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Legislation

None

Literature

None

1. INTRODUCTION

In this Sibergramme cases on civil procedure reported in ***Butterworths Constitutional Law Reports*** between **April and November 2007**, other than cases dealt with in **Civil Procedure Sibergramme 10 of 2007** (7 January 2008), are considered.

2. CAPACITY TO LITIGATE

Person of unsound mind

The plaintiff in ***Road Accident Fund v Mdeyide & another*** **2007 (7) BCLR 805 (CC)** was blind since childhood, illiterate and innumerate, and devoid of any concept of time and space. He was hit by a vehicle in a motor collision, sustaining injuries which apparently rendered him altogether incapable of managing his own affairs. A claim against the Road Accident Fund had been instituted on his behalf in terms of the Road Accident Fund Act 56 of 1996, which resulted in an order being made by the High Court declaring s 23(1) of the Act (dealing with the prescription of claims under the Act) to be unconstitutional. In proceedings before the Constitutional Court for an order confirming the declaration of invalidity, the Court pointed out that there had not been a proper inquiry into the plaintiff's capacity before and during the trial, resulting in a paucity of information on this issue before the Constitutional Court (para 35 at 817A—B). The conduct of the plaintiff in consultations with his legal advisers, his conduct in court and his medical records all ought to have suggested to the protagonists that 'something was badly amiss' (para 36 at 817B—D). If at the time of the trial the plaintiff had indeed been of unsound mind, he would, without the assistance of a curator ad litem, have lacked locus standi, with the possible consequence that the entire proceedings in the trial court might be rendered void (para 37 at 817D).

If the plaintiff did not have the capacity to litigate, said Navsa AJ (writing for the Court), the law required that the assistance of a curator ad litem be provided. In a 'useful discussion' of instances in which the appointment of a curator was called for, *Herbstein and Van Winsen The Civil Practice of the Supreme Court of South Africa (Now the High Courts and the Supreme Court of Appeal)* 4 ed (1997) by the late Louis de Villiers van Winsen, Andries Charl Cilliers & Cheryl Loots ('*Herbstein and Van Winsen*') 1126 had pointed out that if it was suspected that a person was of unsound mind and as such incapable of managing his affairs, proceedings could be instituted for a declaration by the court to that effect and for the appointment of curators to his person and his property. It was clear, continued Navsa AJ, that **the very least that was called for in the court below was an inquiry in terms of uniform rule 57** (para 38 at 817E—G). If, after the collision, the plaintiff had in fact been of unsound mind and in need of a curator ad litem and/or a curator bonis, and if one had been appointed before the termination of the three-year prescriptive period laid down in s 23(1) of the Road Accident Fund Act, the plaintiff would have been entitled to the protection afforded by the exception in s 23(2). (Section 23(2), in so far as it was relevant to *Mdeyide's* case, provides that prescription of a claim for compensation under the Road Accident Fund Act does not run against a person under curatorship.) Without having had a curator appointed, the plaintiff might nevertheless be able to seek the protection of s 13(1)*(a)* of the Prescription Act 68 of 1969 (which provides for the completion of prescription to be delayed where the creditor is (inter alia) insane or prevented by superior force from interrupting the running of prescription) (para 39 at 817G—818B; see also paras 32—4 at 816D—H). The trial court had also failed to explore adequately the impact on the commencement of prescription in relation

to both s 13(1)*(a)* of the Prescription Act and s 23(1) of the Road Accident Fund Act of the possibility that the plaintiff might have been unconscious for the greater part of his stay in hospital after the collision, on the basis of the doctrine that the law does not require one to do the impossible (para 40 at 818B—C, with reference to *Montsisi v Minister van Polisie* 1984 (1) SA 619 (A)).

It was therefore inevitable that the plaintiff be subjected to further processes to determine his capacity, loath though one might be to prolong his agony (para 41 at 818C—D). The answers to the questions raised as to the plaintiff's capacity were essential to determine the plaintiff's rights and the further conduct of the proceedings (para 42 at 818D—E). **The order of the High Court was therefore set aside in its entirety and the matter remitted to the High Court for an inquiry in terms of uniform rule 57 and, if necessary, for the further conduct of the proceedings** (para 43 at 818E, para 48 at 819E). It was open to an appellate court to remit a matter for evidence to be obtained on matters that had been left obscure on the record (para 43 at 818E—F, with reference to *Herbstein and Van Winsen* 909). It was to be hoped that the Legal Aid Board, which had provided counsel for the plaintiff, would continue to assist the plaintiff so as not to prejudice him further. The unhappy path that the litigation had taken should be a salutary reminder to courts and to practitioners that they should be sensitive to the needs and circumstances of someone as vulnerable as the plaintiff (para 44 at 818F—G).

The deliberation and adjudication of the constitutionality of s 23(1) in the High Court was therefore premature, and for that reason the order of constitutional invalidity could not be confirmed. After an inquiry in terms of rule 57 and after hearing the parties on all the issues, the High Court might nevertheless be minded to reinstate its order, in which event a referral to the Constitutional Court in terms of s 167(5) of the Constitution of the Republic of South Africa, 1996 would follow. The Minister and the Road Accident Fund would then be entitled to appeal the order of the High Court. In the event of the High Court establishing that at material times the plaintiff was of sound mind and thereafter reinstating its original order, the Road Accident Fund could re-enrol the matter in the Constitutional Court for a decision on the merits (para 46 at 818I—819B).

No order as to costs was made, this being held in all the circumstances to be the best course to follow (para 47 at 819C, para 48 at 819F).

3. APPLICATIONS

Dispute of fact

The well-known rule in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E—I was rendered by the majority in ***Van der Merwe & another v Taylor & others*** **2007 (11) BCLR 1167 (CC)** (per Moseneke DCJ and Nkabinde J) as being that 'a court in motion proceedings, in determining whether a case is made out, must examine the averments of the applicant together with the undisputed averments of the respondent' (para 130n150 at 1208I—J).

This is not an accurate statement of the rule, for two reasons. First, the rule is confined to the situation in which a final interdict is sought in motion proceedings but there are

disputes of fact on the papers. The rule was formulated specifically with reference to the situation in which the relief sought on motion is a final interdict, as is apparent not only from the statement at 634E that the appellant in the *Plascon-Evans Paints* case sought that relief but also from the dicta reproduced at 634E—F from the judgment in *Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd* 1957 (4) SA 234 (C) at 235E—G. The formulation by Moseneke DCJ and Nkabinde J implies that the *Plascon-Evans Paints* rule is applicable regardless of the type of relief sought. Secondly, the exposition of the rule given by Moseneke DCJ and Nkabinde J confuses the applicant with the respondent**: the rule is that a final interdict will be granted on the papers where the averments of the *respondent* read with the undisputed averments of the *applicant* justify such relief**. As is clear from the dictum in the *Stellenbosch Farmers' Winery* case at 235E—F, it is the respondent's factual averments (supplemented by those of the applicant which the respondent admits) that must constitute the basis for the grant of a final interdict in order for the court to avoid having to resolve the disputes of fact raised on the papers.

4. APPEALS

Remission of matter to court a quo

In ***Road Accident Fund v Mdeyide & another*** **2007 (7) BCLR 805 (CC)** the Constitutional Court (per Navsa AJ) remitted the case to the High Court for evidence to be obtained on matters that had been left obscure on the record, and for a decision to be made by the High Court in the light of that evidence, the Constitutional Court holding that it had the power to do so (para 43 at 818E, with reference to *Herbstein and Van Winsen The Civil Practice of the Supreme Court of South Africa (Now the High Courts and the Supreme Court of Appeal)* 4 ed (1997) by the late Louis de Villiers van Winsen, Andries Charl Cilliers & Cheryl Loots 909).

5. COSTS

Offer to settle

On the legal effect of an offer to settle made in terms of uniform rule 34 in a case involving constitutionally entrenched rights, see ***NM & others v Smith & others (Freedom of Expression Institute as Amicus Curiae)*** **2007 (7) BCLR 751 (CC), 2007 (5) SA 250**, surveyed under '**CONSTITUTIONAL PRACTICE: *Costs***' below.

6. CONSTITUTIONAL PRACTICE

Application for leave to appeal to Constitutional Court

In ***Minister of Safety and Security v Van Niekerk*** **2007 (10) BCLR 1102 (CC)** an application for leave to appeal against a decision of a High Court to award the respondent

damages for assault and for wrongful arrest and detention was dismissed. Prior applications to the High Court and to the Supreme Court of Appeal for leave to appeal had also been dismissed. At the hearing before the Constitutional Court, counsel for the applicant had conceded that if, as the High Court had held to be the case after hearing conflicting evidence, the respondent had not in truth committed the offence of being drunk and disorderly for which he had been arrested and detained, then there was no basis for the arrest. Accordingly, if the Constitutional Court did not upset the decision of the High Court on the facts, no constitutional question would be reached (para 9 at 1105C).

Delivering the judgment of the Constitutional Court, Sachs J held that **the Court, as any court of appeal, would be slow to interfere with findings of fact by a trial court based on a careful assessment of the credibility of witnesses and the probabilities of their respective versions**. Those findings established that the respondent had not been disorderly prior to his arrest, and that he had not committed the offence for which he was arrested. The constitutional question of how to balance out the rights of the individual as against the duties of the police to protect the community accordingly did not arise. Although there could be circumstances where a clear mistake of fact could possibly justify the re-examination by the Constitutional Court of a factual finding made by a trial court, *Van Niekerk* was not one of those cases. And since *Van Niekerk* was not a case where the facts were sufficiently connected to a constitutional issue to render it in the interests of justice to re-examine the factual finding, it was not necessary to consider whether the Constitutional Court had the power to remit the matter to the Supreme Court of Appeal to reconsider the factual findings made by the trial court (para 10 at 1105D—1106A).

Confronted with these difficulties, which suggested that the Constitutional Court did not have jurisdiction in the matter, counsel for the applicant submitted that the trial judge had directly raised a constitutional issue in his judgment by holding that, even if it was accepted that the respondent was drunk and disorderly, the police officer, given his constitutional duties, had not exhausted the option of using a written notice to ensure the attendance of the respondent in court instead of arresting the respondent. That being so, the arrest was unconstitutional, on the basis laid down in *Louw & another v Minister of Safety and Security & others* 2006 (2) SACR 178 (T). In this respect, the trial judge had indeed advanced propositions which clearly had a constitutional dimension, and the Constitutional Court thus had jurisdiction to hear the matter. The question remained, however, whether it was in the interests of justice to do so (para 12 at 1106F—G, read with para 11 at 1106A—F).

Ordinarily, continued Sachs J, it was not in the interests of justice to grant leave to appeal where the evidence clearly showed that no practical relief could be given to the applicant. Nevertheless, the applicant had submitted that it would be in the interests of justice for the Constitutional Court to hear the appeal, since it impacted substantially on questions relating to the maintenance of law and order by the police, on account of the conflicting judgments in *Louw's* case and in *Charles v Minister of Safety and Security* 2007 (2) SACR 137 (W) on the question whether the police could constitutionally effect an arrest without warrant where another method of securing the attendance of the accused in court to stand trial, without an arrest, would have sufficed. Leave to appeal could not,

however, be granted on that basis, said Sachs J, on the facts before the Court in *Van Niekerk***:**

> 'To my mind the present matter is far from constituting a viable test case . . . . On the contrary, it demonstrates that the constitutionality of an arrest will almost invariably be heavily dependent on its factual circumstances. . . . Such conflict as may exist between *Louw* and *Charles* (*supra*) is simply not raised by the facts of this case'

(para 17 at 1107F—H).

It was therefore not in the interests of justice for the application for leave to appeal to be granted, and the application was dismissed, with the applicant being ordered to pay the costs of the respondent (paras 21—2 at 1110A—B).

It is submitted, with respect, that the reasoning in *Van Niekerk* was unnecessarily convoluted, even though the Court correctly dismissed the application. The proper approach was surely that **since there was no basis on which the factual findings arrived at by the trial court could be set aside, no offence had been committed** in the presence of the arresting police officer as contemplated in s 40(1)*(a)* of the Criminal Procedure Act 51 of 1977, and the arrest and detention were therefore clearly wrongful. **That being so, no constitutional issue was raised** by the facts in *Van Niekerk*. Nor was the Court required to determine any issue connected with a decision on a constitutional matter as contemplated in s 167(3)(b) of the Constitution, since (as Sachs J himself remarked) *Van Niekerk* was not a case in which the facts were sufficiently connected to a constitutional issue to render it in the interests of justice to re-examine the factual findings of the trial court (para 10 at 1105G—1106A). As such, the facts could not have been sufficiently connected with a decision on a constitutional matter to bring the application within the jurisdiction of the Court either. The Constitutional Court therefore lacked jurisdiction to deal with the application for leave to appeal, which accordingly had to be dismissed.

In ***Engelbrecht v Road Accident Fund & another*** **2007 (5) BCLR 457 (CC), 2007 (6) SA 96** the Constitutional Court (per Kondile AJ) granted an application for leave to appeal where the application raised a constitutional issue – the constitutionality of reg 2(1)*(c)* of the regulations made under the Road Accident Fund Act 56 of 1996 – which was 'of public importance', affected all road users in South Africa, and had been the subject matter of extensive litigation. It was desirable that a final decision on the constitutionality of the regulation be reached (para 15 at 463B—C (BCLR), 100D—F (SA)). Furthermore, **since the Supreme Court of Appeal in other litigation had previously ruled negatively on the constitutionality of reg 2(1)*(c)*, there would be no point in attempting to appeal first to that Court or to the Full Bench of the High Court, which was bound by the decision of the Supreme Court of Appeal**. It was therefore in the interests of justice that leave to appeal directly to the Constitutional Court be granted (para 16 at 463C—D (BCLR), 100F—G (SA)).

In ***Van der Merwe & another v Taylor & others*** **2007 (11) BCLR 1167 (CC)** Mokgoro J (in a minority judgment) reiterated the principle that **leave to appeal to the Constitutional Court will be granted only if applicants raise a constitutional matter or an issue connected with a decision on a constitutional matter, and when it is in**

the interests of justice to grant leave (para 19 at 1175G—H). The legality of a seizure by the state of private property was in issue in *Van der Merwe*, raising the constitutional issue whether the deprivation of property was arbitrary, as contemplated by s 25(1) of the Constitution of the Republic of South Africa, 1996. The interests of justice in the circumstances of a case would determine whether a constitutional matter raised in an application would be heard. A background of conflicting High Court decisions and the vacillation of the respondents regarding the legal basis for the seizure and holding of the property in *Van der Merwe* rendered it in the interests of justice that the appeal be heard, and the application for leave to appeal was therefore granted (para 20 at 1176A—D). In their majority judgment, Moseneke DCJ and Nkabinde J (in which Langa CJ, Kondile AJ and Madala, Van der Westhuizen and Yacoob JJ concurred) granted the application for leave to appeal (para 138 at 1210G—H) in apparent agreement with the remarks of Mokgoro J, confining themselves to the merits of the appeal itself.

O'Regan J (Van Heerden AJ concurring) dissented, holding that it was not in the interests of justice for the Constitutional Court to hear the appeal (para 78 at 1192D—E). This was because (1) the difference of opinion between the High Courts in question related to the proper interpretation and effect of a provision of the exchange-control regulations which was not in issue in *Van der Merwe*, with the result that the conflict of views could not render it in the interests of justice for the Court to consider the application for leave to appeal (paras 84—5 at 1195B—F); (2) s 195 of the Constitution (dealing with the basic values and principles governing public administration), which was relied on by the applicants as a reason for the hearing of the appeal, could not independently result in an order by the Court requiring the respondents to return property seized from the applicants, which was the only relief (apart from costs) sought, and s 195 thus contributed no weight to the determination whether it was in the interests of justice that the application for leave to appeal be granted (para 88 at 1196B—D); and (3) the appeal would raise complex and difficult legal issues upon which neither the Constitutional Court nor the courts below had had the benefit of argument, and **it was undesirable for the Court to decide important and complex common-law issues as a court of first and last instance, especially in circumstances where the issues had not been properly ventilated on the pleadings or in argument** (para 102 at 1199F—G and para 103 at 1200B—E).

See also ***NM & others v Smith & others (Freedom of Expression Institute as Amicus Curiae)*** **2007 (7) BCLR 751 (CC), 2007 (5) SA 250**, where Madala J (Moseneke DCJ and Mokgoro, Nkabinde, Sachs, Skweyiya, Van der Westhuizen and Yacoob JJ concurring) remarked that it is important to recognize that even if a case does raise a constitutional matter, the assessment whether it should be heard by the Constitutional Court rests on the additional requirement that access to the Court must be in the interests of justice, and not every matter will raise a constitutional issue worthy of attention (para 30 at 760C—D (BCLR), 261D—E (SA)). The dispute in *NM's* case was, however, 'clearly worthy of constitutional adjudication' and it was in the interests of justice that the matter be heard by the Constitutional Court since it involved a nuanced and sensitive approach to balancing the interests of the media in advocating freedom of expression, on the one hand, and the privacy and dignity of the applicants, on the other, irrespective of whether the applicants relied on the constitutional law or the common law. The Court was

in any event mandated to develop and interpret the common law if necessary (para 31 at 760D—F (BCLR), 261E—F (SA)).

Authority of legal representatives to act in Constitutional Court

A party to proceedings in the Constitutional Court who wishes to challenge the authority of an opponent's legal representatives to act in those proceedings must furnish the notice required by Constitutional Court rule 9 disputing the authority of the representative(s) to act before the Court will consider the matter**: *Shilubana & others v Nwamitwa & others* 2007 (9) BCLR 919 (CC)** (also reported sub nom ***Shilubana & others v Nwamitwa (National Movement of Rural Women and Commission for Gender Equality as Amici Curiae)* 2007 (5) SA 620**) para 7 at 921E—F (BCLR), 623D—E (SA), read with para 6 at 921D—E (BCLR), 623B—D (SA); see also para 25 at 927D—E (BCLR), 629A—B (SA).

Costs

On the appropriate award to be made in respect of the costs of a postponement of proceedings in the Constitutional Court, see ***Shilubana & others v Nwamitwa & others* 2007 (9) BCLR 919 (CC)** (also reported sub nom ***Shilubana & others v Nwamitwa (National Movement of Rural Women and Commission for Gender Equality as Amici Curiae)* 2007 (5) SA 620**) para 24 at 926G—927A (BCLR), 628E—G (SA), which is surveyed under '***Postponement of Constitutional Court proceedings***' below. In the course of the Court's judgment, Van der Westhuizen J made the remark that whether the applicants or the respondent were ultimately successful, **the Court would not necessarily award costs in a case involving important constitutional questions** (at 926H—I (BCLR), 628F (SA), with reference to *Executive Council, Western Cape v Minister of Provincial Affairs and Constitutional Development & another*; *Executive Council, KwaZulu-Natal v President of the Republic of South Africa & others* 2000 (1) SA 661 (CC), 1999 (12) BCLR 1360 para 138 at 714E (SA), 1405F (BCLR) (per Ngcobo J). The remark is significant because it was made in proceedings between private individuals, showing that the conduct of the Court in declining to make costs awards in important constitutional cases is not restricted to matters instituted against the state. Further on this issue, see the remarks of Langa CJ in ***NM & others v Smith & others (Freedom of Expression Institute as Amicus Curiae)* 2007 (7) BCLR 751 (CC), 2007 (5) SA 250**, discussed below.

In ***NM & others v Smith & others (Freedom of Expression Institute as Amicus Curiae)* 2007 (7) BCLR 751 (CC), 2007 (5) SA 250** the respondents, on the morning of the trial, made an offer of settlement to the appellants in terms of uniform rule 34 on a 'without prejudice and without admission of liability' basis. The appellants did not accept the offer, and the trial proceeded. The appellants failed, however, to secure greater relief than had been offered, either in the High Court or (on appeal) in the Constitutional Court, and the question accordingly arose what costs order should be made, bearing in mind that the case involved important and complex constitutional issues relating to the proper balancing of the interests of the media in advocating freedom of expression against the

interests of the appellants in their constitutionally entrenched rights to privacy and dignity. Delivering the judgment of the majority, Madala J (Moseneke DCJ and Mokgoro, Nkabinde, Sachs, Skweyiya, Van der Westhuizen and Yacoob JJ concurring) stated that **an offer of settlement must be made timeously and should be responded to promptly**. The offer is made with a view to curtailing the possible escalation of costs (para 83 at 769H—I (BCLR), 271A—B (SA)). An offer of settlement did not mean that an offeree should keep the offeror waiting for several days while costs mounted. And a defendant should not decide only on the morning of the trial to make an offer and so hope to avoid liability for costs (para 85 at 770C—D (BCLR), 271E—F (SA)). In the present matter, although the offer was good, the appellants had been given little time to consider it before the commencement of the trial (para 86 at 770D—E (BCLR), 271F—G (SA)).

Any order as to costs incurred subsequent to an offer of settlement, continued Madala J, is in the court's discretion. When exercising that discretion, the court will take into consideration all relevant factors and will determine whether the offeree acted reasonably in delaying responding to the offer. The respondents in the *NM* case had not entered into any negotiations with the appellants, but had taken the appellants off guard when they had made the offer of settlement on the morning of the hearing (para 87 at 770E—F (BCLR), 271G—H (SA)). On a conspectus of all the circumstances of the case and the efforts made by the respondents to reach an amicable settlement with the appellants, the huge amount claimed in damages by the appellants clearly evidenced a poor assessment of damages by their counsel. It was therefore fair that each party should pay its own costs in the Constitutional Court (para 89 at 770G—H (BCLR), 272B—C (SA)).

The order made (as far as costs were concerned) was accordingly that the respondents were directed to pay the costs of the appellants (wrongly referred to in the report as the 'costs of the respondents') up to (and including) the first day of the trial, and that each party should pay its own costs in respect of the remainder of the trial, and in the Constitutional Court (para 90 at 771B—D (BCLR), 272E—F (SA)).

In a minority judgment, **Langa CJ disagreed with Madala J's approach to rule 34 and consequently his award of costs** (para 92 at 771H (BCLR), 273A (SA)). The decision to award costs following the disclosure of a settlement offer, Langa CJ agreed, is in the discretion of the court (as provided in uniform rule 34(12)). And, as the Constitutional Court had previously made clear, an appellate court should not generally interfere in the exercise of a discretion by a lower court unless the discretion is not exercised judicially, or is based on wrong principles or on a misapprehension of the facts. The question thus arose whether the High Court in the *NM* case had committed such a misdirection (para 118 at 777C—D (BCLR), 278F—G (SA)). Finding that Schwartzman J (the trial judge) had indeed done so, Langa CJ said that although rule 34 serves an important purpose, and undermining the potential to save costs would remove any impetus to make offers of settlement, different principles apply to cases involving constitutional rights. Money might help to alleviate the appellants' pain, but the true and lasting solace for the person wrongly injured was the vindication by the court of his or her rights. No matter the value of the offer, it did not give the acknowledgement of wrongdoing that was often far more valuable than any money could be. That was not the case in all civil claims, however, as many civil disputes revolved entirely around money,

not principle (para 119 at 777D—G (BCLR), 278H—279B (SA), with reference to *Dikoko v Mokhatla* 2006 (6) SA 235 (CC), 2007 (1) BCLR 1 para 109 at 271I—J (SA), 32F (BCLR) (per Sachs J)).

There was a danger, continued Langa CJ, that the risk of adverse costs orders, despite ultimate success, might permit rich and powerful defendants to prevent the law from adapting to meet constitutional imperatives by throwing money at plaintiffs who could not afford to take that chance. **It already took immense courage for ordinary people to take large, powerful defendants to court and the additional peril of an adverse costs order would mean that even fewer plaintiffs would get their day in court. The achievement of our constitutional vision should not be obstructed by the vested interests of those who have the money to protect them** (para 120 at 777H—778B (BCLR), 279C—E (SA)). This reasoning did not dictate that a costs order would never be appropriate when a constitutional right was involved; the award of costs remained a matter of discretion. It did mean that the involvement of a constitutional right seriously altered the framework within which that discretion had to be exercised. The failure by Schwartzman J in the trial court to properly consider the impact of the Constitution of the Republic of South Africa, 1996 meant that it was appropriate for the Constitutional Court to interfere with his award of costs. On the peculiar facts of the *NM* case, the first and third respondents (whom Langa CJ held were liable in law for violating the rights of the appellants) should have been ordered to pay all of the appellants' costs both in the High Court and in the Constitutional Court (para 121 at 778B—D (BCLR), 279E—G (SA)).

The remarks made by Langa CJ on the need to protect ordinary people who allege (in a non-frivolous and non-vexatious manner) that their constitutional rights have been trampled upon by rich and powerful defendants are, with respect, to be commended and are strongly welcomed by the present writer, whose hope it is that they will be borne in mind in future cases involving allegations of the violation of constitutionally entrenched rights.

Direct access to Constitutional Court

The well-documented reluctance of the Constitutional Court to allow itself to be used as a court of first as well as last instance was reiterated in ***Van Vuren v Minister of Justice and Constitutional Development & another*** **2007 (8) BCLR 903 (CC)**, in which the applicant, a sentenced prisoner, brought an application for direct access to the Court to declare a provision of the Correctional Services Act 111 of 1998 governing parole to be inconsistent with the Constitution of the Republic of South Africa, 1996. In earlier proceedings before the High Court, however, the applicant had not sought a declaration of unconstitutionality, and the relief sought in the Constitutional Court was therefore 'materially different' from the relief sought in the High Court (para 10 at 907E). Emphasizing again that it is not ordinarily in the interests of justice for the Constitutional Court to sit as a court of first and last instance, and that **direct access should be granted only in exceptional circumstances** (para 11 at 907F, with reference to *Mkontwana v Nelson Mandela Metropolitan Municipality & another*; *Bissett & others v Buffalo City Municipality & others*; *Transfer Rights Action Campaign & others v MEC, Local Government and Housing, Gauteng, & others (KwaZulu-Natal Law Society & Msunduzi*

Municipality as Amici Curiae) 2005 (1) SA 530 (CC), 2005 (2) BCLR 150 para 11 at 539C—F (SA), 155C—F (BCLR), *De Kock v Minister of Water Affairs and Forestry & others* 2005 (12) BCLR 1183 (CC) paras 3—4 at 1185A—F, *Mnguni v Minister of Correctional Services & others* 2005 (12) BCLR 1187 (CC) and *Bruce & another v Fleecytex Johannesburg CC & others* 1998 (2) SA 1143 (CC), 1998 (4) BCLR 415 paras 7—9 at 1148B—1149B (SA), 419B—420B (BCLR)), the Court dismissed the application. The issue raised by the applicant was 'certainly one of importance and complexity', and it might be that adjudication was required. The interests of justice required that he received legal advice to enable him to launch an application in the High Court, properly formulated and substantiated. It would also be fair to the respondents, who would then be in a position to formulate a response and place evidence before the court on the matter (para 12 at 908B—C).

For a list of further authorities on direct access to the Constitutional Court, see **Civil Procedure Sibergramme 10 of 2007** (7 January 2008) 16—17.

Direct appeal to Constitutional Court

See ***Engelbrecht v Road Accident Fund & another*** **2007 (5) BCLR 457 (CC), 2007 (6) SA 96**, which is surveyed under '***Application for leave to appeal to Constitutional Court***' above.

Equality of arms

Section 34 of the Constitution of the Republic of South Africa, 1996 provides that everyone has the right to have any dispute which can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum. The question whether a 'fair public hearing' was possible where there was a gross imbalance in the firepower of counsel for the respective combatants was raised, but not decided, in ***Shilubana & others v Nwamitwa & others*** **2007 (9) BCLR 919 (CC)** (also reported sub nom ***Shilubana & others v Nwamitwa (National Movement of Rural Women and Commission for Gender Equality as Amici Curiae)*** **2007 (5) SA 620**), where (junior) counsel for the respondent complained that there was not an 'equality of arms' between the respondent and the applicants by virtue of the fact that the applicants were represented, when they should not have been, by the State Attorney, who had briefed senior counsel, as well as by two amici curiae, which broadly supported the applicant's case – a ratio of six counsel against one. In addition, counsel complained, the respondent was hampered by a lack of funds. Describing the concept of an 'equality of arms' as having its constitutional basis, in the civil context, in the guarantee in s 34 of a fair public hearing, Van der Westhuizen J (writing for the Constitutional Court) said that whatever the merits of the claim, **it was not desirable without written submissions by all concerned parties to decide whether the concept had any traction as it related to civil proceedings in the Constitutional Court**. Nor was it necessary to decide whether an 'inequality of arms' actually existed, what an appropriate counsel ratio might be, and whether an inequality necessitated a postponement in *Shilubana*. Since the interests of justice dictated that a

postponement be granted, the Court did not need to address the question whether the asserted imbalance of representation (notwithstanding that the respondent had prevailed both in the High Court and in the Supreme Court of Appeal) was constitutionally cognizable or problematic (para 21 at 925C—G (BCLR), 626H—627D (SA)).

Joinder where constitutionality of Act of Parliament challenged

In ***Road Accident Fund v Mdeyide & another*** **2007 (7) BCLR 805 (CC)** the Constitutional Court, with reference to uniform rule 10A and Constitutional Court rule 5(1), held that **anybody who challenges the constitutional validity of an Act of Parliament must join the responsible executive authority as a party to the proceedings** (para 27 at 814B—F, citing *Van der Merwe v Road Accident Fund & another (Women's Legal Centre Trust as Amicus Curiae)* 2006 (4) SA 230 (CC), 2006 (6) BCLR 682 para 7 at 241D—G (SA), 685F—686A (BCLR) (surveyed in **Civil Procedure Sibergramme 13 of 2006** (21 September 2006) 18)). The High Court in *Mdeyide* had overlooked uniform rule 10A when it decided that it had a duty, in terms of s 39(2) of the Constitution of the Republic of South Africa, 1996, to consider the constitutional validity of s 23(1) of the Road Accident Fund Act 56 of 1996. It had failed to heed decisions of the Constitutional Court which explained why it was important that the relevant authorities be provided an opportunity to be heard when legislation in respect of which they bear responsibility was challenged (para 28 at 814F—G). The Minister of Transport undoubtedly had a right to be heard in matters such as the present, where the constitutionality of provisions of the Road Accident Fund Act was questioned. An application by the Minister for intervention in the proceedings was made after the date provided for such intervention by the Chief Justice, and the Minister accordingly applied for condonation. A senior official in the Department of Transport explained that when the directions were served, the Minister was out of the country on state business. The Minister could acquaint himself with the details of *Mdeyide's* case and take legal advice only after his return to South Africa three days after the deadline set by the Chief Justice's directions. The explanation was satisfactory and it was in the interests of justice that the condonation application and the Minister's application for leave to intervene be granted (para 29 at 815A—C).

Jurisdiction of Constitutional Court

See ***Minister of Safety and Security v Van Niekerk*** **2007 (10) BCLR 1102 (CC)**, which is discussed under '***Application for leave to appeal to Constitutional Court***' above.

Postponement of Constitutional Court proceedings

Proceedings in ***Shilubana & others v Nwamitwa & others*** **2007 (9) BCLR 919 (CC)** (also reported sub nom ***Shilubana & others v Nwamitwa (National Movement of Rural Women and Commission for Gender Equality as Amici Curiae)*** **2007 (5) SA 620**) were postponed by the Constitutional Court for a period of some three and a half months pursuant to an application for postponement made by the respondent the day prior to the

hearing. In a judgment giving reasons for the postponement, Van der Westhuizen J (writing on behalf of the Court) referred to dicta in *National Police Service Union & others v Minister of Safety and Security & others* 2000 (4) SA 1110 (CC), 2001 (8) BCLR 775 para 4 at 1112C—F (SA), 776H—777C (BCLR), where it was made clear that **the central question was whether it was in the interests of justice for a postponement to be granted** by the Constitutional Court. A postponement could not be claimed as of right. The party applying for postponement had therefore to show good cause that a postponement should be granted. The factors to be taken into account included whether the application had been timeously made, whether the explanation given by the party applying for the postponement was full and satisfactory, whether there was prejudice to any of the parties, and whether the application was opposed (para 10 at 922E—F (BCLR), 624B—C (SA); see also para 21 at 925F (BCLR), 627C—D (SA)). The following further factors were added to this list in *Lekolwane & another v Minister of Justice and Constitutional Development* 2007 (3) BCLR 280 (CC) para 17 at 285B—C (surveyed in **Civil Procedure Sibergramme 7 of 2007** (31 October 2007) 17—19)**:** (1) the broader public interest and (2) the prospects of success on the merits. Additional factors that could (non-exhaustively) be added to those already adumbrated were the reason for the lateness of the application for postponement if not timeously made, the conduct of counsel, the costs involved in the postponement, the potential prejudice to other interested parties, the consequences of not granting a postponement, and the scope of the issues that ultimately had to be decided. In the course of balancing those factors, it was of vital importance to keep in mind that what was in the interests of justice would be determined not only by what was in the interests of the parties themselves, but also by what, in the opinion of the Court, was in the public interest. **The interests of justice might require that a litigant be granted more time, but account would also have to be taken of the need to have matters before the Constitutional Court finalized without undue delay** (para 11 at 922F—923B (BCLR), 624C—F (SA), with reference to the *National Police Service Union* case para 5 at 1112F—H (SA), 777C—E (BCLR); see also *Herbstein & Van Winsen The Civil Practice of the Supreme Court of South Africa (Now the High Courts and the Supreme Court of Appeal)* 4 ed (1997) by the late Louis de Villiers van Winsen, Andries Charl Cilliers & Cheryl Loots 666—8, which, together with some of the authorities there cited, was referred to by Van der Westhuizen J in para 11n16 at 922J—923J (BCLR), 624I—J (SA)). A standard way to mitigate prejudice to other parties was for the party asking for the court's indulgence to postpone a hearing – particularly where the postponement was requested at the last minute – to offer, or to be ordered, to pay the costs of the postponement (para 12 at 923B—C (BCLR), 624F—G (SA), with reference to *Herbstein & Van Winsen* 668).

Van der Westhuizen J added that in deciding an application for a postponement, it was imperative to keep the significance of the underlying issues and context in mind (para 3 at 920E (BCLR), 622A (SA)). The matter before the Court in *Shilubana* (a dispute over succession to the chieftainship of a tribe) appeared to pose fundamental questions regarding the interplay between customary law and the Constitution of the Republic of South Africa, 1996, and to raise delicate issues regarding the relationship between traditional community structures and courts of law. How those matters were resolved might be of paramount importance not only to the immediate parties but also to the

community of which they were a part, as well as to the nation (para 5 at 921B—C (BCLR), 623A—B (SA)).

Turning to the facts before the Court in *Shilubana*, Van der Westhuizen J pointed out that the respondent (who sought a postponement) had never filed a notice of intention to oppose the applicant's application for leave to appeal, that an answering affidavit was filed late, that written submissions were filed late by the respondent, and that the application by the respondent for postponement was filed only the day before the scheduled hearing on the merits of the matter. The explanation for the late filing of submissions, as well as the justification advanced for the late date on which the application for postponement was filed, and for the need to postpone at all, was lack of funds. This was understandable as an explanation for the late filing and perhaps even in so far as the application for postponement was concerned, but **the last-minute nature of the application for postponement was inexcusable**. There was no reason why the application could not have been filed at any time after the date of the hearing was determined and furnished to all concerned (which was done just over two and a half months prior to the day of the hearing). Although the services of senior counsel were procured by the respondent two days prior to the scheduled hearing, the lack of funds and the need for proper legal representation of the respondent 'were not sudden developments' (para 14 at 923F—H (BCLR), 625C—E (SA)). Certainly, a postponement was not warranted by the respondent's argument that the non-governmental applicants in the matter were improperly being represented by the State Attorney, particularly in the light of the lateness of the request for a postponement (para 7 at 921F—G (BCLR), 623E—F (SA)).

At the hearing before the Court, junior counsel for the respondents had admitted that he was unprepared to present the respondent's case should the application for postponement be denied. Counsel could not, however, simply presume that an application for postponement would be granted, 'a presumption one makes at the peril of one's client'. In the *National Police Service Union* case para 7 at 1113C—D (SA), 777H—I (BCLR) it had been stated that **ordinarily if an application for a postponement was to be made on the day of the hearing of a case, the legal representatives had to appear and be ready to assist the Court in regard to the application for the postponement itself and, if the application was refused, the consequences that would follow** (para 15 at 923H—924B (BCLR), 625E—G (SA)). Respondent's counsel, despite knowing for some two and a half months that he would have to be prepared to argue the matter in the Constitutional Court, did not prepare and felt no need to communicate that fact to anyone until the day prior to the hearing, when the application for postponement was made. Describing counsel's conduct as going 'from frustrating to astonishing', Van der Westhuizen J recounted that counsel had repeatedly stated that, despite the respondent's lack of funds, he had adamantly refused to do the matter with funding from the Legal Aid Board as the rates of payment were too low and the pace of payments was too slow. Although counsel could not be forced to act on the basis of Legal Aid funding, **he had either to comply with the Court's rules and represent his client properly or to withdraw from the brief timeously**. His client would then be free, through his attorney, to approach a legal practitioner who might be willing to accept the fees and render the required services. The system of state-sponsored legal aid was aimed at providing legal

services to the many people who would not otherwise have access to justice (para 17 at 924C—F (BCLR), 625I—626C (SA), read with para 16 at 924B—C (BCLR), 625G—I (SA)). Counsel's conduct was 'a disservice to his client, to his honourable profession and to the constitutional principles his client seeks to vindicate' (para 18 at 924F (BCLR), 626C (SA)). Counsel's conduct alone, however, could not be decisive of the application for postponement, since the issues at stake were too important not to factor them into the equation. The fact that the courtroom was filled with people who appeared to be interested members of the community underscored that (para 19 at 924G (BCLR), 626D (SA)).

After remarking upon the complaint by (junior) counsel for the respondent that he felt 'overwhelmed and uncomfortable' by the presence of six counsel against him (two for the applicant, and two briefed by each of the two amici curiae, which broadly supported the applicant's case) (as to which, see under '***Equality of arms***' above), Van der Westhuizen J remarked that the interests of the affected parties were too weighty, the importance for the community too high and the benefit of prepared argument too great, to proceed undeterred by those circumstances. In view of the fact that senior counsel was secured at the last minute to represent the respondent, a postponement might result in more helpful argument. When considering the interests of justice, there was room to consider the alignment of both amici with the applicant, the one-to-six counsel ratio in the matter, and the fact that senior counsel could be helpful in wading through difficult and important constitutional issues (para 22 at 926B—C (BCLR), 627E—G (SA)).

Although the Court was not unmindful of the considerable costs occasioned by a postponement and the time, effort and commitment of the parties, the amici, the Court and the community, it was on balance in the interests of justice for the hearing to be postponed. The Court was ultimately persuaded that the benefits to the respondent, the community whose chieftainship was in dispute and the process of constitutional decision-making outweighed the conduct of the respondent's representatives and the costs associated with postponement. **This certainly did not mean that it was generally open for counsel to make eleventh-hour applications for postponements claiming an imbalance of counsel or a lack of preparation**. Only in an exceptional case would an application of this kind succeed, and even then, conduct of the sort displayed by counsel for the respondent was worthy of censure (para 23 at 926C—F (BCLR), 628A—C (SA)).

The latter remarks of Van der Westhuizen J echo, and must be read in the light of, the earlier remarks of the Constitutional Court in *Lekolwane*, emphasizing that it is 'most unusual' for the Court to grant a postponement of a matter before it (para 8 in 2007 (3) BCLR at 283D).

The Court in *Shilubane* proceeded to order that the costs occasioned by the postponement be reserved for determination at the eventual hearing on the merits, since it would be futile to make a costs order against the respondent (whose justification for seeking a postponement was, after all, his inability to fund his own counsel), nor would it make sense for the costs of postponement to be costs in the cause, since the additional costs incurred as a result of the postponement were not related to the ultimate merits of the appeal. Issues regarding funding would be clearer and argument (on costs) might benefit from the presence of senior counsel on the side of both the applicants and the respondent if the matter was held over for determination at the hearing on the merits.

Furthermore, whoever was ultimately successful, the Court would not necessarily award costs in a case involving important constitutional questions (para 24 at 926G—927A (BCLR), 628E—G (SA)).

Preparation by counsel

In ***Shilubana & others v Nwamitwa & others*** **2007 (9) BCLR 919 (CC)** (also reported sub nom ***Shilubana & others v Nwamitwa (National Movement of Rural Women and Commission for Gender Equality as Amici Curiae)*** **2007 (5) SA 620**) Van der Westhuizen J, writing for the Constitutional Court, remarked that counsel who is briefed to argue a matter before the Court must either comply with the rules of the Court and represent his client properly or withdraw from the brief timeously so that other representatives can be approached. **It is not acceptable for counsel to remain on brief, not prepare and bring an application for postponement of the proceedings at the last minute** (para 17 at 924D—E (BCLR), 626A—B (SA), read with para 18 at 924F (BCLR), 626C (SA)). (For a more detailed exposition of the remarks of the Court, see under '***Postponement of Constitutional Court proceedings***' immediately above.)

Unconstitutional statutory provision

In ***Van Vuren v Minister of Justice and Constitutional Development & another*** **2007 (8) BCLR 903 (CC)** the Constitutional Court deprecated the **failure by the State Attorney, Pretoria**, as the legal representative of the two respondents (both Cabinet ministers) **to file a notice of intention to oppose, or any other response, to an application to have a provision of national legislation declared unconstitutional** (para 13 at 908C—D). Although the application was dismissed on the ground that the applicant sought direct access to the Constitutional Court without having made out a valid case for that relief, the Registrar of the Court was directed to bring the judgment to the attention of the Law Society of the Northern Provinces, with a view to procuring the services of an attorney to assist the applicant (a sentenced prisoner), as well as to the attention of the respondents and the State Attorney in Pretoria (para 14 at 908D—E).

In ***Engelbrecht v Road Accident Fund & another*** **2007 (5) BCLR 457 (CC), 2007 (6) SA 96** the Constitutional Court, having declared reg 2(1)*(c)* of the regulations made under the Road Accident Fund Act 56 of 1996 to be invalid, pointed out that no cogent reason had been given by the respondents why the Court should exercise its discretion under s 172(1)(b)(ii) of the Constitution of the Republic of South Africa, 1996 and suspend an order of invalidity. The regulation imposed a condition on the institution of an action for the recovery of a debt and was not necessary for the furtherance of the objects of the legislation governing claims under the Road Accident Fund Act as a whole. The provision had to be struck down or severed from the other provisions in reg 2(1). The legislature was at liberty, if so advised, to respond by amending the statute and substituting an alternative which would be constitutional (para 44 at 471E—H (BCLR), 108H—109B (SA)). Section 172(1)(b)(i) of the Constitution implied, by stating that the Court could make an order limiting the retrospective effect of the declaration of invalidity, that a declaration of invalidity had retrospective effect, but a competent court

had a discretion to make an order that was just and equitable, limiting the retrospective effect of an order of invalidity. The Court in *S v Bhulwana*; *S v Gwadiso* 1996 (1) SA 388 (CC), 1995 (12) BCLR 1579 para 32 at 400B—C (SA), 1590F—G (BCLR) had held that, **as a general principle, an order of invalidity should have no effect on cases which had been finalized prior to the date of the order of invalidity**. That principle was apparently applied in *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC), 1996 (12) BCLR 1559 para 25 at 135G—136A (SA), 1571A—C (BCLR), and there was no reason not to apply it in *Engelbrecht's* case as well (para 45 at 471H—472B (BCLR), 109B—D (SA)).

On ***Road Accident Fund v Mdeyide & another*** **2007 (7) BCLR 805 (CC)**, where the Constitutional Court refused to confirm an order of the High Court declaring s 23(1) of the Road Accident Fund Act 56 of 1996 to be unconstitutional, on account of the possible mental incapacity of the plaintiff and consequent invalidity of the proceedings, see under '**CAPACITY TO LITIGATE: *Person of unsound mind***' above.

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