

PRINCIPLED CALM AMIDST A SHAMELESS STORM:
TESTING THE LIMITS OF THE JUDICIAL
REGULATION OF LEGISLATIVE
AND EXECUTIVE POWER

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1 Setting the scene

This article seeks broadly to analyse some of the judgments handed down by the Constitutional Court (CC) 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 was required by Constitutional Principle VI of the transitional Constitution of 1993,¹ compliance with which in the final Constitution² was certified by the CC in the Certification judgments in 1996.³ The presence of the doctrine as an essential feature of the Constitution was endorsed in *Executive Council of the Western Cape Legislature v President of the RSA*,⁴ a view which has been repeated frequently since then. Perhaps the best concise restatement of the position is to be found in one of the cases considered below, *Glenister v President of the RSA*,⁵ where Langa CJ (speaking for the Court) wrote as follows:

There is no express mention of the separation of powers in the text of the 1996 Constitution. In the First certification judgment ... this court stated:

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¹ Constitution of the Republic of South Africa, Act 200 of 1993.

² Constitution of the Republic of South Africa, 1996.

³ *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*, 1996 1996 4 SA 744 (CC).

⁴ 1995 4 SA 877 (CC); see paras 30-33.

⁵ 2009 1 SA 287 (CC) paras 30-33 (references omitted).

There is ... no universal model of separation of powers and, in democratic systems of government in which checks and balances result in the imposition of restraints by one branch of government upon another, there is no separation that is absolute ...

In ... *De Lange v Smuts NO*, Ackermann J ... continued with the following remarks:

I have no doubt that over time our Courts will develop a distinctively South African model of separation of powers, one that fits the particular system of government provided for in the Constitution and that reflects a delicate balancing, informed both by South Africa's history and its new dispensation, between the need, on the one hand, to control government by separating powers and enforcing checks and balances and, on the other, to avoid diffusing power so completely that the government is unable to take timely measures in the public interest ...

In our constitutional democracy, the courts are the ultimate guardians of the Constitution. They not only have the right to intervene in order to prevent the violation of the Constitution, they also have the duty to do so. It is in the performance of this role that courts are more likely to confront the question of whether to venture into the domain of other branches of government and the extent of such intervention ... But even in these circumstances, courts must observe the limits of their powers.

I have recently reviewed in more general terms the state of health of the separation of powers in this country since 1994.⁶ In what follows, my focus is much narrower. I seek through close reading of several cases decided by the Constitutional Court (CC) in 2008 to determine the extent to which the judgments delivered impact on the doctrine of separation of powers in South African constitutional law, in the sense of mutual respect by each branch of government for the limits of each other's lawful domain of authority under the Constitution. Ultimately, prospects for substantial compliance with the rule of law⁷ will be directly affected by the current health and future viability of the doctrine. I pursue this theme more narrowly by focussing on the administrative review cases handed down by the CC in 2008, for these too indicate, albeit in a formally more 'comfortable' view of the role of a court exercising judicial regulation of administrative action, the Court's view of the limits of its powers. I then proceed briefly to examine patterns of judicial conduct exposed in these decisions, a highly speculative exercise, it is conceded, but one which may nevertheless provide some clues as to the collective and individual

⁶ See H Corder 'On stormy waters: South Africa's judges (and politicians) test the limits of their authority' 12th Geoffrey Sawer Memorial Lecture, Australian National University, Canberra, 12th November 2009, unpublished paper, copy on file with author.

⁷ One of the 'founding values' of the Constitution – see sec 1(c).

state of judicial mind in the highest court in the land at a critical juncture in its existence, for the reasons which follow.

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, during the course of 2008. Two major conflicts, both with their roots in events of the immediately preceding years, reached new heights in 2008, severely depleting whatever measure of judicial legitimacy had been painstakingly nurtured since 1994, largely to the credit of the unstinting efforts of the CC. I refer to the series of legal disputes surrounding Jacob Zuma, culminating in the decision of 12th September by Judge Nicholson in the Pietermaritzburg High Court,⁸ in which it was found that there was evidence of political interference with the decision to prosecute Zuma. This decision⁹ effectively led to a bloodless coup as far as executive government was concerned, with the 'recall' of President Mbeki by the ANC, and eventually to the formal dropping of charges against Zuma by the Acting National Director of Public Prosecutions in early 2009.

Prior to that momentous decision, the 'Hlophe saga' had erupted again, with the submission by the Justices of the Constitutional Court on 30 May of a complaint to the Judicial Service Commission (JSC) 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 members of the CC, to become the target of outspoken public comment by all and sundry, often intemperate, vitriolic, and intimidatory, and mostly ill-informed. Shamefully, much of the comment emanated from some of the most senior office-bearers of the ANC, and even from Judge Hlophe himself. The 'Zuma-storm' rather perplexingly but perhaps significantly subsided just a few days before Judge Nicholson gave judgment, and has been largely muted (as far as the courts are concerned) since then. On the other hand, 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,

⁸ See *Zuma v National Director of Public Prosecutions* 2009 1 BCLR 62 (N).

⁹ Even though reversed on appeal – see *National Director of Public Prosecutions v Zuma* 2009 2 SA 277 (SCA).

which has been described as ‘lawfare’,¹⁰ provides an indispensable backdrop to the work of the CC which is the focus of this article. I make this point, because the constitutional judges were somehow 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 Veterans Association and the Congress of South African Trade Unions. 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.

Within this broader legal-political context, 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.

2 Judicial oversight of the legislative process and executive action

Four cases decided by the CC in 2008 hold direct implications for the theme of this article in demonstrating the state of constitutional good governance, in my view. Two of them concern the responsibilities of the legislature, while two more impact on the authority under law of the executive. As to the review of Parliamentary conduct, the Constitution¹¹ requires that the National Assembly and the National Council of Provinces (NCOP) must seek to achieve one 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.¹² 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

¹⁰ A term apparently used by the Bush Administration in the USA to describe the use or misuse of law instead of military means, to achieve certain objectives. See J Comaroff & JL Comaroff (eds) *Law and disorder in the postcolony* (2006), especially 26-31.

¹¹ Sections 59(1)(a) & 72(1)(a).

¹² As with all constitutional requirements, this is a justiciable matter: see *Doctors for Life International v Speaker of the National Assembly* 2006 6 SA 416 (CC).

power by the highest office-bearers in the executive branch of government provides a similar indication of the robustness of the doctrine.

*Merafong Demarcation Forum v President of the Republic of South Africa*¹³ (hereafter *Merafong*) was triggered by the long-running attempt by national government to redraw provincial boundaries by excising a certain part of a town on the West Rand from Gauteng and incorporating it into the North West province. This executive initiative was translated into law in the form of the Constitution Twelfth Amendment Act of 2005 and the Cross-boundary Municipalities Laws and Repeal Related Matters Act.¹⁴ A similar issue had reached the CC in the previous two years,¹⁵ and these disputes generally 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 Constitution¹⁶ requires the approval of a province for the passing of any Bill by the NCOP which alters the boundaries of that province. The applicants in *Merafong* asked the CC to declare that the Gauteng Legislature had failed to comply with its Constitutional obligation¹⁷ to facilitate public involvement in the process leading to the adoption by the NCOP of the twelfth Amendment Bill. Alternatively, they sought a declaration that the Gauteng Legislature had failed to act rationally when it supported the same Bill in the NCOP. The factual background was briefly as follows. In late 2005, both provincial legislatures affected called for and received representations on the siting of Merafong within either of the provinces. A well-attended public hearing was also held, and the majority view was that part of Merafong should stay within the Gauteng province. The relevant committee of the Gauteng Legislature thus formulated a 'negotiating mandate', which associated itself with the abolition of cross-border municipalities as a general principle and recorded its support for the Twelfth Amendment Bill, but on condition that the Bill be amended to incorporate Merafong into Gauteng. However, after being advised that such conditional support was not possible ie that a province could not seek to amend but only to vote against (and effectively veto) a part or the whole of such a Bill, the committee changed its tune, and

¹³ 2008 5 SA 171 (CC).

¹⁴ 23 of 2005.

¹⁵ See *Matatiele Municipality v President of the RSA* 2006 5 SA 47 (CC) and *Matatiele Municipality v President of the RSA* (No 2) 2007 6 SA 477 (CC).

¹⁶ Section 74.

¹⁷ Under sec 118.

recommended to the full Gauteng Legislature that it give its unconditional support to the Twelfth Amendment Bill, which duly happened. This was done without notice to, nor consultation with, the residents of Merafong, and within a few weeks at the end of 2005.

The applicants were granted direct access to the CC as they were challenging the validity of a constitutional amendment which is in the exclusive domain of that Court.¹⁸ Their arguments were based on a complex amalgam of law and fact, which presented the CC with several challenges. It was almost to be expected that the Court would respond in a number of ways, given the divisiveness of the issues and the complexity of the constitutional provisions which fell to be interpreted. The leading judgment for the majority, which held both that the Gauteng Legislature had complied with its duty to facilitate public involvement in the process, and that it had acted rationally in changing its mandated view, thus dismissing the application, was delivered by Van der Westhuizen J. After noting that the resolution of this matter had been delayed by the necessity of calling for further evidence, he usefully summed up the wide-ranging views of the Court at the outset of his judgment, as follows:¹⁹

Ngcobo J and I agree on the issue of the facilitation of public involvement. On the question of whether the Gauteng ... Legislature exercised its powers rationally we largely agree, and differ only in approach and emphasis. I also associate myself with the views expressed in the judgment of Skweyiya J.

Moseneke DCJ and I agree that Gauteng fulfilled its duty to facilitate public involvement. Sachs J disagrees on this point. The disagreement between Moseneke DCJ and me relates to the rationality issue. Moseneke DCJ (with whom Madala agrees in his judgment) concludes that the conduct was irrational because the legislature misconceived its constitutional obligations and misconstrued the consequences of the exercise of its powers under the Constitution. I am unable to find that the conduct ... was irrational. The basis of our disagreement can for convenience be summarised as threefold. We disagree on the rationality standard to be applied ... I recognise that legislative conduct must be rational, but in my respectful view the judgment of Moseneke DCJ goes beyond a constitutionally appropriate application of the requirement of rationality. We furthermore disagree as to Gauteng's understanding and appreciation of its constitutional powers and obligations. I do not hold that the legislature materially misunderstood its constitutional role.

Lastly, but perhaps most importantly, we disagree on a fundamental aspect regarding the geographical area and the community at the core of this application, namely whether it deals with the whole of Merafong

¹⁸ See sec 167(4)(d) of the Constitution.

¹⁹ See Merafong (n 13 above) paras 7-9.

... or only with the part of it that was located in Gauteng before the application of the Bill.

This summary indicates the main points of disagreement between the justices, but hides the exhaustive processes of reasoning which they employed to substantiate their views. There is much within the judgments which merits close attention, but for present purposes it suffices to set out their views on the two main issues as follows. As to the adequacy of the facilitation of public involvement by the Gauteng Legislature, Van der Westhuizen J (with whom eight other justices concurred in this respect) found that it had fulfilled its constitutional duty to do this, as it had taken reasonable steps to solicit public comment, and such submissions had been taken into account by it. Although the provincial legislative Committee had failed to report back to the community its change of position from its 'negotiating mandate', this could possibly be characterised as 'disrespectful', rather than unconstitutional, conduct.²⁰ On this finding Sachs J alone disagreed. He reasoned that the legislature's failure to communicate its change of view to the community amounted to a breach of its constitutional obligations. For him,²¹ the nature of the legislation under consideration, the extent of the impact of the change on the community, and the strong public expectation that the legislature had created that it would support the majority view in the community resulted cumulatively in a requirement that the community be appropriately involved in the entire decision-making process. In typically pithy language, Sachs J expressed himself as follows:

Arm's-length democracy is not participatory democracy ... After making a good start ... , the legislature stumbled badly at the last hurdle ... In choosing not to face the music (which, incidentally, it had itself composed) it breached the constitutional compact requiring mutuality of open and good-faith dealing between citizenry and government, and thereby rendered the legislative process invalid.

The issue of the rationality of the legislature's decision-making process proved much more divisive. The applicants had argued that the decision was irrational on its merits, and because the Gauteng legislature had changed its mind. On the standard of rationality to be applied, Van der Westhuizen began that part of his judgment by invoking the previous approach of the CC:²²

The exercise of public power has to be rational. In a constitutional State arbitrariness or the exercise of public power on the basis of naked

²⁰ This issue is resolved for the majority in paras 42-60. For the minority, see the remarks of Moseneke DCJ at para 123, who characterises the legislative conduct as reasonable, although taken in 'unseemly haste'.

²¹ See paras 295-298.

²² See para 62.

preferences cannot pass muster. Judgments of this court suggest that, objectively viewed, a link is required between the means adopted by the legislature and the end sought to be achieved.

After detailed examination of the questions whether the Gauteng legislature sufficiently well understood the nature and extent of its constitutional powers and obligations,²³ he concluded that it could not be said to have laboured under misconceptions in this regard. After further consideration of the available evidence, Van der Westhuizen J decided that it was impossible to conclude that the legislature's decision was irrational on its merits – that is, that there was no link between the means adopted by the legislature and the legitimate government end sought to be achieved.²⁴ Ngcobo J agreed that the legislature had not acted irrationally, as the negotiating mandate was by definition subject to change.²⁵ The legislature changed its position once it fully appreciated the legal framework within which it was operating. The Legislature's reasons for supporting the Twelfth Amendment Bill were rationally related to legitimate governmental objectives, and its action was thus constitutional.²⁶ In a further concurring judgement which rejected the application, Skweyiya J stressed²⁷ that it was not the function of the Court to determine the merits of the demarcation exercise, but rather a political matter. The Court was not a site for political struggle, and it was the role of the Constitution to provide a forum in which politicians could be held accountable through regular, free and fair elections.²⁸ In his words:²⁹

Courts deal with bad law; voters must deal with bad politics. The doctrine of the separation of powers ... does not allow this court ... to interfere in the lawful exercise of powers by the legislature.

Yacoob J concurred in all three judgments outlined on this issue thus far, while Langa CJ and Mpati AJ concurred in the judgments of both Van der Westhuizen and Ngcobo JJ, thus constituting a majority of six justices in rejection of the application.

Moseneke DCJ spoke for the minority on this issue³⁰ and acknowledged³¹ the 'elegantly crafted and persuasive' judgments of Madala and Sachs JJ, as well as the fact that a judicial enquiry into rationality does not give the court licence to 'place its own

²³ See paras 67-102.

²⁴ See paras 114 & 115.

²⁵ See para 252.

²⁶ See para 268.

²⁷ See para 305.

²⁸ See para 309.

²⁹ See para 308.

³⁰ He was joined by Madala, Nkabinde and Sachs JJ.

³¹ See para 123.

preference above that of the public functionary properly charged with the power'.³² He characterised the issue before the Court as one concerning not a general legislative power but a specific question about the approval or not of the alteration of provincial boundaries on which the factual circumstances admitted of no speculation about the action taken and the legislative motivation, thus making judicial scrutiny entirely appropriate.³³ He went on to find that the reversal without rational explanation of the clear negotiating stance of the legislative committee, arrived at after proper public participation and consultation, pointed to arbitrary and irrational conduct.³⁴ He held further that the provincial legislature had misconceived its powers and obligations, in taking the view that only two courses of action (to support or reject the amendment Bill in its entirety) were open to it.³⁵ After discussing three possible implications of Gauteng's failure to support that part of the Bill referring to Merafong,³⁶ Moseneke DCJ reached the 'inescapable conclusion that the provincial legislature had not only misconceived its constitutional obligations but also misconstrued the consequences of the exercise of its powers under the Constitution', leading to the finding that the legislative conduct under scrutiny was both irrational and inconsistent with the Constitution.³⁷

Madala J pithily expressed his support for the minority view, casting the justification for the obligation to consult the public within the historical experience of black people under apartheid. He reminded the Court that '... during the apartheid era the views of the black population were never canvassed when legislation affecting them was being mooted ...', and that public involvement in the legislative process '... was also intended to salvage the dignity of black people which had been ravaged by apartheid'.³⁸

What lessons are to be drawn from this fascinating set of judgments, in response to a highly 'political' matter? While the sudden and embarrassing (in the light of the professed seriousness of the public participation of those directly affected) about-face of the Gauteng legislature and its representatives on the NCOP made a mockery of the process of consultation in good faith, it was certainly feasible for a court to have held that such was the prerogative of a representative and deliberative body such as a provincial parliament, after due consideration. In such circumstances, one seeks explanations for judicial views beyond the letter of the law, perhaps

³² See paras 169 & 170.

³³ See para 171.

³⁴ See para 175.

³⁵ See para 179 & 180.

³⁶ See paras 181-190.

³⁷ See para 192.

³⁸ See paras 207 & 208.

in the personal backgrounds of the judges and their careers before elevation to the Bench, to seek the inarticulate premises which may have moved them to decide one way or the other. The make-up of the majority and minority in this matter is, however, remarkably similar in terms of demographic and pre-judicial backgrounds, so that this line of enquiry yields little.

Perhaps the most striking aspect of all the judgments is that the six judges who spoke 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 on the limits of legislative and judicial jurisdictions is exposed in the judgments, as well as frank discussion of the role of the Court in such circumstances, ranging from justified intervention to a hands-off stance. There is generally a refreshing tone of forthright expression of opinion by almost all the judges, and it is significant that the Court was unanimous in its disapproval of the discourteous/misleading conduct of the Gauteng legislature, on occasion in quite strong language. The narrowness of the majority indicates that the decision could have gone either way and that the difference of opinion is probably to be attributed to the relative conceptions of the propriety of judicial intervention under the separation of powers, ie, where on a spectrum of legislative impropriety the starting point of judicial intervention is reached. The decision overall shows a series of multiple alliances among the judges, such that an organogram of who agrees with whom on which issues would make almost as confusing reading as that which reflects judicial views in *New Clicks*³⁹ some years ago.

The case is also of interest for the frequent judicial use of the language employed in judicial review of administrative action (procedural fairness, reasonableness, rationality etc), in circumstances far removed from such action, for this was legislative conduct par excellence under examination. Perhaps, just as in the now-general expectation of a culture of justification in our law, the Court is increasingly comfortable in resorting generally to the standards of lawfulness, reasonableness and procedural fairness prescribed in the rights to administrative justice in section 33 of the Constitution.

The second case which falls for discussion in this context is *Glenister v President of the Republic of South Africa and Others*,⁴⁰ the attempt by a private party acting (and being given standing as such) in his own cause, and as a member of a group or class of people

³⁹ See *Minister of Health v New Clicks South Africa (Pty) Ltd (Treatment Action Campaign & Another as Amici Curiae)* 2006 2 SA 311 (CC).

⁴⁰ 2009 1 SA 287 (CC).

and in the public interest, to arrest the legislative process before it had run its course. Again here, the political profile of the matter 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. This event took place at Polokwane in December 2007, and played out against the backdrop of the struggle for the leadership of the ANC (and thus in all likelihood the Presidency of the country) 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, in that there was no mass mobilisation of popular political forces which preceded it, although media coverage was probably more pronounced, precisely because of the generality of the effects of the proposed legislation, and of the direct party-political interest in the objectives ostensibly sought to be achieved by the legislation.

The ANC had resolved at Polokwane to require the party leadership to disband the Directorate of Special Operations (commonly known as the Scorpions, an investigative arm of the National Prosecuting Authority which worked closely with that body and had achieved major successes in the fight against organised crime and corruption), and to absorb its activities and membership into the South African Police Services. Cabinet had duly decided to initiate legislation to achieve such goals, which had apparently led directly to a loss in morale and substantial numbers of resignations of staff from the Scorpions, thus directly affecting its ability to do its work effectively. Glenister, a businessman who argued that his vested interest in the survival and growth of the South African economy would be damaged by the reduced ability to fight crime which would flow from the adoption of the amending legislation, applied to the Pretoria High Court for an interdict to stop the legislative process at the stage of cabinet's drafting of legislation to realise the ANC resolution, but that Court found that it lacked jurisdiction to hear the application, and the matter was struck from the roll. Glenister then applied for leave to appeal this decision, alternatively for direct access, to the CC, seeking an order compelling Cabinet to withdraw the Bills from Parliament.⁴¹

Speaking for the Court, the Chief Justice had in advance directed the parties to confine their arguments to a single issue, as follows:⁴²

⁴¹ For the factual background and details of the parties involved, see paras 1-7 & 10-17 of the judgment.

⁴² See para 9.

Whether, in the light of the doctrine of the separation of powers, it is appropriate for this court ... to make any order setting aside the decision of the national Executive that is challenged in this case?

Glenister answered this question by arguing that there are 'exceptional circumstances in which an aggrieved litigant cannot be expected to wait for Parliament to enact a statute before he or she challenges it in court', and that the underlying question should be 'whether effective redress could be given after the legislation had been enacted.' If not, then it was appropriate for the court to intervene in advance of the completion of the legislative process, and Glenister averred that such was the case here. The amici curiae added to such arguments in their submissions.⁴³ Government responded essentially that the separation of powers as provided for in the Constitution depended on a delicate balance of powers between the three arms of government, and that judicial intervention with the legislative process as sought by Glenister would unnecessarily and unjustifiably upset that balance: the exceptional circumstances referred to by the applicant were not present in this case.⁴⁴

Langa CJ delivered a relatively short judgment. He started with a review of the place of the doctrine of the separation of powers in the Constitution noting that, although not expressly mentioned in the text, it was 'axiomatic' that it was part of the constitutional design.⁴⁵ He summed up the situation in this respect as follows:⁴⁶

It is a necessary component of the doctrine of the separation of powers that courts have a constitutional obligation to ensure that the exercise of power by other branches of government occurs within constitutional bounds. 'But even in these circumstances, courts must observe the limits of their powers.'

After extensive reference to and quotation from the leading case in this area thus far, *Doctors for Life*,⁴⁷ he formulated the test for intervention by a court in the legislative process as follows:⁴⁸

Intervention would only be appropriate if an applicant can show that there would be no effective remedy available ... once the legislative process is complete, as the unlawful conduct will have achieved its object in the course of the process. The applicant must show that the resultant harm is material and irreversible.

⁴³ See paras 19-24 for details of the arguments.

⁴⁴ See paras 25-28.

⁴⁵ See paras 29-32.

⁴⁶ Para 33.

⁴⁷ *Doctors for Life International v Speaker of the National Assembly* 2006 6 SA 416 (CC).

⁴⁸ See para 44.

Having acknowledged that this cast a ‘formidable burden’ on any applicant in such cases and that circumstances which warranted intervention would be ‘extremely rare’, Langa CJ cautiously declined to venture into speculation about what would in general amount to the ‘exceptional circumstances’ required to justify intervention, and preferred to decide on a case-by-case basis. Applying the test to the circumstances of this dispute, he held that they did not justify judicial intervention,⁴⁹ for two main reasons:⁵⁰ it was possible that Parliament would amend the proposed legislation, so that its ultimate effect was not able to be determined; and the causal connection between the proposed legislation and the loss of staff by the Scorpions had not been clearly established - even were it to be established, it would not necessarily amount to irreversible harm of the degree required by the test. He went on to dismiss all the additional arguments raised by the amici.⁵¹

No doubt all concerned were acutely aware of the forces at work behind the litigation: indeed, the judgment refers to the applicant arguing with a

great deal of passion, no doubt because of the important and emotive debates in the country about the unacceptable levels of crime, its prevention and the measures that ... should be employed to combat it

though is careful not to engage too much with those arguments which raised party-political points about the internal battles within the ANC. The highly visible and contested context of the case may well account for the unanimous judgment of the Court, with weight being added by it being delivered by 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 Congress,⁵² again reminiscent of an administrative-law ground of review. This judgment can fairly be described as ultimately deferential, in the sense of being respectful to the limits of the court’s jurisdiction with respect to the other branches of government – appropriately so, in my view, for the consequences of an intervention by the Court here would have been extremely grave in terms of the Court’s reputation and popular legitimacy, especially against the socio-political background described above. This is not to argue that the Court should never stick its neck out too far, because of the risk of calamitous political fallout; it is rather to acknowledge a degree of political consciousness and wisdom as guides to the judges in such circumstances.

⁴⁹ See para 57.

⁵⁰ See paras 51 & 52.

⁵¹ See paras 54-56.

⁵² See para 54.

Discussion of the next two cases selected for review shifts the focus from judicial attitudes to the legislative process to the Court's views on the regularity of the exercise of executive power. My choice of this focus is triggered not only by the cases decided, but to emphasise the distinction drawn in our law between the high-level actions of the executive authority, laden with discretion based on policy, as opposed to administrative power, the typical daily fare of those working in the public administration in all its manifestations. The importance of such a distinction is reinforced, if not exacerbated, by the definition of 'administrative action' in the Promotion of Administrative Justice Act (hereafter the PAJA).⁵³ The situation has been further developed, if not clouded, by Justice Sachs's reliance in a number of cases⁵⁴ on the 'principle of legality' as the ultimate ground of review of the exercise of all public power or the performance of all public functions.⁵⁵

In *Kruger v President of the RSA and Others*,⁵⁶ the legality of an act of the national executive (in the form of the President as formal Head of State) in approving and issuing a Proclamation⁵⁷ was brought into question. After the issuing of this proclamation (the 'First Proclamation'), the government realised that it had been issued in error, ostensibly bringing into force an arbitrary selection of sections of the Road Accident Fund Act.⁵⁸ The government attempted, before the date on which the First Proclamation would have come into force, to remedy this error by issuing through the President a further 'amending' proclamation (the 'Second Proclamation') which set out the objectives of the legislative amendment scheme correctly and as originally intended. The consequential effect of invalidity would have been extremely serious for the statutory Road Accident Fund 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.

Kruger was an attorney whose main focus was on personal injury work and, appreciating the serious errors contained in the First Proclamation, he sought and obtained from the High Court an order of

⁵³ Act 3 of 2000. For a discussion of the complexities of the statutory definition of 'administrative action', which is the gatekeeper to the authority of the courts to review administrative conduct, and judicial interpretation of that phrase, see C Hoexter "Administrative action" in the courts' 2006 *Acta Juridica* 303, and 'Clearing the intersection? Administrative law and labour law in the Constitutional Court' 2008 (1) Constitutional Court Review 209.

⁵⁴ See his judgment in *New Clicks* (n 39 above), for example.

⁵⁵ For a broader discussion of this aspect, including the close relationship between the principle of legality and the 'rule of law' as a constitutional value, see C Hoexter *Administrative law in South Africa* (2007) 116-119 & 219-220.

⁵⁶ 2009 1 SA 417 (CC).

⁵⁷ Proclamation R27 of 2006, issued in terms of the Road Accident Fund Amendment Act, 19 of 2005.

⁵⁸ Act 56 of 1996.

invalidity in respect of it. He now sought confirmation of this order in the CC, while the Fund sought direct access in order to confirm the validity of the Second Proclamation, without which the legal situation would have been chaotic. Questions as to the standing of Kruger were raised by the respondents at the outset, but need not detain us here: suffice to say that the Court adhered to its by now well-established approach to the broadening of access to the courts, especially in matters of great constitutional moment, by confirming his right to approach it in this matter.⁵⁹

On the substantive question of whether the First Proclamation had been invalid, there was no disagreement between the parties and on the Court- it was 'objectively irrational'.⁶⁰ As to the constitutional validity of the Second Proclamation, which all parties agreed to be an attempt in good faith to fill the lacuna occasioned by this invalidity, the CC did not endorse this attempt by the Office of the President to recover from its error. In the judgment of Skweyiya J,⁶¹ the majority of the justices assumed a tough and formalistic stance on its interpretation of the limits of executive power. While interpreting the formal grant of power to 'issue' a Proclamation to include the power to withdraw it (contrary to what had been argued by the applicant) but not without more to 'amend' it,⁶² Skweyiya J relied on the 'rule of law' as a foundational principle of the Constitution⁶³ in refusing to allow substance to trump form in this instance. To do so, would have had the undesirable consequence of validating references to an invalid proclamation, and approving a proclamation which 'lacked clarity', which in itself was 'inconsistent with the rule of law'.⁶⁴ Both proclamations were thus declared invalid.⁶⁵

Jafta AJ and Yacoob J did not agree with these decisions. Without going into their reasoning (which is similar) as disclosed in their separate judgments in dissent, it is fair to say that they took an altogether more pragmatic stance on the issue of invalidity of the Proclamations, preferring substance over form, and arguing that there was a sufficient proportion of the First to be saved on adoption of severability, and that the Proclamations read together made sufficient sense to construct a viable order and to deliver the Fund from administrative inconvenience of a high order. A 'just and equitable' outcome, in the view of Yacoob J,⁶⁶ would have been the

⁵⁹ See paras 20-27 of the judgment.

⁶⁰ See para 50 of the judgment of Skweyiya J.

⁶¹ Concurring in by Langa CJ, O'Regan ADCJ, Madala, Mokgoro, Nkabinde and Van der Westhuizen JJ and Kroon AJ.

⁶² See paras 60-64.

⁶³ See his discussion of the vital role of this value in para 65.

⁶⁴ See para 64.

⁶⁵ See para 72.

⁶⁶ See paras 132-136.

formulation of a Proclamation which both severed invalid elements from the First Proclamation, and read in other words, so as to save the executive enterprise as a whole.

The judgment of a large majority of the Court in this case represents an important line which has been drawn in the sand, because the interests of executive convenience and pragmatism are sure to have indicated a more accommodating judicial approach, as exemplified by the judgments of Jafta AJ and Yacoob J in dissent. In deciding in this way, the majority of the CC have given notice that they will 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 by the executive branch.⁶⁷ *Kruger* is thus a timely reminder to those in government of the high importance of compliance with the formal aspects of our constitutional framework; tiresome though such requirements may be at times, their value endures.⁶⁸

The last case to be considered in this section, *Independent Newspapers v Minister for Intelligence Services: In Re Masetlha v President of the RSA and Another*,⁶⁹ 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 in acquiescence.

The factual background in brief was the attempt by the Minister for Intelligence Services not to disclose to applicant media group certain parts of the evidence presented in restricted fashion to court in the legal dispute arising out of the suspension and then dismissal of the Director-General of the National Intelligence Agency (Masetlha) by the President of the country. While the organising theme, so to speak, of the application was the core constitutional value of 'openness of government', the narrower emphasis in the judgment was on the openness of court process and the facilitation of the effective participation of all parties to judicial proceedings, rather than the Promotion of Access to Information Act.⁷⁰ Moseneke DCJ

⁶⁷ See, for example, *Zondi v MEC for Traditional and Local Government Affairs* 2006 3 SA 1 (CC), and much more recently, *Minister for Justice and Constitutional Development v Nyathi* 2010 4 SA 567 (CC).

⁶⁸ At this point, it is appropriate to refer to the classic exposition of this aspect of the rule of law, by way of the much-celebrated but now too frequently forgotten 'Postscript' to E P Thompson's *Whigs and hunters* (1977) 258ff.

⁶⁹ 2008 5 SA 31 (CC).

⁷⁰ Act 4 of 2000.

delivered the leading judgment on behalf of five other Justices of the Court.⁷¹ He constructed a novel composite ‘right’, the right to open justice, built on the rights to freedom of expression, of access to court, and to a public trial before an ordinary court.⁷² Starting from the point of view that access to court process should be available to the media to attend and report on proceedings in open court, but accepting that all such rights were subject to limitation according to the well-known formula, Moseneke DCJ held that simple reliance on ‘national security’ (through classification as ‘secret’ or the Minister’s *ipse dixit*, for example) as a complete answer to the request for open process was insufficient. Once seized with the matter, a court was obliged, as part of its inherent power to regulate its own process,⁷³ to ‘consider all relevant circumstances and to decide whether it is in the interests of justice for the documents to be kept secret ... from any other parties, the media or the public’,⁷⁴ in an attempt to balance the competing claims of both state and the media/ public. The majority declined, however, to lay down a principled procedure to be followed in all such cases, preferring to take each case on its merits and in its context.⁷⁵ After due consideration of the contested materials, the majority of the Court ordered that some of them be disclosed, but upheld the secret status of others, so the applicant succeeded partially.

A strong minority of Justices dissented from this view, however, all of them being in favour of full disclosure of the restricted materials. While Yacoob J characterised the majority judgment as ‘strikingly clear, decidedly forceful and engaging in its flow’, he regretted that he found it ‘quite impossible to agree with its reasoning and conclusion in several aspects of substance’.⁷⁶ In what is increasingly becoming a characteristic style, Yacoob J methodically and categorically sets out his points of difference with the majority in three areas. The most important for present purposes is his weighing up of the interests of the executive as opposed to the media group, coming down emphatically on the side of ‘open justice’. In forthright manner, he stated⁷⁷ that:

A court should not be used as an instrument of concealing bungling and deceit under the guise of protecting the names of operatives and other details that are already in the public domain. To suggest that this course is in the interests of justice is ... to define the concept of justice in a

⁷¹ Madala, Ngcobo, Nkabinde, and Skweyiya JJ and Mpati AJ.

⁷² These are provided for in secs 16, 34 & 35(3)(c) of the Constitution, respectively: see para 39 of his judgment.

⁷³ As provided for in sec 173 of the Constitution.

⁷⁴ See para 55.

⁷⁵ Paras 57 and 58.

⁷⁶ See para 80.

⁷⁷ Para 136.

manner inconsistent with the understanding of the notion throughout the world and, perhaps more importantly, in a manner utterly inconsistent with our Constitution.

Sachs J joined Justice Yacoob in his view that all the material should have been disclosed. Justice Sachs noted an indissoluble link between democracy and openness. In the style to which we have become accustomed from him, he referred to the transformation required of the intelligence services by the Constitution: from its role as a 'shadowy and all-powerful' prop of the 'beleaguered' apartheid regime, to their current function 'which was to keep government well informed, so that it can confidently fulfil its responsibilities towards ensuring a better life for all in a country undergoing major transformation'.⁷⁸ Van der Westhuizen J concurred with Yacoob J but in more measured tones, and he would also have allowed the 'redaction of the names of any operatives not already identified in the media' before disclosure.⁷⁹

Set against the 'executive-mindedness' with which successive courts increasingly succumbed to arguments from the apartheid regime about the need to preserve 'state security' in the face of a 'total onslaught', this is an extraordinary set of judgments. Even the relatively conservative approach of the majority on the Court went further than many courts in similar jurisdictions would have done, and was certainly far more progressive in its approach when compared with the courts before 1994. Justices Yacoob and Sachs are quite outspoken in their insistence on full disclosure, and the pre-judicial experiences of each of them no doubt played some part in moving them to decide as they did. Of particular note is the complete willingness of each of the four judges who spoke, not only to lay down a test suitable for reviewing the lawfulness of the executive action, but also to pronounce on the merits (in respect of their 'disclosability') 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, in the face of increasing social disenchantment with government's record in service delivery and accountability; the temptation for any executive to plead state security when under pressure is very strong.

In partial summary at this point, and building on *Doctors for Life* 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

⁷⁸ See para 159.

⁷⁹ Para 182.

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 the judicial branch on the correct side of the justifiable limits of authority prescribed for the courts, the executive and Parliament, according to the nuanced understanding of the doctrine of the separation of powers prescribed in the Constitution. Attention now shifts to a narrower aspect of the relationship between the judiciary and the executive.

3 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.⁸⁰ In this way, some of the features of pre-Constitutional, common-law administrative law have reared their heads, in particular in a casuistic judicial approach which makes it difficult to decipher points of legal principle and to discern trends. Among its 2008 roster of administrative justice cases, the following decisions of the CC are of especial interest.

*Walele v City of Cape Town and Others*⁸¹ arose from what must be a very frequent occurrence: the dissatisfaction of an adjacent landowner about the granting of planning permission to a neighbour whose new structure offends in some way. Here Walele complained that the erection of a four-storey building devalued his property but his application for review at High Court level was dismissed. Before the CC, he persisted with two arguments: firstly, that the approval of the plans had been procedurally unfair, arbitrary and capricious; and then that the City planning authority had failed to comply with mandatory procedural requirements of the National Building Regulations and Building Standards Act,⁸² essentially because the decision-maker could not have been 'satisfied' on various grounds and had not received sufficiently motivated advice to have reached his decision.⁸³ As Jafta AJ said:⁸⁴ 'The case raises issues of great importance in the field of town planning and development in cities and towns throughout the country.' Indeed, the City of Johannesburg was admitted as an *amicus curiae* for this reason.

⁸⁰ For a fuller description and analysis of this process, see Hoexter (n 55 above) Chapter 1 in particular.

⁸¹ 2008 6 SA 129 (CC).

⁸² Act 103 of 1977, hereafter the Building Standards Act

⁸³ See paras 4-22.

⁸⁴ Para 21.

The CC divided into two almost equal camps in this case. A majority of six justices coalesced around the judgment of Jafta AJ,⁸⁵ while the rest⁸⁶ joined O'Regan ADCJ in the minority. The differences of opinion were not on every ground, however, as will be seen.

On the alleged failure to provide procedural fairness, the Court was unanimous (though their views were expressed differently) that applicant's *rights* had not been 'materially and adversely affected'⁸⁷ by the granting of planning permission, chiefly because the town-planning zoning scheme for the area concerned contemplated the erection of buildings up to seven storeys high.⁸⁸ The Court was similarly of the same mind in rejecting applicant's argument that he was owed procedural fairness on the ground of legitimate expectation, based on 'past practice': the latter was shown not to have been established.⁸⁹

The Court divided on the question of whether the decision-maker could have been 'satisfied' about certain factors before granting permission, and on whether the signing-off of the plans by the Building Control Officer (BCO) was sufficient to amount to a 'recommendation' by him in the circumstances, as required by law. Jafta AJ for the majority held that: 'The decision-maker must ...show that the subjective opinion it relied on for exercising power was based on reasonable grounds' and that, in the absence of any evidence on the record that the BCO had considered a number of factors stipulated in the Building Standards Act, the decision-maker could not have been so satisfied.⁹⁰ Furthermore, the mere signature of the BCO on the plans, in addition to the fact that the plans had been signed off by all the necessary departments within the City, was not sufficient to amount to his 'recommendation', in the absence of an express statement that he had, before signing off, considered the factors which the Act required him to, and gave more reasoned advice than a mere signature.⁹¹ In the absence of one of the required jurisdictional facts, therefore, the administrative action concerned was declared invalid.

O'Regan ADCJ for the minority approached this aspect of the case in a different order. She firstly considered whether the BCO's signature amounted to the required 'recommendation'. This was answered in the affirmative, when seen in the context of the town-

⁸⁵ With whom Madala, Mokgoro, Ngcobo, Nkabinde and Skweyiya JJ concurred.

⁸⁶ Langa CJ, Kroon AJ and Van der Westhuizen and Yacoob JJ.

⁸⁷ As required by the PAJA, sec 3, for the triggering of a duty to hear Walele.

⁸⁸ See paras 31 & 32, and 128-132, for the separate reasoning of the majority and minority.

⁸⁹ Again, for the two sets of views on this ground, see paras 39-42, and 133-136.

⁹⁰ Paras 60-62.

⁹¹ See the reasoning of Jafta AJ in paras 69-72.

planning operation in such a large metropolitan authority as Cape Town.⁹² Next, Justice O'Regan considered whether the decision-maker had exercised an independent discretion, or had in fact 'acted under dictation', as had been argued by Walele. Once again, in the situation-specific context of the town-planning system under review, the minority was prepared to allow the decision-maker to place 'considerable weight' on the recommendation of the BCO and, in the absence on the evidence of a suggestion that the former had not considered the documentation sent to him by the BCO, O'Regan ADCJ concluded that the permission was valid.⁹³ Finally, on the question whether the decision-maker had considered the factors required by the Building Standards Act, the minority found no evidence that he had not done so, despite his not stating that he had, and so they concluded that his action was not reviewable.⁹⁴

These two judgments are intriguing, given the reasoning which they contain and the narrowness of the split in the Court (6 to 5). Both judgments are clearly and well argued, and one is left with the feeling that frankly, the difference between them was very slight, and attributable perhaps to a marginally different understanding of the practical constraints under which the typical town-planning exercise proceeds on a daily basis. This case is significant, nevertheless, for the entire Court's refusal to interrogate more closely Walele's argument that his 'existing rights' had been affected; for its confirmation of the accepted or standard approach to the doctrine of legitimate expectation, albeit now within the context of 'constitutionalised' administrative law; for the CC's (divided) attitude to the increasingly common (and necessary) administrative practice of multi-stage decision-making;⁹⁵ for the (again divided) 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). This is likely to be a case which is frequently referred to in the future.

Merafong, dealt with extensively above, is of passing relevance again here, especially for the express and detailed examination of the concept of 'rationality' as a ground of review.⁹⁶ It will be recalled that section 33 of the Constitution requires administrative action

⁹² Paras 105-109.

⁹³ See paras 115-117.

⁹⁴ See paras 119-120.

⁹⁵ For an infamous example of judicial blindness to the realities of such a process, see *South African Defence and Aid Fund v Minister of Justice* 1967 1 SA 263 (A)

⁹⁶ See in particular paras 62-74, per Van der Westhuizen J and 169 & 170, per Moseneke DCJ, and their application of the rationality standard in the following paragraphs of their judgments.

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.⁹⁷ Mercifully, the CC in *Bato Star*⁹⁸ effectively abandoned the circularity of the Wednesbury test and rather interpreted it as requiring the characteristics of rationality and proportionality.⁹⁹ The decision by the CC in *Merafong* strengthens the notion of ‘reasonableness’ as being something wider than mere ‘rationality’.

The final case to be reviewed in some detail is *Njongi v MEC, Department of Welfare, Eastern Cape*.¹⁰⁰ This decision is likely to take its place 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, which reflects the parlous state of affairs on the ground, is essential to note. There had been countless judgments of the Eastern Cape High Court, many of them penned by Froneman and Plasket JJ,¹⁰¹ setting aside administrative action of the provincial government in the sphere of the payment of social security grants. The SCA had also delivered severely critical judgments along the same lines in *Ngxuza*¹⁰² and *Kate*.¹⁰³ What exacerbated the situation was that the provincial government of one of the poorest provinces in the country, in which social grants provide the means of subsistence to probably the majority of its inhabitants, obdurately insisted on appealing the High Court decisions against it, thus delaying justice and using limited financial resources which may have been better spent.

Njongi provided the CC with the opportunity to demonstrate its concern in a unanimous judgment. The factual background in brief was that appellant had been in receipt of a disability grant from the State until it was terminated without explanation in late 1997. The

⁹⁷ For a detailed description of this sorry saga, see C Hoexter ‘The future of South African administrative law’ (2000) 117 *South African Law Journal* 484.

⁹⁸ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 4 SA 490 (CC).

⁹⁹ See the judgment of O’Regan J at paras 43-45 especially.

¹⁰⁰ 2008 (4) SA 237 (CC).

¹⁰¹ See the authorities referred to in the judgment of Nugent JA in *Kate* (below), and especially at paras 3-6.

¹⁰² *Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuza* 2001 4 SA 1184 (SCA).

¹⁰³ *MEC, Department of Welfare, Eastern Cape v Kate* 2006 4 SA 478 (SCA).

grant was restored almost three years later, but with a small sum by way of compensation for the period in which no grant had been paid. Njongi took four years to institute a claim for payment of the arrears in full, and this was resisted by the provincial government on the ground that the claim had prescribed. Although Njongi was initially successful, the finding was reversed on appeal to a full bench, leave to appeal to the SCA was refused, and so the matter ended up in the CC.

Yacoob J spoke for the unanimous Court, and upheld the appeal in all respects, dismissing the arguments on prescription with a degree of summary impatience. The decision itself is less significant in a broader sense than the language in which it is couched, and the quite excoriating criticism of the provincial government and its officials which it contains. After an extensive review of the socio-legal context,¹⁰⁴ we encounter the following statement summarising the State's responsibility in this sphere:¹⁰⁵

The vast majority of the people who were deprived of their disability grants as a result of the bewildering conduct of the provincial government are the poorest people in our society. Sadly they eked out a miserable existence and the unlawful denial of their grants was unthinkably cruel and utterly at odds with the constitutional vision to the achievement of which that government ought to have been committed. The provincial government failed dismally in its constitutional obligations.

After further consideration of similar cases which had reached the courts, many of which were also brought late, Yacoob J dealt with the issue of prescription and held that, as the administrative action concerned (the removal of the grant) had never been disavowed, prescription had not begun to run. Therefore Mrs Njongi's arrears were payable in full, plus appropriate interest.¹⁰⁶ The extent of Justice Yacoob's disenchantment with, if not contempt of, the provincial government appears abundantly from the portion of his judgment dealing with the allocation of costs. In awarding costs against the provincial government on the scale as between attorney and client, he traversed in detail the affidavits and arguments put forward by the provincial government as to why it should not have to pay costs *de bonis propriis*, having stated at the outset¹⁰⁷ 'that I have reluctantly come to the conclusion that it would not be just to make' such an order. Starting with a review of the conduct of the highest political figure involved, the MEC for Welfare, Justice Yacoob examined in detail the rather thin reasons given by all the public

¹⁰⁴ Paras 8-16.

¹⁰⁵ Paras 17 & 18.

¹⁰⁶ See paras 57-60.

¹⁰⁷ Para 63.

officials involved, criticising repeatedly conduct that was lamentably short of what was required of them by any measure of efficiency or true understanding of and commitment to the values of the Constitution and the social development objectives of the national government.¹⁰⁸ He was particularly concerned about careless official responses to decisions of the courts.¹⁰⁹

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, and it must be remembered that he was speaking for the Court.¹¹⁰

Situated more generally within the context of the inefficient or failed implementation of socio-economic rights decisions of the CC,¹¹¹ 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 are, I suggest, the questions which will loom large in the years to come, and to which I attempt some speculative answers in the concluding section of this piece. Before then, it will be helpful to review some of the internal dynamics of the judicial process within the CC, as much as these appear from their judgments over a longer period than just 2008.

4 Internal aspects of the judicial process in the Constitutional Court

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*,¹¹² it seems appropriate to ask the following questions: are we seeing more split decisions in the CC; what explains multiple decisions in both dissenting and majority positions; what, if anything, can be read

¹⁰⁸ See paras 64-90.

¹⁰⁹ Para 84.

¹¹⁰ Langa CJ, Moseneke DCJ, Madala J, Mpati AJ, Ngcobo, Nkabinde, Sachs, Skweyiya and Van der Westhuizen JJ concurred.

¹¹¹ The nominal litigant in perhaps the most famous case on socio-economic rights yet delivered by the CC, *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC), Irene Grootboom, died in the course of 2008, still without a formal house, fully seven years after her triumph in court.

¹¹² Details of references to which can be found in M Bishop, L Chamberlain & S Kazee 'Twelve year review of the work of the Constitutional Court: A statistical analysis' (2008) 24 *South African Journal on Human Rights* 354-391 note 1, which is itself a composite summary of much of what was included in the annual reviews over the period 1995 to 2006. In what follows, I have relied chiefly on this last piece, to which I shall refer as Bishop *et al*.

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*; and is Justice Yacoob's outspokenness (which is striking when one reads all the decisions I have selected) coincidental or a sign of something else?

More generally, are we witnessing the emergence of fault-lines within the jurisprudence and 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.

Writing about 'judicial politics', or discernible trends in the record of a particular court, is something which was completely alien to our legal culture a mere thirty years ago, but now occupies a well-defined niche. This is not the place to recount the main findings of the many studies which have been published, but rather to remark on the chief features which are common to almost all of them, in order to situate the current enquiry in its relevant context. First, and most importantly, such work has been historical in nature, generally looking back several decades and benefiting from a fair degree of hindsight and the knowledge of subsequent developments in both politics and law. In addition, the focus has been to take a fairly broad period of time, certainly longer than fifteen years. Secondly, the analyses tend to be empirical and descriptive, with some analysis, theoretical discussion and development being the exception. In this regard, John Dugard's *Human rights and the South African legal order*¹¹³ and David Dyzenhaus's *Hard cases in wicked legal systems*¹¹⁴ are singular exceptions. Thirdly, the conclusions drawn from such studies tend to be of a corporate character, analysing critically a group of judges, typically during the tenure in office of a particular Chief Justice; so we read about the 'Centlivres court' or the 'Steyn years'. This is not to say that the role of an individual judge within a court is not emphasised from time to time, nor to ignore the studies which have focused on individuals,¹¹⁵ but to recall that the strong emphasis has not been on the influence of one or two judges over

¹¹³ (1978).

¹¹⁴ (1978)

¹¹⁵ Such as E Cameron 'Legal chauvinism, executive-mindedness and justice – LC Steyn's impact on South African Law' (1982) 99 *South African Law Journal* 38.

their colleagues. Fourthly, again with isolated exceptions, such as the period immediately after the accession to office of the national Party in 1948, there has been relatively little attention paid to party-political influence on the judicial process, but rather an assessment of judicial policy towards socio-political and economic issues which they have been forced to confront in cases brought before the courts. Finally, all the studies thus far have examined the role of the judiciary before 1994, when the relationship between formalised injustice and 'wickedness' and the law reared its head frequently in court process. The contrast with the post-apartheid constitution could hardly be starker, at least in form and increasingly in substance.

Against this background, what are we to make of the judicial politics as seen in the small sample of cases analysed above? To make any attempt to respond meaningfully, the characteristics established by the CC in its first twelve years provide a useful comparator. Bishop *et al* review the work of the Court and all justices appointed permanently to its ranks before the end of 1996 in a number of categories, of which only the following are relevant for present purposes: voting patterns of the judges (how many leading, concurring and dissenting judgments and votes were written or cast by each justice); the extent to which the Court was unanimous in its views; and the 'voting alignments' amongst justices. So we learn that, in the period 1995 to 2006, of the justices still on the Court in 2008, O'Regan, Ngcobo and Madala JJ were most likely to deliver a dissenting judgment (expressed as a percentage of the cases in which they participated), Van der Westhuizen J had a relatively high level of dissent, if dissenting votes are added, and that Yacoob J had clearly the lowest level of dissent, giving the leading judgment or concurring in 175 of the 178 cases in which he had sat till that point.¹¹⁶ Justices Madala and Skweyiya wrote judgments relatively seldom, while Justices Ngcobo, O'Regan and Sachs were likely most frequently to express their views in the form of a written judgment.¹¹⁷ While the average rate of dissent over the period was a mere 13.4%, several years (such as 1995 and 1997) saw a spike in this percentage, the most significant being in 2006, in which fully 40% of the 25 cases decided elicited a division of opinion from the Court.¹¹⁸

Perhaps the most interesting aspect of the 12-year review is to be seen in the voting alignments of each individual justice, arrived at by determining the frequency with which individual pairings of judges sided with each other. The authors acknowledge that their findings in this sphere of the Court's activities are highly speculative, so must be read with caution. So we learn that there has been a 'steady and

¹¹⁶ See Bishop *et al* (note 111 above) tables 1 & 2, and the graphs following.

¹¹⁷ As above.

¹¹⁸ Bishop *et al* (n 111 above) Table 3, 360.

noticeable decline' in the level of agreement between Langa CJ and Moseneke DCJ;¹¹⁹ that the likely alliance in any matter of Madala J is most difficult to predict, although he is more likely to agree with Moseneke DCJ than most;¹²⁰ that the rate at which Ngcobo J agreed with other justices declined from 2004, when compared with his earlier voting pattern;¹²¹ and that Sachs J has the 'lowest agreement rate' of all the justices.¹²²

When one compares these aspects of judicial activity with the admittedly highly selective and small sample of cases discussed in this article, the following points of interest emerge. Firstly, the proportion (66%) of cases in which dissenting judgments were handed down, and the extent of such dissent (three separate dissenting judgments in both *Merafong* and *Independent Newspapers*, two in *Kruger* and one in *Walele*), may well indicate that the pattern seen in 2006 is being repeated. Secondly, the highly contentious nature of the situation which gave rise to *Merafong* is attested to by the fact that no fewer than six justices (of the ten on the Court) felt sufficiently moved to speak out. Thirdly, both in *Merafong* (6 to 4) and *Walele* (6 to 5) the Court split unusually evenly, but probably for very different reasons. In *Merafong* the Court was confronted with a long-running socio-political dispute involving many thousands of people, on which it could be expected that the justices would have been aware and even had views before the hearing, while *Walele* concerned an individual landowner, and raised more esoteric points of legal doctrine.

Fourthly, several remarkable aspects of individual judicial conduct emerge from the cases discussed. Yacob J plays a large role in three of the cases, with the leading judgment in *Njongi* and dissenting judgments in both *Kruger* and *Independent Newspapers* as well as a dissenting vote in *Walele* – these three dissents equal the number of dissents he registered in the 178 cases he heard in the 12-year review. Skweyiya J is one of the more active justices in this sample, contrary to the image sketched earlier, while Ngcobo J seems slightly more silent than one would expect. Jafta AJ is remarkably active (one leading judgment and one dissent) than one would anticipate from an acting justice, and the fact that he has subsequently been appointed to the Court in a permanent capacity indicates that this has been viewed favourably. Van der Westhuizen J similarly strengthens his reputation for speaking out. Finally, unfortunately the smallness of the sample and the absence of several long-serving justices on leave during this year (Moseneke DCJ,

¹¹⁹ n 111 above, 364.

¹²⁰ n 111 above, 369.

¹²¹ n 111 above, 372.

¹²² n 111 above, 374.

O'Regan and Sachs JJ) make comments on voting alignment too tenuous an undertaking.

Tentative answers to several of the questions posed at the outset have been touched on in the immediately preceding paragraphs. A detailed treatment of them requires another forum on another day. One question requiring an assessment most urgently concerns the effects of the retirement from the CC of Justices Madala, Langa, Mokgoro, O'Regan and Sachs on the politics of the Court. The last two mentioned were known for their outspokenness, but it seems as if Justices Yacoob and Van der Westhuizen, now joined by Justices Jafta and Froneman (based on his judgments *a quo* in the social grants cases from the Eastern Cape), will ensure a continuation of a healthy and even robust exchange of views from the Bench, especially if the elevation of Justice Ngcobo to the Chief Justiceship does not constrain his customary willingness to express his views. For the rest, we should be particularly alert to the internal aspects of the Court's operations at this time of transition and stress, as it is increasingly called on to intervene in highly disputed political territory, with a not altogether empathetic executive watching its every move.

5 Principled calm within a shameless 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. When I started working on this article in mid-2009, my sense of things would have pushed my assessment closer to the 'struggling to survive' pole, such were the pressures being brought to bear on the CC by the accession to power of Jacob Zuma and the running battles with Hlophe JP. Since then, however, the latter issue has subsided and largely disappeared from public attention, while the appointment of four new justices to the CC has brought a degree of reassurance. However, the picture sketched is certainly not that of the unified, self-confident Court of the period 1997 to about 2004, over-ruling the excesses of apartheid jurisprudence with alacrity and pushing the boundaries in the development of socio-economic jurisprudence, basking in the general approbation of judiciaries elsewhere in the world and gradually winning the confidence of larger numbers of South Africans, particularly the marginalised.

Indeed, I would contend that the Court is at a vulnerable stage of its development, but with no reason for great pessimism. Much will depend internally on the rapid integration of the five justices most recently appointed into the culture of the Court established in its first

fifteen years, and the strength and wisdom of leadership (including the relationship between them) of the Chief Justice and his Deputy. The political context in which the CC operates is largely but not completely beyond its control, and will have a decided effect on whether it is able to weather the inevitable buffeting winds it will face, to emerge stronger and relatively unscathed. The critical element in this equation, in my view, is the extent to which the Court can both restore some of the confidence lost recently in popular perceptions of its independence, impartiality and dignity, and build on the earlier foundations to increase public confidence in it. Ultimately, the greatest safeguard of its strength and development will be the legitimacy it enjoys from all South Africans: much work lies ahead in that quarter.

