Constitutional application

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Judicial independence

In *S v Van Rooyen* 2001 (2) SACR 376 (T), it was held that certain provisions of the Magistrates Court Act 1944, the Magistrates Act 1993 and certain regulations made under the latter Act were unconstitutional. It was held that, due to a large amount of executive influence over the system of magistrates' courts, these courts were not institutionally independent from the executive. (For a more detailed discussion of the case, see A Pillay 'Constitutional Application' (2002) 15 *SACJ* 156.) The case went to the Constitutional Court for a confirmation of the High Court finding of invalidity and, at the same time, on appeal against the finding.

In a unanimous decision, the Constitutional Court found that some provisions of the Magistrates Act 1993, the Magistrates' Courts Act 1944 and the Regulations made under the Acts violated the principle of institutional independence. However, the court found that the legislation governing the magistrates' system, as a whole, was consistent with the principle of judicial independence demanded by the Constitution (at para 269). This was a significant departure from the High Court decision and was based, in large part, on the fact that there are safeguards built in to the system, designed to protect the institutional independence of the magistrates' courts.

Before dealing with the individual complaints, the Constitutional Court set out the context within which it reached its judgment. The court found that the fact that some of the of legislative provisions governing the magistrates court system were different from those in the Constitution protecting the independence of judges was not, *in itself*, sufficient basis for a finding of constitutional invalidity (at para 22). The High Court had found these differences to be very significant but the Constitutional Court found that a number of factors, including the specific functions of the court and its position in the hierarchy of courts, must be taken into consideration (at para 23). The Constitutional Court also noted that, although judicial impartiality was integral to the right to a fair trial protected in s 35 of the Constitution, the independence of the judiciary, as an institution, was a general constitutional principle. Importantly, then, infringement of the principle of judicial independence cannot be justified in terms of s 36 as that section applies only to the limitation of rights (at para 35). In addition, the court found that the test to be applied when determining whether there was a lack of independence or impartiality was determined with reference to how things appear to 'a reasonable, objective and informed person'.

The court found many of the impugned provisions to be constitutional because of the existence of 'powerful judicial and constitutional safeguards' in the system. Thus, for example, the court strongly disagreed with the High Court's finding that the changes to the composition of the Magistrate's Commission introduced in 1996 via an amendment led to the 'inescapable' conclusion that the magistracy is now a '"personal fiefdom" of the Minister of Justice' (at para 46). The Constitutional Court referred to the context within which the changes were made and the purpose for which they were made. The Commission 'is now more representative of South African society as a whole' (at para 61). However, this was a separate issue from that of whether the changes resulted in a limitation of judicial independence. On this issue, the court held that 'the fact that the Executive has a strong influence in the appointment of the members of the Magistrates Commission does not mean that magistrates' courts lack institutional independence' (at para 71). The

objective person would have no reason to believe that the members of the Commission, who are all responsible members of the community and some of who are required, as magistrates themselves, to take an oath requiring them to exercise their duties impartially and independently, would not act with integrity. The members of the Commission include members of opposition political parties (at 72). In addition, the matter must be viewed against the constitutional and judicial safeguards within the system. These safeguards are referred to at the beginning of the judgment and include the jurisdiction of the magistrates' courts as compared to other courts and recourse to higher courts for the appeal or review of the decisions of magistrates' courts. Thus, the protection of the institutional independence of higher courts results in greater protection of the independence of all courts (at para 23–para 25).

Similarly, the Constitutional Court held that s 6 of the Magistrates Act 1993 and the Complaints Procedure Regulations were constitutional. These provisions gave the Executive the power to create a complaints system to address improper conduct of magistrates. Section 180(*c*) of the Constitution expressly allows for a complaints mechanism to be established by national legislation. Subordinate legislation is included within the definition of national legislation in s 239 of the Constitution. Also, the regulations passed by the Minister were constitutionally reviewable (at para 100 and para 101). The findings of constitutional validity with respect to appointments, conditions of service, financial security, vacation of office and discharge of magistrates, seniority, transfer, assignment of powers to magistrates, complaints by magistrates, and conditions of service, rest in a large part on the presence of safeguards within the system.

Some provisions were found to be unconstitutional. Section 3(2) of the Magistrates Act gave the 'appointing or designating authority ... after consultation with the Commission' the power to recall a member of the Commission '*if in his, her or its opinion* there are sound reasons for doing so [emphasis in the original]' (at para 93). The court found this to be inconsistent with the principle of independence because the test is not an objective one — provided objective criteria for recall exist, executive control over the process would be unobjectionable (at para 94). The Constitutional Court opted to delete the words 'in his, her or its opinion' from the section and set aside the order of the High Court declaring the section, as a whole, to be invalid.

On the rules and procedures regarding impeachment, the Constitutional Court found many of the provisions to be constitutional. This was, again, on the basis of in-built safeguards against the abuse of power, coupled with the fact that these procedures in the provisions were similar to those applying to

other bodies like the Public Protector and the Human Rights Commission (at para 162). However, s 13(3)(*b*), which leaves the decision as to whether a suspended magistrate will continue to receive a salary to the Minister was found to be inappropriate as the Minister should not be given 'the power to depart from decisions of the Commission on such matters' (at para 177). The words 'the Minister on the recommendation of' were deleted from the section to secure constitutional consistency. In addition, the power to discipline and punish judicial officers should not rest with the Minister — this would infringe judicial independence by placing the judiciary in a subordinate position to the government (at para 179). The relevant provisions were interpreted to remove the Minister's discretion in deciding whether to refer a recommendation by the Commission to Parliament. On this interpretation, any recommendation by the Commission must be referred to Parliament (at para 181–para 182). Various other provisions were interpreted consistently with the Constitution and, where this was found to be impossible, held to be invalid (at para 192, para 195–para 201).

Most importantly, the judgment confirms the finding in the *First Certification Judgment* 1996 (4) SA 744 (CC) that the South African Constitution does not require a strict separation of powers. Thus, where the High Court's findings of invalidity were based solely on the involvement of the Legislature and Executive in matters affecting the system of magistrates' courts, these findings were not confirmed. A system in which checks and balances exist between arms of government cannot also be one in which the separation of powers is absolute (at 105).

Leave to appeal

S v Bierman 2002 (2) SACR 219 (CC) dealt with an application for special leave to appeal to the Constitutional Court against a conviction of murder and two other offences by the Supreme Court of Appeal. The applicant argued that the admission into evidence of the testimony of the Reverend G Bothma was a violation of her right to privacy (protected in s 14 of the Constitution) and her right to a fair trial (protected in s 35 of the Constitution). The applicant had confessed, during one of the Reverend's visits to her in prison that she was guilty of the charge of murder (at para 2 and para 3) and the Reverend testified to this effect, after having been advised by his attorneys that the information was not privileged. There were several other witnesses and the conviction was not based on the Reverend's testimony alone.

The court found that the applicant had not argued, before the Supreme Court of Appeal, that the admission of the evidence was a violation of her

constitutional rights and that the common law rules on this issue had, as a result, to be re-evaluated (at para 6 and para 7). Special leave to appeal would only be granted in circumstances where the interests of justice required it. Previous Constitutional Court jurisprudence on this has identified prospects of success as a significant factor in determining whether it is in the interests of justice to grant the appeal. In addition, where the development of the common law is in issue and the issue has not been canvassed before the Supreme Court of Appeal, the Constitutional Court will be reluctant to allow a direct appeal (at para 7). The court found that the applicant's failure to raise the issue before the Supreme Court of Appeal might have been a sufficient basis upon which to refuse the application but that, in addition, she could not establish a reasonable prospect of success (at para 9). A finding that the testimony of the Reverend ought to have been excluded would not have resulted in the reversal of her conviction because of the evidence of other witnesses.

Interpretation — freedom of expression

In *Phillips v Director of Public Prosecutions (WLD)* 2002 (2) SACR 375 (W) the constitutionality of s 160(*d*)(*i*) and (*ii*) of the Liquor Act 1989 was challenged. The relevant parts of the section provide:

> 'The holder of an on-consumption licence who
> (d) allows any person
> (i) to perform an offensive, indecent or obscene act; or
> (ii) who is not clothed or not properly clothed, to perform or to appear,
> on a part of the licensed premises where entertainment of any nature is presented or to which the public has access ... shall be guilty of an offence.'

The applicants used both ss 12 (freedom and security of the person) and 16 (freedom of expression) to challenge the provision. The judgment deals only with the latter provision. The court followed a number of other decisions in finding that the right must be interpreted widely. This was due to the presence of a general limitation clause in the Bill of Rights and to the wording of the section itself (at para 11–para 12). The court followed what has become known as a 'content-neutral approach'. Expressive activity cannot be excluded from the protection of s 16(1) on the basis that its content is offensive or degrading or unacceptable to certain people (at para 14). The only real requirement is that there must be some expressive content — 'the purely physical activity of parking a car ... performed as a day-to-day task, cannot be said to have expressive content' (at para 17). The court did not have to deal with the categories of expression specifically excluded from the scope of the right by s 16(2).

The court accepted that the kind of performances prohibited by the section ('a topless waitress or barmaid, for example, or their male counterparts'), whilst not necessarily an expression of artistic creativity, are nevertheless expressive activity (at para 17). Thus, the section had the effect of limiting the right to freedom of expression. The next step was to examine whether such limitation was justified under s 36, the general limitation clause. However, the respondents had not made any arguments on the question of justifiability and the court found that, where there is sufficient notice of the constitutional challenge, it is up to the respondents and not the court to provide justification (at para 18). As a result, the application succeeded. The order of invalidity will have to go to the Constitutional Court for confirmation or reversal.

Interpretation — right to a fair trial

S v Charles 2002 (2) SACR 492 (E) dealt with the accused's right to 'have a legal practitioner assigned ... by the state and at state expense if substantial prejudice would otherwise result ...' protected in s 35(3)(*g*) of the Constitution. The basis for the appellant's claim was that his legal representative did not consult with him about his defence before his trial began and that the magistrate's allowing the trial to continue despite this also contributed to the violation of his rights. On the facts, the court found that the attorney had not consulted with his client (at 497*e–f*). The accused's testimony indicated that he had an alibi but this was inconsistent with what his attorney put to the state witnesses (at 494*c*). The court held that the right in s 35(3)(*g*) 'embraces the right to legal representation by a person who has placed himself or herself in a position to present the client's case as instructed' (at 497*d*). The attorney must familiarise himself or herself with the charges, 'the facts with which the accused is confronted and, more importantly, the version of the accused' (at 496*g*). The magistrate's decision to continue, despite his awareness of the problem was found, by the court, to have contributed to the violation of the appellant's rights. The conviction and sentence were set aside.

Constitutionality of the prostitution and brothel provisions of the Sexual Offences Act

In *S v Jordan* 2002 (1) SACR 17 (T), the High Court held that s 20(1)(*a*A) of the Sexual Offences Act 1957, which provided that '[any person who has unlawful carnal intercourse, or commits and act of indecency, with any other person for reward] ... shall be guilty of an offence' was unconstitutional. However, the court found the brothel provisions of the Act, s 2, 3(*b*) and 3(*c*) to be constitutional. (For a fuller discussion of the High Court decision, see A Pillay 'Constitutional Application' (2002) 15 *SACJ* 154.)

In *S v Jordan (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae)* 2002 (2) SACR 499 (CC), the High Court's declaration of invalidity came before the Constitutional Court for confirmation. At the same time, the decision that the brothel provisions were consistent with the Constitution, was appealed. The first issue to be considered was which Constitution was relevant to the case. The court was unanimous in its finding on this question. Item 17 of Schedule 6 of the Constitution provides that '[a]ll proceedings which were pending before a court when the new Constitution took effect, must be disposed of as if the new Constitution had not been enacted, unless the interests of justice require otherwise'. Although the interim Constitution was the one in effect at the time the events occurred and no argument for the application of the 1996 Constitution in the interests of justice was made, the High Court applied the 1996 Constitution. The Constitutional Court noted that this, in itself, would be a basis for declining to confirm the order of invalidity (at para 2–para 4). However, due to the fact that the finding was based on the discrimination provision of the 1996 Constitution, which was substantially similar to that in the interim Constitution, the court decided to examine the case on its merits, applying the interim Constitution (at para 14).

Ngcobo J, for the majority, was also critical of the fact that the High Court did not indicate whether its decision was based on a violation of s 9(1), enshrining equality before the law and equal protection and benefit of the law or on s 9(3), which prohibits unfair discrimination. In addition, it was noted that the High Court failed to provide any basis for its finding that the discrimination could not be justified under s 36, the general limitation clause.

On the question of whether s 20(1)(*a*A) discriminates unfairly against women, the court accepted the appellants' submission that the section is aimed at the prostitute and not the customer (at para 8). As the distinction made is between prostitute and customer, the court found that there was no direct discrimination on the ground of gender. On the question of whether there was indirect discrimination, the court noted that the section must be viewed in the context of law dealing with prostitution generally. At common law, the customer is a *socius criminis* (accomplice). In addition, the customer would fall within the parameters of s 18(2) of the Riotous Assemblies Act 1956 that makes it an offence to instigate, incite, command or procure another to commit an offence. Such person is liable to the same penalties as the prostitute (at para 11). The court went on to find that, even if there is discrimination, such discrimination is fair — the Act pursued a 'legitimate constitutional purpose, namely, to outlaw commercial sex' and targeting the supply is an effective way of doing this (at para 15). In addition, the fact that the customer and prostitute are dealt with under different provisions of the

law is not unfairly discriminatory. The majority found the provision to be 'gender-neutral' in that it is aimed at both male and female prostitutes (at para 15). The stigma attached to prostitutes, according to the court, is attached to both male and female prostitutes and is not a legal stigma but a societal one, deriving from the nature of the conduct knowingly engaged in (at para 16 and para 17). Thus, the court concluded that there was no unfair discrimination on the basis of gender, rejecting the argument that the fact that most prostitutes are women means that the legislation discriminates indirectly on the basis of gender (at para 18). The court declined to take into account the submission that the practice of prosecuting prostitutes and not customers is unfairly discriminatory. It found that, whilst this pointed to a defect in the application of the law, it did not amount to a constitutional defect relevant to the question of whether the High Court order should be confirmed (at para 19).

The majority went on to consider the constitutional challenges to s 20(1)(*a*A) based on economic activity and privacy. Having found the provision to be unconstitutional because it was unfairly discriminatory, the High Court did not examine the other challenges. The Constitutional Court was critical of this, stating that a discussion of these issues by the lower court is necessary to cater for the cases, like this one, where the Constitutional Court refuses to confirm the order of invalidity on a particular ground. However, the appellants relied on the same arguments, dealing with economic activity and privacy in their argument on the brothel provisions. Thus, the Constitutional Court felt that it had the benefit of full argument on these grounds and it was not necessary to send the matter back to the High Court.

The court proceeded on the interpretation of s 26 most favourable to the appellants: that the only permissible limitations on free economic activity were those set out in s 26(2) (at para 23). Even on this interpretation, the court held that the right was not violated. The state argued that the prohibition of prostitution and brothel keeping existed for 'the protection or the improvement or the quality of life' and human development because '[p]rostitution is associated with violence, drug abuse and trafficking' (at para 24). The court accepted this, finding that it was not entitled to set aside legislation simply because the legislature could, in its view, have adopted a more effective course (at para 26).

The court also found that the provisions prohibiting prostitution and brothel keeping did not violate the right to privacy. The court found that, even if the right to privacy was at issue here, the core of the right was unaffected. The prohibition affects only the sale of sex, not private sexual relations generally (at para 29) and the interest involved is, thus, a

commercial one. Even if the right had been violated, the limitation would be justifiable because of the legitimate government purpose referred to in the discussion of free economic activity.

There was a minority judgment by O'Regan and Sachs JJ, in which Langa DCJ, Ackermann and Goldstone JJ concurred. The minority judgment deals with each of the challenges in detail but the most significant points of departure from the majority judgment relate to unfair discrimination and privacy. In a judgment clearly more consistent with the Constitutional Court's decision in *City Council of Pretoria v Walker* 1998 (2) SA 363 (CC), the minority found that s 20(1)(*a*A) amounts to indirect and unfair discrimination on the ground of gender. The provision affected women disproportionately because most prostitutes are women, a contention that the state did not seek to refute (at para 60). The fact that the customer or patron could be prosecuted in terms of other laws did not assist the state as the effect was to treat the prostitute as the principal offender. This perpetuated gender stereotypes about the sexual roles of men and women: '[the] inference is that the primary cause of the problem is not the man who creates the demand but the woman who responds to it: she is fallen, he is at best virile, at worst weak' (see para 61 — para 65). Having found indirect discrimination to exist, the court went on to examine whether the discrimination was unfair by assessing 'the nature of the group discriminated against, the nature of the discriminatory provision or conduct, as well as the impact of the discrimination on those who complain of it' (at para 66). Although the minority found that prostitutes are partially responsible for the social stigma that attaches to them, it also found the group to be a marginalized one. The judges emphasised the fact that the law here entrenches received notions about male and female sexuality and saw no reason for the prostitute to be treated as more blameworthy than the patron (at para 68 and para 72). Interestingly, the court also mentions in its discussion of privacy that an argument can be made that the 'institution of commercial sex' itself reinforces 'patterns of inequality' (at para 82). This was not an issue explored in the judgment, however, due possibly to the fact that that the main concern was the differential treatment of prostitute and patron.

The minority judgment found that the right to privacy was also infringed by the provision. The infringement did not attach to the core of the right because the act of hiring out sexual services removes much of the private and intimate aspects from the act of sex (at para 83). The conduct did not, however, deprive a prostitute of her right to privacy in its entirety. The extent to which the right was infringed was a significant consideration in the limitation analysis under s 36. The judges found the violation of this right to be justifiable in terms of s 36, largely on the basis that the choice of how to

regulate commercialised sex was a legislative one. Prohibition, although perhaps not the most effective approach, is one adopted by many other democratic countries and one that is constitutionally permissible in South Africa (at para 88–para 92). This judicial approach, the minority held, should be followed '[I]n circumstances where the limitation of a right is not severe, where Parliament has identified important purposes to be achieved by that limitation, and where people may reasonably disagree as to the most effective means for the achievement of those purposes' (at para 94).

The finding on the justifiability of the infringement of the right to equality was quite different. This was because of the fact that the state did not show that any important purpose was served by drawing a distinction between patron and prostitute. The purpose of limiting prostitution might well be better achieved if both are targeted (at para 96 and para 98).

On the question of whether the brothel provisions violated any provisions of the Constitution, the judges held that the sections must be read purposively to apply only to commercial sex. On this interpretation, the argument that the provisions were overbroad in that it could apply to any residence where anyone other than husband and wife went to have sex, was rejected (at para 101). In addition, the minority found that, although the provisions were originally enacted to enforce a particular moral code, they could be interpreted as serving a legitimate purpose currently unless the text is plainly at odds with the values of the Constitution (at para 112). Again, as to the effectiveness of the provisions in achieving the constitutionally permissible objective of limiting prostitution, the court found this was a question for the legislature, not the judiciary (at para 120).

The minority judgment is, it is submitted, to be preferred. The treatment of indirect discrimination by the majority was cursory and at odds with the earlier Constitutional Court approach to indirect discrimination in *City Council of Pretoria v Walker*, referred to in both the minority and majority judgments. The majority's refusal to acknowledge that s 20(1)(*a*A) of the Sexual Offences Act 1957 has a disproportionate impact on women does not cohere with the commitment to a notion of substantive equality reflected in the Constitution and in other Constitutional Court decisions.