Constitutional Application

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Section 35 — right to a fair trial

Right to legal representation

In *Ehrich v CEO, Legal Aid Board* 2006 (1) SACR 356 (E), the applicant asked for the court to review and set aside a Legal Aid Board decision refusing him legal representation at state expense. He had been convicted on a number of charges of indecent assault and wished to appeal (at para [1]). His criminal trial had gone on for some time and his legal representatives were repeatedly replaced at his request (at para [3]). Following his conviction and sentencing, the applicant instructed an attorney at the Eastern Cape Justice Centre to file a notice of appeal. He was later informed that he would have to re-apply for legal aid for the appeal and that the decision whether to grant such aid would be based on his chances of success in an appeal (at para [5]).

After considering the record, an attorney at the Legal Aid Board and two members of the Grahamstown Bar concluded that there was no prospect of success. In reaching their conclusion, the members of the Bar also consulted a medical expert regarding the possibility of leading further evidence at the appeal (at paras [6] — [7]). The applicant made use of an internal appeal procedure but was also unsuccessful in this (at para [7]).

The applicant argued, first, that the Board's filing of a notice of appeal indicated an intention to take the case on appeal in that it would not have filed a notice if there was no chance of success in an appeal. Having regard to the fact that the attorney who filed the notice was simply acting on the applicant's instruction and was a 'virtual stranger' to the case, the court found no merit in this submission (at para [8]). The applicant's second argument was that he had a right to state-provided legal assistance for his appeal in terms of s 35 of the Constitution.

The court referred to the fact that, under s 35, both detained and accused persons have a right to legal representation at state expense 'if substantial justice would otherwise result' (at para [9]). Thus, the right is not absolute. Given the number of legal opinions indicating there was no chance of a successful appeal, the Board was 'entitled to conclude that a refusal to provide the applicant with assistance would not amount to a substantial injustice' (at para [11]).

Impression of partiality

In *S v Mdyogolo* 2006 (1) SACR 257 (E), the appellant claimed that his right to a fair trial had been violated because the magistrate had not allowed him to confer with his lawyer during the proceedings (at 259*e-f*). The court noted that 'notwithstanding the irritation that a magistrate feels where proceedings are continuously interrupted by an accused wishing to give instructions which should really have been given previously, the judicial officer must maintain his [sic] cool-headedness' (at 261*a-b*). The court held that the magistrate's refusal, on some occasions, to allow the appellant to confer with his legal representative and the threat to have him removed from court 'may certainly have created an impression of a lack of objectivity'. However, the court did not decide whether this constituted an irregularity in the trial due to its finding on a different basis for the appeal.

Right to remain silent

In *Mdyogolo* (supra), the magistrate had relied heavily on a confession made by the appellant to another magistrate (at 261*d*). The appellant had claimed that this confession was made under duress. However, no trial-within-a-trial was held to consider the admissibility of the confession. The court held that this amounted to a fatal irregularity in the trial (at 261*g-h*) as, in the absence of a trial-within-a-trial, the appellant was compelled to enter the witness box in order to challenge the evidence on the confession, thereby subjecting himself to general cross-examination. This amounted to a violation of his right to remain silent (at 263*c-e*). The judge set the conviction and sentence aside but ordered that the trial commence afresh before a different magistrate, as provided for by s 324(*c*) of the Criminal Procedure Act 1977 in circumstances where a conviction and sentence have been set aside due to a 'technical irregularity or defect in the procedure' (at 263*i-j* and 264*b-c*).

Right to be informed of the charge with sufficient detail to answer it

S v Fielies 2006 (1) SACR 302 (C) came before the court on automatic review. The two accused were charged with housebreaking with intent to steal and attempted theft. They did not have legal representation, pleaded not guilty and were ultimately convicted for malicious injury to property, which is a competent verdict under s 262(1) of the Criminal Procedure Act 1977 (at para [1]). One of the issues before the court was whether the accused should have been informed of the possibility of their being convicted for malicious injury to property (at 305*c*).

Noting that the right to a fair trial in s 35(3) of the Constitution includes a 'right to be informed of the charge with sufficient detail to answer it' (at para [7]), the court held that the right had been violated in this case (at para [12]). Canvassing the jurisprudence in this area, the court held that the right in s 35(3)(*a*) generally included a right to be informed of competent verdicts on the charge. This did not have to be done in the charge-sheet but, at least, before pleading. Failure to provide this information to an accused in time would not, in itself, render the trial unfair. The question is always whether there has been prejudice to the accused (at para [9]). On the facts here, the explanation given to the accused was 'woefully inadequate' and given only once the magistrate had started to hand down judgment (at para [10]). In addition, both accused focused only on a denial of their involvement in the housebreaking. In these circumstances, there was prejudice to the accused (at para [11]).

Section 28 — Children's rights

In *S v Dial* 2006 (1) SACR 395 (E), s 337 of the Criminal Procedure Act 1977, had to be considered. The section provides:

> 'If in any criminal proceedings the age of any person is a relevant fact of which no or insufficient evidence is available at the proceedings, the presiding judge or judicial officer may estimate the age of such person by his appearance or from any information which may be available, and the age so estimated shall be deemed to be the correct age of such person, unless–
> (a) it is subsequently proved that the said estimate was incorrect; and
> (b) the accused at such proceedings could not lawfully have been convicted of the offence with which he was charged if the correct age had been proved.'

The court noted that this section has been interpreted as a last resort (at para [4]). In this case, the magistrate had, with reference to s 337, estimated that the accused was 19 years old (at para [2]). The court held that there was, in fact, sufficient evidence available regarding the age of the accused (at paras [5] — [7]). No attempt had been made to acquire the accused's birth certificate from the Department of Home Affairs (at para [7]). In addition, the accused was not sent to a district surgeon. The reason for this was ostensibly that there was no district surgeon in the relevant area. However, the court held that, even if this were so, the accused could have been referred 'to the nearest district surgeon or to the nearest State-run hospital' (at para [10]). Moreover, on investigation, it transpired that, whilst there was no permanent district surgeon in the area, a roster system operated by four doctors in private practice was in place to try to help the situation (at para [12]).

The court noted the difficulties magistrates face in dispensing justice in these 'less than perfect conditions'. However, the court also stated that

the consequences for the accused were significant — the magistrate's estimate of his age as 19 meant that he did not fall within the protection offered by s 28 of the Constitution (at para [13]). However, the magistrate was very much aware of the relative youth of the accused and this was the primary reason for his ordering a non-custodial sentence (at para [14]). There was no injustice to the accused as there was no indication that a different estimate of his age would have led the magistrate to impose a different sentence (at para [15]).

In his concluding remarks, Plasket J referred to certain systemic problems highlighted by the case. These were the difficulties of gaining access to a district surgeon (discussed above) and problems with correctional supervision. On the latter issue, the magistrate had noted that the Department of Correctional Services was 'unable to supervise those offenders who have been sentenced to correctional supervision' (at para [20]). Clearly, if this is so, it would have huge implications for the administration of justice. The judge confirmed the conviction and sentence and ordered that copies of the judgment be sent to the Premier of the Eastern Cape Provincial Government and to the Provincial Commissioner of Correction Services in the Eastern Cape (at para [21]).

The judgment is the latest in a line of cases highlighting the relationship between social and economic factors and the right to a fair trial. Whilst the judge was very much alive to the difficulties presiding officers face in the context of limited resources and problems with the criminal justice system itself, the judgement provides an indication of the role that presiding officers have to play in this context. The social and economic context may demand more creative and thoughtful approaches on the part of presiding officers. Thus, it was inadequate for the presiding officer to simply accept that the accused could not be sent to a district surgeon, without further investigation. On the systemic problems with correctional supervision, it is hoped that forwarding judgements like these to relevant departments of government may, ultimately, have some effect.

In *Director of Public Prosecutions, KwaZulu-Natal v P* 2006 (1) SACR 243 (SCA), the state appealed against the sentence of a 14 year-old, who had been convicted for the murder of her grandmother. The lower court had postponed the passing of sentence for 36 months 'on condition that the accused complie[d] with the conditions of a sentence of 36 months of correctional supervision in terms of s 276 (1)(*h*) of the Criminal Procedure Act 1977' (at para [1]). The state argued, on appeal, that direct imprisonment was appropriate, given the aggravating factors and despite the youth of the accused (at para [5]). The court held that the trial judge had not treated the evidence of witnesses on sentencing with the requisite degree of objectivity. As a result, he over-emphasised the personal circumstances of the accused and did not pay sufficient attention to the other material considerations. Stating that '[c]ourts do not need professors of law to tell

them what the law is or should be', Mthiyane JA held that the evidence of one of the witnesses, a professor of law, was inadmissible. He went on to state that the trial judge should have paid more attention to the fact that the evidence of some of the witnesses was informed only by what the accused had told them (at para [7]).

The question before the court then was whether the sentence imposed was appropriate (at paras [10] — [11]). The court noted that this issue had to be considered against the backdrop of s 28(1)(*g*) of the Constitution and international developments on the issue of sentencing of juvenile offenders (at para [11]). Both s 28(1)(*g*) of the Constitution and relevant international instruments indicate that incarceration is a measure of last resort for juvenile offenders and, when imposed, such incarceration must be 'for the shortest appropriate period of time' (at para [15]). The court also referred to certain non-binding international instruments which indicate that 'any reaction to juvenile offenders shall always be in proportion to the circumstances of both the offender and the offence'. In this assessment, it is not only the circumstances and gravity of the offence that must be taken into account but also the needs and circumstances of the juvenile as well as the needs of society (at para [16]). Mthiyane JA also referred to the work of the South African Law Reform Commission, which approves the principles outlined in the Constitution and the international instruments in this area (at para [17]).

The court then pointed out that none of the sources referred to prohibit the incarceration of children (at para [19]). On the facts here, the court held that the trial judge had failed to give sufficient attention to the aggravating factors and did not give sufficient weight to proportionality between the sentence and the gravity of the offence (at paras [21] — [22]). The judge referred to problems with prison conditions and the failure of the Department of Correctional Services to comply with constitutional requirements when children are detained (see s 28(1)(*g*)(i) and (ii) of the Constitution). However, he also noted that there were serious problems with the implementation of correctional supervision (at paras [23] — [25]). The court ordered the original sentence to be replaced with a period of seven years' imprisonment, suspended on certain conditions, as well as 36 months of correctional supervision on certain conditions (at para [28]).

In *S v B* 2006 (1) SACR 311 (SCA), the court had to consider 'the application of the minimum sentencing legislation to offenders under 18' (at para [1]). In applying the legislation, the trial judge did not take the age of the appellant, who was under 18 at the time of the offence, into account (at paras [1] — [2]). In particular, the trial judge applied s 51(3)(*a*) but did not pay attention to s 51(3)(*b*) of the Criminal Law Amendment Act 105 of 1997. The relevant sections provide:

> '(a) If any court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those

circumstances on the record of the proceedings and may thereupon impose such lesser sentence.

(b) If any court referred to in subsection (1) or (2) decides to impose a sentence prescribed in those subsections upon a child who was 16 years of age or older, but under the age of 18 years, at the time of the commission of the act which constituted the offence in question, it shall enter the reasons for its decision on the record of the proceedings.'

On appeal, a majority of the judges of the full court of the Eastern Cape Division took this section into account but found that life imprisonment was appropriate in this case. This court rejected the approach of Cachalia J in *S v Nkosi* 2002 (1) SACR 135 (W) to s 51(3)(*b*) (at para [5]). The approach taken in that case was that, as s 51(3)(*b*) did not refer to 'substantial and compelling circumstances' as a means for departing from a minimum sentence, courts were not *ordinarily* bound to apply the minimum sentence in the case of offenders between the ages of 16 and 18. Thus, courts could exercise their discretion on sentencing in the usual way provided they also took account of s 28(1)(*g*) of the Constitution (see *Nkosi* supra at 143).

In considering this approach, the Supreme Court of Appeal took account of s 28 of the Constitution, provisions of international instruments dealing with juvenile offenders and the work of the South African Law Reform Commission on juvenile justice (at paras [13] — [21]). The court extracted four related principles from these sources. First, incarceration is a last resort for juvenile offender. Second, where incarceration is imposed, it must be for the 'shortest appropriate period of time'. Third, sentencing of offenders must be guided by the need proportionality. Fourth, where there is incarceration 'the sentence must be individualised with the emphasis on preparing the child offender from the moment of entering into the detention facility for his or her return to society' (at para [19]). The court went on to approve the approach in *Nkosi* (supra) but held that in determining the sentence, the fact that a minimum sentence applies to the offence, is a factor to be taken into account. The court was of the view that this was not treated as a factor to be taken into account in the approach adopted by the court in *Nkosi* (supra) (at para [23]). The court substituted the sentence of life imprisonment for one of 18 years' imprisonment (at para [26]).

The general approval for the *Nkosi* approach should be welcomed. *Nkosi* was one of the first cases to thoroughly canvass the international and domestic law on children's rights and to consider what impact that law has in the context of minimum sentences. The starting point for all offenders under 18 must be the Constitutional provision on children's rights. For a court to proceed on an assumption that minimum sentences should *ordinarily* be imposed on those between the ages of 16 and 18

whose offences fall within the scope of the minimum sentencing legislation de-emphasises s 28 of the Constitution. The fact that a minimum sentence applies to the offence itself then becomes a factor to be considered, as stated by the court in *S v B* (supra) rather than the primary concern.

The issue of children's rights was of concern in a different context in *S v November and Three Similar Cases* 2006 (1) SACR 213 (C). In this case, three convictions for a failure to pay maintenance in terms of s 31(1) of the Maintenance Act 1998 came before the court on automatic review (paras [1] — [2]). The court was of the view that the terms upon which the 'defaulting parties' were required to pay off the arrear maintenance were far too lenient and that the lower court had not conducted an adequate enquiry into the financial circumstances of the three accused (at para [8]). The court found that it was not entitled, on review, to alter the terms or order that the magistrate consider the terms afresh (at para [16]). However, in his discussion of the issues, Bozalek J made useful comments about s 28 of the Constitution. He noted that both the Constitutional Court and the Supreme of Appeal have indicated that courts have a duty to 'use the provisions of the Maintenance Act to ensure that the rights and best interests of children are upheld, as entrenched in s 28 of the Constitution, by holding parents to their duty to maintain their children' (at para [9]). The court referred to procedures and remedies in the Maintenance Act, which enable a court to order the payment of arrears at a realistic rate and the payment of interest on the capital amount (at paras [12] — [14]) and noted that presiding officers have a duty to consider the appropriate remedy in light of all the possible procedures in the Act. Bozalek J's comments on s 28 and avenues available to presiding officers in ensuring a more effective implementation of the Act are extremely valuable. The approach by the lower court constituted an appallingly weak enforcement of the provisions of the Act and it is hoped that future judgments will more actively protect those affected by non-payment of maintenance.

Constitutionality of the Domestic Violence Act 116 of 1998

Following an unsuccessful challenge to certain provisions of the Domestic Violence Act 1998 in the Cape High Court, the applicant applied for leave to appeal to the Constitutional Court in *Omar v Government, RSA (Commission for Gender Equality, Amicus Curiae)* 2006 (1) SACR 359 (CC). The court refused leave to appeal on the ground that, inter alia, the applicant's case lacked merit (at para [63]).

Van der Westhuizen J, writing for a unanimous court, first considered the context of the Act (see paras [11] — [19]). He referred to the unacceptable prevalence of domestic violence in South Africa and its gendered nature in our society (at para [13]). Given that domestic violence occurs in the context of a home and family and that victims are usually hesitant to

pursue criminal prosecution, it is reasonable for the legislature to adopt special measures to deal with the problem (at para [18]). However, the court noted that this does not mean that fair trial rights may be ignored (at para [19]).

The Act mandates a court to issue a protection order in respect of acts of domestic violence. The circumstances under which it will do so are set out in ss 4 – 7 of the Act (at para [22]). The court must, at the same time, 'make an order authorising the issue of a warrant for the arrest of the respondent and suspending the execution of the warrant, subject to compliance with the contents of the order. The warrant remains in force until the protection order is set aside, or until the warrant is cancelled after its execution'. There is also provision for a clerk of the court to issue a second arrest warrant in certain, closely prescribed, circumstances (at para [28]).

The significance of the arrest warrant is that a complainant may hand it over to a police officer, together with an affidavit indicating that the respondent has violated the protection order and, if there are reasonable grounds for believing 'that the complainant may suffer imminent harm as a result of the alleged breach of the protection order by the respondent, he or she must forthwith arrest the respondent for the alleged contravention…'. A police official is required to consider a number of specified factors in making the decision whether to arrest the individual concerned (at para [29]).

There was some lack of clarity about the bases on which the applicant was bringing his case (at para [32] – [33]). The court found that the challenge to the constitutionality of s 8 of the Act was the only issue it had to decide (at para [33]). The applicant argued that his right of access to courts, protected in s 34 of the Constitution, was infringed because s 8 required a court to authorise the arrest of the respondent in a protection order without the knowledge of that individual (at para 35]). The court stated that notice to the respondent would defeat the object of protecting the complainant as notice would be given to the very person considered to be a threat to her safety. Furthermore, the respondent is given the opportunity to provide reasons why an interim protection order should not be made final. A court will only grant a final order after a proper hearing (at para [37]). Finally, this kind of emergency procedure is used in a number of similar circumstances involving an immediate threat. For these reasons, there was no violation of s 34 of the Constitution (at para [38]).

The applicant also alleged a violation of s 12(1)(*a*) of the Constitution. Despite the fact that the interim protection order will not be effective until it has been served on the respondent, the applicant argued that s 8 allowed for the possibility of an individual being arrested 'without having actual knowledge of either the original order or the hearing' because the service procedures were inadequate. This, he claimed, infringed the right

not to be arbitrarily arrested (at para [40]). Service by registered post was permitted by s 8 (at para [40]). Applicant used the decision in *Coetzee v Government of the RSA, Matiso v Commanding Officer, Port Elizabeth Prison* 1995 (4) SA 631 (CC) to argue that '*actual* knowledge of either the original judgment against him or her or the hearing' is a condition of constitutionality (at para [42]). The court held that *Coetzee* could not be relied on here. *Coetzee* dealt with indefinite imprisonment in respect of a civil claim for failure to pay a debt whereas the procedure in the Domestic Violence Act contemplates an eventual criminal trial. A person ultimately arrested under the Domestic Violence Act would be entitled to the rights of an accused person set out in s 35 of the Constitution. No such protection had been in place in respect of civil imprisonment under s 65 of the Magistrates' Courts Act 1994 (at para [44]).

The applicant argued further that s 8 allows for arbitrary arrest because it requires a police official to arrest an individual based on the affidavit of a complainant who may be acting maliciously (at para [46]). The court noted that a complainant who makes false statements in an affidavit would be liable for a criminal offence (at para [47]). In addition, the special provisions must be considered in light of the context of domestic violence in our society and the need for urgent responses to situations of possible imminent harm, leaving no time to approach a court. Finally on this issue, the court noted that the police official involved does have some discretion on whether to arrest the respondent and that such an official is required to take account of certain factors in the exercise of that discretion. For these reasons, the court concluded that s 8 was consistent with the prohibition on arbitrary arrest (at para [48]).

On the issue of whether s 8 violates the right of an accused person to a fair trial, protected in s 35(3) of the Constitution, the court held that 'accused person' may not be interpreted to include a respondent in s 8 proceedings. Such an individual only becomes an accused person when he or she is charged with the contravention of a protection order. The execution of a warrant of arrest in the context of domestic violence is a temporary means of ensuring compliance with a protection order. In any *ensuing* criminal trial, an individual accused of an offence would be entitled to the rights in s 35(3) of the Constitution (at para [51]).

The applicant also made a general argument that the Act does not do enough to guard against abuse by malicious complainants. In this regard, he referred to the potential for abuse of the wide definition of 'domestic violence' (at para [58]). On the definition, the court noted that various forms of abuse, including economic abuse would only amount to domestic violence under the Act if they actually harmed, or could result in 'imminent harm to the safety, health or well-being of the complainant' (at para [59]).

The court also noted that there was no evidence to support the view that the Act is too open to abuse. Moreover, the possibility of abuse was

outweighed by the role the Act may potentially play in protecting victims of domestic violence (at para [60]). The possibility of abuse of the Act, therefore, did not render s 8 unconstitutional (at para [62]).

Many of the arguments in the applicant's case were based on a flawed understanding of the relevant constitutional provisions. Moreover, however, this judgment is based on a valuable and detailed consideration of the context in which the Act operates and the problems it is meant to address. The Constitutional Court's ultimate finding that the Act strikes the appropriate balance between protecting victims of domestic violence and rights of respondents in protection orders is very welcome.

Constitutionality of ss 1(1) — (5) of the Criminal Law Amendment Act 105 of 1997

In *Sibiya v Director of Public Prosecutions, Johannesburg* 2006 (1) SACR 220 (CC) the applicants had successfully challenged ss1 (1)–(5) of the Criminal Law Amendment Act 105 of 1997 on the basis that these provisions were inconsistent with the right to a fair trial, protected in s 35 of the Constitution. The matter came before the Constitutional Court as an application for confirmation of the invalidity of the provisions (at para [2]).

The background to the case was the Constitutional Court's finding that capital punishment was unconstitutional in *S v Makwanyane* 1995 (2) SACR 1 (CC). The order in that case did not have retrospective effect. Consequently, the Constitutional Court had to make an order regarding death sentences, which had already been imposed. The court ordered that such sentences were not to be executed and had to be substituted with lawful sentences (at paras [10]–[11]) and s 1 of the Criminal Law Amendment Act was the means chosen by the legislature to achieve this. The constitutional challenge concerned only those provisions dealing with persons who had already 'exhausted all the recognised legal procedures pertaining to appeal or review…'(at paras [17]–[18]).

Under the impugned sections, the Minister of Justice refers the relevant cases to the court which imposed the death sentence (at para [19]). The matter then falls to be considered either by the judge who imposed the sentence or, if this is not possible, by another judge selected by the Judge President of the relevant court. In considering the sentence, the judge is required to take the written arguments, as well as evidence led at the trial into account. The judge can, but does not have to, hear oral argument. The judge must then 'advise the President of the country (the President) on the appropriate sentence to be substituted for the death sentence. There is no appeal from the judge's finding (at para [20]) and the President has no discretion to depart from such finding (at para [22]).

In a unanimous decision, the court found the basis for the High Court's decision that is, that sentences of death imposed *before* the decision

Makwanyane were invalid, to be unsound. The Constitutional Court's order in *Makwanyane* did not have retrospective effect and the court did not, in fact, set aside previously imposed death sentences (at paras [29] — [30]). The High Court had assumed that all the rights in s 35(3) applied to the category of people affected by the impugned sections and that they, therefore, had to be sentenced afresh, taking these rights into account (at para [29]). The Constitutional Court held that the category of persons referred to were not accused persons and fell outside the ambit of s 35(3). Section 35(3) applied to those accused persons tried in 'our new constitutional era' (at para [31]).

The court, per Yacoob J, went on to find, however, that s 12 of the Constitution did apply to the class of people contemplated in the impugned provisions. The question was then whether the mechanism in the Act, for the substitution of certain sentences, amounted to an arbitrary deprivation of liberty. The court interpreted s 12 to mean that there must be a 'satisfactory reason' for the deprivation of liberty and that the deprivation must be effected by a procedure that is fair (at para [32]). On the reasons for the mechanism, the court noted that the provisions were enacted to cater for an extraordinary situation and that speed and efficiency were important objectives for the substitution of sentences. Furthermore, a lengthy re-sentencing procedure would have been 'unlikely to produce new evidence that would have a bearing on the appropriate sentence' (at para [33]).

The court stated that, in these circumstances, it was legitimate for the legislature to assume that the sentences of death had been lawfully imposed and legislation simply providing for these sentences to be substituted with life imprisonment may have been constitutionally permissible (at para [35]). However, the legislature opted for a route containing a number of protections for the individuals concerned (at para [36]). These individuals would already have had a public trial. Although there is no appeal from the judge's finding on the appropriate sentence, the President's implementation of that finding is subject to review (at para [37]). For these reasons, the court found no violation of s 12 of the Constitution.

When one considers the vast difference in protection offered to those tried in the post-Constitutional era and those tried before, the finding of the court on s 35(3) is concerning. In particular, s 35(3) has now been interpreted to place a large number of duties on presiding officers to ensure that accused person's are fully informed of their rights. Those people tried before the Constitution came into effect would not have had such benefits. However, the Constitutional Court's finding that s 35(3) does not apply to the category of persons concerned in the case is clearly supported by the text. Furthermore, the court emphasised the fact that the legislature was dealing with an extraordinary situation requiring efficient resolution. To sentence all the concerned individuals afresh would have

had a detrimental effect on that goal. The application of s 12(1)(*a*) is also sound as that section clearly demands only that the deprivation of liberty not be 'arbitrary or without just cause' and one cannot use this to read in all the protections offered in s 35(3).

The applicants also argued that the impugned provisions infringed the constitutional principle of separation of powers in that they 'required a judge to perform an administrative function' and the President to perform a judicial function (at para [38]). With reference to *President of the RSA v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC), the court noted that there is no absolute rule preventing judges from performing administrative tasks. A problem would only arise if the task in question were inappropriate for a judge to perform because it is too closely linked to the executive function. Here, the consideration of a record with written and/or oral argument is judicial in nature (at para [39]). On the President's role, the court noted that he simply imposes the sentencing, with no discretion to depart from the judge's advice. This is not a judicial exercise. Furthermore, similar functions are given to the President in the Constitution itself (at paras [40–[41]).

This separation of powers argument made in this case was not an especially strong one, given the fact that our Constitution does not envisage a complete or extremely strict separation of governmental powers. Cases like *SARFU* and legislation such as the Promotion of Administrative Justice Act 2000 focus on the nature of the function performed rather than the functionary performing it and certainly do not contemplate a ban on judges performing administrative functions, for example.