Constitutional Application

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Interpretation – section 35 – right to a fair trial

Generally – legality of plea agreements

In *Van Eeden v Director of Public Prosecutions, Cape of Good Hope* 2005(2) SACR 22 (C) the court considered the relationship between plea agreements and the right to a fair trial, protected in s 35 of the Constitution. In this case, the applicant and a co-accused had been charged with contravening the Drugs and Drug Trafficking Act 1992 (at 23*i-j*). The Director of Public Prosecutions, Cape of Good Hope acknowledged the existence of a plea agreement but there was some dispute as to the terms of that agreement (at 25*d-e*). The applicant's version, confirmed by the attorney who had entered into the agreement on his behalf, was that the prosecution had agreed not to prosecute him if his co-accused pled guilty to the charge (at 24*a-b*). The prosecution claimed that proceedings against the applicant were terminated because of insufficient evidence at the time (at 25*h-i*). The prosecution sought to re-charge the applicant and the

question before this court was whether this was permissible. Budlender AJ noted that plea agreements were now formally regulated by section 105A of the Criminal Procedure Act, a section that was not yet in force when the facts of this case arose. However, plea bargaining had already become an essential part of our criminal justice system before this (at 24*j* – 25*b*). Following a number of earlier judgments, Budlender AJ held that the right to a fair trial extends beyond the enumerated rights in the section (at 27*c-d*) to 'notions of basic fairness and justice'. The latter includes holding the state to a plea bargain it has made or 'is deemed to have been made' (at 27*g-h*). On the facts of this case, the court held an agreement not to proceed against the applicant provided his co-accused pled guilty existed or was deemed to exist and ordered the prosecution to be stayed (at 28*c-e*).

Generally – witness statements

In *S v Naude* 2005 (2) SACR 218 (W), there were important differences between the complainant's written statement and her evidence in court. The prosecutor had not informed the regional magistrate who had convicted the accused that the written statement existed (at 221*b-c*). The court held that this failure by the prosecutor resulted in an unfair trial because knowledge of the contents of the statement may have had an impact on the magistrate's findings on the credibility of the complainant, a single witness in the case (at 221*j*–222*b*). Whilst witness statements are no longer privileged documents and it is, thus, open for the defence to raise inconsistencies between written statements and oral evidence, the court held that the prosecutor still has a duty to bring the court's attention to such inconsistencies where counsel for the accused person does not do this. The prosecutor bears a responsibility to ensure that every accused person receives a fair trial (at 222*b-i*).

The question of inconsistent witness statements was also considered in *S v Raikane en Andere* 2005 (1) SASV 464 (T). In this case, a witness' original statement went missing from the police docket (at 468*a-b*). The witness in question was a police officer and a senior officer with some authority over the witness then wrote a new statement. It appeared that the witness was then told to sign the new statement (at 468*c-d* and 469*i-j*)). Inconsistencies between the statement and what the witness actually remembered were revealed during cross examination (at 468*i-j*). The court held that this constituted a violation of the right to a fair trial.

Generally – duties of presiding officers

The issues in *S v May* 2005 (2) SACR 331 (SCA) all arose from the fact that the appellant did not have legal representation at the trial. The bases for his appeal from his conviction and sentencing on four charges were that the regional magistrate had not fully explained his right to legal

representation to him; had not adequately explained what his right to cross examine state witnesses entailed; had unfairly restricted his cross examination of witnesses; and did not conduct the trial impartially (at 333*g-i*). The magistrate had, in fact, not informed the appellant of his right to legal representation. From the facts, it appeared that the magistrate assumed that the appellant was aware of this right because he did have legal representation prior to the commencement of the trial (at 334*c-d* and *h-i*).

The court indicated that, even in these circumstances, the magistrate was obliged to inform the appellant of his right to legal representation as set out in section 35(2)(*g*) of the Constitution (at 334*g-h*). This omission did not, however, necessarily mean that the trial had been unfair. The issue was whether the appellant had been prejudiced by the omission (at 335*c*). The court held that this question could be answered by evaluating the other bases for the appeal. Lewis JA went on to find that the right to cross-examine state witnesses had been properly explained to the appellant: '[t]he magistrate in fact spent some time explaining that questions should be put to the witnesses and that the appellant should contest any evidence he thought to be incorrect' (at 336*f-g* and 337*b-c*).

The magistrate had intervened to put questions to state witnesses on behalf of the appellant. The appellant argued that this amounted to a 'curtailment of the right properly to cross-examine' (at 337*d-e*). The court held that it was not inevitably inappropriate for a presiding officer to 'formulate questions more skilfully than an unrepresented person would do himself'. Whether this impacted on the right to cross-examine effectively depended on the manner in which it was done (at 337*e-f*). After an examination of passages from the record, the court found that, though the magistrate had been impatient about the repetitive nature of the appellant's question, interventions made on his part were made to assist the appellant and did not render the trial unfair (at 338*b-f*).

The claim of a lack of impartiality was, in part, on the assertions regarding the magistrate's intervention in the cross-examination, described above. In addition, the appellant referred to the fact that the magistrate had also put a range of questions to the complainant after the prosecution had examined her (at 340*b-d*). The magistrate did elicit evidence from the complainant which the prosecution had not. However, the court held that this amounted only to clarification. Furthermore, the magistrate used the information elicited to suggest a line of questioning to the unrepresented appellant (at 341*e-f* and 341*g-h*). The court held that, taken together, the magistrate's conduct during the trial did not give rise to an appearance of partiality. He did nothing to hinder the appellant's case or to assist the prosecution (at 342*e-g*). Lewis JA also commented on the role of judicial officers more generally. In this case, the magistrate had been more active

than is perhaps usual. However, judicial officers are not required to be passive umpires. Their primary duty, in a criminal context, is to ensure the fairness of the trial and any intervention will only result in a conclusion of unfairness if there has been some prejudice to the accused (at 341*i* – 342*a*).

Generally – sharing of office space by assessors; state officials and a witness

In *S v Jaipal* 2005 (1) SACR 215 (CC), leave to appeal against a decision of the Supreme Court of Appeal was requested on the basis that the appellant's right to a fair trial had been infringed. This claim arose from the fact that, due to shortages of space in a High Court building in Durban, office space had been made available in the Pinetown Magistrate's Court (at para [3]). The assessors in the case occupied an office in the latter court. The prosecutor made use of the same office everyday. The investigating officer did so 'from time to time' and a state witness was present in the office 'occasionally' (at para [1]).

The prosecutor explained that he did not have an office and that the assessors' office was the only place from which he could make telephone calls to witnesses to settle practical arrangements. He did not discuss the case in the presence of the assessors. The investigating officer had the telephone numbers of the witnesses and, therefore, accompanied the prosecutor (at para [6]). When the applicant first raised the matter before the High Court in the form of an application for a special entry in terms of s 317 of the Criminal Procedure Act 1977, the judge had asked him if he wished the assessors to recuse themselves. He did not (at para [7]).

The Constitutional Court noted that the importance of the impartiality of assessors is something that has always been acknowledged by our courts (at para [40]). The court found the sharing of office space described above to be an irregularity (at para [44]). However, the applicant's right to a fair trial had not been violated in the particular circumstances of this case. First, the explanation for the sharing of office had been given by the prosecutor in open court, in front of applicant, his friends, family and other interested members of the public (at para [47]). Second, applicant had not asked for the assessors to recuse themselves, even when the judge has asked if he wanted to exercise this option (at para [48]). Third, there was no indication that the assessors had been influenced by the presence of the prosecutor and others in their office. The applicant did not allege that the prosecutor and investigating officer had discussed the case with the assessors. He also did not criticise any of the conclusions the lower courts reached on the evidence (at para [50]).

The court noted that effective protection of the right to a fair trial requires significant resources but cautioned against 'popularizing a lame

acceptance that things do not work as they ought to, and that one should simply get used to it' in the context of upholding fundamental rights and other constitutional requirements (at para [56]).

Generally – international co-operation in criminal matters

In *Thatcher v Minister of Justice and Constitutional Development* 2005 (1) SACR 238 (C), the court had to consider the extent to which the fair trial rights applied at the international co-operation stage of proceedings. The applicant had been implicated in the financing of an alleged coup attempt in Equatorial Guinea in March 2004, was arrested and charged in terms of the Regulation of Foreign Military Assistance Act 1998 and subsequently released on bail (at 241*c-e*).

The government of Equatorial Guinea made a formal request to the South African government in order to be allowed to question the applicant. This request was considered by various members of the Department of Justice and Constitutional Development ('the department') under the International Co-operation in Criminal Matters Act 1996. The Director–General's authorised delegate satisfied himself that the jurisdictional requirements in s 7(2) of the Act had been met. The Minister then approved the request, acting under ss 7(4) and (5) of the Act (at 241*g-i*). Upon receiving the documents indicating that the above sections had been complied with, a magistrate issued the required warrants (at 241*j*–242*b*).

The applicant challenged these decisions on the basis of his right to silence and protection against self-incrimination in s 35 of the Constitution (at 243*e-f*). In addition, he claimed that the decisions amounted to arbitrary, capricious and unreasonable administrative action in contravention of the Promotion of Administrative Justice Act 2000 (at 243*i*). He also claimed that s 8(1) of the Co-operation Act was unconstitutional because it did not give the magistrate any discretion, thereby imposing the executive will on the judiciary and violating the separation of powers principle (at 257*g-h*). From an administrative justice point of view, the court found nothing lacking in the manner in which the Director-General's delegate had reached his decision. Under the Co-operation Act he had only to 'satisfy himself that proceedings had been instituted in a court exercising jurisdiction in Equatorial Guinea'. This he did. There was no basis on which the decision made by the Director-General's representative could be reviewed (at 256*b-c* and 257*b*).

On the constitutionality of s 8(1) of the Act, the court held that the magistrate did, in fact, exercise discretion. She had to apply 'her mind to the nature and content of the documents before her … had she been of the view that that such documents did not comply with the Act, she would have returned them to the second respondent with appropriate comments' (at 257*d-e* and *h-j*). Furthermore, at this stage of

the proceedings, the magistrate was not required to take the applicant's constitutional rights into account. These rights were to be taken into account when the applicant appeared before the magistrate to answer questions directed at him (at 258*g-h*).

The applicant claimed that the Minister had a duty to 'satisfy herself that it would be "in the interests of justice and in order to permit the accused to benefit from a fair trial"' before she approved the request made by the government of Equatorial Guinea (at 259*g-h*). Concerns about the fairness of criminal proceedings in Equatorial Guinea and the fact that the death penalty could be imposed in relation to the charges arising out of the alleged coup attempt should, it was argued, have been taken into account. The court disagreed, stating that, in this case, the Minister was 'doubtless aware' of the development of Equatorial Guinea's legal system (at 259*g-i*). Applicant has never suggested that the Minister had acted 'dishonestly or in bad faith' (at 259*i-j*).Thus, it could not be said that the Minister had not properly applied her mind before approving the request.

On the question of whether the Minister should have taken the applicant's constitutional rights, specifically, into account, the court held that the appropriate moment at which to consider these rights was when the applicant appeared before the magistrate to answer questions (at 264*c-e*).The court acknowledged that, where there is an extradition request in place, the South African government has certain positive obligations, as set out in *Mohamed v President of the Republic of South Africa* 2001 (2) SACR 66 (CC) (at 268*c-e*). In this case, there was no such request and it was 'pure speculation' as to whether the accused in the ongoing alleged coup trial in Equatorial Guinea would be convicted and sentenced at all (at 267*g-i* and 268*d-e*).

The court's main finding that the claims in this case were premature is sound. However, there is a lack of clarity in the court's reasoning about administrative review. In determining whether the decision made by the representative of the Director-General could be reviewed, the court appeared only to consider legality (the official stayed within the powers set out in the Act) and did not examine the reasonableness of the decision (at 256*b-d*). Moreover, the court examined the Minister's decision only on the basis of rationality and did not provide a reason for doing so (at 261*f-i*).Whilst executive action has been held to be reviewable on the basis of legality (*Fedsure Life Assurance Ltd v Greater Transitional Metropolitan Council* 1999 (1) SA 374 (CC) and *President of the RSA v SARFU* 1999 (10) BCLR 1059) and rationality (*Pharmaceutical Manufacturers Association of South Africa: Ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC)), administrative action is reviewable on the basis of all the grounds listed in s 6 of the Promotion of Administrative Justice Act 2000. Here the court did not make a finding on whether the Minister's

decision amounted to administrative action as it clearly does. As a result, the Minister's action was measured only on the basis of rationality. Although a discussion of all applicable grounds of review may have yielded the same result, this gap in the court's reasoning is problematic.

Generally – right of diplomatic protection

In *Kaunda v President of the Republic of South Africa* 2005 (1) SACR 111 (CC), the applicants were being held in Zimbabwe on charges arising from an alleged coup attempt on the President of the Equatorial Guinea (see *Thatcher* supra). They feared that they would be extradited to Equatorial Guinea to stand trial there and made a number of constitutional arguments, requesting the order to order the South African government to take certain action (at para [1] – [2]). The applicants relied, in part on s 7(1) of the Constitution, which places an obligation on the state to 'respect, protect, promote and fulfil the rights in the Bill of Rights'. The first issue the court had to decide was whether the South African Constitution could be applied extraterritorially. A majority of the judges, per Chaskalson CJ noted the judiciary's obligation to apply international law in the circumstances set out in s 233 of the Constitution; and its obligation to consider international law under s 39(1)(*b*) of the Constitution (at para [32] – [33]). Chaskalson CJ went on to hold that that there was no *right* to diplomatic protection in international law. Such a right was also not explicit in our Constitution (at para [33] – [35]). Furthermore, the court held that nothing in s 7 indicated that the Constitution applied extraterritorially (at para [37]). This finding was based purely on a reading of the text itself. The Constitution may apply beyond our borders in terms of international law but only where the application of our law does not hinder the sovereignty of other states (at paras [38] – [40] and [44]).

The applicant also argued, relying on the Constitutional Court's judgment in *Mohamed v President of the Republic of South Africa* 2001 (2) SACR 66 (CC) that the state incurred certain obligations to them by virtue of the fact that state intelligence officials had provided information to the Zimbabwean authorities leading to their arrest (at para [46]). The court held that this passing on of information was not an illegal act (at para [52]). Chaskalson CJ distinguished *Mohamed* on the basis that, in that case, state officials had acted illegally and in violation of Mohamed's constitutional rights. As the question before the court in *Kaunda* was whether the state officials had acted in breach of constitutional obligations, the reasoning here is not very clear. The majority went on to note also that the court did not order the government to take steps to alleviate the prejudice experienced by Mohamed in that case (at para [48]). Finally, on this issue, the court stated that, whereas Mohamed had been removed from South Africa by South African authorities, the applicants in this case had left of their own free will (at para [50]).

The applicants also invoked s 3 of the Constitution as a basis for their claims. The section provides:

'(1) There is a common South African citizenship.
(2) All citizens are-
(a) equally entitled to the rights, privileges and benefits of citizenship; and
(b) equally subject to the duties and responsibilities of citizenship.
(3) National legislation must provide for the acquisition, loss and restoration of citizenship.'

As the citizens are usually nationals and the applicants in this case were both, the court did not have to interrogate the difference between the two and the impact of this in international law (see para [61]). The court was willing to accept that citizens are entitled to request assistance from the government in cases of wrongful action by a foreign state (at para [60]) and '[w]hen the request is directed to a material infringement of a human right that forms part of customary international law, one would not expect our government to be passive' (at para [64]). A refusal of assistance by the government would be a justiciable matter for a South African court (at para [69]). There may even be cases where the government has a duty to act in the absence of a request for assistance – where it has knowledge of 'egregious breaches of international human rights' (at para [70]). However, the question of whether diplomatic protection should be afforded and the nature of such protection is largely a matter for the executive (at para [77]). Although decisions taken by the executive in this area would be subject to constitutional scrutiny, this would be only on the bases of irrationality and bad faith (paras [78]–[80]).

Having established this limited basis for diplomatic protection, the court went on to consider each of the applicants' claims. The applicants wanted the government to request their extradition from Zimbabwe to South Africa. The basis for this would be prosecution by the South African government. The Promotion of Administrative Justice Act 2000 excludes decisions to prosecute from review but is silent on decisions not to prosecute. Assuming in the applicant's favour that such a decision is reviewable, the court noted that a South African extradition request would have to meet the requirements of Zimbabwean extradition law. In this case, the South African government did not have the evidence and the particulars of the offence to enable it to prosecute the same offences and, thus, would not be able to comply with Zimbabwe's extradition law (at paras [82]–[91]).

The applicants wanted the court to order the South African government to take steps to secure their release. The court held that it could not do this as there was no evidence that the charges against the applicants did not constitute offences in Zimbabwean law and there was no allegation of a lack of evidence to support the charges (at para [95]).

On the question of whether the government could be ordered to seek assurances from the governments of Zimbabwe and Equatorial Guinea that the death penalty would not be imposed on them, the court held that, at the moment, there appeared to be no risk of the death penalty being imposed by Zimbabwe. However, the risk existed in respect of any prosecution by Equatorial Guinea in this case (at para [97]). The court referred to the fact that capital punishment is not specifically prohibited under international law (at para [98]) and held that, provided there is consistency with international law, citizens could be treated according to the laws of the country in which they are being held (at para [100]). The court did refer to the South African government's policy of making representations against the death penalty once it has been imposed but did not clearly state that there is an obligation on the state to do this (at paras [99[–[101] and [112]).

The applicants also wanted the government to make representations preventing their extradition to Equatorial Guinea. The court accepted, on the evidence, that there existed a real risk of this occurring (at paras [103]–[104]). However, this was something that was not yet final and applicants would be given an opportunity to resist their extradition when the proceedings for such extradition were properly in motion (at para [105]). The court held that the South African government could not be ordered to respond to applicants' concerns that Zimbabwe would bypass the extradition procedures and simply hand them over as it could not operate in the foreign sphere on the assumption that a state with which it has friendly relations will act illegally (at para [107]).

Applicants raised certain fair trial issues as well – they claimed that, if extradited to Equatorial Guinea, they would not receive a fair trial. As the court had earlier held that the Constitution did not apply beyond our borders, the court indicated that this claim could not be based on s 35 of the Constitution (at para [115]). The court referred to serious allegations about torture and other treatment of prisoners and the lack of independence of the judiciary made in reports of reputable international bodies and by a Special Rapporteur appointed by the United Nations Human Rights Committee (at paras [117] – [121] and [123]). However, Chaskalson CJ held that the claim for protection was premature as the applicants were not in Equatorial Guinea and had not yet been put on trial there.The court referred to the fluidity of the situation, ongoing talks between the governments involved and, in essence, approved a wide degree of discretion for government action in this area (at para [127]–[132]). The claim about potential ill-treatment in detention in Equatorial Guinea was also held to be premature (at para [135]).

On the issue of ill-treatment (assault and poor prison conditions, amongst other things) in Zimbabwe, the court stated that there was nothing which indicated that the South African government had not provided assistance in this matter (at para [143]). The majority dismissed the appeal.

O'Regan J wrote a judgment in which she dissented from the majority on certain points. Mokgoro J concurred in her judgment. Whilst O'Regan J agreed that there was, strictly speaking, no international law right of diplomatic protection, she referred to developments in international law in this regard and the potential such a right has in the protection of human rights generally (at para [216]). She went on to consider first, whether there is a constitutional obligation on the state to take action to protect its nationals and second, if such an obligation exists, to what extent it is justiciable (at para [217]). O'Regan J referred to the 'growing international consensus that the promotion and protection of human rights is part of the responsibility of both the global community and individual states …' (at para [221]); the South African government's ratification of a number of human rights instruments (at para [223]) and the fact that the Constitution sustains a change of attitude by judicial and other organs of state toward international law as the background to her judgment. She noted that, although applicants appeared to argue for the extraterritorial application of the Constitution on the papers, their oral argument was based on a claim that government had a constitutional obligation to exercise its international right of diplomatic protection in this case (at para 224]). O'Regan J held that the Bill of Rights has no direct extraterritorial application and that South Africans could not, therefore, rely on its provisions in foreign courts (at para [227]). However, the government still had a duty to act consistently with the Constitution when it acts in the foreign sphere (at para [228]) to the extent that that did not obstruct the sovereignty of another state (at para [229]).

On the issue of diplomatic protection in this case, O'Regan J agreed with the majority that, though the state is entitled to exercise its right of diplomatic protection on behalf of its nationals, it is not obliged to do so. Finding that it is increasingly acknowledged that individuals and not states are the primary beneficiaries of the right under international law, O'Regan J went on to hold that this entitlement, when exercised by the state, is one of the 'privileges and benefits' of citizenship mentioned in s 3 of the Constitution (at para [236]). In this way, she effectively found a constitutional duty to exist.

On the issue of the content of that duty, O'Regan J held that s 3 was more than just a guarantee of equal treatment of citizens in the foreign sphere (in any event covered by s 9 of the Constitution) but was also a guarantee that there would be some kind of protection (at para [237]). Reasoning in light of the protection of human rights she referred to at the beginning of her judgment, O'Regan J went on to hold that s 3 imposes an obligation on government to 'provide diplomatic protection to its citizens to prevent or repair *egregious* breaches of international human rights norms [my emphasis]'(at para [238]).

On the second question of whether executive action or inaction in this arena is subject to judicial scrutiny, O'Regan J held that, as an executive power, it is subject to review on the basis of rationality and legality (at paras [243] – [245]). Regarding the substance of the argument, O'Regan J held that *Mohamed* could not be distinguished on certain of the bases mentioned by the majority. In particular, the Constitutional Court's judgment in that case indicated that the duty to seek an assurance against the imposition of the death penalty existed whether or not the action taken by the South African authorities was illegal (at para [253]). This does appear to be the correct interpretation of the Constitutional Court's approach in that case. However, she was convinced by the majority's reasoning on the timing of the request – an order to seek such an assurance was premature (at para [255]). O'Regan J went on to agree with the majority's findings on all but one of the applicants' claims. She held that the right of an accused person to a fair trial was part of customary international law (at para [263]) and that the government has a constitutional obligation to take steps to protect its nationals in this context. Although the government claimed to be taking steps, no details were provided (at para [267]). O'Regan J held that the request was not premature in respect of a possible trial in Equatorial Guinea as there was, on the evidence, an 'appreciable risk' that applicants would be extradited to that state (at para [268]). She held that a declaratory order requiring the government to take 'appropriate steps' to protect the applicants against 'egregious violation of human rights norms' would meet the demands of this case (at paras [269] – [271]).

In effect, the dissenting judgment was also ultimately quite deferential to government in this sphere. The case raises questions about the extent to which human rights norms should be prioritised over state sovereignty. It also addresses questions about the appropriate level of judicial scrutiny over executive action in the foreign sphere. Both Chaskalson J and O'Regan J (who ultimately would have made a declaratory order only) allow for a wide discretion when government acts in the foreign sphere. On the first issue, though, O'Regan J expresses a carefully worded but clear preference for human rights norms. This principle and her less deferential approach toward government action and inaction are to be preferred. The problem is that international law, in its traditional form, does not adequately support the precedence of human rights norms. O'Regan J acknowledged this in her references to developing or evolving international law. As the judgment is based on a constitutional obligation to fulfil international obligations, however, this gap in international law presents more of a problem for the reasoning in this case than appears from O'Regan J's judgment. The conclusions are difficult to sustain without some argument that traditional methods of proving international law need no longer be strictly applied.

Section 35 (3)(g) – legal representation at state expense

In *S v Ambros* 2005 (2) SACR 211 (C), the accused's application for legal aid had been turned down by the Legal Aid Board and he was unrepresented during the trial (at 213*b-i*). The court pointed to the fact that the obligation to provide legal representation to an accused at state expense under section 35(3)(*g*) of the Constitution exists whenever 'substantial injustice would otherwise result'. This obligation is not met simply through state establishment and funding of the Legal Aid Board. Thus, where the Board rejects an application for legal representation, the state must still consider whether substantial injustice would result from the accused being unrepresented in that case (at 216*e-g*). This particular case was not one in which the accused could easily manage without assistance (at 217*a-b*) and he was clearly unable to represent himself adequately (at 218*a-b*). In addition, he was not informed that he had a right to appeal the decision not to grant him legal aid and that he could ask the court to order that substantial justice would result from a lack of representation, despite the decision of the Legal Aid Board (at 217*e-h*). The court held that he had not received a fair trial and set aside the conviction. The case highlights the fact that there are many people who do not qualify for Legal Aid but who are unable to provide themselves with an adequate defence. The principle that the existence of a Legal Aid Board does not, in itself, satisfy the state's obligation to provide legal representation under section 35(3)(*g*) is a welcome one. The question of resources is not one directly addressed in this case as the accused was not informed of avenues open to him outside of the Legal Aid Board. However, the principle laid down in the case certainly has resource implications and challenges the idea that there is a clear distinction to be drawn between first and second generation rights.

Section 35(3)(o) – right of appeal – delay

In *S v Liebenberg* 2005(2) SACR 350 (SCA), the court held that the 'inordinate delays' in the case amounted to a violation of the appellants' right to of appeal, protected in section 35(3)(*o*) of the Constitution (at 360*b-i*). The trial had taken place approximately four months after the offences were committed, a period of time which the court found to be a reasonable (at 356*i-j* and 360*a-b*). An appeal to the Cape High Court was unsuccessful but the appellant was only informed of this outcome three months after the fact (at 360*c*). His application for leave to appeal that judgment was only lodged some six years later due to delays in making contact with the Legal Aid Board, amongst other things (at 360*d-e*). Although he was immediately granted leave to appeal, the Registrar of the Supreme Court of Appeal only received the record of the proceedings

almost a year later and the appeal was only set down for hearing two years after this. At the time, there was no explanation for either of these delays (at 360*f-g*) but the court was informed by the Registrar that the actual hearing of the appeal was delayed by the fact that appellant's heads of argument were not filed for over a year after the Registrar had received record of the leave to appeal (at 360*g-h*). The court held that there was no explanation for the delays following the granting of leave to appeal to the Supreme Court of Appeal and therefore no way to determine who was responsible for these delays. In these circumstances, the delays amounted to a breach of the appellant's right of appeal (at 360*b-i*).

It is important to note for future cases that the reason for the delay will be relevant in determining whether a delay amounts to a violation of s 35. It is not clear from the judgment why the court relied on the right of an accused person to appeal and not 'the right to have their trial begin and conclude without unreasonable delay', specifically protected in s 35(3)(*d*). A narrow interpretation of the term 'trial' in the s 35(3)(*d*) may exclude the relevance of delays during the appeal stage of a criminal matter but there is no reason why such a restrictive approach should or would be adopted.

The issue of appeal also arose, albeit only in an obiter dictum, in *S v Raikane* 2005(1) SASV 464 (T). In that case, Bertelsmann J noted that the delay of approximately six years between the conviction and the hearing of the appeal was cause for concern (at 474*b-c*) and that there seemed, on the face of it, to be a case for damages against the state as a result of the prejudice caused by this delay (at 474*e-f*).

Interpretation

Interpretation – section 28 – children's rights

Prinsloo v Bramley Children's Home 2005 (2) SACR 2 (T) concerned an application for access to information in the context of a criminal trial. The applicants had been accused of indecent assault on the second and third respondents who were both minors; and possession and production of child pornography, amongst other things They applied for access to the first respondent's files on the second and third respondents (at 4*d-e*). They based this application on their constitutional rights to a fair trial and of access to information.

The court held that these rights had to be weighed against the children's rights, protected in s 28 of the Constitution. As s 28 makes children's rights paramount in any matter concerning a child (at 11*f-g*), the applicants had to show that the information was 'essential for their defence' (at 11*i-j*). The applicants had not done this – they had simply suggested that the files of the children's home might contain information that the children

had been involved in 'sexual misbehaviour or other improper conduct' (at 6*i-j*). At this stage the applicants had not even disclosed the basis for their defence (at 12*d-e*) and had not demonstrated how the character of the second and third respondents was necessary for that defence (at 13*c*). The application was dismissed. Although the case was not brought under the Promotion of Access to Information Act 2000, it is worth noting that s 7 of this constitutionally mandated piece of legislation makes it clear that 'records requested for criminal or civil proceedings after commencement of proceedings' are excluded from the application of the Act. The intention was for the ordinary rules of discovery to apply. In addition, the court's finding that the paramount nature of children's rights translates into an onerous burden of justification for access to information affecting the privacy and dignity of children is a useful principle for future cases.

Interpretation – section 39(2) – development of the common law in line with constitutional principles

S v Engelbrecht 2005 (2) SACR 41 (W) arose from the death of Mr Engelbrecht. He was killed by his wife, who alleged that she had been subjected to sustained domestic violence during her marriage (at 50*b-c*). The case was decided by Satchwell J and two assessors. The findings on the law were made by Satchwell J and decisions on the facts by her and the assessors. The *amicus curiae* in the case, Centre for Applied Legal Studies at the University of the Witwatersrand made two main constitutional arguments: (a) If the court decided that the defence had to be based on an established ground of justification, the elements of that justification should be developed consistently with the Constitution, as demanded by s 39(2) of the Constitution. In their view, this would involve interpreting the existing defence to make it 'relevant and accessible to abused women who resort to violence as a result in the abuse' (at 53*b-c*); and (b) The court need not demand that a recognised defence be established in this case but could evaluate the defendant's conduct in light of the legal convictions of the community, which are now informed by the values underpinning the Constitution (at 53*c-d*).

The court, per Satchwell J, first considered the established justification of private defence or self-defence. The court noted that lawfulness in this context is determined by what the 'reasonable man' would have done in the relevant circumstances (at 129*e-g*). This reasonableness approach is, in turn, based on the legal convictions of the community – now informed by Constitutional values (at 130*c-e*). The court then went on to discuss the issues that would have to be considered in applying the reasonableness standard here. In the context of this case, the court held that it would have to have to take account of the defendant's experience of domestic

violence and of the effect that had on her (at 130*e-f*). That this should be considered was made necessary by a number of constitutional values, including that of equality (at 130*e-f*). The court accepted the amicus' arguments about the 'gendered nature of domestic violence', noting that this is something that has already been acknowledged by our Constitutional Court in *Carmichele v Minister of Safety and Security* 2002 (1) SACR 79 (CC) (131*a-b*) and went on to discuss the gendered nature of the defences recognised in criminal law. On this latter point, Satchwell J accepted the submissions made by the amicus that women's experiences of violence have largely been ignored in the development of the traditional criminal law defences (at 131*e-f*). She held that, where necessary, the common law would be developed, in terms of s 39(2) of the Constitution, to protect equality (131*j* – 132*a*).

The court found that private defence or self-defence is a justification against unlawfulness on which abused women who have killed their abusive partners may rely (at 132*f*). The question was then whether the justification applied on the facts of this case. Satchwell J held that it did but the majority decision was that it did not. The majority held that the defendant had not made adequate use of society and state institutions in the form of the South African police service and the legal system for assistance (at 151*b-c* and 157*e-g*). Satchwell J held that the defendant had attempted to make use of these forms of assistance without success and her loss of faith in them was, as a result, reasonable. The reasons for the difference in views are set out at some length (147 – 151). In short, the assessors referred to the defendant's abandoning of the legal system in not arriving in court on allocated dates and in withdrawing charges against her husband. Satchwell J emphasised the certain failings by the police service, the family violence court and volunteer agencies. Her findings were also more clearly connected to the context of domestic violence, something canvassed earlier in the judgment. Thus, for example, she referred to the fact that when the defendant withdrew certain of the charges against her husband, it was on his instruction and he accompanied her to the police station. It is submitted that this approach is preferable, given the Constitution's commitment to gender equality and the approach of the Constitutional Court reflected in the *Carmichele* case.

The findings on the law made by Satchwell J will be useful for future cases. In developing private defence or self-defence in terms of s 39(2) of the Constitution, she took the nature of domestic violence, discussed at length before the court, into account. Against this background, she held that it was permissible to focus on the effect of the domestic violence on the 'psyche, make-up and entire world view of an abused woman' (at 132*i*). The unlawful attack against which the defence must be measured could, in the context of domestic violence, be emotional abuse, degradation,

infringement of dignity, physical attacks or threats of any of these (133*a-b*). The interests defended could be the rights to life, dignity and bodily integrity and interest in quality of life, her home, her freedom and similar interests of her children (at 133*c-d*). Where the abuse happens often and regularly and there is a 'pattern' of such abuse, the requirement of imminence would be satisfied by abuse which is 'inevitable' (at 134*c-d*). In determining whether the action taken was 'necessary for protection of' her interests (at 134*e*), Satchwell J cautioned against requiring that an abused woman leave her home (at 135*c-d*) and passing judgment on the fact that an abused women stayed in the abusive relationship (at 135*g-h*). On the question of proportionality, Satchwell J listed a number of factors to be considered. These included the respective ages of the parties, the 'content' of their relationship (power relations etc), their relative strengths, the effect of the abuse on the defendant and the extent to which it was possible for her to extricate herself from the situation (see 136*b-e*).

On the second main constitutional argument made by the *amicus curiae*, the court declined to adopt a general defence based on reasonableness as there were insufficient representations on the content and development of such a new defence in this case (at 158*c-d*). This finding does not rule out the development of a new defence in a future case.

Application – right of appeal

In *Western Areas Ltd* 2005(1) SACR 441 (SCA), the court had to deal with the issue of piecemeal appeals. The appellants objected to certain of the charges against them and, before the commencement of the hearing of the trial in the High Court, they presented argument on this objection. The judge dismissed the objection (at 447*h-i*). The appellants appealed this decision to the Supreme Court of Appeal. The court upheld the view from *Minister of Safety and Security v Hamilton* 2001(3) SA 50 (SCA) that, despite the fact that s 168(3) of the Constitution allowed for the Supreme Court of Appeal to 'decide appeals in any matter,' that section had to be read in the context of the Supreme Court Act 1959. This was mandated by another section of the Constitution – s 171 (at 449*h* and 450*b-c*). Thus, the court had discretion as to whether to decide an appeal on the objection to the charges. This discretion had to be exercised in the interests of justice (at 452*f-g*). As a general rule, piecemeal appeals are frowned upon. However, they may be engaged in where the guidelines set out in *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) are met: the order must be 'final in effect'; 'definitive of the rights of the parties;' and 'must have the effect of disposing of at least a substantial portion of the relief claimed' (at 451*c-d*). As the decision on the objection to the charges could be reconsidered at the end of the trial, not all of these requirements were met in this case (at 452*b*). However, taking

into account the principle that 'judgment or order' should not be construed restrictively if this would conflict with the interests of justice (at 452*e-f*), the court went on to consider what would best serve the interests of justice here. In this case, the trial on the charges to which the appellants had not objected would be lengthy and the inclusion of the charges under doubt would not significantly extend the trial (at 454*e*). As a result, the matter was struck from the roll.