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FROM THE EDITOR:

This is the 1st electronic edition of the **Judicial Officer** and is also the 1st edition that I am responsible for. I want to thank everyone who has submitted articles for publication and also Ron Laue who assisted me with editing. Naturally opinions expressed by authors are their own and do not necessarily reflect that of the editor or the Judicial Officers Association of South Africa.

Gerhard van Rooyen
Magistrate/Greytown

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THE JUDICIAL OFFICER – GUIDELINES FOR AUTHORS

1. Readers are invited to submit articles, notes, reviews of cases and correspondence to the editor with a view to publication. In general we welcome contributions of 1 000 to 3 000 words.

   We wish to publish articles of practical interest for magistrates that include the several aspects of public law and private law that magistrates encounter every day.

2. Submissions should be in English and all submissions should be submitted by e-mail in MS Word to the editor, Gerhard van Rooyen at gvanrooyen@justice.gov.za . Pages should be numbered. Titles and headings should be kept as short as possible.

3. Footnotes should be kept to a minimum and numbered consecutively with Arabic numerals.

4. Cases and statutes should be cited accurately and fully.

5. It is assumed that contributions are original and have not been submitted for publication elsewhere.

Introductory Concepts of the Sociology of Law: Human Rights Made Easy

DJ Steyn

Additional Magistrate: Mthatha

1 INTRODUCTION

"What interests [the university professor] in the law is the search for real justice ... A difference **today**, however, is that we tend to think of the law within the framework of 'social sciences' - [the] relation [of the law] to political science, economics and **sociology**" (David & Brierley 1985:41)(my emphasis).

Sociology of law implies a ***description*** and ***understanding*** of "Why does the law work the way it does?" (Steyn 1997:11, 13).

The **theoretic** component of sociology of law, as **a *humanist* development strategy**, must be viewed as a ***triangle*** with three *interrelated sides*:

(1) *ETHICS OF LAW* which can be linked to the Bill of [Human] Rights in Chapter Two of the Constitution (Act 108 of 1996) of South Africa.

(2) *SOCIOLOGY OF LAW per se* which enables us to absorb the meaning of and the conflict in the law in our consciousness.

(3) *POLITICS OF LAW* which, in the light of *ETHICS OF LAW* and *SOCIOLOGY OF LAW per se,* postulates proposals for transformation of the South African legal system to be **in harmony with the Bill of [Human] Rights** (Steyn 2000:31 - 32).

The "new" South Africa is characterized by a **constitutional revolution**.

2 THE CONSTITUTIONAL REVOLUTION

2.1 A brief history of the constitutional revolution in South Africa

Effective protection of **human rights** (i.e. a human being's **fundamental rights**) was previously virtually impossible. This was because constitutional law (before 1994) was dominated by the doctrine of parliamentary supremacy. Parliamentary supremacy dictates that parliament is the supreme law-making authority in the state. Consequently, under parliamentary supremacy, every citizen of South Africa, and every organ of the South African state (including the courts), were subservient to parliament (De Waal *et al* 1999:2-3; Hosten *et al* 1995).

The *Interim* Constitution (Act 200 of 1993) took effect on 27 April 1994, the very same day that the first truly democratic elections in South Africa took place. This *Interim* Constitution brought about three fundamental changes:

(1) Racial discrimination (associated with the infamous **apartheid**) was brought to an end.
(2) A state with a strong central government (four provinces) was replaced by a state with strong federal elements (nine provinces - each with its own provincial government).
(3) The doctrine of parliamentary supremacy was replaced by the doctrine of constitutional supremacy (De Waal *et al* 1999:2-3).

This *Interim* Constitution was later replaced by the “new” or “final” Constitution. This new Constitution took effect on 4 February 1997 and it asserts that the Constitution is the supreme law of the Republic.

Since it is said that the doctrine of parliamentary supremacy was replaced by the doctrine of constitutional supremacy, the latter prompts us to take a closer look at the concept of **constitutional supremacy**.

2.2 Constitutional supremacy

Constitutional supremacy means that the Constitution of Country A, is the supreme law or *lex fundamentalis* of this Country A (Botha 1998:15-16).

The concept of constitutional supremacy is closely related to **the principle of constitutionalism**.

2.3 What is the principle of constitutionalism?

The principle of constitutionalism – or the Rule of Law, which also equates with the principle of legality – means that the government of Country A is compelled to govern in accordance with the Constitution of the said Country A.

A true democracy demands **full** recognition of the principle of constitutionalism.

2.4 Full recognition of the principle of constitutionalism

Full recognition of the principle of constitutionalism requires that the Constitution **both**

* prescribes a **procedure** for passing legislation (i.e. an Act); and
* contains a **Bill of (Human) Rights** against which the contents of the mentioned legislation can be tested.

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Consequently, full recognition of the principle of constitutionalism is related to an understanding of the **application** of the Bill of Rights in accordance with the new Constitution of South Africa.

3 THE APPLICATION OF THE BILL OF RIGHTS

3.1 Elements of application (of the Bill of Rights)

Application of the Bill of Rights (i.e. chapter two of the Constitution of 1996) comprises of three elements:

(1) Who is **protected** by the Bill of Rights?
(2) Who is **bound** by the Bill of Rights?
(3) **Retroactive** application of the Bill of Rights.

We will now proceed to take a closer look at each of these **elements** of application of the Bill of Rights.

3.2 Element 1: Who is PROTECTED by the Bill of Rights?

3.2.1 **Natural** persons

All natural persons (i.e. private individuals), not only citizens of the Republic of South Africa, are entitled to the most of the (human or) fundamental rights in the Bill of Rights.

3.2.2 **Juristic** persons

Section 8(4) of the Constitution stipulates that a juristic person becomes in certain circumstances entitled to some of the fundamental rights in the Bill of Rights, provided that **this**

(1) Is required by the nature of the particular **fundamental right**; and

(2) Is required by the nature of the particular **juristic person.**

This means that:

A juristic person is **not** *per se* entitled to protection by the Bill of Rights, b**ut that** a juristic person becomes entitled to protection by the Bill of Rights; **provided** that this particular juristic person is being used by natural persons for the collective exercise of these natural persons' fundamental rights (see also section 38 of the Constitution).

3.3 Element 2: Who is BOUND by the Bill of Rights?

3.3.1 **Vertical** and **horizontal** application of the Bill of Rights

3.3.1.1 **Vertical** application

The Constitution stipulates that all organs of the state must respect the fundamental rights in the Bill of Rights. That is why the Bill of Rights has **vertical** application between

* The state; and
* Subjects of the state

(See **section 8(1)** of the **Constitution**; Steytler 1998:15).

This **vertical** application of the Bill of Rights must be distinguished from the **horizontal** application of the Bill of Rights.

3.3.1.2 **Horizontal** application

The Constitution stipulates that

* Natural persons (private individuals); and
* Juristic persons (companies)

in certain circumstances must respect *OTHER* **NATURAL persons'** fundamental rights in the Bill of Rights. That is why the Bill of Rights has **horizontal** application between private individuals (See section **8(2)** of the **Constitution**; Steytler 1998:15).

Please note that this horizontal application of the Bill of Rights implies that the South African common law and indigenous law is open to far-reaching changes (see par 4).

The Bill of Rights is also **directly** and **indirectly** applicable to "the law".

3.3.2 **Direct / indirect** application of the Bill of Rights to the law

3.3.2.1 **Direct** application of the Bill of Rights

3.3.2.1.1 What is the purpose of direct application of the Bill of Rights?

The purpose of direct application of the Bill of Rights is to determine whether there **is** an inconsistency between

* the law; and
* the Bill of Rights,

as a result of an *INTERPRETATION*

* of the law; and
* of the Bill of Rights.

3.3.2.1.2 What does the direct application of the Bill of Rights entail?

Remember that "all law" comprises of the common law, legislation, case law and indigenous law.

Section 8(1) of the Constitution stipulates that the Bill of Rights

* applies to all law; and
* binds all organs of the state on all levels.

Implication 1: In terms of this section 8(1) of the Constitution, the Bill of Rights has DIRECT **VERTICAL application**.

Strydom (1995) is of opinion that private law matters deal frequently with the common law and with the indigenous law.

Implication 2: In terms of section 8(1) of the Constitution, the Bill of Rights has also *DIRECT* **HORIZONTAL application**. This second implication 2 is substantiated by section 8(2).

Section 8(2) of the Constitution stipulates that the Bill of Rights binds

* natural persons; and
* juristic persons

to the extent that the Bill of Rights is applicable.

This **direct** application of the Bill of Rights to the law must be distinguished from the **indirect** application of the Bill of Rights to the law.

3.3.2.2 **Indirect** application of the Bill of Rights

3.3.2.2.1 What is the purpose of indirect application of the Bill of Rights?

The purpose of the indirect application of the Bill of Rights is to determine whether inconsistency **can be avoided** between

* the law; and

* the Bill of Rights,

as the result of an *INTERPRETATION*

* of the law; and
* of the Bill of Rights.

3.3.2.2.2 What does the indirect application of the Bill of Rights entail?

Section 39(2) of the Constitution stipulates that

* when *INTERPRETING* **ANY legislation**; and
* when *DEVELOPING* **the [South African] COMMON law or INDIGENOUS law**:

every court, tribunal or forum **must promote** the spirit, purport and objects of the Bill of Rights.

Implication 1: In terms of section 39(2) of the Constitution, the Bill of Rights has *INDIRECT* VERTICAL **application** (cf. Steytler 1998:3).

Strydom (1995) is of opinion that private law matters deals frequently with the common law and with the indigenous law.

Implication 2: In terms of section 39(2) of the Constitution, the Bill of Rights also has *INDIRECT* **HORIZONTAL application**.

3.4 Element 3: RETROACTIVE application of the Bill of Rights

In ***Pennington v Minister of Justice* 1995 (3) BCLR 270 (C)** the Constitutional Court emphasized that the 1996 Constitution is **not** retrospective, **unless** such retrospectivity of the 1996 Constitution is demanded in the interests of justice (cf. De Waal *et al* 1999:72-73; ***Pienaar v Lid van die Uitvoerende Raad: Gesondheid,***

Superintendent: Wes-Koppies Hospitaal, en Nasionale Minister van Gesondheid **CCT 26/01** ***Government Gazette*** **22750 of 19 October 2001**).

The application of the Bill of Rights requires us to take note of the **interpretation** clause (i.e. section 39) of the South African Constitution.

4 THE INTERPRETATION CLAUSE

4.1 Section 39(2)

Section 39(2) of the Constitution stipulates that

* when *INTERPRETING* **ANY legislation**; and
* when *DEVELOPING* **the [South African] COMMON law or INDIGENOUS law**:

every court, tribunal or forum **must promote** the spirit, purport and objects of the Bill of Rights.

Please note that such promotion of the spirit, purport and objects of the Bill of Rights, implies a revolution with regard to **the INTERPRETATION of statutes** in South Africa (cf. Botha 1998: v).

To elaborate:

In ***Public Carriers Association v Toll Road Concessionaries*** **1990 (1) SA 925 (A)** the Supreme Court of Appeal declared

* that **the OBJECT of the legislation (or act)** [which is established by means of **contextual** interpretation] is a concrete or real concept; and
* that **the INTENTION ["BEDOELING"] of the legislator** [which was *before* 1994 established by means of **textual** interpretation] is a historical search for the imaginary will or intention of a group of persons.

The important implication appears to be the following:

* under the doctrine of *parliamentary* supremacy we tend to speak of **the INTENTION of the legislator**; but
* under the doctrine of *constitutional* supremacy we must speak of **the OBJECT of the legislation** (cf. Botha 1998:48-49).

Please note that today the most important principle of interpretation of statutes is
* To *determine* **the OBJECT of the legislation** in the light of the Bill of Rights; and
* To *apply* this determined **OBJECT of the legislation** to the **FACTS of the case** (Botha 1998: 47-50).

The spirit, purport and objects of the Bill of Rights are determined in terms of section 39(1).

4.2 Section 39(1)

Section 39(1) of the Constitution stipulates that when *INTERPRETING* the **Bill of Rights**:
every court, tribunal or forum
(a) **must** *promote* the values that underlie an open and democratic society based on [the ***core values*** of] ***human dignity***, ***equality*** and ***freedom***;
(b) **must** *consider* international law; and
(c) **may** *consider* foreign law.

Please take note of the following remarks with regard to this section 39(1):

(1) When the South African Constitution is read as a whole, it is imperative to view it as resting (or being built) upon three pillars (or core values) :

human dignity, ***equality*** and ***freedom***. The true importance of these three core values, will become clear when we take a look at the **supremacy** clauses of the South African Constitution (par 5).

(2) Section 39(1) of the Constitution is mandatory. Why ? Because every court, tribunal or forum **must** consider international law. But, with regard to this compulsory consideration of international law, every court, tribunal or forum **may** consider (municipal) foreign law with regard to **how** a foreign municipal court, which applied its' **OWN (local) law** *WITHIN* **a SUPREME constitution**, interpreted this corresponding (human or) fundamental right.

(3) Section 39(1) of the Constitution stipulates that every court, tribunal or forum

* must only consider international law; and
* must not necessarily apply international law.

It is imperative to note that this judicial discretion in terms of section 39(1) (b) is not much of a discretion. Why ? Because **section 232** of the Constitution stipulates that customary international law is part of the South African law, provided that this customary international law is **not** inconsistent

* with the Constitution; or
* with an Act of Parliament.

With regard to this section 232, section 233 of the Constitution must be considered.

Section 233 of the Constitution stipulates that when **ANY legislation** is *INTERPRETED*, every court **must** prefer any reasonable interpretation that is consistent over any alternative interpretation of this legislation that is inconsistent with international law.

It is trite that the Constitution is the supreme law of South Africa. This prompts us to take a look at the **supremacy** clauses in the South African Constitution.

5 THE SUPREMACY CLAUSES

1. Section 1(c) of the Constitution stipulates that the Republic of South Africa is a sovereign and democratic state, founded on the values of **supremacy of the Constitution** and the rule of law.

2. Du Plessis (in Botha 1998:41) is of opinion that this section 1(c) merely **anticipates** the supremacy of the Constitution, where section 2 **ascertains** the supremacy of the Constitution.

3. This section 2 of the Constitution stipulates that the Constitution is the **supreme law** of South Africa.

4. This section 2 must be read together with section 7(1); section 7(2); section 8(1); and section 8(2) of the Constitution.

5. Section 7(1) of the Constitution stipulates that the **Bill of Rights** is a cornerstone of democracy in South Africa; enshrines the (human or) fundamental rights of all people in South Africa; and affirms the democratic values of ***human dignity***, ***equality*** and ***freedom***.

6. Section 7(2) of the Constitution **compels** the state to respect; protect; promote; and fulfil the fundamental rights in the **Bill of Rights**.

7. Section 8(1) of the Constitution stipulates that the **Bill of Rights** is applicable to all law; and binds all organs of the state on all levels.

8. Section 8(2) of the Constitution stipulates that the **Bill of Rights** binds natural persons; and juristic persons to the extent that the Bill of Rights is applicable.

9. If all the above-mentioned sections are read together, it becomes clear that this Constitution is **supreme**; and that all and everybody are subordinate to this Constitution.

10. Although section 2 of the Constitution is formally known as the **supremacy** clause, has section 1 of the Constitution a HIGHER **ENSHRINING-status** than section 2. Why? Because section 74(1) of the Constitution stipulates that ***section 1*** of the Constitution may be amended, **provided that 75%** of the members of the National Assembly; and 6 of the 9 provinces in the National Council of Provinces support such an amendment.

11. Please note that NO *OTHER* **section** in the Constitution is as strongly **enshrined** as this section 1. Further, section 74(2) of the Constitution stipulates that the ***Bill of Rights*** in the Constitution may be amended, **provided that 2/3** of the members of the National Assembly; and 6 of the provinces in the National Council of Provinces support such an amendment.

12. **Implication 1:** Section 1 of the Constitution is the **most important** section in the supreme Constitution.

13. **Implication 2:** If section 1 (as the most important section) is read together with section 74(1), then every (human or) fundamental right in the Bill of Rights which relates to any of the three core values of *human dignity*, *equality* or *freedom*, may **ONLY be amended** if **75%** of the members of the National Assembly; and 6 of the 9 provinces in the National Council of Provinces support

such an amendment: **contrary** to the popular (but **faulty**) belief that only a "2/3-majority" is needed "to ***rewrite*** the **Bill of Rights** in the South African Constitution".

14. In certain circumstances an enshrined fundamental right of an individual may be limited. This necessitates a closer look at the **limitation** clause (i.e. section 36) in the Constitution.

6 THE LIMITATION CLAUSE

6.1 What does LIMITATION of a FUNDAMENTAL RIGHT entail?

The (human or) fundamental rights in the Bill of Rights are **not** absolute. Why? Because one person's fundamental right(s) **are limited**

* by other persons' fundamental rights; and
* by justifiable needs of society (cf. De Waal *et al* 1999:140-141).

The fundamental rights in the Bill of Rights are protected against **limitation** by the state. That is why the limitation clauses are **RESTRICTIVELY interpreted** with regard to the **vertical** application of the Bill of Rights. Overly simplified, ***restrictive*** **interpretation** requires that the law must be interpreted, as far as possible, **in favour** of *the subject of the state* [because the *subject of the state* is in a **much weaker** ***power*** *position* than the **powerful** *state* (Burns 1998:29)].

Section 36(1) is the most important part of the limitation clause in the South African Constitution.

6.2 Section 36(1)

In ***S v Makwanyane*** **1995 (6) BCLR 665 (CC); 1995 (3) SA 391 (CC)** the Constitutional Court adopted a "proportionality enquiry or test" with regard to the

application of the limitation clause in the *interim* Bill of Rights in the *interim* Constitution. This *proportionality test* has become a standard reference when the Constitutional Court considers **the LEGITIMACY of any limitation** in terms of section 36(1) of the 1996 Constitution (Burns 1998:30-31; De Waal *et al* 1999:151-153). The latter was recently also confirmed by the Constitutional Court in ***S v Manamela and Others*** **2000 (1) SACR (CC)**.

When section 36(1) of the Constitution is read together with the mentioned *proportionality test* in **Makwanyane**, section 36(1) purports the following:

A fundamental right in the Bill of Rights may only be limited in terms of **law of general application**, provided that this limitation is **reasonable and justifiable in an open and democratic society based on the three core values of**

(1) human dignity;

(2) equality; and

(3) freedom.

During consideration of whether this limitation is reasonable and justifiable in an open and democratic society, competing fundamental rights are being weighed up against one another. This weighing up requires the **application of a *proportionality test***. This *proportionality test* requires a balance between

* the harm caused with this limitation; and
* the benefits that this limitation seeks to achieve.

During this *proportionality test*, the following **factors** are taken into consideration:

(1) the nature of this fundamental right;

(2) the nature and extent of this limitation;

(3) the importance of the purpose of this limitation;

(4) the causal relation between

  * this limitation; and

* the purpose of this limitation;

(5) Is there any *OTHER* **LESS restrictive** manner to render the purpose of this limitation **EQUALLY effective**?

In short, in terms of this section 36(1) a fundamental right in the Bill of Rights may only be limited **provided that** the following three *requirements* are met:

(1) This limitation must be in the form of **law of general application** (i.e. "the 'law' must apply to a number of persons (generally) and not to an individual case or group of cases). In other words, the law, be it legislation, a rule of common law or customary [indigenous] law, must apply to an unlimited number of people" (Burns 1998:30).

(2) This limitation must be reasonable and justifiable in an open and democratic society based on the three **core values** of

[i] ***human dignity***;

[ii] ***equality***; and

[iii] ***freedom***.

(3) The *proportionality test* must be applied.

De Waal *et al* (1999:135) emphasize that, in accordance with the principle of constitutional supremacy, "a court **must test** a challenged law or conduct against **ALL possible** relevant provisions in the Bill of Rights, whether the applicant relies on them or not". De Waal *et al* expressly warns of the **danger** "to identify and focus only on 'the most relevant [fundamental] right' ".

Please note that the author's ***tri - angular*** approach of sociology ***of law*** is very "user-friendly" with regard to the **warning** of De Waal *et al*. Why ?

* Because when dealing with **ethics of law** (cf. Steyn 1997:10; 1998:30; 1999(a):18; 1999(b):60; 2000:32) the author attempts to identify **ALL possible** relevant provisions in the Bill of Rights; and

* Because when dealing with **sociology of law** (cf. Steyn 1997:11; 1998:30; 1999(a):19; 1999(b):61; 2000:32) the author attempts to establish which of these possible relevant provisions in the Bill of Rights the applicant(s) are entitled to.

Section 36(2) is the second part of the limitation clause in the South African Constitution.

6.3 Section 36(2)

Section 36(2) of the Constitution stipulates that no law may limit a fundamental right in the Bill of Rights.

* except in terms of section 36(1) of the Constitution; or
* except in terms of any other provision in the Constitution.

When a court finds

* that a fundamental right in the Bill of Rights has been infringed; and
* that this infringement does not satisfy the test for a valid limitation of a fundamental right, then this court must award an appropriate **remedy** for this infringement of the fundamental right (De Waal *et al* 1999:166).

7 REMEDIES

7.1 NORMAL remedies

7.1.1 Remedies with regard to the **vertical** application of the Bill of Rights

Section 172(1) of the Constitution stipulates that when a competent court decides that a particular *law* or *conduct* of the state is **unconstitutional**, the court **must** then declare that **part of this *law* or *conduct* of the state WHICH IS INCONSISTENT WITH THE CONSTITUTION**, is **invalid**. (In this regard, such a declaration by the High Court or Supreme Court of Appeal, must, in terms of section 167(5) and section 172(2) of the Constitution, be ***confirmed*** by the **Constitutional Court** before such a declaration has any force.)

7.1.2 Remedies with regard to the **horizontal** application of the Bill of Rights

Section 8(3) of the Constitution stipulates the following:

(1) The court firstly establishes whether **legislation** provides a remedy for the infringement of the fundamental right.

(2) If legislation provides no remedy, then the court establishes whether the **common law** provides a remedy for the infringement of the fundamental right.

(3) If the common law provides no remedy, then the court **must develop** the rules of the **common law** to provide a remedy for the infringement of the fundamental right.

7.2 OTHER remedies

7.2.1 What are these **other** remedies ?

If a party to Bill of Rights-litigation proposes an **alternative** remedy in stead of a "normal" remedy, then the onus is on this party to justify this alternative remedy.

We now proceed to take a very brief look at some of the possible alternative remedies.

7.2.2 Damages

In **Fose v Minister of Safety and Security 1997 (3) SA 786 (CC); 1997 (7) BCLR 851 (CC)** it was said that if a fundamental right is infringed, it is possible that **both**

* delictual damages; and
* constitutional damages

may be awarded (De Waal *et al* 1999:181).

7.2.3 Exclusion of evidence

7.2.3.1 With regard to a **civil** case

Evidence which is obtained in a manner that violates a fundamental right, must be excluded if the **admission** of this evidence

* would render the trial unfair; or
* would be detrimental to the administration of justice (cf. De Waal *et al* 1999:183).

(See Schwikkard *et al* 2002:249 to 251 for a discussion on the admission of **unconstitutionally obtained evidence**.)

7.2.3.2 With regard to a **criminal** case

Section 35(5) of the Constitution stipulates that evidence which is obtained in a manner that violates a fundamental right, must be excluded if the **admission** of this evidence

* would render the trial unfair; or
* would be detrimental to the administration of justice (cf. De Waal *et al* 1999: 183).

Note that the procedure to follow is that the court must hold a **trial within a trial** (Du Toit *et al* 24-98L). (For a discussion on the admission of **unconstitutionally obtained evidence**, see Du Toit *et al* 24-98H to 24-98O and Schwikkard *et al* 2002:167-248.)

7.2.4 Administrative law remedies

In **Maharaj v Chairman of the Liquor Board 1997 (1) SA 273 (N); BCLR 248 (N)** it was decided that

* if a statute prescribes grounds for review; and
* these grounds for review are more strict than those grounds for review which are demanded by the Constitution,

then the statute may be declared invalid (De Waal *et al* 1999:183).

7.2.5 Interdict

An interdict may be obtained

* to restrain the wrongdoer from violating a fundamental right; or
* to compel the wrongdoer to discontinue the violation of a fundamental right.

The normal procedures and rules with regard to "normal" interdicts also apply with regard to "constitutional" interdicts (De Waal *et al* 1999:185).

It was said that equality is one of the three core values of the Constitution. This prompts us to take a closer look at the **equality** clause (i.e. section 9) of the Constitution.

8 THE EQUALITY CLAUSE

8.1 The constitutional commitment to EQUALITY

It is very important to distinguish between **formal** and **substantive** equality.

8.1.1 **Formal** equality

Formal equality demands that the law must **treat** individuals **equally**, regardless of these individuals' circumstances. Why ? Because formal equality **ignores** an analysis of the true economic and social disparities

* between individuals; and

* between groups of individuals (Albertyn & Kentridge 1994:152-153; De Waal *et al* 1999: 190-191; Van Reenen 1997: 153).

For example, formal equality is achieved if all children, including deaf children, are educated according to the same school curriculum (De Waal *et al* 1999:190).

Both Albertyn & Kentridge (1994) and Van Reenen (1997) emphasize **substantive** equality in stead of formal equality.

8.1.2 **Substantive** equality

Substantive equality demands that the law must ensure **equality of outcome** for individuals, taking into account these individuals' circumstances. Why ? Because substantive equality **demands** an analysis of the true economic and social disparities

* between individuals; and
* between groups of individuals (Albertyn & Kentridge 1994:152-153; De Waal *et al* 1999:190-191; Van Reenen 1997:153).

For example, substantive equality demands that the law must ensure equality of outcome for individuals, but, if deaf children are educated according to the same school curriculum as "normal" children (as according to formal equality), then it is

very likely that these deaf children are receiving an education which is inadequate for their special needs (De Waal *et al* 1999:190).

The implication appears to be the following:

To realize the right of equality of these deaf children, it may be necessary to treat these deaf children different than normal children (De Waal *et al* 1999:190).

Please note that according to **Brink v Kitshoff NO 1996 (4) SA 197(CC); BCLR 752 (CC)**, the equality clause supports **substantive** equality. Please bear this in mind when we proceed to take a closer look at the equality clause in the South African Constitution.

8.2 What purports SECTION 9 of the Constitution ?

8.2.1 Section 9(1) ["equality-guarantee"]

Section 9(1) of the Constitution stipulates that every person

* is equal before the law; and
* has the right to equal protection and benefit of the law.

(Please note that the following discussion from Albertyn & Kentridge is amended from the *interim* Constitution to the final Constitution.) Albertyn& Kentridge (1994:153-160) is of opinion that this section 9(1) must be interpreted according to substantive equality. According to substantive equality, section 9(1) provides for remedial measures. These remedial measures in turn provides for affirmative action.

Van Reenen (1997:154-156) is basically of the same opinion as Albertyn & Kentridge (1994).

8.2.2 Section 9(2) ["discrimination-guarantee"]

Section 9(2) of the Constitution stipulates that equality includes the full and equal enjoyment of all constitutional rights and freedoms. To promote the achievement of this equality, remedial measures *MAY* [and **not** *MUST*] be taken. These remedial measures must be designed to protect and develop

* persons; or
* categories of persons,

disadvantaged by unfair discrimination.

(Please note that the following discussion from Albertyn & Kentridge is amended from the *interim* Constitution to the final Constitution.) Albertyn & Kentridge (1994:172-174) is of the opinion that section 9(2) acknowledges that remedial measures is necessary for the achievement of equality. That is why affirmative action policies must promote substantive equality.

Van Reenen (1997:154-156, 161-162) is of the opinion that this section 9(2) is superfluous. Why ? Because Van Reenen is of the opinion that (a substantive interpretation of) section 9(1) already provides for affirmative action.

8.2.3 Section 9(3) ["prohibition of unfair discrimination - vertical"]

Please note that the right to equality in section 8(2) of the *interim* Constitution, is extended in section 9(3) of the final Constitution through the addition of the following **listed grounds**:

(1) birth;
(2) marital status; and
(3) pregnancy.

Section 9(3) of the Constitution stipulates that the ***state*** may *NOT* **unfairly** discriminate **directly** or **indirectly** against any person on one or more of the following (listed) grounds:

(1) birth;
(2) marital status;
(3) pregnancy;
(4) race;
(5) gender;

(6) sex;
(7) ethnic or social origin;
(8) colour;
(9) sexual orientation;
(10) age;
(11) disability;
(12) religion;
(13) conscience;
(14) believe;
(15) culture; and
(16) language.

The implication appears to be the following:

Section 9(3) of the Constitution contains the prohibition of **unfair** discrimination in terms of the **listed grounds** with regard to the **vertical** application of the Bill of Rights. These listed grounds refer to the 16 listed grounds in section 9(3) of the Constitution.

Albertyn & Kentridge (1994:164-167) is of the opinion that **direct** discrimination occurs if one person

* is disadvantaged simply on the ground of the person's **race**, **sex**, **colour** or whatever the **distinguishing feature(s)** may be; or
* is disadvantaged simply on the basis of some **characteristic(s)** *SPECIFIC* to members of a **particular group** (cf. Van Reenen 1997:159).

For example, an employer refuses to employ A. Why ? Because A is a *WHITE* [i.e. **race**] *MALE* [i.e. **gender**] (**Public Servant's Association of South Africa v Minister of Justice 1997 (3) SA 925 (T); 1997 (5) BCLR 577 (T)**).

Albertyn & Kentridge (1994:164-167) is of the opinion that **indirect** discrimination occurs

* when an apparent neutral policy is applied, and
* the *application* of this apparent neutral policy adversely affects a **disproportionate number of** members of a **certain group** (cf. Van Reenen 1997:159).

For example, a pension scheme is available only to full-time workers. On "face-value" there is no **gender** discrimination to distinguish between part-time workers and full-time workers. But, **a DISPROPORTIONATE number of** members of a **certain group** (i.e. **PART-time workers**), are women. These women are attempting to combine **employment OUTSIDE the house** with **childcare**. "Hence a disproportionate number of women are ineligible for these pension benefits, and these women are therefore victims of **indirect** discrimination"(Albertyn & Kentridge 1994:165).

It was said that section 9(3) relates to the **vertical** application of the Bill of Rights. In similar vein can it be said that section 9(4) is related to the **horizontal** application of the Bill of Rights.

8.2.4 Section 9(4) ["prohibition of unfair discrimination - horizontal"]

Section 9(4) of the Constitution stipulates that ***ONE person*** may *NOT* **unfairly** discriminate **directly** or **indirectly against** any ***OTHER person*** on one or more of the **listed grounds** in section 9(3) of the Constitution. National legislation must be enacted to **prevent** or **prohibit** unfair discrimination [on the horizontal level].

The implication appears to be the following:

Section 9(4) of the Constitution contains the prohibition of **unfair** discrimination in terms of the **listed grounds** with regard to the **horizontal** application of the Bill of Rights.

With regard to the mentioned national legislation to be enacted, Van Reenen (1997:165)is of the opinion that a "Civil Rights Act" will promote the **horizontal** application of the Bill of Rights.

Please note that section 9(5) of the Constitution contains a **REBUTTABLE presumption** that discrimination based on any of the listed grounds, is **unfair** discrimination.

8.2.5 Section 9(5) ["rebuttable presumption"]

Section 9(5)of the Constitution stipulates that if

* any discrimination by the ***state***; or
* any discrimination by a ***private individual***

in terms of any **listed ground** in section 9(3) of the Constitution is proved, then this discrimination is **presumed UNFAIR**, unless the contrary is proved.

This contrary is proved

* if the other party proves that this discrimination is **not** unfair discrimination; or
* if the other party proves that this discrimination is **justifiable** in terms of section 36 of the Constitution (see par 8.3).

Section 9(5) applies to both **direct** and **indirect** discrimination (cf De Waal *et al* 1999:210; par 3.3.2).

We will now proceed to take a closer look at the different **phases** with regard to an **enquiry** into unfair discrimination.

8.3 The PHASES with regard to an ENQUIRY to unfair discrimination

(Please note that the following discussion of **Harksen v Lane NO 1998 (1) SA 300 (CC); 1997 (11) BCLR 1489 (CC)** is changed from the *interim* Constitution to the final Constitution.)

In **Harksen v Lane** it was decided that the **phases** with regard to an **enquiry** into the violation of **section 9** of the Constitution, must occur as follows:

PHASE 1: Does the provision or conduct differentiate

* between people; or
* between categories of people ?

[i] **If this provision or conduct DOES differentiate as such:**

↳Is there a **CAUSAL relation** between

* the limitation; and
* the purpose of the limitation ?

[ii] **If there is NO causal relation:**

↳Then there is **differentiation** in terms of section 9(1) of the Constitution.

[iii] **If there IS a causal relation:**

↳Then there may be **differentiation** in terms of section 9(1) of the Constitution.

PHASE 2: [i] Does the **differentiation** amount to **discrimination** ?

(a) If the differentiation **IS based** on a **listed ground** in section 9(3) of the Constitution, then there is **discrimination**.

(b) If the differentiation **is NOT based** on a **listed ground** in section 9(3) of the Constitution, then there is **discrimination**, provided that this differentiation has the **potential**

* to impair a person's **human dignity**; or

* to affect a person adversely in a comparably serious manner.

[ii] If the differentiation does amounts to discrimination, does the **discrimination** amount to **UNFAIR discrimination** ?

(a) If the discrimination **IS based** on a **listed ground** in section 9(3) of the Constitution, then in terms of section 9(5) of the Constitution it is **presumed** that the discrimination amounts to **UNFAIR discrimination**.

(b) If the discrimination **is NOT based** on a **listed ground** in section 9(3) of the Constitution, then the complainant **must PROVE** that the discrimination amounts to **UNFAIR discrimination**.

If the discrimination does **not** amount to unfair discrimination, then there is **no** violation of section 9(3) or section 9(4) of the Constitution.

PHASE 3: If the discrimination **does** amount to unfair discrimination:

↳Is the infringement **justifiable** in terms of section 36 of the Constitution ?

When determining whether "the **discrimination** does amount to **UNFAIR discrimination**", certain **factors** must be taken into account.

8.4 FACTORS with regard to " Does this discrimination amount to UNFAIR discrimination ? "

Please note that section 9(3) and section 9(4) of the Constitution

* does **not** prohibit discrimination; but
* **does** prohibit ***unfair*** discrimination.

In the mentioned **Harksen v Lane**, it was decided that **UNFAIR discrimination** is discrimination with an **unfair IMPACT** on **the VICTIM of the discrimination**. (The author is of the opinion that his conception of **sociology of law** will enable the Constitutional Court and other courts to determine **such IMPACT** on the said **victim** of discrimination.) Unfair discrimination principally means treating people, who are inherently **equal in HUMAN DIGNITY**, *differently* in a way which ***impairs*** these people's **fundamental HUMAN DIGNITY** as human beings (De Waal *et al* 1999:201). In **S v Makwanyane 1995(3) SA 391 (CC); 1995 (6) BCLR 665 (CC)** the Constitutional Court emphasized that **human dignity** and the right to life are the **most important** (human or) fundamental rights in the Bill of Rights (De Waal *et al* 1999: 217)(cf. par 6.8.1).

In **Harksen v Lane** the Constitutional Court held that the following **factors** must be taken into account in determining whether discrimination has an **unfair IMPACT** on **the VICTIM of discrimination**:

(1) [i] The complainant's **position** in society; and

[ii] Was this complainant in the **past** a victim of discrimination ?

(The latter appears to be a very important consideration. Why ? Because almost 100% of *ALL* **WHITE males**, [with the exclusion of the "medical unfit or disabled",] which is currently the main "target-victims" of affirmative action policies, were before 1994 forced to do 1-4 years [i.e. **lost** 1-4 years of their lives] of compulsory military service (*Rapport*, 19 December 1999:20). Thousands of these white males died . Further, many of these white males suffer today from physical mutilation or injury due to the [apartheid] compulsory military service. Many of these white males and their families still suffer from psychological injuries due to this compulsory military service - cf *Rapport*, 19 December1999:20. Please note that ***none*** of the so-called "non-

white" males nor women [from any "colour"] was **forced** to do such compulsory military service. Here the implication thus appears to be that most of these **WHITE males**, which is currently the main "target-victims" of affirmative action, were in the **past** victims of discrimination.)

(2) [i] The **nature** of this discriminating conduct or provision; and

[ii] The **purpose** sought to be achieved by this discriminating conduct or provision.

(3) [i] The **extent** to which this discriminating conduct or law **impaired** the complainant's **fundamental right**; and

[ii] Did the discriminating conduct or law **impair** the complainant's

fundamental HUMAN DIGNITY ?

The **CUMULATIVE effect** of these factors determine whether the discrimination will have an **unfair IMPACT** on **the VICTIM of the discrimination**. According to the Constitutional Court, these factors must be assessed **objectively** (De Waal *et al* 1999: 201). In this regard the author is of the opinion that his concept of **sociology of law** will be able to assist the courts with this **objective** assessment. Why ? Because (1) the author applied Berger's phenomenological approach in the author's conception of sociology of law (Steyn 1997), and (2) phenomenology can be classified as an **objective** [i.e. value-free] epistemology (Steyn 1997:5).

The author's proposed sociology of law also relates to the implied plea of De Waal *et al* for a sociology of law. Why ? Because to determine whether the violation of a fundamental right did occur, the court *NEEDS* **SOCIOLOGICAL data** with regard to the **impact** of the legislative restriction on society (De Waal *et al* 1999:143). And in this regard De Waal *et al* (1999:78) acknowledges that the courts are **not** able

* to **ascertain** the needs of society; and
* to **respond** to these needs of society.

Unfair discrimination is frequently related to **affirmative action**.

9 AFFIRMATIVE ACTION

9.1 General

Affirmative action suggests **PREFERENTIAL treatment** for disadvantaged groups of people. This preferential treatment occurs mostly

* in terms of **race**; or
* in terms of **gender** (De Waal *et al* 1999:212).

Affirmative action can be viewed

* as an **exception** to the right to equality; or
* as a **part** of the right to equality (De Waal *et al* 1999:212).

9.2 Affirmative action as an EXCEPTION to the right to equality

Affirmative action as an **exception** to the right to equality, views affirmative action as **reverse** discrimination. Reverse discrimination

* **favours** those discriminated against in the past; and
* **discriminates** against those who were favoured in the past (De Waal *et al* 1999: 212).

With regard to affirmative action as **reverse** discrimination, a point in case is evident by the 1998 matric results of the Mpumalanga Province. In the local news (*Monitor*; 7 May 1999) it appears that there was an "unnatural" increase (about 20%) in the percentage of matrics that passed in 1998, compared with the percentage of matrics that passed in 1997. Then a court order was obtained, in terms of which all

The results from the **remark** revealed the following:

* There were **black** pupils that **passed** in terms of the **initial** results, but who **failed**

in terms of the **remarked** results.

* There were **white** pupils
  - that **failed** in terms of the **initial** results, but who **passed** in terms of the **remarked** results; or
  - that obtained **poorer** marks in terms of the **initial** results, but who obtained **better** marks in terms of the **remarked** results.

Consequently it appears, that with regard to the mentioned **white** students, **reverse** discrimination had occurred.

In a similar vein it appears that "mental rape" occurred also with regard to the 1999 matric results of the Free State Province. A list of the 100 best matrics in the Free State Province,

* was **not** based on true results obtained in the matric examination; but
* was **adjusted** by the Department of Education of the Free State Province to give recognition to previously disadvantaged schools.

"The alphabetical list of the 100 best performers consists of **50 candidates with the highest marks** and **50 candidates who did good in 'difficult circumstances' "** (*Die Volksblad*, 29 December 1999:1)(my emphasis).

Dr Peliwe Lolwana, chairperson of Safsert[i.e. the South African Certification Board], confirmed that in 2000, **all** "previously disadvantaged" [i.e. black and ***not*** white or "coloured"] matrics, who wrote their examinations in English, but did not

speak English as their first language, **received a "pasella" of 5% on their examination results** (*Die Volksblad*, 28 December 2001: 1).

The mentioned "mental-rape" in **schools** in South Africa, necessitates consideration of the following question: "Are **tertiary institutions** in South Africa also applying (covert ?) "mental-rape" to their students ?"

To take this matter (of "mental-rape") with regard to tertiary studies even further, it appears that ***white*** **top-matrics** do ***not*** get bursaries "because [these white top-matrics] are not black [i.e. white top-matrics are ***denied*** bursaries (because of the colour of their skin) because the white top-matrics are **white** and ***not*** **black**] ... This is not affirmative action, this is one of the new racist practices [in the South African society]" (*Die Volksblad*, 31 December 2001: 1)(my translation).

In theory, affirmative action as an **exception** to the right to equality, appears to be the opposite of affirmative action as a **part** of the right to equality.

9.3 Affirmative action as a PART of the right to equality

Affirmative action as a **part** of the right to equality, views affirmative action as a manner to achieve a more equal society. Equality

* is viewed as a long-term goal; and
* is achieved through remedial measures. These remedial measures is aimed at reducing the current inequality.

De Waal *et al* (1999:212) is of the opinion that the final Constitution favours the view of affirmative action as a **part** of the right to equality.

Mureinik is of the opinion that affirmative action programmes (or policies) must be **carefully constructed** to achieve equality. This view of Mureinik was supported in **Public Servant's Association of South Africa v Minister of Justice 1997 (3) SA 925 (T); 1997 (5) BCLR 577 (T)** (De Waal *et al* 1999: 213).

9.4 Public Servant's Association of South Africa v Minister of Justice

(Please note that the following discussion of the **Public Servant's Association** case is changed from the *interim* Constitution to the final Constitution.)

"In the **Public Servant's Association** case, **no** white males (all who had considerable work experience) who applied for senior posts in the Department of Justice were interviewed for the vacant positions. This was because the Department [of Justice] was virtually the exclusive domain of white males. To address this situation the Department [of Justice] apparently adopted a policy that **no** white males would be considered for certain posts. According to the court, these actions, though forming part of an affirmative action programme, were haphazard, random and overhasty. [These actions] **could not** in any sense be said to be 'designed' to, or constructed to, achieve affirmative action goals. [These] actions therefore **did not** constitute 'measures designed to achieve affirmative action' and consequently **were**

invalidated as UNFAIR discrimination based on RACE and GENDER" (De Waal *et al* 1999:213-214)(my accentuation).

In the **Public Servant's Association** case, the following was decided:

(1) Affirmative action is to be viewed as a **part** of the right to equality.

(2) That is why the applicant carries the **onus of PROOF** to prove that the affirmative action programme is invalid or amounts to **UNFAIR discrimination**.

(3) If the applicant proves **discrimination** that is based on a **listed ground** in section 9(3) of the Constitution, then in terms of section 9(5) of the Constitution, a **presumption** comes into effect.

(4) In terms of the presumption it is **rebuttably** presumed that the discrimination (based on a listed ground) amounts to **unfair** discrimination.

(5) When the **presumption** comes into effect,

* the applicant has discharged the **onus of PROOF**; and

* then an **onus of REBUTTAL** rests upon the respondent to **rebut** the presumption.

(6) The **onus of REBUTTAL** means that the respondent must establish (show) that there is a **CAUSAL relation** between

* the **affirmative action programme**; and
* the **purpose** of the affirmative action programme.

(7) This **CAUSAL relation** means that the respondent must establish (show) that **both**

* the **affirmative action programme**; and
* the **purpose** of the affirmative action programme

are reasonably able to correct the disparities of the past.

The implication appears to be that **unplanned** and **reckless** affirmative action programmes

* will be **unfair** discrimination in terms of **race** and **gender** [i.e. unconstitutional]; and
* will consequently be declared **invalid**.

Please note the following:

Harksen v Lane NO

* was decided by the **Constitutional Court**; and
* relates to the **phases** with regard to an **enquiry** into the violation of section 9 of the Constitution.

The **Public Servant's Association** case

* was decided by the **High Court** (Transvaal Provincial Division); and

* relates to the **onus of PROOF** and the **onus of REBUTTAL** when an affirmative action programme is disputed.

The implication thus appears to be that the **Public Servants Association** case *COMPLIMENTS* (and not contradicts) the **Harksen v Lane** case.

It is imperative to note that different **categories** of (human or) fundamental rights exist.

10 CATEGORIES OF FUNDAMENTAL RIGHTS

There are three **categories** of fundamental rights in the South African Constitution (cf. Hosten *et al* 1995:547-551; Kleyn & Viljoen 1998:256-257):

10.1 FIRST generation (fundamental) rights

FIRST generation rights (1) are also known as "blue rights"; (2) are civil and political rights; and (3) strive to limit the power of government. For example, the right to equality (section 9 of the Constitution).

Please note that these first generation rights are also **negative** rights. Why ? Because these rights strive to **limit** the power of government.

10.2 SECOND generation (fundamental) rights

SECOND generation rights (1) are also known as "red rights"; (2) are socio-economic rights; and (3) strive to enhance the individual's socio-economic circumstances. For example, the right to have access to adequate housing (section 26(1) of the Constitution).

Please note that these second generation rights are also called **positive** rights. Why?

Because these rights strive to **compel** the state to enhance the individual's socio-economic circumstances (in accordance with what the state **can AFFORD** - see par 11).

10.3 THIRD generation (fundamental) rights

THIRD generation rights (1) are also known as "green rights"; and (2) focus on the interests of groups. For example, the right to a clean environment (section 24 of the Constitution).

The **dimensions** of socio-economic (second generation) rights are extremely important.

11 THE DIMENSIONS OF SOCIO-ECONOMIC RIGHTS

Socio-economic rights has two dimensions (De Waal *et al* 1999:418-425):

(1) **NEGATIVE dimension:** The state may **not** interfere with an individual's socio-economic rights.

(2) **POSITIVE dimension:** The state must take **positive** steps to enable an individual to realise his/her socio-economic rights

This positive dimension of socio-economic rights is **qualified**. Why ? Because the constitutional obligation on the state to enable an individual to realise his/her socio-economic rights, must occur **in accordance with what the state** ***can AFFORD***.

This qualification will be illustrated when we proceed to take a brief look at **section 26** of the Constitution. Section 26 is one of the **most important** socio-economic rights in the Constitution.

12 SECTION 26

12.1 Section 26(1)

Section 26(1) of the Constitution stipulates that every person has the right to have **ACCESS to adequate housing**.

Please note that in terms of this section , a person

* has *NO* **right to ADEQUATE housing**; but
* has the *RIGHT* to **ACCESS to adequate housing**.

The implication is that a person

* **cannot** demand a house from the state; but
* **can** demand the removal of obstacles which stand in the way of the person to obtain a house. For example, banks previously refused to grant black persons housing loans (De Waal *et al* 1999:425).

12.2 Section 26(2)

Section 26(2) of the Constitution stipulates that the state must take **reasonable** steps, *WITHIN* **the resources AVAILABLE to the state**, to progressively realise the section 26(1)-right.

12.3 Section 26(3)

Section 26(3) of the Constitution stipulates that

* **no** eviction from a house; and
* **no** demolition of a house

may occur, unless a court

* has taken into consideration all the relevant circumstances; and
* has authorized the eviction or demolition.

12.4 With regard to "all the relevant circumstances" in section 26(3)

In **Uitenhage Local Transitional Council v Zenza 1997(8); BCLR 1115 (SE)** squatters illegally occupied land which had been earmarked for a housing project for about 8 000 families. Through their illegal occupation of the land, these squatters were effectively jumping the housing queue. That is why the court authorized an order of eviction with regard to these squatters (De Waal *et al* 1999:427).

13 CONCLUSION

Sociology of law implies a **description** and **understanding** of "Why does the law works the way it does ? " In this vein the author attempts to give to the reader a "bite-size" and coherent description and understanding of the **Bill of [Human] Rights** and some of the most important **human rights** enshrined therein. The "new" South Africa is characterized by a **constitutional revolution**. Full recognition of **the principle of constitutionalism** relates to the **application** of the Bill of Rights in the Constitution of South Africa. The application of the Bill of Rights requires us to take note of the **interpretation** clause of the South African Constitution. Interpretation of the Constitution in turn relates to the very important **supremacy** clauses of the Constitution (remember that the South African Constitution is the supreme law of South Africa).

The supremacy clauses in turn relate to the **limitation** clause (i.e. in certain circumstances an enshrined human right of an individual may be limited). During consideration of whether this limitation is reasonable and justifiable in an open and democratic society, competing human rights are being weighed up against one another. This weighing up means the application of a **proportionality test.** When a court finds (1)

that a human right has been infringed; and (2) that this infringement does not satisfy the test for a valid limitation of a human right, then the court must award an appropriate **remedy** for the infringement of this human right.

The **equality** clause (section 9) suggest (1) an "equality-guarantee"; (2) a "discrimination-guarantee"; (3) "prohibition of unfair discrimination - vertical"; (4) "prohibition of unfair discrimination - horizontal"; and (4) a "rebuttable presumption" of unfair discrimination. The phases with regard to **an enquiry into unfair discrimination** is explained. Unfair discrimination is frequently related to **affirmative action**. Affirmative action suggests preferential treatment for disadvantaged groups of people. This preferential treatment occurs mostly in terms of **race** or **gender**. Affirmative action can be viewed (1) as an **exception** to the right to equality; or (2) as **part** of the right to equality.

There are three **categories** of human rights: (1) first generation rights; (2) second generation rights; and (3) third generation rights. Section 26 is one of the most important second generation rights. In terms of section 26(1) a person has NO **right to ADEQUATE housing**; but has the RIGHT to **ACCESS to adequate housing**.

References

Albertyn, C. & Kentridge, J. 1994. Introducing the right to equality in the interim Constitution. *SAJHR*, 149-178.

Botha, C. 1998. *Wetsuitleg: 'n inleiding vir studente*. 3de uitgawe. Kenwyn: Juta.

Burns, Y. 1998. *Administrative law under the 1996 Constitution*. Durban: Butterworths.

David, R. & Brierley, JEC. 1985. *Major legal systems in the world today: an introduction to the comparative study of law*. London: Stevens.

De Waal, J. Currie, I., & Erasmus G. 1999. *The Bill of Rights handbook*. 2nd edition. Kenwyn: Juta.

Die Volksblad. 1999. Ontevredenheid met 'top'-lyste., 29 Desember:1.

Die Volksblad. 2001. Aangepaste punte werp skadu oor uitslae., 28 Desember: 1.

Die Volksblad. 2001. Topmatrieks kry nie studiebeurse., 31 Desember: 1.

Du Toit, E. De Jager, FJ, Paizes, A. Skeen, AstQ., & Van der Merwe, S. 1997. *Commentary on the Criminal Procedure Act*. Cape Town: Juta.

Edwards, AB. 1997. Affirmative action: a euphemism for reverse discrimination ?, in *Codicillus* 38(2): 13-30.

Hosten, WJ., Edwards, AB., Nathan, C. & Bosman, F. 1979. *Inleiding tot die Suid-Afrikaanse reg en regsleer*. Durban: Butterworths.

Hosten, WJ., Edwards, AB., Bosman, F. & Church, J. 1995. *Introduction to the South African law and legal theory*. 2nd edition. Durban: Butterworths.

Kleyn, D. & Viljoen, F. 1998. *Beginnersgids vir regstudente*. 2de uitgawe. Kenwyn: Juta.

Republic of South Africa. 1993. *Constitution of the Republic of South Africa, no 200 of 1993*. Pretoria: Government Printer.

Republic of South Africa. 1996. *Constitution of the Republic of South Africa, no 108 of 1996.* Government Printer.

Schwikkard, PJ., Van der Merwe, SE., Collier, DW., De Vos, WL., Skeen, AStQ. & Van der Berg, E. 2002. *Principles of evidence*. 2nd edition. Kenwyn: Juta.

Steyn, DJ. 1997. Sociology of law as dialogue between law and society: Berger's phenomenolgical approach applied. *ILISO* 1(5): 2-16.

Steyn, DJ. 1998. Sociology of law as a humanist development strategy with regard to the South African criminal justice system. *ILISO* 2(1): 22-36.

Steyn, DJ, 1999a. Sociology of law investigates compulsory community service: are "white" males a 'reserve army of labour' ?. *ILISO* 3(1): 11-24.

Steyn, DJ. 1999b. Affirmative action: sociology of law investigates. *Codicillus* 40(2): 56-64.

Steyn, DJ. 2000. (Humanist) sociology of law and the internal dynamics of the proposed jury. *ILISO* 4(2): 24-36.

Steytler, N. 1998. *Constitutional Criminal Procedure*. Durban: Butterworths.

Strydom, HA. 1995. The private domain of the Bill of Rights. *SAPL* 52-72.

Van Reenen, TP. 1997. Equality, discrimination and affirmative action: analysis of section 9 of the Constitution of the Republic of South Africa. *SAPL*: 150-165.

Van Zyl. FJ. & Van der Vuyver, JD. 1982. *Inleiding tot die regswetenskap*. 2de uitgawe. Durban: Butterworths.

Termination of maintenance orders in respect of minors

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A question that is often raised in maintenance matters is: When does the maintenance order cease to operate? There appears to be dissent on this topic, both in academic circles and amongst some cases from the law reports. No doubt, if an order specifies until what age of a child the maintenance is payable, the order ceases to operate at that stage. Nothing prevents the variation of such an order, provided there is good reason to do so. The difficulty that is dealt with herein is where the order does not specify the duration of the order.

In the oft quoted case of *Richter v Richter* 1947 (2) 86 (W) at 90 of the report, it was declared that:

> ***"...the payment of maintenance is to cease when any child reaches the age of majority, or earlier if he or she begins to earn his or her own living."***

The reason given by Price J for this, was that in relation to a parent's guardianship over a child:

> ***"The money is ordered to be paid to the mother for the children; therefore, it follows that it is to be paid until the children pass out of her natural guardianship at the latest. It is true that there is a reciprocal obligation in certain circumstances for sons and daughters to support their parents, and vice versa, but this is under quite a different rule of law…and if such a claim were preferred against a father by a destitute major daughter it would have to be preferred by the daughter herself and not by the mother as her natural guardian…"***

In this case, the order to pay maintenance did not stipulate until when the payments are to be made.

Of note are the remarks by Flemming J in *Smit v Smit* 1980 (3) SA 1010 (O) at 1017-8 about the *Richter* case:

> **"The duty which in Richter v Richter 1947 (3) SA 86 (W) was held to have terminated because the child had turned 21, was the obligation created by the order of Court and the conclusion was reached as a matter of interpretation of the order."**

Flemming J disagreed with the argument that, as a matter of law, a duty to maintain terminates upon a child becoming a major.

As regard to the coming to an end of a duty to maintain if a child earns an own living, it appears from the facts of the *Richter* case that the fact of being self-supportive at a specific date was not in dispute.

In *Kemp v Kemp* 1958 (3) SA 736 (D&CLD) at 738G, Jansen J, pointing out at 738C that there would be no certainty if the order is varied *ipso jure* by changed circumstances, also held the following:

"(at 737H) The true position appears to be that the existence of the duty [to maintain a minor child] is not dependant upon the child being under a certain age, but continues even after majority and remains operative...

(at 738 D-E) There seems much to be said for the point of view that once the order is pronounced it has an existence divorced from the fluctuations of the incidence of the common law duty to maintain but that it may be brought into harmony with that duty by the Court at any time.

(at 738F-G) But what is the position if the order merely provides for the periodic payment of a sum as maintenance for a child and nothing further? In such a case there is, it is said, an implication in the order

that the payment is to cease when the child reaches the age of majority or earlier if he or she begins to earn his or her own living (see *Richter*). But it would seem undesirable to extend this approach.

(at 738H) It would seem that if the order stipulates periodic payment of a fixed sum of money until the child reaches a certain age, there should

be no room for an implication that the order will *ipso jure* cease to operate before that time if the child becomes self-supporting."

Hofmeyer J in *S v Richter* 1964 (1) SA 841 (O) at 844 G-H expressed the opinion that it is undesirable if it were to be that a parent had to approach the court for a variation of an order when the common law duty to maintain had ceased. It was, in the Court's view, sufficient if a parent could, by way of a defence, prove that the reason for existence of the order lapsed.

In *Kanis v Kanis* 1974 (2) SA 606 (RAD), it was contended that a parent's duty to maintain a child ceased automatically upon attaining the age of 18 (i.e. the age of majority at that time in the then Rhodesia). The order did not indicate until what age the maintenance was to be payable. Lewis AJP held at 611E that

> **"…it was for the appellant (person ordered to pay), who now asserts that it should come to an end at the age of 18 years, to have obtained clarification on this from the High Court…"**

The facts showed that the child was not self-supporting when she reached the aged of 18 years and that the appellant was able to continue maintaining the child. The Court upheld the decision of the Court *a quo* whereby the appellant was ordered to pay arrear maintenance which, it seems, covered a period after the child turned 18.

In the case of *Van Wyk v Du Toit and another* 1993 (2) SA 781 (O) at 783, it was held

> **"The lapsing of a legal duty to maintain with regard to a child on the basis of becoming self supportive occur ipso iure or by operation of**
>
> **the law. No court order to such effect is required before the duty to maintain ceases. The mere advent of self supportiveness brings it along."**

(My translation)

Fortunately ,as one would have hoped, the Supreme Court of Appeal had occasion to consider this issue and settle the position. *Bursey v Bursey and Another* 1999 (3) SA 33 (SCA), Viviers JA authoritatively set the correct approach at 37B-D of the report:

> **"It was next submitted, also on the strength of Richter's case, that John's [The minor child who attained majority after the order was granted] maintenance in terms of the order was payable to the first respondent in her capacity as his custodian so that when this status terminated upon majority the appellant's obligation to pay her either ceased or was henceforth enforceable only by John and not by the first respondent. The maintenance order is, as I have said, ancillary to the common-law duty of support and merely regulates the incidence of this**

duty as between the parents. The effect of this order is simply that after John's majority the maintenance payable to him by his parents would continue to be paid to him by the first respondent who would recover under the Court's order the appellant's contribution to this common parental duty to support. This she was fully entitled to do in terms of the order. John's position was not affected as he could at any time during the operation of the order have enforced his common-law right to an upward variation of the maintenance payable by his parents upon proof of the requisites for such a variation. I cannot, therefore, agree with the submission that the mere fact that John's maintenance was payable to the first respondent meant that the maintenance ceased upon his majority."

And at 38G-H of the report

"...it is desirable to consider the question whether the order automatically ceases to operate when John becomes self-supporting.....The order is thus not *ipso jure* varied by changed

circumstances but <u>remains fully effective until terminated or varied by the Court</u>."

(My underlining)

Despite these clear remarks, Van Zyl, *Handbook of the South African Law of Maintenance*, 2nd Edition at 44 (para 3.2.11) nonetheless still declares that an order of court ceases by mere operation of the law either when a child becomes a major or self supportive, whichever occurs first (the Second edition was published in 2005). Some of the cases relied on by Van Zyl for her proposition does not support it, e.g. *Kemp* and *Kanis*.

Family Law Service (loose leave) in the chapter on Maintenance, Page 36 (issue 45) follows the approach adopted in *Bursey*. It is submitted that the *Bursey* case be followed.

JUDICIAL IMMUNITY: THE CIVIL AND CRIMINAL LIABILITY OF PERSONS WHO PERFORM JUDICIAL OR QUASI-*JUDICIAL FUNCTIONS.*[*]

M F T Botha

Regional Magistrate, Middelburg (Mpumalanga)

[*] This paper is a slightly updated version of an unpublished document that I wrote for the JOASA National Executive Committee, dated 16 February 2007, with the title: *'The criminal liability of a judicial officer for performing judicial functions.'*

1. INTRODUCTION

There has, a few months ago, been a lot of speculation in the media as to the steps that the authorities intended taking against a Magistrate who, allegedly improperly, removed cases from the roll in her court after 16h00. The media went crazy, seeking the blood of this Magistrate. She was, because of this, at some stage criminally summoned before court but the matter was ironically enough 'removed from the roll' so that the National Director of Public Prosecutions could decide whether she should be prosecuted criminally. Nothing happened since that removal.

Understandably, some Magistrates were very perturbed by this announcement and the question immediately arose as to the criminal and even civil liability of the Magistrate for performing judicial functions the way she did. What follows is a short discussion of the civil and criminal liability of persons that perform judicial or *quasi*-judicial functions for the negative consequences of their judicial or *quasi*-judicial actions. I shall not deal with the technical legal arguments with regard to how delictual liability is eventually determined, especially avoiding the minefield of confusion with regard to the determination of wrongfulness because that is a matter for argument in a different paper that I am busy with. I shall also not deal with the Constitutional implications of a decision to prosecute a judicial officer in such a situation.

This is just an article to set out the law as it currently is, without an in-depth critical examination. The legal position with regard to both civil and criminal liability is in essence governed by the common law

2. CIVIL LIABILITY

The civil liability of judicial officers or people that perform *quasi*-judicial functions, for loss occasioned by them in the exercise of their official duties, is in essence governed by the common law. The common law position is set out in the case law.

A person who performs a judicial or *quasi*-judicial function and who delivers a judgment or order that is bad in law and which caused a party to the proceedings to suffer a

loss as a consequence of the judgment or order *may*, under certain circumstances, be held liable for such damages in terms of the law of delict.

The *locus classicus* in this regard is the case of *Penrice v Dickenson* .[1] It deals with the matter in detail. In that case the legal question was stated as follows:[2]

> *'The main features of the controversy, which the plaintiff wishes now to bring in appeal before this Court, being those above stated, the first question to determine is one of law, namely, the test of the liability of a magistrate for acts done in the exercise*

[1] 1945 AD 6.

[2] At 15.

of functions such as those performed by the defendant on 17th and 31st March, 1941. It is clear, in my opinion that in making the orders complained of the defendant acted in a judicial capacity.'

The Court went on to say, with regard to the common law position, that:

'The Roman-Dutch writers who deal with the question of the liability of a Judge who gives a wrong judgment through want of knowledge express their views in commenting on the Roman law stated in *Institutes* (4-5-pr.). Groenewegen, *De Legibus Abrogatis*, in commenting on that passage, states that *"by the customs of this age a Judge is not liable who gives a bad judgment through want of legal skill (per imperitiam) . . . but (it is) otherwise if fraud and deceit have been present"*. See also the commentary of Vinnius on the same passage. Voet (5.1.58 *in fine*) mentions *imprudentia* as well as *imperitia*, remarking: *"eo quod ex sola imperitia aut imprudentia eum non teneri tralatitium est; sed demum ex dolo, qui difficilis plerumque probationis est."* See also van Leeuwen, *Roman-Dutch Law* (4.33.10). This

test of the liability of an officer performing judicial functions was accepted by this Court in *Matthews & Others v Young* (1922 AD 492 at p. 509).' [3]

After this investigation and having regard to the facts of the specific case, the Court came to the conclusion that the refusal of a remand in that case was an irregularity and said:

'*Undue haste in criminal proceedings often leads to injustice, and the plaintiff suffered an injustice on 17th March in that the order made on that date was made without giving him the postponement he asked for after the medical evidence called by the Crown had been heard.*

[3] At 15.

The irregularity in the proceedings on 17th March constituted by the refusal of the postponement, though it may possibly have afforded a good ground for review proceedings, was not a ground on which the plaintiff could validly base a claim for damages; for the trial court was satisfied that the defendant acted in good faith throughout, and there is no prospect that the plaintiff will be able, on appeal to this Court, to establish that the defendant acted mala fide in the proceedings on that date.'[4]

The Court went even further than this and said that:

'On this view of the matter it is not necessary to consider whether the plaintiff proved absence of reasonable care; for, owing to the protection above explained which the common law gives to persons performing judicial functions, even if the plaintiff proved absence of reasonable care on the part of the defendant in the proceedings on 17th and 31st March, 1941, that would not render the defendant liable to the plaintiff in damages caused by the orders made on those dates.'[5]

The case that the Court referred to, i.e. *Matthews & Others v Young* [6] indeed set out the principle, but not in so much detail. That case was a case of a body performing *quasi*-judicial functions, and all that the Court said there was that:

'In my opinion, therefore, in considering plaintiff's conduct and in taking the resolution they took, the council purported to act under the rules of the society, and as in so doing they were performing functions analogous to those performed by a judge, they were acting in a quasi-judicial capacity, and are, therefore under our law (Groenewegen, de Leg. Abr. Ad. 1.4.5.1; Voet 5. 1.58 in fine), as also, I understand,

[4] At 21-22.

[5] At 18.

[6] 1922 AD 492.

under the English law, not liable for any damage provided they acted bona fide and in the honest discharge of their duties.'[7]

This issue was again decided by the Appellate Division in the case of *May v Udwin*. [8] There the Magistrate was sued for defamation of character by an attorney. In the High Court he was held liable, but he appealed. The Appellate Division took a critical look at the old authorities and came to the conclusion that:

'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,...'*[9]

The Court decided in the end:

'On weighing up the two sets of facts and circumstances I do not think that on a preponderance of probabilities Udwin proved that May did so act with malice towards him. The Court a quo was therefore right in its finding to that effect.
I therefore come to the conclusion that the Court a quo was wrong in holding that Udwin has discharged the onus of proving that May had exceeded the ambit of the qualified privilege and had accordingly forfeited the protection of the qualified privilege.'[10]

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[7] At 509.

[8] 1981 (1) SA 1 (A).

[9] At 19A.

[10] At 21 E-F.

In *Moeketsi v Minister van Justisie* [11] a Regional Magistrate ordered a police official to be arrested and kept in custody because he apparently disrupted the court proceedings. The officer later sued the Regional Magistrate for wrongful arrest and incarceration and claimed damages. The Court found that the judicial officer was acting unreasonable but said, in this regard:

> *'In die geval van 'n regterlike beampte soos die tweede verweerder is nalatigheid in die uitvoering van sy judisiële bevoegdhede egter nie voldoende om hom met deliktuele aanspreeklikheid te belas nie. Die gesag is duidelik dat daar mala fides, kwaadwilligheid of bedrieglike optrede aanwesig moet wees. Die getuienis het nie bewys dat die tweede verweerder hom aan enige sodanige optrede skuldig gemaak het nie, hoe onredelik sy optrede ook al mag gewees het. Dit volg dan dat die eiser se vordering nie kan slaag nie'*[12]

With regard to negligence, this is clearly correct when one considers the remarks of Nugent JA in *Minister of Safety and Security v Van Duivenboden*:[13]

> *'Negligence, as I understood in our law, is not inherently unlawful - it is unlawful, and thus actionable, only if it occurs in circumstances that the law recognises as making it unlawful.'*

[11] 1988 (4) SA 707 (T).

[12] At 714.

[13] 2002 (6) SA 431 (SCA) in para [12].

In the latest SCA case on the matter, *Telematrix (Pty) Ltd v Advertising Standards Authority SA*,[14] Harms JA dealt with the matter as follows:

'[17] Since the present case deals with the wrongfulness of a decision reached in a process that may properly be described as adjudicative, it will be useful to consider in more detail the immunity given to judicial officers against damages claims. Johannes Voet in his *Commentary on the Pandects* 5.1.58 said (Gane's translation somewhat adapted):

> "But in our customs and those of many other nations it is rather rare for the judge to [bear the responsibility for the outcome] by ill judging. That is because the trite rule that he is not made liable by mere lack of knowledge or [lack of skill], <u>but by fraud only</u>, which is commonly difficult of proof. It would be a bad business with judges, especially lower judges who have no skill in law, if in so widespread a science of law and practice, such a variety of views, and such a crowd of cases which will not brook but sweep aside delay, they should be held personally liable to the risk of individual suits, *when their unfair judgment springs not from <u>fraud</u>, but from mistake, lack of knowledge or [lack of skill]*."

This statement reflects the current legal position.'[15] (Emphasis added)

He also said:

'Public or legal policy consideration require that there should be no liability, ie, that the potential defendant <u>*should be afforded immunity*</u> against a damages claim, even from third parties affected by the judgment.'[16](Emphasis added).

[14] 2006 (1) SA 461 (SCA).

[15] In para [17].

And:

> 'To sum up: In different situations courts have found that public policy considerations require that adjudicators of disputes *are immune to damages claims* in respect of their incorrect and negligent decisions. The overriding consideration has always been that, by the very nature of the adjudication process, rights will be affected and that the process will bog down unless decisions can be made without fear of damages claims, something that must impact on the independence of the adjudicator. *Decisions made in bad faith are, however, unlawful and can give rise to damages claims*.'[17] (emphasis added)

Very recently in *McDowell v Minister of Justice and Constitutional Development*, [18]a prosecutor, in his capacity as maintenance officer, was sued for the wasted legal costs incurred for deciding to take a matter to court where the plaintiff argued that he had no reason

to do so, meaning he exercised his discretion in adjudicating their matter improperly. The Court based its judgment on the *Telematrix* case and decided that because the prosecutor was acting in a *quasi*-judicial capacity, he cannot be held liable because,

> 'Although he was not a judicial officer, but a prosecutor appointed to carry out the functions of a maintenance officer, he certainly fulfilled a *quasi*-judicial role. In that position he had a duty to investigate complaints laid before him and not err negligently. Dealing with the issue of wrongfulness in respect of a decision taken by a judicial officer Harms JA said the following in the *Telematrix* case, *supra*:

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[16] In para [14].

[17] In para [26].

[18] [2007] JOL 20082 (C).

> *"To illustrate: there is obviously a duty –even a legal duty-on a judicial officer to adjudicate cases correctly and not to err negligently. That does not mean that a judicial officer who fails in the duty, because of negligence, acted wrongfully….Public or legal policy consideration require that there should be no liability, ie, that the potential defendant should be afforded immunity against a damages claim, even from third parties affected by the judgment."*

In my view similar considerations would apply when assessing the conduct of a maintenance officer.'[19]

Another case of importance in this regard is the Appellate Division case of *Regional Magistrate Du Preez v Walker*.[20] In that case the issue was the ordering of cost on review against a Regional Magistrate for a wrong judgment. In the Court *a quo* an order *de bonis propriis* was requested against the Regional Magistrate. The Court found his conduct to be 'perverse' or 'at least grossly illegal' but ordered him to pay the cost on review 'in his official capacity.' The Regional Magistrate took the matter on appeal. When the matter went to the

Appellate Division the other party insisted that costs *de bonis propriis* should have been granted in the court *a quo*. The Court disagreed and said:

> 'The Court *a quo* held that even although *mala fides* did not account for appellant's incorrect order with reference to respondent, nevertheless appellants conduct was perverse and grossly illegal and merited an order against him in his official capacity. It would appear therefore that the Court *a quo*-rightly, in my view-accepted the position that if evidence fell short of establishing *mala fides* on the part of appellant, costs could not be awarded against him *de bonis propriis*…..it is necessary to emphasis that

[19] At 6.

[20] 1976 (4) SA 849 (A.D.)

it is the existence of *mala fides* on the part of the judicial officer that introduces the risk of an order of costs *de bonis propriis* being given against him.'[21]

In the end, the Court found that there was no malice. It said:

'That being so, no order for costs can be made against him personally and the appropriate order would, in such circumstances, have been "no order as to costs."' [22]

It consequently therefore also cancelled the order for costs in his official capacity.

All the cases referred to dealt with the liability of judicial officers except *Matthews v Young, Telematrix* and *McDowell* that dealt with the liability of people that acted in a *quasi*-judicial capacity. The test for determining liability is however the same for both.[23]

There might be people who think that the following words in *Carmichelle v Minister of Safety and Security* [24] is a matter of concern:

'A *public interest immunity* excusing the respondents from liability that they might otherwise have in the circumstances of the present case, would be inconsistent with our Constitution and values. Liability in this case must thus be determined on the basis

[21] At 853 E-H.

[22] At 855H to 856A.

[23] *Telematrix* case, in para [20] and [28].

[24] 2002 (1) SACR 79 (CC).

of the law and its application to the facts of the case, *and not because of an immunity* against such claims granted to the respondents.'[25] (Emphasis added)

It is respectfully submitted that it is not, because those words are not applicable to judicial or *quasi*-judicial functions. In that case the prosecutor did not perform a *quasi*-judicial function. A prosecutor who decides to oppose or not oppose bail does not *adjudicate*[26] but simply exercises a discretion which is administrative. That is the reason why you will note in that case, even in the final SCA judgment reported as *Minister of Safety and Security and Another v Carmichelle*,[27] no mention whatsoever is made of a *quasi*-judicial functioning of the prosecutor, because in that matter he did not function as such.

3. CRIMINAL LIABILITY

The only case that I could find in which the criminal liability of a person who performed a judicial or *quasi*-judicial function was decided is the Appellate Division case of *S*

v Kumalo and Others.[28] In this case the appellant was a native chief who had, under section 12 of Act 38 of 1927, been authorised to determine civil claims arising out of native law and custom. Together with three other appellants, his private constables, and a fifth appellant, his chief induna, they were found guilty of assault on one of the chief's subjects. It appeared that on the day when the cases were about to be dealt with this subject 'misbehaved' himself and as a result the first appellant directed that he receive 10 strokes with

[25] In para [49].

[26] See the terminology used by Harms JA in *Telematrix*.

[27] 2004 (3) SA 305 (SCA).

[28] 1952 (1) SA 381(A).

a sjambok for contempt of court The majority of the Appellate Division held him criminally liable for his actions and confirmed his conviction of assault. Schreiner JA, agreeing with the majority that the appellant was convicted correctly, said:

> *'For these reasons it is clear that the first appellant had no jurisdiction to make an order that the complainant be whipped. If, however, the matter had rested there, so far as the first appellant was concerned, and if the execution of the order had been carried out without further intervention on his part, it may be that, whatever would have been the position of the persons who executed the order, he himself, as a judicial officer, would have been protected. For it could then well have been argued that all that he had done was to impose a sentence which he had no jurisdiction to impose, though he had a general jurisdiction to punish for contempt. Clearly a judicial officer is not lightly to be made responsible criminally, or even civilly, for his judicial acts. But that is not the position as disclosed by the evidence, for the first appellant did not merely give an insupportable judgment, but himself directly instructed his officers to execute the illegal sentence. It may be that a native chief's jurisdiction to punish for contempt is insufficiently supported by regulations, providing for the execution of any punishment that he may impose, but any difficulty that he may have in this respect does not create in him an authority to execute his illegal orders himself. The first*
>
> *appellant's intervention did not stop at a judicial act and he cannot rely upon any protection accorded to the honest though mistaken exercise of judicial functions.'* [29]

Van Den Heever JA did not agree with the majority and gave a dissenting judgment. He said:

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[29] At 386-387.

'In Roman law a Judge was liable for his judicial mistakes even if they were due to ignorance of the law (Dig. 44.7.5.4). But this rule, after being received, fell into desuetude in the Netherlands (Rechtsgel. Observ. 4 Observ. 46; Voet (5.1.58) in fin. and the number of authorities there cited; van der Keessel Thes. Select., Thes. 808; Schorer ad Grot. 3.37.9; Groenewegen de Legib. Abrogat. ad Inst. 4.5 exord.). In The Cape of Good Hope Bank v Fischer, 4 S.C. 368 at p. 375 DE VILLIERS, C.J., speaking of administrative functions performed by judicial officers, said:

> *"I can find no authority for the contention that such a judge or magistrate would have been liable for any loss occasioned by mistakes made by him in good faith in the performance of his duties."*

It would be remarkable, therefore, if he were liable to criminal prosecution.

Voet (47.10.2), whilst stating that Judges are in certain circumstances liable for judicial acts, demands something like *dolus* on their part before their conduct can be said to be injurious: their method of correction must be *contra bonos mores*; they must inflict chastisement without cause or immoderately, not in order to maintain public authority but out of spite. He adds that an unworthy motive is not readily presumed.' [30]

Only Schreiner JA and Van den Heever JA, both being minority judgments, dealt with the question of the appellants' liability in the light of the fact that he performed a judicial function. Hoexter JA gave the majority judgment and did not deal with the issue, because he was of the opinion that the court was not yet in session when the so-called contempt was committed and also that the appellant never alleged that he punished the complainant because of a contempt of court *in facie curiae*, but merely because he misbehaved at his kraal and the

[30] At 389.

punishment took place not in terms of authority derived from his appointment as Native chief in terms of the Act but merely from native custom. Hoexter JA said:

> *'On this evidence I come to the conclusion that the misbehaviour of the complainant took place outside the actual precincts of the court and immediately before the proceedings of the court were to commence. The complainant did not interfere in any way with the proceedings of the court and the first appellant never alleged that the complainant had committed a contempt in facie curiae. It is clear from the evidence of the first appellant that he professed to have acted in accordance with native custom when he ordered the complainant to be beaten. '* [31]

From both the judgment of Schreiner JA as well as Van den Heever JA, it is quite clear that they agree on the underlying principle, namely that a judicial officer is not criminally liable for giving a wrong judgment in good faith in his/her official capacity. The only reason Schreiner JA held the appellant criminally liable is because he said:

> 'If, however, the matter had rested there, so far as the first appellant was concerned, and if the execution of the order had been carried out without further intervention on his part, it may be that, whatever would have been the position of the persons who
>
> executed the order, *he himself, as a judicial officer, would have been protected*. For it could then well have been argued that all that he had done was to impose a sentence which he had no jurisdiction to impose, though he had a general jurisdiction to punish for contempt. *Clearly a judicial officer is not lightly to be made responsible criminally, or even civilly, for his judicial acts.*...The first appellant's intervention did not stop at a judicial act and he cannot rely upon any protection accorded to the honest though mistaken exercise of judicial functions.' [32] (my emphasis)

[31] At 393.

[32] At 386.

In a previous paper , I specifically emphasised the judgment of the minority, without having been aware of the *Telematrix* case. Very recently, the SCA in *Telematrix* [33] had the following to say with regard to the judgment of the minority in *Kumalo*:

> *'More of interest though is Schreiner JA's finding (concordant with that of Van den Heever JA) that the fact that the chief had exceeded his jurisdiction on its own would not have made him liable. This I would suggest, in the ordinary course of things makes good sense because a wrong assumption of jurisdiction does not differ in kind from any other wrong decision.'*

4. CONCLUSION

In my opinion, it makes sense that there should be some sort of immunity for people that perform judicial or *quasi*-judicial functions for *bona fide* wrong judgments they give. The underlying reasons for not holding them liable in law for their *bona fide* mistakes in exercising their functions was set out as follows, in *Moeketsi*:

> *'Die rede hiervoor is duidelik, aangesien onervare persone ook die regtersamp beklee sonder dat hulle hoegenaamd behoort te vrees dat hulle deur hulle onkunde in baie sake aanspreeklikheid sal opdoen nie. Dit sou hoogs onbillik wees en regters sou maar sleg vaar, veral dié wat nog die laer range beklee, indien hulle in die moeilike wetenskap van die reg en regspraktyk waarin daar so 'n verskeidenheid menings bestaan en waar soveel sake geen vertraging duld nie, sodat daar nie genoegsame tyd vir oorweging verleen word nie, aan die risiko van aanspreeklikheid blootgestel word*

[33] In para [18].

in elke saak waarin hulle per abuis iets oor die hoof gesien het as gevolg van onkunde of onbedrewenheid.'[34]

I can, in agreement, just *echo* these words, which is in fact a slightly adapted version of the reasons given by *Voet*.[35] These are the same reasons Harms JA gave as the underlying policy considerations for the recognition of the immunity in *Telematrix*.

From all these cases, the following is clear;

1. A person who perform judicial or *quasi*-judicial functions is not liable in law, either civilly or criminally, for a wrong judgment given in the exercise of judicial or *quasi*-judicial functions unless the following is present:

   (a) fraud and deceit
   (b) *mala fides*, bad faith or fraudulent conduct (kwaadwilligheid of bedrieglike optrede)
   (c) *dolus* or listigheid, *calliditas*, (listigheid = fraud or deceit)

2. If those aspects are not present, even if there was,

   (a) absence of reasonable care,
   (b) negligence,
   (c) unreasonableness,

[34] Footnote 12 at 712-713.

[35] Commentary on the Pandects 5.1.58, *Gane's* translation, see also *Telematrix* in para 19.

liability is not incurred.

3. An irregularity committed is rather a ground for review or appeal.

The decision in Masiya v DPP,Pretoria and Another 2007(2) SACR 435 under the Spotlight.

T V Ratshibvumo *Magistrate, Johannesburg*

There are many aspects that come to one's mind when reading the decision handed down by the Constitutional Court recently. Of the many aspects and reasoning, I am stricken by two in particular, to wit; the decision calls for a Single Judiciary, and that the male victims of sexual assault will remain in the cold indefinitely.

1. The call for a Single Judiciary.

Never before had the Lower Court (the Magistrate Court) done what culminated in the *Masiya* decision before the Constitutional Court; and it did it so perfectly. This must be commended as an appropriate way to represent the lower court in the public. For the first time the Magistrates Courts were not in the public forum due to criticism and lambasting they usually suffer in the hands of the public or the Superior Courts.

It is necessary just to start off by unpacking the gist of the Constitutional Court findings in respect of the magistrate who presided over the trial proceedings. Having presided over a rape trial matter wherein a 9 year old girl was penetrated *per anum* (anally) by the accused, using his penis, the magistrate felt compelled to consider if the definition of rape was not unconstitutional and marginalising the male victims. The definition of rape as it stood was "sexual intercourse (vaginal penetration by a male penis) with a woman without her consent." The concern must have originated from aspects such as the fact that with our common law having been developed to its current standing, same sex relationships are recognised by the law in our country. Prior to the decision of *National Coalition for Gay and Lesbian Equality and another v Minister of Justice and others 1998 (2) SACR 556 (CC)* (the *National Coalition'* case), anal intercourse between males was punishable by law and was known as "sodomy" even when it was committed with consent of both

parties. The Constitutional Court in the *National Coalition'* case decriminalised sodomy. The only circumstances in which similar conduct can now be punishable is when it is done without the consent of the other party (presumably the *penetratee* as opposed to the *penetrator*) and in such a case that would be indecent assault. The terminology is the same even if the victim could be a female who has been penetrated anally: indecent assault.

One needs to keep in mind though that there are cases of same sex relationships which received the Constitutional Court's blessing and the same got cemented by the Legislator. What difference exists between a female being penetrated vaginally by a male penis and a male being penetrated anally by a male penis (with or without consent) if any? Experience from those who have been parties in such cases or those who have dealt with such cases in courts tell that there is absolutely no difference. When similar conduct is performed without consent, the pleasure sought after by the perpetrator is equally achieved as much as is the trauma suffered by the victim irrespective of whether the victim is a male or a female or whether the penetration was anal or vaginal. In all cases, the victims find themselves easily prone to sexually transmitted diseases including HIV/Aids. Knowing that there are minimum sentences to be imposed on the perpetrators of rape but not for indecent assault perpetrators, the magistrate went on to declare the definition of rape to be unconstitutional since the definition of rape as it stood then suggested that it was gravely serious when the penetration is committed per *vaginum* than per *anum*. This definition the Lower Court found to be sidelining the female victims when the perpetrator opts for anal penetration and male victims when they are penetrated (of cause anally). The magistrate proposed an extended definition for rape to include the "acts of non-consensual sexual penetration of the male penis into the vagina or anus of another person." In essence, the extended definition meant that whether the penetration is on males or on females, (that is either the vaginal or anal penetration) the conduct would be rape and punishable as such.

The Constitutional Court in return agreed almost 90 % with the ruling by the Lower Court. It agreed that the pleasure sought after by the perpetrators of indecent assault (anal penetration) and the trauma suffered by the victims of the same is identical to similar circumstances when it is rape. It further agreed that the definition of rape has to be altered as suggested but only in respect of female victims, not male victims. In respect of this

later ruling, the Constitutional Court split into two, with the Chief Justice and another judge holding that the definition should be extended to include male victims. The majority however went against the Chief Justice (and against the magistrate) and the final ruling limited the extension of the definition to the female victims (that is when they are penetrated anally it would also be rape). The reason advanced by Nkabinde J (who

delivered the judgment for the majority) was that precedence by the Constitutional Court required that they should make rulings only in respect of facts emanating from the cases at hand and that failure to adhere to this precedence would be making the judiciary to be the legislator, which it is not. Agreeing that such an extension of the definition could be necessary even in respect of male victims, she was noncommittal in entertaining it, saying the facts before the courts pertain to a female victim and that the extension to include the male victims should be entertained when such facts are before the courts.
The learned judge also hinted that making general extensions in respect of matters not before the court would be disrespectful to the principle of separation of powers which entails that the government, the legislature and the judiciary should operate independent from each other and respecting each other's boundaries.

The Constitutional Court refused to confirm the conviction of Mr. Masiya of rape simply because of the principle of legality saying he could not be convicted because at the time of the commission of the offence, it was not defined as rape.

It is important to note that the decision by the magistrate was taken *mero motu* meaning the case was not before the Lower Court for the court to declare the definition of rape to be unconstitutional. The High Court would have been an appropriate forum for that. The matter was before the magistrate for him to pronounce on the guilt of Mr. Masiya. For the magistrate to temporarily deviate from the facts before him and searched for authorities to help him arrive at a finding which was confirmed by the Constitutional Court (or at least 90 % thereof) was not an easy task. That cannot be described as eating from the table prepared before him, but rather preparing the table yourself before eating. In a number of cases that appear before the High Courts involving the constitutional challenge of any provision or any law, it is common for parties to advance arguments and counter-arguments and for the court to just choose the preferred argument as its ruling. That is

eating from the prepared table. This is not what happened in this matter hence it deserves to be saluted.

It is very common that even when the table is well prepared before the High Court, the chosen ruling (chosen from the prepared table) ends up being dismally rejected and

criticised by the Constitutional Court. The example I prefer is that of *S v Singo* wherein after arguments and counter arguments had been advanced, the High Court (*per* Judges Hetisani *et* Patel), declared section 72 of the Criminal Procedure Act to be unconstitutional saying the reverse onus on the accused (in cases where the accused who fails to appear in court has a duty to convince the Court that failure to appear in court was not due to fault on his part) negated the fundamental right of the accused to remain silent. The Constitutional Court reversed the order by the High Court and found the statute to be constitutional. This is just one of many similar cases.

For the past 13 years the courts, both the Lower Courts and the Higher Courts have been hearing cases involving rape and indecent assault just like it was in the *Masiya* matter; while the current Bill of Rights was already operational, and the discrepancies were not spotted until the magistrate presiding over the *Masiya* matter took the bold initiatives that changed the history of rape for good in our country.

If the Lower Court acting *mero motu* can do such an excellent job which gets the blessings of the High Court and of the Constitutional Court, it confirms the view that the judiciary should be one. It demonstrates that although the rank and the jurisdiction may differ, both the Lower Court and the High Court can perform any task imposed on them by any law in execution of justice.

2. The male survivors of sexual assault will remain marginalised <u>indefinitely</u>.

The ruling by the Constitutional Court means that there is no immediate hope for the male victims of sexual violence. The reason for this is that the Constitutional Court refused to

extend the definition to include the male victims saying the facts before the court involved a female victim. Although from its judgment as a whole it would appear that the Constitutional Court would not have any problem in extending the definition to include male victims, it refused to directly give an opinion saying they will make a decision when facts before the court involve a male victim if such a case come before it.

Cases of indecent assault do not usually get tried in the High Courts unless they are among other more serious charges against the same culprits. They are usually tried in the Lower Courts (the Regional Courts). Although the Constitutional Court can be said to have been happy and impressed with the magistrate's ruling in *Masiya*, it went on to rule that the Magistrate Courts do not have jurisdiction to pronounce on the constitutionality of any provision or law. The Magistrate Courts, ruled the Constitutional Court, have to proceed with the trials and finalise them presuming that any such provision is constitutional. It was like saying to the magistrate, 'you did well but don't do it again.'

My concern is that how easy are such matters going to end up before the Constitutional Court so that it can rule on them in future? Now that such matters can be dealt with only by the High Courts, are we to hope that there will be such a trial in the High Court in the future? Or will the matter be before the High Courts through appeal? While that remains a possibility, if it ever happens, it will not be as easy as it was or as cheap for the parties as it was when the magistrate ruled in the *Masiya* matter. Hope for the male victims is now in the hands of the Legislature which has been struggling with the Sexual Offences Bill for four years. Thanks to the pressure brought about by the *Masiya* decision though, the National Assembly has passed the Bill. The Bill will now have to be passed by the National Council of Provinces before it could be signed by the president to become law. If it all goes well, sexual penetration of male victims of anus by a male penis could also be rape very soon. Until then, male survivors remain marginalised without any solution in sight.