

CONFIDENTIAL DRAFT, NOT TO BE QUOTED BEYOND THE WORKING CONFINES OF
THE CCR

CONSTITUTIONAL COURT REVIEW 2009

[*Woolman-style introductory note:*

I have been considerably challenged by this assignment, as will be apparent. In fact, despite the honour of being invited early on this year to be part of the CCR team --- not a rock band from the 60s—and despite an attempt to withdraw mid-year, here I sit at the 11th hour struggling with this project, and justifiably irritating all concerned. My ailment has been lack of academic fitness, in the sense that whatever skills and aptitudes I might have possessed before 1999 were considerably eroded during a decade of deanship, and not even a year's sabbatical has helped to restore what I thought I had. Now, this may be seen by some as an Ellison Kahn-type exculpation, prior to a brilliant piece, but this is not the case. So, please forgive the shortcomings in what follows; please be as constructively critical as you can be when we meet. I am sure that something good will come out of this in the end.

Finally, a word about structure. What follows are sets of skeletal notes, with a preface in section A which situates the ensuing sections within the legal/political context in which the cases discussed were decided. Section D likewise flows, as I hope to show, from the context described polemically in A. Stuart Woolman kindly commented as follows on the notes as sent to him in mid-November: he would dispense with section A, except insofar as it links directly with sections B and C, and omit D entirely. I accept his remarks as a challenge, which I hope to meet. I have left section A virtually unchanged, even though I accept that much of it may have to go. I have attempted to expand on sections B and C, and much more will be done by way of detail in regard to each of the cases on which I focus. I have expanded briefly on section D, to try to explain why I think that it's both relevant and not mere speculation.

Thanks so much for indulging me in reading thus far. I await your advice.]

WORKING TITLE:

" Principled Calm Amidst A Shameless Storm : Testing The Limits Of The Judicial Regulation Of Legislative And Executive Power"

HUGH CORDER

OUTLINE OF ARGUMENTS(Details of the judgments given and discussion of their implications for the general thrust of the arguments will be added):

A] SETTING THE SCENE

This article broadly seeks to analyse some of the judgments handed down in 2008 which directly or indirectly impact on the relationships between the judiciary on the one hand and the legislature and executive on the other. The organising theme is the doctrine of the separation of powers, as required by Constitutional Principle VI of the transitional Constitution of 1993, compliance with which in the final Constitution was certified by the Constitutional Court (CC) in the Certification judgments of 1996, and as endorsed in the Western Cape Exec case and

frequently since then. I seek through close reading of the cases to determine the extent to which the judgments impact on the health of the doctrine in South African constitutional law, in the sense of mutual respect by each branch of government for each other's lawful domain of authority under the Constitution. Ultimately, prospects for substantial compliance with the rule of law will be directly affected by the current health and future viability of the doctrine.

This analysis of the jurisprudence cannot be severed from an acknowledgment of the political storms which battered the administration of justice, and particularly the Constitutional Court (CC), during the course of 2008. Two major running battles, both with their roots in events of the immediately preceding years, reached a crescendo in 2008, severely depleting whatever reservoirs of judicial legitimacy had been painstakingly nurtured since 1994, largely to the credit of unstinting effort by the CC. I refer of course to the series of legal disputes surrounding Jacob Zuma, culminating in the decision of 12th September by Judge Nicholson in the Pietermaritzburg High Court, which effectively led to a bloodless coup as far as executive government was concerned, with the "recall" of President Mbeki by the ANC. Prior to that momentous decision, the "Hlophe saga" had erupted into virulent life again, with the submission by the judges of the CC on 30th May of a complaint about the conduct of Judge President John Hlophe directly in relation to litigation involving Mr Zuma. It was alleged, in quite the most serious complaint ever to be directed at a South African judge, that Judge Hlophe had endeavoured on two occasions improperly to interfere with the work of two judges hearing a matter involving Mr Zuma.

In tandem, these two disputes caused the judiciary, and particularly the CC, to become the target of outspoken public comment by all and sundry, often intemperate, vitriolic, and intimidatory, mostly ill-informed, and shamefully emanating from some of the most senior office-bearers of the ANC, and even Judge Hlophe himself. The "Zuma-storm" oddly enough subsided just a few days before Judge Nicholson gave judgment, and has been largely muted (as far as the courts are concerned) since then, while the litigation and unseemly comments, descending on occasion to racist ad hominem attacks directed at their critics by Judge Hlophe and his supporters, continued unabated into 2009. This atmosphere has been described as "lawfare" (Comaroff), and provides an indispensable backdrop to the work of the CC which is the focus of this article, as the constitutional judges were expected to continue soberly and diligently to continue to do justice, while the thunderbolts were hurled at them through a complaint media by the ANC Youth League, the Young Communists, the MK Vets Association and COSATU. Such an atmosphere must have penetrated even the wonderful setting of the Constitutional Court building in Braamfontein, providing a poignant context in which the analysis which follows must be situated. Whether this turbulence will have a lasting effect on the jurisprudence of the CC remains to be seen; there can be no doubt that it must have wounded, in the short term.

I consider the judgments which, I believe, are relevant to my theme, under three heads: challenges to the propriety of the legislative process and executive action; review of administrative action more narrowly; and, more briefly, internal aspects of the judicial process, with possible implications for the future.

B] JUDICIAL OVERSIGHT OF THE LEGISLATIVE PROCESS AND EXECUTIVE ACTION

Here I plan to discuss the following cases, with the implications for my theme mentioned above. The Constitution (sections 59(1)(a) and 72(1)(a)) requires that the National Assembly

and the National Council of Provinces must seek to achieve an element of a participatory democracy by “facilitating public involvement” in their legislative processes. Naturally, the extent and effectiveness of such participation must be capable of measurement by a reviewing body, in this case a court. This express endorsement of one of the “checks and balances” which are so essential a part of the doctrine of the separation of powers provides an excellent potential standard against which to diagnose the health of that doctrine. Again, the willingness of the courts to accept the challenge of regulating the exercise of power by the highest office-bearers in the executive branch of government provides a similar indication of the robustness of the doctrine. Four cases decided in 2008 demonstrate these aspects of constitutional good governance, in my view.

MERAFONG concerned the long-running and often violent attempt by national government to excise a certain part of a town on the West Rand from Gauteng and incorporate it into the Northwest province. A similar issue had reached the CC in the previous two years (Matatiele cases), and these disputes presented the Court with an apparently intransigent executive “leaning on” its party colleagues in a provincial legislature to toe the party line imposed from above. This was a highly charged political issue for the “ordinary people” on the ground, as was shown by the extraordinary level and ferocity of public protest. The apparent and sudden about-face of the Gauteng legislature and its representatives on the NCOP made a mockery of the process of consultation in good faith, yet it was certainly feasible for a court to have held that such was the prerogative of a representative body such as a provincial parliament, after due consideration. *[Further detail to be added here]*

Yet the CC judges showed clearly that they were not unwilling to “enter the lists”, so to speak, to give content to the requirement of “facilitating public involvement in the legislative process. A wide range of judicial views is exposed in the judgments, from intervention to a hands-off stance. The decision overall shows a series of multiple alliances among the judges, such that an organogram of who agrees with whom on which issues makes almost as confusing reading as that which reflects views in New Clicks some years ago. *[I will attempt to reproduce such an organogram in the article.]*

Overall, however, the majority takes a strongly critical view of the conduct of the Gauteng provincial legislature, and the CC is willing to review its conduct for rationality, procedural fairness, and so on. *[Potential link to grounds of review in administrative law worth exploring here?]*

The second case which falls for discussion is GLENISTER, the attempt by a private party acting (and being given standing as such) in the public interest, and attempting to arrest the legislative process before it had run its course. Again here, the political profile could hardly have been higher, concerning as it did the discharge of a mandate given by the ruling party to its leadership during a highly contentious party congress against the backdrop of the struggle for its leadership and the unwritten expectation, on all sides, that charges against Mr Zuma would be at least compromised, if not dropped altogether. This case was fought out at a more elevated level than Merafong, however, although media coverage was probably more pronounced. *[Again here, much greater detail about the facts and the arguments must be inserted.]*

No doubt all concerned were acutely aware of the forces at work behind the litigation, which may well account for the unanimous judgment of the Court, with weight being added by it being in the name of the Chief Justice. Of particular interest is the approach of the court to the argument that cabinet and parliament were “acting under dictation” from the ANC Polokwane

Congress, again reminiscent of an administrative-law type ground of review. This judgment is ultimately deferential, as being respectful ---- appropriately so, in my view.

The next two cases discussed shift the focus to judicial attitudes to the regularity of the exercise of executive power (as opposed to administrative power--- this is surely a good point at which to expand briefly on the growing distinction drawn in our law between such forms of power, exacerbated by the definition of " administrative action " in the PAJA and abetted by Justice Sachs's cultivation in a number of cases of the " principle of legality " [equals the " rule of law"???) as the ultimate ground of review of the exercise of all public power or the performance of all public functions.

In *KRUGER v PRESIDENT OF THE RSA AND OTHERS*, the legality of an act of the Executive (in the form of the President as formal Head of State) in issuing a Proclamation was in question. The President had realised that a particular proclamation had been issued in error, ostensibly bringing into force certain sections of the Road Accident Fund Act, and he attempted before the date on which the first proclamation would have come into force to remedy this error by issuing a further proclamation. The consequential effect of invalidity would have been extremely serious for the RAF and for the many attorneys who make their living out of road accident work, not to mention the thousands of road accident victims who depend on the Fund for compensation.

The majority of the CC did NOT endorse this attempt at recovering from its error by the Office of the President, taking a tough and formalistic stance on its interpretation of the limits of executive power, and relying on the "rule of law" as a foundational principle of the Constitution. This is an important line which has been drawn in the sand, because the balance of convenience and pragmatism indicated a more accommodating approach, exemplified by the judgments of Jafta AJ and Yacoob J in dissent. In deciding in this way, the majority of the CC gave notice that they would continue to insist on the formal requirements of limited government under law, in the face of increasing evidence of slipshod administration and appeals for condonation of missed deadlines (such as Nyathi in 2009, but I will also refer to earlier examples of failure to act timeously by the executive).

INDEPENDENT NEWSPAPERS v MINISTER FOR INTELLIGENCE SERVICES :IN *RE MASETLHA V PRESIDENT OF THE RSA AND ANOTHER* has only an indirect connection with review of executive action, yet it provided the forum for the CC clearly to show that it would be no push-over in the face of strong appeals by the executive to the demands of state security. Of course, this country has a sad and shocking history of judicial executive-mindedness in this sphere of the law, so this was a particularly important case for the CC to show that it would not roll over into acquiescence. While the organising theme, so to speak , of the judgment was the core constitutional value of "openness of government", the narrower focus was on the openness of court process and the facilitation of the effective participation of all parties to judicial proceedings, rather than the PAIA. Of note is the complete willingness of each of the four judges who spoke, not only to lay down an applicable test for reviewing the lawfulness of the executive action, but also to pronounce on the merits of the contested material which the Intelligence Ministry sought to classify as secret, and thus to deny to the parties and to the public. Again, this sets a vital precedent in the relationship between the executive and the judiciary, as such arguments are likely to be raised more frequently in the future; the temptation for any executive to plead state security when under pressure is just too strong.

In partial summary, and building on Doctors for Life International and perhaps New Clicks, these cases seem to me to take appreciably further the willingness of the Court to insist upon measures to enhance the notion of a participative democracy in its legislative guise and to hold the executive to its duties to act within the law, as required by the Constitution. At the same time, they appear to keep on the correct side of the justifiable limits of authority prescribed for the courts, the executive and Parliament by the Constitution.

C] REVIEW OF ADMINISTRATIVE ACTION MORE NARROWLY

The development of administrative review in its transformed structure and form since the year 2000 has been a relatively rocky and inconsistent ride thus far. In this way, some of the features of pre-Constitutional, common-law administrative law have reared their heads, in particular a casuistry in approach which makes it difficult to decipher points of legal principle and to discern trends. In its 2008 roster of administrative justice cases the following decisions of the CC are of interest.

WALELE v CITY OF CAPE TOWN AND OTHERS [*facts and arguments to be added here*] was significant ---

for its confirmation of the accepted/ standard approach to the doctrine of legitimate expectation, albeit now within the context of “constitutionalised” administrative law; --- for the CC’s view on the increasingly common (and necessary) administrative practice of multi-stage decision-making ; --- for the meaning within such administrative practice of the word “recommendation”; and --- for the generally deferential attitude of the narrow minority (again, as in Glenister above, probably appropriately so, given the specialist nature of town planning schemes and processes).

MERAFONG, dealt with extensively above, is of relevance again here, especially for the express and detailed examination of the concept of “rationality” as a ground of review. It will be recalled that section 33 of the Constitution requires administrative action which is “lawful, reasonable and procedurally fair”, the need for reasonableness being a substantial advance on the “justifiability” compromise which marked section 24 of the transitional Constitution. The meaning to be attributed to “reasonableness” was muddled from an elegant exposition of a combination of rationality and proportionality proposed by the SA Law Reform Commission drafting team in 1999 to the long-discredited *Wednesbury* unreasonableness approach favoured by the Justice portfolio Committee when the PAJA was ultimately adopted by Parliament. mercifully, the CC in *Bato Star* interpreted the circularity of the *Wednesbury* test as being rationality plus proportionality, and this decision by the CC strengthens the notion of “reasonableness” as being something wider than “rationality”.

NJONGI v MEC, DEPARTMENT OF WELFARE, EASTERN CAPE is likely to go down in the annals of the administration of justice in this country as the most scathingly critical judgment of administrative and executive bungling and inefficiency yet to emanate from the CC. The background in law is essential to note: countless judgments of the Eastern Cape High Court, many of them penned by Judges Froneman and Plasket, and severely critical SCA judgments along the same lines in *Ngxuzza* and *Kate*. *Njongi* provided the CC with the opportunity to demonstrate its concern in a unanimous judgment. *Yacoob J*’s impatience and irritation with the Eastern Cape government’s seeming contempt for socio-economic rights and the welfare of its most vulnerable people is palpable.

Situated more generally within the context of the implementation of socio-economic- rights decisions of the CC (note the death of Irene Grootboom in 2008, still without a house), is the Court becoming more forceful in the expression of its views? And will this exasperation spill over into counter-action by the frequently-chastised executive? Is this approach in line with the separation of powers, thus making a connection with the cases discussed in section B above? *[These questions are critical in my view for any analytical review of the work, and likely future direction of the jurisprudence, of the CC. I will thus move here, BASED ON POINTS MADE IN THE PRECEDING DISCUSSION OF THE CASES, to speculate on answers to such questions, which also leads naturally, in my view, to the enquiry which I wish to pursue in section D.]*

D] INTERNAL ASPECTS OF THE JUDICIAL PROCESS IN THE CC

Against the background of the foregoing discussion, and drawing on the valuable statistical analyses of the annual terms of the CC undertaken since its establishment by Klaaren et al in the SAJHR, I wish to pursue the following lines of enquiry, in reviewing all of the decisions of the CC in 2008:

- Are we seeing more split decisions in the CC?
 - What could explain multiple decisions in both dissenting and majority positions?
 - What, if anything, can be read into the narrow majorities such as in *Walele*, *Merafong*, and *Independent Newspapers*?
 - Equally, how much weight should one attach to the unanimity of the decisions in *Glenister* and *Njongi*?
 - Is Justice Yacoob's outspokenness (which is striking when ones reads all the decisions I have selected on which to focus--- I'd naturally still need to check this out more generally) coincidental or a sign of something else?

More generally, are we witnessing the emergence of fault-lines within the jurisprudence/membership of the court? If so, what impact will the ending of the terms of Langa CJ, Madala, Mokgoro, O'Regan, and Sachs JJ have on such lines of division?

I appreciate that the answers to these questions are highly speculative, and can at best be informed by the objective facts of the judgments handed down in 2008. I am aware too that a considerable amount of guess-work will infuse the discussion. Yet I would argue that these matters are worth raising, if only to refute as without substance.

[These are lines of enquiry which I am emboldened to raise, precisely because of the opportunity for peer review on the occasion of the CCR conference in two days' time, which will no doubt guide me on whether such questions are worth pursuing or not. It may well be that others have noticed similar shifts in the Court, and I'd indeed be grateful for such input.]

E] PRINCIPLED CALM WITHIN A DESTRUCTIVE STORM?

By way of conclusion, does the picture sketched above symbolise a Court at the top of its powers, or struggling to survive in dreadful circumstances, or some other more nuanced position? It seems inevitable that the answer will fall between these extremes, and aspects of the judicial performance will be nearer one end of the spectrum or the other. I will attempt in this concluding section to draw lessons for the future vitality of the separation of powers and of the rule of law in South Africa.

