our Constitutional framework cannot . . . be doubted. The Constitution asserts dignity to contradict our past in which human dignity for black South Africans was routinely and cruelly denied. It asserts it too to inform the future, to invest in our democracy respect for the intrinsic worth of all human beings. Human dignity

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> "The Republic of South Africa is one, sovereign, democratic state founded on the following values:
>
> (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
>
> (b) Non-racialism and non-sexism.
>
> (c) Supremacy of the constitution and the rule of law.
>
> (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness."

Further see section 10 of the Constitution which reads "Everyone has inherent dignity and the right to have their dignity respected and protected."

[35] *S v Mamabolo (E TV and Others Intervening)* [2001] ZACC 17; 2001 (3) SA 409 (CC); 2001 (5) BCLR 449 (CC) at para 41. See *Khumalo* above n 27 which held at para 25:

> "[A]lthough freedom of expression is fundamental to our democratic society, it is not a paramount value. It must be construed in the context of the other values enshrined in our Constitution. In particular, the values of human dignity, freedom and equality." (Footnote omitted.)

See also *Independent Newspapers Holdings Ltd and Others v Suliman* 2005 (7) BCLR 641 (SCA), where the Supreme Court of Appeal held at para 44, in relation to public benefit or interest, that—

> "there is obviously a potential clash between constitutionally entrenched rights: the rights to dignity and privacy on the one hand and, on the other, the right of freedom of the press, of expression, and of receiving or imparting information. None of these rights should be regarded as permanently trumping the others in the sense that there is a preordained and never shifting order of priority to be assigned to each of them. The weight to be assigned to each of them in a given situation will vary according to the circumstances attending the situation."

[36] *Khumalo* above n 27 at para 26. See also the preamble to the Constitution.

therefore informs constitutional adjudication and interpretation at a range of levels."[37] (Footnote omitted.)

[243] Indeed, human dignity must colour the spectacles through which we view defamatory publications, particularly those which are inextricably linked to our painful past. And so should our rich values, like ubuntu, which are consistent with the Constitution, our shameful history of institutionalised human rights violations, our commitment to make a decisive break with this past as well as our pursuit of the noble objectives of national unity and reconciliation also inform the interpretation and exercise of the rights to dignity, freedom of expression, privacy and property in this country. To this end, we ought to be slow to borrow from comparable jurisdictions which do not necessarily share the same history and experience with us.[38] This ought to be so because very few, if any, of these jurisdictions have made a firm and generous commitment to national unity and reconciliation. In cases of defamation that relate to the amnesty process sensitivity to this national project is called for. The law cannot simply be applied with little regard to the truth and reconciliation process and ubuntu.

[37] *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* [2000] ZACC 8; 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC) at para 35.

[38] See for example cases in the USA, such as *The New York Times Company v L. B. Sullivan. et al.* 376 U.S 254 (1964) at 279-80 and *Snyder v Phelps et al.* 562 U.S. - (2011) and other American authorities on freedom of expression in general, which leave very little of the right to human dignity. We should only borrow what we do not have. Our first port of call should be the interpretation and development of our Constitution and our law in general based on our unique history, experience and conditions such as those outlined in this paragraph.

[244] Our constitutional values and our unique and rich history, with all the challenges in which it is steeped, have so much more to offer in the development of our jurisprudence.[39] We need to tap into this treasure.

[245] To sum up I would therefore find for Mr McBride, dismiss the appeal and uphold the cross-appeal with costs.

[39] This is said mindful of the provisions of section 39 of the Constitution.

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