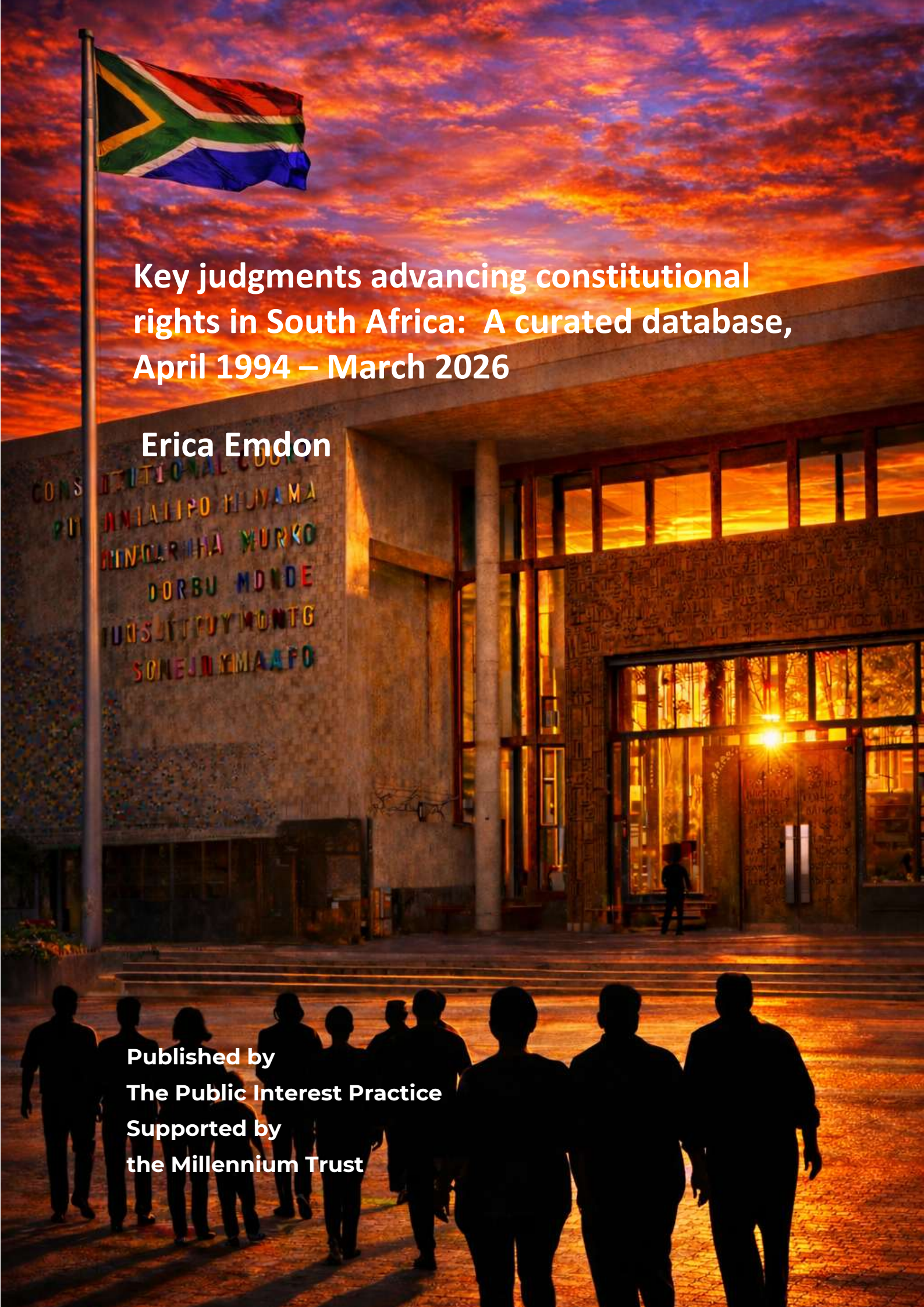

Key judgments advancing constitutional rights in South Africa: A curated database, April 1994 – March 2026

Erica Emdon

Published by
The Public Interest Practice
Supported by
the Millennium Trust

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Published by

The Public Interest Practice

First published March 2026

ISBN: 978-1-0492-8504-7

This publication was made possible through funding provided by the Millennium Trust.

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Introduction

The Constitution, negotiated in the early 1990s and enacted in 1996, enabled South Africa's first democratic elections in April 1994 and marked the culmination of a long struggle for a free and democratic constitutional order. For me, it stands as a transformative instrument that not only enshrines fundamental rights, but places dignity and equality at the core of South Africa's democracy, with a clear focus on protecting those most vulnerable to poverty, marginalisation, and abuse of power.

In compiling this database, I have sought to show how, over the past thirty years, courts have brought the Constitution to life. Through their decisions, they have interpreted and clarified the rights it is designed to protect, and have held government accountable where it has failed to give those rights real effect. While the Constitution sets out rights in their ideal form, their realisation has required ongoing effort and struggle. Even where rights have been recognised by the courts, meaningful change has depended on the state giving effect to them in practice. Still, these judgments point the way forward, making clear what the Constitution requires and how it can be realised.

This book brings together case summaries of over 180 judgments. They span the full range of socio-economic rights in the Constitution, as well as other fundamental rights, including the right to protest and freedom of expression, and important developments in gender and migrant rights.

My aim has been to present these judgments in a clear and accessible manner, so that readers can quickly grasp the core principles emerging from each case and understand how they have expanded and deepened constitutional rights. The database demonstrates the power of litigation as a tool for accountability and change. When a case secures or clarifies a right and holds government to account, it creates the conditions for meaningful change and real improvements in people's lives.

This book is written with lawyers, paralegals, journalists, researchers, and activists in mind, so that they can draw on the chapters most relevant to their work. Users can focus on their particular areas of interest and use this resource to deepen their understanding and strengthen their engagement. At the same time, I hope that readers without formal legal or activist backgrounds will also find the material accessible and useful.

Each case summary is structured as an independent unit. The full citation of the judgment appears in the heading, and a hyperlink is provided in a footnote to the full judgment on the Southern African Legal Information Institute (SAFLII), a free online database of Southern African case law.

In selecting the cases, I have focused on judgments that have expanded, clarified, or strengthened constitutional rights, particularly for disadvantaged or marginalised groups. Many establish important legal principles, define the scope of state obligations, or provide practical mechanisms for enforcing rights. Others expose shortcomings in legislation, whether by identifying gaps in the statutory framework or highlighting provisions that are inconsistent with constitutional protections. My intention has not been to produce an exhaustive catalogue, but to highlight those judgments that have made a significant contribution to the development and enforcement of constitutional rights.

Each chapter concentrates on a particular constitutional right and begins with brief contextual remarks. These include statistical information, mainly drawn from government sources such as the General Household Survey and national census data. The introduction is followed by uniformly presented case summaries and concludes with a table of cases.

Because constitutional rights are often interconnected, cross-references are included throughout the database to guide readers to related discussions in other chapters. For example, some children's rights cases also engage the rights of migrants and refugees, while certain housing cases raise important questions about land rights. These cross-references are intended to reflect the interconnected nature of constitutional rights in South African law.

At the end of each chapter, a section titled "Current enforceable rights" distils the rights emerging from the case law into concise bullet points, providing a practical reference tool.

This compilation was developed through a desktop study of public-interest law organisations and the cases they have litigated, together with interviews with public-interest lawyers and activists. In doing this work, I have been continually reminded that the cases reflected here are not only legal developments, they are the result of the efforts of individuals and communities, often supported by committed public interest lawyers, social justice organisations, and amici curiae. These actors help to shape litigation, develop arguments, and ensure that cases reach the courts. Their work lies at the heart of this body of jurisprudence and is essential to the advancement of constitutional rights.

I recognise that some judgments involving advanced constitutional rights may not have been included. It is intended that this database be updated annually and that additional cases be incorporated in future editions.

A number of individuals have provided invaluable insight and support during the development of this project and responded when I reached out to them. These include Wayne Ncube, Nabeelah Mia, David Dickinson, Kayan Leung and Louise du Plessis of Lawyers for Human Rights; Lauren Royston of the Socio-Economic Rights Institute of South Africa; Nersan Govender, Cameron McConnachie, Wilmien Wicomb, Sipesihle Mguga and Moray Hathorn of the Legal Resources Centre; Omhle Ntshingila and Felix Quibe of Right2Protest;

Bronwyn Pithey of the Women's Legal Centre; Sasha Stevenson of Section27; Jacob van Garderen of the Public Interest Practice; Odette Geldenhuys of SAFLII; Anton Harber of Campaign for Free Expression; and Mark Heywood, a social justice activist. I must add Clifford Elk, my husband, who gave some valuable insights to me along the way.

Finally, this database would not have been possible without the support of the Millennium Trust, whose commitment to democracy and the rule of law aligns closely with the purpose of this work. I am deeply grateful to the trustees for their support, and to Le Roux van der Westhuizen and Reina de Waal for their engagement and continued assistance throughout the development of the project.

I hope that this database will assist practitioners, researchers, activists and all those interested in our Constitution, to navigate the growing body of constitutional jurisprudence in South Africa. By bringing together key judgments in a structured and accessible format, it seeks to make the development of constitutional rights more visible and more readily usable in litigation, advocacy, and public education.

Erica Emdon
March 2026

Freedom of expression

> *Freedom of expression, especially when gauged in conjunction with its accompanying fundamental freedoms, is of the utmost importance in the kind of open and democratic society the Constitution has set as our aspirational nor…"*[1]

Cases in this chapter

1. South African National Defence Union v Minister of Defence and Another CCT 27/98 [1999] ZACC 7 1999 (4) SA 469 (CC) 12
2. S Mamabolo v S CCT 44/00 [2001] ZACC 17 2001 (3) SA 409 (CC) 2001 (5) BCLR 449 (CC) 15
3. D.A v Governing Body, Settlers High School and Others [2002] 4 All SA 294 (C) 18
4. Islamic Unity Convention v Independent Broadcasting Authority and Others [2002] ZACC 3; 2002 (4) SA 294 (CC); 2002 (7) BCLR 702 (CC) 20
5. Laugh It Off Promotions CC v SAB [2005] ZACC 7 22
6. The Citizen 1978 (Pty) Ltd and Others v McBride [2011] ZACC 11; 2011 (4) SA 191 (CC) 25
7. Print Media South Africa v Minister of Home Affairs [2012] ZACC 22 28
8. Pilane and Another v Pilane and Another [2013] ZACC 3; 2013 (4) SA 509 (CC); 2013 (7) BCLR 431 (CC) 32
9. Masuku & Ano v SAHRC (1062/2017) [2018] ZASCA 180 (04 December 2018) 34
10. Economic Freedom Fighters and Another v Minister of Justice and Correctional Services and Another [2020] ZACC 25 36
11. Qwelane v South African Human Rights Commission [2021] ZACC 22 38
12. Mineral Sands Resources (Pty) Ltd and Others v Reddell and Others [2022] ZACC 37 42
13. Afriforum NPC v Nelson Mandela Foundation Trust and Others [2023] ZASCA 58 45

1 Kriegler J in S v Mamabolo CCT 44/00 [2001] ZACC 17, para 37

The Constitution

Section 16

- Freedom of Expression
    a) Everyone has the right to freedom of expression, which includes
    b) freedom of the press and other media;
    c) freedom to receive or impart information or ideas;
    d) freedom of artistic creativity; and
    e) academic freedom and freedom of scientific research
- The right in subsection (1) does not extend to
    f) propaganda for war;
    g) incitement of imminent violence; or
    h) advocacy of hatred that is based on race, ethnicity, gender, or religion, and that constitutes incitement to cause harm.

General points

Freedom of expression in South Africa is primarily protected by section 16 of the Constitution, which guarantees freedom of the press and other media, the right to receive and impart information or ideas, artistic creativity, and academic freedom. The Constitution also specifies that certain categories of expression are not protected, namely propaganda for war, incitement of imminent violence, and advocacy of hatred based on race, ethnicity, gender, or religion that amounts to incitement to cause harm. Several other constitutional rights reinforce freedom of expression, including political rights, freedom of association, freedom of opinion and belief, and the right of access to information.[2]

Legislation plays a complementary role. The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 regulates hate speech and must be read consistently with the constitutional thresholds in section 16(2), which curtail certain expression. The Films and Publications Act 65 of 1996 controls harmful digital content, while the Electoral Act 73 of 1998 restricts false statements that could interfere with free and fair elections.

[2] Section 15 (freedom of religion, belief and opinion), Section 18 (freedom of association), Section 19 (political rights – essential for political expression), Section 32 (right of access to information), Section 34 (access to courts) – protects the ability to litigate and speak freely in legal matters.

At the same time, some areas of criminal law, such as intimidation, incitement and crimen injuria, may lawfully limit expression when it infringes the rights or dignity of others.

General principles consistently emphasised in South African constitutional law include that freedom of expression protects not only popular speech but also ideas that disturb or offend. Political expression receives the highest protection because it is essential to democratic accountability and participation. Limits on expression must always satisfy the general limitations clause in section 36.

Section 36 states: "1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including:

- The nature of the right;
- The importance of the purpose of the limitation;
- The nature and extent of the limitation;
- The relation between the limitation and its purpose; and
- Less restrictive means to achieve the purpose"

This means that freedom of expression is both a central democratic value and a complex right that must be balanced against equality, dignity and safety in a constitutional democracy.

Statistics

South Africa continues to be rated a "free" country in major global assessments of freedom, including freedom of expression, press freedom and internet freedom. According to Freedom House's Freedom in the World 2025 report, South Africa scores 81 out of 100 overall, with strong civil liberties and political rights that include expressive freedoms.[3] Its internet freedom score is 73 out of 100, reflecting a broadly open digital space, though challenges such as affordability and access disparities remain. South Africans are generally able to express views and access information freely under constitutional protections.[4]

On press freedom specifically, the Reporters Without Borders (RSF) World Press Freedom Index 2025 places South Africa among the top-ranked countries globally. Recent data place South Africa 27th out of 180 countries, making it one of the strongest press freedom

[3] Freedom house scores each country on a scale from 0 to 100. Coming 81 out of 100 means that South Africa is considered 'free'.

[4] https://freedomhouse.org/country/south-africa/freedom-world/2025?utm_source=chatgpt.com

environments in Africa. Journalists benefit from a well-established investigative culture and legal protections for the media, although verbal attacks and economic pressures on journalism persist.[5]

Regionally and globally, freedom of expression faces broader challenges: RSF's global analysis finds that more than half the world's population now lives in countries where press freedom is in a "very serious" situation, and economic pressures have reached a historic low in media conditions, dragging down overall freedom scores. These trends underscore ongoing risks even where statutory rights exist.

In summary, South Africa retains a comparatively robust statistical profile for freedom of expression and press freedom, scoring well in global indices.

Cases

1. South African National Defence Union v Minister of Defence and Another CCT 27/98 [1999] ZACC 7 1999 (4) SA 469 (CC) [6]

The case concerned the rights of members of the South African National Defence Union (SANDU) to join a trade union and to engage in protest ion. The Court considered sections 44 and 45 of the Defence Act 44 of 1957, which prohibited protest and the right to join trade unions, and declared them unconstitutional.

Parties

Applicant: South African National Defence Union (SANDU)

Respondents: Minister of Defence; Chief of the South African National Defence Force

Background and facts

SANDU challenged the constitutionality of section 126B of the Defence Act. That provision imposed an absolute prohibition on members of the South African National Defence Force (SANDF) from participating in public protests and, in the case of members of the Permanent Force, from joining trade unions. Contravention of these provisions constituted a criminal offence under military law.

The challenge arose after the High Court (Hartzenberg J) declared section 126B unconstitutional to the extent that it prohibited participation in public protest and trade union membership. As the declaration concerned an Act of Parliament, it was referred to

[5] https://witsvuvuzela.com/2025/05/07/south-africa-ranks-higher-on-world-press-freedom-index/?utm_source=chatgpt.com

[6] https://www.saflii.org/za/cases/ZACC/1999/7.html

the Constitutional Court for confirmation under section 172(2) of the Constitution.

SANDU argued that the prohibition on public protest violated the rights to freedom of expression and assembly, and that the ban on trade union membership violated soldiers' labour rights. The State opposed confirmation of the declaration only in relation to the prohibition on trade union membership, but did not contest the prohibition on public protest.

Legal issues before the Court

The Court was required to determine:

Whether section 126B(2) read with section 126B(4) of the Defence Act, which prohibited members of the SANDF from participating in public protest, unjustifiably limited the right to freedom of expression (section 16) and related constitutional rights, including the right to assembly (section 17).

Whether section 126B(1), which prohibited members of the Permanent Force from joining trade unions, unjustifiably limited the right of workers to form and join trade unions under section 23(2) of the Constitution.[7]

Whether members of the Permanent Force qualified as “workers” for the purposes of section 23 of the Constitution.

Court’s findings and reasoning

Freedom of expression and protest

The Court held that section 126B (2), read with section 126B (4) of the Defence Act, constituted a grave and unjustifiable limitation on freedom of expression.

The definition of “act of public protest” was exceptionally broad, vague, and sweeping, encompassing almost any meeting, gathering, or conduct intended to express support for or opposition to any policy, cause, or interest, whether public or private. It applied regardless of whether a member was on or off duty, in uniform or in civilian clothing, and regardless of whether the conduct occurred in public or in private.

[7] Section 126B of the Defence Act 44 of 1957 imposed extensive restrictions on members of the South African National Defence Force. Section 126B(1) imposed an absolute prohibition on members of the Permanent Force joining trade unions, subject only to Ministerial approval for membership of professional or vocational associations. Section 126B(2) criminalised strike action and participation in, encouragement of, or incitement to “acts of public protest” by members of the Defence Force subject to the Military Discipline Code. Section 126B(4) defined “act of public protest” in extremely broad terms, encompassing virtually any meeting, gathering or conduct intended to express support for or opposition to any policy, decision, cause or interest, whether public or private, and regardless of whether the conduct occurred on or off duty, in public or private, or in uniform or civilian dress.

O'Regan J emphasised that freedom of expression lies at the heart of South Africa's constitutional democracy and forms part of a web of mutually reinforcing rights, including freedom of assembly, association, dignity, and political participation. The impugned provisions effectively required members of the Defence Force to detach themselves from ordinary civic life and silenced them on matters of public concern. This was incompatible with the Constitution's conception of soldiers as citizens in uniform, not as individuals stripped of constitutional rights.

While the Court accepted that members of the security services must perform their duties in a politically neutral and non-partisan manner, it found that the blanket prohibition on all forms of protest went far beyond what was necessary to achieve that aim. The limitation was therefore not reasonable or justifiable under section 36 of the Constitution.

The Court held that the offending words relating to "acts of public protest" could be severed from section 126B (2) and that the definition of "act of public protest" in section 126B (4) should be struck down.

Trade union membership

Turning to section 126B (1), the Court held that members of the Permanent Force qualify as "workers" for the purposes of section 23 of the Constitution. Although their relationship with the SANDF is not identical to a conventional contract of employment, members render services for remuneration and benefits, and international labour law instruments, particularly those of the International Labour Organisation, recognise members of the armed forces as workers whose labour rights may be regulated but not wholly denied.

The ourt concluded that section 126B (1) unjustifiably limited section 23 and was therefore unconstitutional.

Court order

- Declared section 126B(1) of the Defence Act unconstitutional and invalid, with the declaration suspended for three months to allow the Minister of Defence to put in place an appropriate regulatory framework.
- Declared unconstitutional and invalid, with immediate effect, the words in section 126B(2) referring to "acts of public protest" and severed those words from the subsection.
- Declared the definition of "act of public protest" in section 126B(4) unconstitutional and invalid, and severed it from the Act.

Why the case matters

The case affirms that members of the armed forces are not stripped of constitutional rights by virtue of their service. The case is particularly important for freedom of expression and the right to protest, as it establishes that even within the security services, blanket prohibitions on peaceful expression and assembly are constitutionally impermissible.

The judgment reinforces the idea of soldiers as "citizens in uniform", bound by constitutional values and entitled to participate in civic life, subject only to narrowly tailored limitations necessary for military discipline. It also provides early and influential authority on the constitutional approach to limitations analysis, severance, and the relationship between security, democracy and fundamental rights.

Cross reference right to protest

2. S Mamabolo v S CCT 44/00 [2001] ZACC 17 2001 (3) SA 409 (CC) 2001 (5) BCLR 449 (CC)[8]

Mamabolo, a senior official in the Department of Correctional Services, criticised a judge for a decision to release Eugene Terre'Blanche from prison. The judge initiated contempt of court proceedings against him, saying he had "scandalised the court". In the High Court, he was convicted of contempt of court and sentenced to a fine or imprisonment. The Constitutional Court affirmed that judges and courts are not immune from criticism, and that freedom of speech includes the right to criticise judges and courts. On this basis, the Court overturned the conviction, but it did argue for the retention of the common law offence of scandalising the courts. Its use, however, should be narrowly construed, and it should not interfere with the freedom of expression.

Parties

Appellant: Russell Mamabolo

Respondent: The State

Amici curiae: E.tv, Business Day and the Freedom of Expression Institute

Background and facts

Mr. Mamabolo was a senior official and spokesperson for the Department of Correctional Services.in August 2000, following a High Court decision granting bail to Eugene Terre'Blanche pending an appeal, Mamabolo made public statements to the media

[8] https://www.saflii.org/za/cases/ZACC/2001/17.html

criticising the judgment.

He conveyed the Department's view that the decision was incorrect and had contributed to uncertainty about Terre'Blanche's detention.

The judge concerned initiated summary contempt proceedings against Mamabolo on the basis that his statements constituted the common-law offence of scandalising the court. Mamabolo was convicted of contempt of court in the High Court and sentenced to a fine or imprisonment. His application for leave to appeal was refused, but he was granted leave to appeal directly to the Constitutional Court.

The case raised important constitutional questions about the compatibility of the offence of scandalising the court with the right to freedom of expression and the procedural fairness of summary contempt proceedings.

Legal issues before the Court

The Court was required to determine:

- Whether the common-law offence of scandalising the court unjustifiably limited the right to freedom of expression under section 16 of the Constitution.
- How freedom of expression should be balanced against the need to protect the authority and integrity of the courts under section 165 of the Constitution.[9]
- Whether the summary procedure used to convict Mamabolo violated the right to a fair trial under section 35(3).[10]

Court's findings and reasoning

The Court affirmed that freedom of expression under section 16 is foundational to South Africa's constitutional democracy. It plays a central role in promoting accountability, transparency and public debate about the exercise of public power, including judicial power.

The Court emphasised that open and robust discussion of the administration of justice is constitutionally protected and essential to democratic life.

[9] Section 165 of the Constitution protects the independence and institutional integrity of the courts by prohibiting interference with their functioning and requiring organs of state to safeguard their dignity, authority and effectiveness, in order to maintain public confidence in the administration of justice.

[10] Section 35(3) of the Constitution Section 35(3) guarantees every accused person the right to a fair trial. This includes rights to information, legal representation, adequate time to prepare, a public and timely trial, and the ability to challenge and adduce evidence. It also entrenches core safeguards such as the presumption of innocence, protection against self-incrimination and access to appeal or review.

Kriegler J held that judges and judicial decisions are not immune from public criticism. Public confidence in the judiciary is not secured by suppressing criticism, but by fostering a culture of openness in which judicial decisions may be questioned, analysed and debated. Criticism of judgments, even if strongly worded or mistaken, ordinarily falls within the core protection of section 16(1).

However, Kriegler J took the view that the offence of scandalising the court should be retained because it serves a narrowly defined but constitutionally legitimate purpose: protecting public confidence in the administration of justice as an institution. He emphasised that courts have no power to defend themselves publicly against attacks, misinformation, or deliberate distortions of their role. Unlike politicians or officials, judges must remain silent and impartial, speaking only through their judgments. This structural vulnerability justifies limited legal protection.

For Kriegler J, the offence is not about shielding judges from criticism, embarrassment, or personal insult. Robust criticism of judgments, including strong and even unfair criticism, must ordinarily be tolerated in a constitutional democracy. The offence concerns only extreme forms of expression that pose a real risk of undermining the authority of the courts in the eyes of the public and thereby impairing their ability to function effectively.

The offence must be narrowly construed to avoid unjustifiably limiting section 16. Only expressions that objectively and in context pose a real and substantial risk of undermining public confidence in the administration of justice can fall outside constitutional protection. Mere criticism of a judicial decision, allegations of error, or expressions of disagreement do not meet this high threshold.

The Court warned of the chilling effect that criminal sanctions may have on free expression, particularly where speech concerns the functioning of the courts. In a constitutional democracy, robust, even uncomfortable, expression about the judiciary must be tolerated. The offence of scandalising the court survives constitutional scrutiny only because of its limited scope and exceptional application.

Applying these principles, the Court found that Mamabolo's statements constituted criticism of a judicial decision rather than an attack on the integrity, impartiality, or legitimacy of the courts. His conduct, therefore, remained within the ambit of constitutionally protected expression under section 16.

Court order

The Court:

- Set aside Mamabolo's conviction and sentence for contempt of court.

- Held that the common-law offence of scandalising the court remains constitutionally valid but must be narrowly construed.
- Declared that the use of summary contempt proceedings in circumstances such as these is inconsistent with the right to a fair trial.

Why the case matters

The case establishes that criticism of judicial decisions lies at the heart of speech protected under section 16 of the Constitution and that democratic accountability requires tolerance of robust debate about the courts. At the same time, it preserves a narrowly defined offence of scandalising the court to protect public confidence in the administration of justice.

The case draws a clear constitutional line: while attacks that genuinely threaten the integrity of the judicial system may be restricted, ordinary criticism of judgments may not. Mamabolo therefore provides essential guidance on the relationship between freedom of expression, judicial authority and democratic openness, and remains a cornerstone of section 16 jurisprudence.

3. D.A v Governing Body, Settlers High School and Others [2002] 4 AAll SA 294 (C)[11]

This case concerned the right of a learner to wear dreadlocks to school after she became an adherent of the Rastafarian religion. The judgment found that the school's holding the learner of serious misconduct for wearing dreadlocks was a blatant absurdity. The judgment stressed that the South African Schools Act 84 of 1996 guidelines for codes of conduct mention the need to establish a culture of tolerance and peace at schools, done in the context of the democratic values of human dignity, equality and freedom (para 14). Dignity and freedom of expression are mentioned as rights to be upheld.

Parties

Applicant: D.A., a 15-year-old Grade 10 learner.

Respondents: Governing Body of The Settlers High School, Head, Western Cape Education Department and MEC[12] for Education, Western Cape

Background and facts

The applicant was a fifteen-year-old girl who embraced the Rastafarian religion in December 1999. As part of her religious beliefs, she grew dreadlocks and wore a cap

[11] https://www.saflii.org/za/cases/ZAWCHC/2002/4.html?utm_source=chatgpt.com

[12] MEC is the acronym for Member of the Excecutive Council. This is the provincial government exectuive body.

covering her hair.

She repeatedly sought permission from the school to wear dreadlocks and headgear. When permission was not granted, she attended school wearing a black crocheted cap (in school colours) covering her dreadlocks.

She was charged with "serious misconduct" for defying school regulations and authority by wearing dreadlocks and headgear. The governing body found her guilty and suspended her for five days. She brought the matter on review.

Legal issues before the Court

- Whether growing dreadlocks and wearing a cap contravened the school's code of conduct.
- Whether such conduct could constitute "serious misconduct" under the applicable regulations.
- Whether the governing body properly applied its mind to constitutional values, including dignity and freedom of expression.

Court's findings and reasoning

The Court held that:

- The code of conduct did not prohibit dreadlocks or headgear.
- Even if there had been a breach, it could not amount to "serious misconduct" under the regulations.
- "Serious misconduct" must be conduct of a particularly grave nature, akin to immoral or shockingly inappropriate behaviour.
- The governing body failed to apply its mind to the meaning of serious misconduct.
- The Court also emphasised the importance of dignity, tolerance, mutual respect, and freedom of expression, including outward expression through clothing and hairstyles.

Court order

The Court set aside the finding of serious misconduct and the suspension.

Why the case matters

The case is a recognition that school disciplinary codes must be interpreted in light of constitutional values, including dignity and freedom of expression. It rejects rigid enforcement of school rules where they unjustifiably infringe a learner's religious identity

and personal development.

Cross reference education

4. Islamic Unity Convention v Independent Broadcasting Authority and others [2002] ZACC 3; 2002 (4) SA 294 (CC); 2002 (7) BCLR 702 (CC)[13]

The case held that sections of the Code of Conduct for Broadcasting Service Licensees (Code of Conduct[13]) were so broadly defined that they allowed restrictions on freedom of expression that were too wide. The Court held that section 16(2) of the Constitution sets out three very clear circumstances in which freedom of expression rights can be limited, and any broader restrictions would be unreasonable restrictions on the right.

Parties

The applicant was the Islamic Unity Convention, an organisation that operated a community radio station, Radio 786, under a broadcasting licence. The respondents included the Independent Broadcasting Authority (IBA) and its complaints bodies, the South African Jewish Board of Deputies, and the Minister of Communications.

Background and facts

In May 1998, Radio 786 broadcast a programme titled "Zionism and Israel: An in-depth analysis", featuring an interview with Dr Yaqub Zaki. During the programme, Dr Zaki expressed views critical of Zionism and the legitimacy of the state of Israel, and made statements denying that Jewish people were gassed in concentration camps during the Second World War, asserting instead that deaths were caused largely by disease and that the number of Jewish deaths was exaggerated.

Following the broadcast, the South African Jewish Board of Deputies lodged a complaint with the IBA, alleging that the programme contravened clause 2(a) of the Code of Conduct.

The complaint was specifically based on the provision prohibiting the broadcasting of material "likely to prejudice relations between sections of the population".

Legal issues before the Court

The central constitutional issue was whether the portion of clause 2(a) of the Code of Conduct that prohibited broadcasting material "likely to prejudice relations between sections of the population" unjustifiably limited the right to freedom of expression

[13] https://www.saflii.org/za/cases/ZACC/2002/3.html

guaranteed in section 16 of the Constitution.

This required the Court to determine whether the provision fell outside the categories of unprotected expression in section 16(2), and if so, whether it could nevertheless be justified under the limitations clause in section 36.

Court's findings and reasoning

The Court reaffirmed that freedom of expression lies at the heart of South Africa's constitutional democracy, particularly in light of the country's history of censorship, thought control, and suppression of dissent. Section 16 protects not only popular or benign speech but also expression that may offend, shock, or disturb. Such protection is essential to pluralism, tolerance, and democratic debate.

The Court emphasised that section 16(2) defines a narrow category of expression that is excluded from constitutional protection: propaganda for war, incitement of imminent violence, and advocacy of hatred based on race, ethnicity, gender or religion that constitutes incitement to harm. These exclusions are carefully circumscribed and reflect a constitutional judgment that only expression posing a serious threat to dignity, equality, or public safety should be entirely outside protection.

By contrast, the prohibition in clause 2(a) was framed in extremely broad terms. The phrase "likely to prejudice relations between sections of the population" was not limited to hatred, harm, or incitement, nor confined to the specific grounds listed in section 16(2). It captured a wide range of expression, including robust political debate, historical analysis, and controversial opinions, even where no harm was intended or likely. The Court held that this prohibition clearly extended into the realm of constitutionally protected expression and therefore constituted a limitation of the right in section 16(1).

The Court then considered whether this limitation could be justified under section 36. While acknowledging the importance of protecting human dignity, equality, and national unity, particularly in a deeply divided society, the Court found the prohibition vague, overbroad, and lacking clear standards.

Broadcasters could not reasonably know in advance which content might be regarded as prejudicing relations between sections of the population, thereby creating a chilling effect on freedom of speech. The prohibition also interfered with the public's right to receive information and ideas, an aspect of freedom of expression explicitly protected by the Constitution.

The Court rejected the argument that the limitation was minimal because it applied only to broadcasters, noting the powerful role of broadcast media and the wide audiences affected. It also rejected the suggestion that the absence of criminal sanctions reduced

the seriousness of the infringement, pointing out that licence suspension could have

severe consequences. Importantly, neither the IBA nor the Minister advanced a persuasive justification for why such a sweeping restriction was necessary, nor was it shown that less restrictive means could not achieve the same objectives.

Court order

The Court declared clause 2(a) of the Code of Conduct unconstitutional and invalid to the extent that it prohibited the broadcasting of material "likely to prejudice relations between sections of the population". The Court added an express proviso that this invalidity order does not apply to (i) propaganda for war; (ii) incitement of imminent violence; or (iii) advocacy of hatred based on race, ethnicity, gender or religion that constitutes incitement to cause harm, which falls within section 16(2) of the Constitution and remains unprotected.[14]

Why the case matters

This case is a leading authority on the scope of freedom of expression in South Africa, particularly in the context of media regulation. It affirms that the Constitution protects controversial and unsettling expression unless it clearly falls within the narrow exclusions of section 16(2). The judgment draws a firm constitutional boundary against vague and overbroad restrictions that suppress debate in the name of social harmony. It underscores that dignity, equality, and national unity must be promoted through carefully tailored regulation, not through sweeping prohibitions that risk reviving the culture of censorship rejected by the Constitution.

5. Laugh It Off Promotions CC v SAB [2005] ZACC 7[15]

Laugh it Off Promotions CC produced a T-shirt that parodied South African Breweries (SAB). It featured the SAB logo and the words "Black Labour" instead of "Black Label". It also had the words "White Guilt" instead of "Carling Beer" and the slogan "Africa's lusty lively exploitation since 1652". SAB obtained an interdict against Laugh it Off, arguing that the T-shirt contravened trade mark legislation and was detrimental to the brand. The High Court confirmed the interdict, whereas the Constitutional Court set it aside. Strong arguments were advanced by Moseneke, J and Sachs, J, emphasising freedom of expression and the need for humour and parody in society.

[14] The Court acknowledged the content of the broadcast, including the denial that Jews were gassed in concentration camps and the minimisation of Jewish deaths during the Holocaust; but made it clear that it was not adjudicating the lawfulness or constitutionality of the specific broadcast itself. Instead, the Court confined its enquiry to the constitutionality of clause 2(a) of the Broadcasting Code.

[15] https://www.saflii.org/za/cases/ZACC/2005/7.html

Parties

The applicant was Laugh It Off Promotions CC, a close corporation that produced and sold T-shirts bearing altered versions of well-known commercial brands as a form of social commentary. The respondent was South African Breweries International (Finance) BV, trading as Sabmark International (SAB), the registered proprietor of the well-known CARLING BLACK LABEL trademarks. The Freedom of Expression Institute was admitted as amicus curiae.

Background and facts

Laugh It Off produced and sold T-shirts that closely mimicked the get-up of the CARLING BLACK LABEL beer label, altering the wording to read "Black Labour" instead of "Black Label" and "White Guilt" instead of "Carling Beer", and including slogans such as "Africa's lusty lively exploitation since 1652" and "No regard given worldwide". The shirts were marketed and sold for profit and, according to the applicant, were intended to constitute parody and social commentary on race, labour, and corporate practices in South Africa.

SAB, as owner of the registered trademarks, objected to this use and sought an interdict in the High Court under section 34(1)(c) of the Trade Marks Act 194 of 1993.[16] That provision protects well-known trade marks against dilution, including use that is likely to take unfair advantage of, or be detrimental to, the distinctive character or repute of the mark, even where there is no likelihood of confusion. The High Court granted the interdict, and the SCA dismissed Laugh It Off's appeal, holding that the use tarnished the repute of the marks and was not saved by freedom of expression. Laugh It Off then approached the Constitutional Court.

Legal issues before the Court

The central issue was how section 34(1)(c) of the Trade Marks Act should be interpreted and applied in light of the constitutional right to freedom of expression in section 16 of the Constitution. In particular, the Court had to decide whether the parody T-shirts constituted protected expression and, if so, whether SAB had nevertheless established a likelihood of unfair advantage or material detriment to the repute of its trade marks sufficient to justify restraining that expression.

[16] Section 34(1)(c) of the Trade Marks Act 194 of 1993 reads as follows:
"Infringement of registered trade mark.
(1) The rights acquired by registration of a trade mark shall be infringed by– …
(c) the unauthorised use in the course of trade in relation to any goods or services of a mark which is identical or similar to a trade mark registered, if such trade mark is well known in the Republic and the use of the said mark would be likely to take unfair advantage of, or be detrimental to, the distinctive character or the repute of the registered trade mark, notwithstanding the absence of confusion or deception …"

Court's findings and reasoning

The Court, per Moseneke J, emphasised that freedom of expression lies at the heart of South Africa's constitutional democracy and extends to artistic creativity, satire, parody, and social commentary, including expression that is provocative or unsettling. Expression is protected unless it falls within the narrow exclusions in section 16(2), which were not applicable in this case.

The Court accepted that section 34(1)(c) of the Trade Marks Act limits freedom of expression by restricting certain uses of trade marks, but held that the section must be interpreted in a manner that is least restrictive of free expression. This required that the internal requirements of the provision, "unfair advantage" and "detriment to the repute" of a mark, be understood through the prism of the Constitution.

The Court rejected the Supreme Court of Appeal (SCA)'s[17] approach of first finding trade mark infringement and only later considering freedom of expression. It held that freedom of expression must be considered from the outset. Whether the altered trade mark is unfair or causes real harm cannot be decided without considering what it communicates to the public and the reason it was displayed in that form.

The reason the trade mark is displayed, and the message it is intended to convey, are central to the enquiry and cannot be considered only later.

On the facts, the Court found that Laugh It Off's T-shirts constituted parody and social commentary, which should attract constitutional protection. The fact that the T-shirts were sold for profit did not strip them of expressive value; commercial gain and expression are not mutually exclusive. To confine protected expression to non-commercial speech would disproportionately favour well-resourced speakers and marginalise critical or dissenting voices.

Crucially, the Court held that SAB had failed to establish a likelihood of material detriment to the repute of its trademarks in the sense required by section 34(1)(c) of the Trade Marks Act. Tarnishment, the Court explained, must be understood as probable and substantial economic harm to the selling power or commercial magnetism of the mark. Mere offence, moral disapproval, or the creation of discomforting associations is insufficient. There was no evidence that the parody T-shirts had caused, or were likely to cause, any decline in sales, loss of goodwill, or erosion of the brand's powerful market position. Given the immense scale and reach of the CARLING BLACK LABEL brand, the limited circulation of the T-shirts rendered claims of likely economic harm speculative.

The Court stressed that in an open and democratic society, powerful trademark owners

[17] Throughout this complidation the Supreme Court of Appeal is referred to as the SCA.

should not be permitted to silence critical or satirical expression in the absence of convincing proof of substantial commercial harm.

Court order

The Court upheld the appeal, set aside the orders of the SCA and the High Court, and dismissed SAB's application for an interdict.

Why the case matters

This judgment is a landmark in South African constitutional and intellectual property law. It affirms that parody, satire, and social criticism enjoy robust protection under section 16, even when they involve the commercial use of well-known brands. The case establishes that trademark dilution claims must be supported by evidence of likely and substantial economic harm, not mere reputational discomfort.

It provides an important constitutional counterweight to expansive assertions of intellectual property rights, ensuring that trademark law is not used as a tool of censorship against dissenting or critical expression.

6. The Citizen 1978 (Pty) Ltd and Others v McBride [2011] ZACC 11; 2011 (4) SA 191 (CC)[18]

The Citizen newspaper published a number of articles stating that McBride, who was standing for public office in Ekurhuleni, was a murderer, involved in criminal activities in Mozambique, and not sorry for what he had done. McBride had been granted amnesty by the Truth and Reconciliation Commission (TRC) and sued the Citizen for defamation. The Citizen's appeal (against the SCA judgment that held it had defamed McBride) was upheld by the Constitutional Court, which held that the articles were not defamatory, except for the allegation that McBride had shown no contrition, which was untrue and impaired his dignity. Freedom of expression, in terms of section 16, allows comments on people's past behaviour, and in his case, his past murders while fighting apartheid.

Parties

The applicants were The Citizen 1978 (Pty) Ltd (publisher of The Citizen newspaper) and three journalists, and the respondent was Robert John McBride. Several amici curiae were admitted, including the Freedom of Expression Institute, the South African National Editors' Forum, and family members of apartheid-era victims.

[18] https://www.saflii.org/za/cases/ZACC/2011/11.html

Background and facts

In 1986, Robert McBride planted a car bomb outside Magoo's Bar and Why Not Restaurant in Durban. Three civilians were killed, and many others were injured. He was convicted of murder and sentenced to death.

In 1997, he applied for amnesty under the Promotion of National Unity and Reconciliation Act 34 of 1995. Amnesty was granted in 2001. In terms of section 20(10) of that Act, his conviction was deemed expunged and, for all purposes, deemed not to have taken place.

In 2003, McBride was a candidate for appointment as head of the Ekurhuleni Metro Police. The Citizen published a series of articles from 10 September 2003 to 30 October 2003, along with editorials, opposing his appointment. These articles referred to him as a "criminal" and a "murderer" and stated that he was not contrite about what he had done.

McBride sued for defamation and impairment of dignity.

Legal issues before the Court

An issue of concern to the Court was the meaning and effect of section 20(10) of the Reconciliation Act.

Specifically:

- Does the deeming provision mean that, after amnesty, it is false in law to describe the person as a "murderer"? The deeming provision in section 20(10) of the Reconciliation Act states that once a person is granted amnesty for a crime, any entry or record of the crime is deemed to be expunged, and the conviction is deemed not to have taken place.
- How must the amnesty provision be interpreted in light of freedom of expression (section 16 of the Constitution) and dignity (section 10)?

Court's findings and reasoning

The Court rejected a literal reading of section 20(10). It held that amnesty expunges the legal consequences of the conviction, including official records and civil disabilities, but does not erase historical fact or the moral consequences. Amnesty does not renderuntrue the fact that the person committed the act, nor does it silence public discussion of it.

The Court emphasised that the Truth and Reconciliation (TRC) process was premised on truth-telling. It would be contrary to the purpose of the legislation and to constitutional values to interpret it as suppressing truthful speech about the past.

In ordinary language, “murder” means the unlawful, intentional killing of another person. It does not depend on whether a conviction currently stands. Since McBride committed the killings, it was not false to describe him as a murderer in that ordinary sense.

The Court held that section 20(10) restores full civic status and expunges official records, but does not confer immunity from moral criticism or from truthful descriptions of past conduct. Accordingly, the SCA had erred in holding that calling McBride a “murderer” was false because of the amnesty.

Regarding sections 10 (dignity and reputation) and 16 (freedom of expression), the Court held the following:

Freedom of expression

The Court emphasised that public debate about the past, including the violent past, lies at the core of constitutional democracy. The TRC process itself was premised on truth-telling. It would be contrary to that purpose to interpret section 20(10) as suppressing truthful speech about crimes committed during apartheid.

A literal interpretation that holds that once amnesty is granted, it becomes false to call someone a “murderer” would silence public discussion of historical facts, prevent victims and the public from accurately describing wrongdoing, and place a constitutionally problematic limitation on Section 16.

The Court held that the statute was never intended to “mute the voices” of those who wish to speak truthfully about the past. Amnesty removes legal consequences; it does not censor speech or rewrite history.

Dignity and reputation

The Court recognised that reputation is part of dignity and that defamation law protects that interest.

However, dignity does not entitle a person to demand that historical truth be treated as false. Amnesty restores civic status and removes legal disabilities, but it does not confer moral absolution or immunity from criticism.

The Court rejected the notion that the Act was intended to allow perpetrators to “rid themselves of the stigma and moral opprobrium” of their deeds by prohibiting truthful description. That would go beyond what the statute permits and would unduly curtail freedom of expression.

Court order

Leave to appeal was granted. The appeal succeeded. The Court set aside the order of the

SCA appeal and replaced it with an order dismissing McBride's claim that the "murderer" statements were defamatory.

However, the Court awarded McBride R50 000 in damages for the Citizen's portrayal of him in one of the articles as not being contrite for having killed people. Evidence was led to show that he was sorry and contrite, which he gave at the TRC.

Why the case matters

This judgment clarifies that amnesty under the Reconciliation Act removes both criminal and civil liability and expunges official records, but does not erase history.

Crucially, it protects freedom of expression in public debate about the past, including robust and even harsh criticism of former perpetrators who have received amnesty. The case reinforces the idea that reconciliation in South Africa is built on truth, not enforced forgetting, and that constitutional democracy requires open public discussion of the country's violent past.

It also sets out the requirements for fair comment that Cameron J called protected comment, indicating that such comment must, among other things, concern a matter of public interest and be based on facts that are true and accurate.

7. Print Media South Africa v Minister of Home Affairs [2012] ZACC 22[19]

The case concerned an amendment to the Films and Publications Act 65 of 1996, which introduced a requirement for prior classification of material portraying sexual conduct. The section was struck down as unconstitutional, as the Court found that the prior classification of certain material was an unnecessary constraint on freedom of expression, that sexual material that might affect children was covered elsewhere in the act, and that the amendment was broader than section 16(2) of the Constitution, which covers unprotected freedom of expression.

Parties

Applicants: Print Media South Africa (representing newspaper, magazine and independent publishers); South African National Editors' Forum

Respondents: Minister of Home Affairs; Film and Publication Board

Amici curiae: Justice Alliance of South Africa**,** Section 16 (freedom of expression NGO)

[19] https://www.saflii.org/za/cases/ZACC/2012/22.html

Background and facts

The case concerned a constitutional challenge to amendments to the Films and Publications Act, introduced by the Films and Publications Amendment Act 3 of 2009. The amendments established an administrative prior classification system, requiring certain publications to be submitted to the Film and Publication Board for approval before distribution, with criminal penalties for non-compliance.

The applicants argued that these provisions imposed unjustifiable prior restraint on freedom of expression, were vague and overbroad, and irrationally distinguished between newspapers and magazines. The High Court declared several provisions unconstitutional and referred the order to the Constitutional Court for confirmation.

Legal issues before the Court

The Constitutional Court was required to determine:

- Whether section 16(2)(a) of the Films and Publications Act unjustifiably limited the right to freedom of expression by imposing prior administrative classification.
- Whether the exemption of bona fide newspapers, but not magazines, from prior classification was irrational and unconstitutional.
- Whether section 24A(2)(a), which criminalised the distribution of unclassified publications, was constitutionally valid.
- What the appropriate remedy should be.

Court's findings and reasoning

Majority judgment (Skweyiya J, Mogoeng CJ, Cameron J, Jafta J, Khampepe J, Nkabinde J, Maya AJ and Zondo AJ concurring)

Statutory provisions under scrutiny

The core provision was section 16(2)(a) of the Films and Publications Act,[20] which required the prior submission of material containing certain sexual conduct for classification by the Films and Publications Board.

[20] "Any person, except the publisher of a newspaper contemplated in subsection (1), who, for distribution or exhibition in the Republic creates, produces, publishes or advertises any publication that—

(a) contains sexual conduct which—

(i) violates or shows disrespect for the right to human dignity of any person;

(ii) degrades a person; or

(iii) constitutes incitement to cause harm;

… shall submit, in the prescribed manner, such publication for examination and classification to the Board before such publication is distributed …"

Section 24A(2)(a) provided that any person who distributed or exhibited an unclassified publication committed a criminal offence punishable by up to five years' imprisonment.

Freedom of expression and prior restraint

The Court reaffirmed that freedom of expression under section 16(1) of the Constitution is broad, and that any expression not falling within section 16(2) (propaganda for war, incitement of imminent violence, or advocacy of hatred constituting incitement to cause harm) is constitutionally protected. Sexual expression does not fall within section 16(2) of the Constitution and is therefore protected expression.

The majority held that administrative prior classification is a form of prior restraint, which is constitutionally suspect and permissible only in narrow circumstances. Section 16(2)(a) placed the burden on publishers to justify expression before publication and transferred control over expression from the right-holder to an administrative body under executive control.

Limitation analysis

Although the purposes of the Act (protecting children, banning child pornography, and providing consumer advice) were legitimate and important, the Court held that section 16(2)(a):

- Imposed a severe limitation on freedom of expression.
- Was overbroad and vague, particularly because a publication merely had to "contain" sexual conduct.
- Created delays and uncertainty that could lead to self-censorship and a chilling effect.
- Was not necessary to achieve the Act's purposes, given the availability of less restrictive means.

The Court emphasised that child pornography and exposing children to explicit sexual conduct were already criminalised elsewhere in the Act, independently of the classification scheme.

Less restrictive means included post-publication sanctions, criminal prosecution, and court interdicts, which preserve judicial oversight and place the burden on the party seeking restraint rather than on the publisher.

Differentiation between newspapers and magazines

The Court held that exempting newspapers but not magazines from prior classification was irrational. Many magazines were subject to the same Press Code and self-regulatory mechanisms as newspapers, and there was no rational basis for the distinction. This

violated the principles of legality and equality before the law.

Section 24A(2)

The Court found that section 24A(2) was fundamentally flawed because it criminalised the distribution of publications that were not required to be submitted for classification. This drafting defect resulted in over-criminalisation and further unjustifiable limitation of expression.

Minority judgment

The majority judgment (per Skweyiya J) identified the central constitutional defect in the statutory scheme itself, holding that compulsory administrative prior classification of protected expression by an executive-controlled body amounts to an unjustifiable form of prior restraint that inverts the constitutional presumption in favour of free expression. By contrast, the minority judgment (per Van der Westhuizen J) rejected the administrative character of the scheme as the decisive flaw, instead identifying the core constitutional problem as the combination of prior restraint with vague and overbroad statutory criteria; on this view, prior restraint is not per se unconstitutional, but becomes impermissible where it operates through indeterminate standards, whether imposed administratively or judicially.

Court order

The Court:

- Confirmed the invalidity of sections 16(1), 16(2) and 16(2)(a) of the Films and Publications Act.
- Declared section 24A(2) unconstitutional in its entirety.
- Suspended the declarations of invalidity to allow Parliament to remedy the defects.
- Ordered costs against the respondents

Why the case matters

This judgment is a leading South African authority on prior restraint and freedom of expression. It holds that:

- Administrative prior classification of protected expression is constitutionally suspect and generally impermissible.
- Sexual expression is protected under section 16 of the Constitution unless it falls within the narrow exclusions in section 16(2).

- The state must justify not only the purpose but also the chosen means to limit expression.
- Self-regulation and post-publication remedies are constitutionally preferable to prior restraint under executive control.
- Irrational differentiation within regulatory frameworks violates the rule of law.

The case is central to constitutional jurisprudence on media freedom, censorship, and the limits of state power to regulate expression.

8. Pilane and Another v Pilane and Another [2013] ZACC 3; 2013 (4) SA 509 (CC); 2013 (7) BCLR 431 (CC)[21]

In this case, the Court set aside interdicts that barred members of a traditional community from meeting and organising, holding that such interdicts unjustifiably limited their rights to freedom of expression, association and assembly. It said that no clear harm or reasons had been shown to justify the restrictions.

Parties

The applicants were members of the Bakgatla-Ba-Kgafela traditional community who opposed the recognised traditional leader's authority. The respondents included the recognised Kgosi (chief) and other traditional authority structures.

Background and facts

A dispute arose within the Bakgatla-Ba-Kgafela community concerning governance, accountability, and the conduct of the traditional leader. The applicants sought to mobilise community members, convene meetings, and engage in protest and dissent against the Kgosi's leadership. The Kgosi obtained an interdict preventing the applicants from convening meetings, addressing community members, or mobilising opposition, effectively silencing internal dissent within the community. The applicants challenged the interdict as an unjustifiable limitation of their constitutional rights.

Legal issues before the Court

The Court was required to determine whether the interdict infringed the applicants' right to freedom of expression under section 16 of the Constitution and whether the limitation was constitutionally justifiable. The case also raised broader questions about the relationship between traditional authority, internal community dissent, and

[21] https://collections.concourt.org.za/handle/20.500.12144/3677

constitutional rights.

Court's findings and reasoning

The Constitutional Court held that the interdict constituted a serious and unjustifiable infringement of the applicants' right to freedom of expression. It emphasised that freedom of expression includes the right to criticise, mobilise, persuade others, and engage in peaceful political activity, even within traditional or communal structures.

The Court rejected the notion that traditional authority may suppress dissent in the name of maintaining order or unity. It stressed that constitutional rights apply horizontally and bind traditional leaders when they exercise public power.

The interdict was impermissibly broad, operated as a form of prior restraint, and effectively silenced legitimate expression and political engagement within the community.

Court order

The Court upheld the appeal and set aside the interdict.

Why the case matters

Pilane v Pilane affirms that peaceful dissent, mobilisation, and protest-like activity within communities are protected by section 16 of the Constitution. The case confirms that freedom of expression safeguards internal political contestation and criticism, including against traditional authorities, and that such expression may not be suppressed through broad or pre-emptive court orders. It is frequently relied upon in protest-rights jurisprudence as a foundational section 16 case, particularly where expression and mobilisation occur outside the formal framework of the Regulation of Gatherings Act 205 of 1993.

Cross-reference to right to protest

9. Masuku & Ano v SAHRC (1062/2017) [2018] ZASCA 180 (04 December 2018)[22]

Against the backdrop of intense protests over Israel's 2008–2009 military action in Gaza, Bongani Masuku made aggressive statements at a political rally and online in his capacity as a COSATU official, criticising Zionism and supporters of Israel. The SCA found that, in context, these statements were part of robust political protest and were directed at a political ideology and state conduct rather than at Jews as a religious or ethnic group, and therefore did not amount to hate speech.

Parties

The appellants were Bongani Masuku and the Congress of South African Trade Unions (COSATU). The respondent was the South African Human Rights Commission, acting on behalf of the South African Jewish Board of Deputies.

Background and facts

Mr. Masuku, then COSATU's international relations secretary, made a series of strong political statements in early 2009 during protests and public debates in response to Israel's military actions in Gaza.

These included blog posts and remarks in a speech at the University of the Witwatersrand.

The South African Jewish Board of Deputies complained to the SAHRC that the statements constituted hate speech.

The SAHRC agreed and referred the matter to the Equality Court, which found that some of the statements constituted hate speech and ordered an apology. Mr. Masuku and COSATU appealed to the SCA.

Legal issues before the Court

The central issue was whether Mr. Masuku's statements fell outside constitutional protection because they constituted hate speech under section 16(2) of the Constitution — in particular, whether they advocated hatred based on race, ethnicity, gender or religion and amounted to incitement to cause harm. These forms of freedom of expression are not protected.

[22] https://www.saflii.org/za/cases/ZASCA/2018/180.html

Court's findings and reasoning

The SCA reaffirmed that freedom of expression is broadly protected under section 16(1) and that only a narrow category of speech is excluded from protection under section 16(2). Speech does not lose constitutional protection merely because it is offensive, hurtful, disturbing, or politically inflammatory.

The Court stressed that, to justify curtailment of expression, the speech must clearly fall within section 16(2). In the context of hate speech, this requires advocacy of hatred, based on race, ethnicity, gender or religion; and that constitutes incitement to cause harm.

The Court held that Mr. Masuku's statements did not meet this threshold. Properly interpreted in context, his remarks were directed at Zionism as a political ideology and at the conduct of the State of Israel, not at Jewish people as a religious or ethnic group. The Court accepted that "Zionists" and "Jews" are not synonymous and that criticism of Zionism or Israel, even in harsh terms, does not amount to hatred based on religion or ethnicity.

Although the language used by Mr. Masuku was strong, provocative, and in parts offensive, the Court found that it was political speech made in the context of protest and international solidarity activism and did not amount to incitement to imminent violence or to advocacy of hatred causing harm.

As such, it remained protected expression under section 16(1).

Court order

The appeal was upheld. The order of the Equality Court was set aside, the complaint was dismissed, and each party was ordered to pay its own costs.

Why the case matters

Masuku is an important authority affirming that only speech that falls squarely within section 16(2) may be curtailed, and that courts must be cautious about labelling political speech as hate speech. The judgment makes clear that offensive, angry or extreme political expression, particularly in the context of protest and international conflict, remains constitutionally protected unless it clearly amounts to advocacy of hatred based on a protected ground and incitement to cause harm. The case underscores the high threshold that must be met before freedom of expression may be limited in South Africa's constitutional democracy.

10. Economic Freedom Fighters and Another v Minister of Justice and Correctional Services and Another [2020] ZACC 25[23]

The case concerned criminal charges against Julius Malema for speeches encouraging people to unlawfully occupy land. The Constitutional Court held that treating such political speech as criminal incitement under the Riotous Assemblies Act 17 of 1956 which makes it unlawful to incite people to commit "any offence" limited freedom of expression too broadly, and ruled that only incitement to commit "serious" offences may be criminalised. It held that section 18(2)(b) of that Act should be amended to reflect this.

Parties

The applicants were the Economic Freedom Fighters (EFF) and Julius Sello Malema and the respondents were the Minister of Justice and Correctional Services and the National Director of Public Prosecutions. The Socio-Economic Rights Institute of South Africa and Sakeliga NPC participated as amici curiae.

Background and facts[24]

Mr. Malema faced criminal charges under section 18(2)(b) of the Riotous Assemblies Act, based on public political statements urging supporters to occupy land, whether lawfully or unlawfully. The statements were alleged to constitute incitement to commit the offence of trespass.

The applicants challenged section 18(2)(b) on the ground that it criminalised incitement to commit "any offence", thereby unjustifiably limiting the right to freedom of expression protected by section 16(1) of the Constitution.[25] The case concerned whether section 18(2)(b) is framed so broadly that it unjustifiably curtails political speech, including the kind of political speech Mr. Malema engaged in.[26]

[23] https://www.saflii.org/za/cases/ZACC/2020/25.html

[24] The case dealt with several matters, but this summary only looks at the freedom of expression issues raised and decided upon.

[25] In essence they argued that you cannot make it a crime to encourage people to act in almost any way, because encouraging action is how politics works. If you criminalise incitement to any offence, you silence protest, civil disobedience, and strong political speech. That goes further than the Constitution allows.

[26] Section 18 stated: "(2) Any person who— …

(b) incites, instigates, commands, or procures any other person to commit, any offence whether at common law or against a statute or a statutory regulation, shall be guilty of an offence and liable on conviction to the punishment to which a person convicted of actually committing that offence would be liable."

Legal issues before the Court

The central constitutional issue was whether section 18(2)(b) of the Riotous Assemblies Act unjustifiably limits freedom of expression by criminalising the incitement of another person to commit "any offence", including minor or non-serious offences, and whether that limitation can be justified under section 36 of the Constitution.

Court's findings and reasoning (majority)

The majority judgment, authored by Mogoeng CJ, held that incitement is a form of expression and therefore falls within the protective scope of section 16(1) of the Constitution unless it falls within the narrowly defined exclusions in section 16(2). Incitement to commit "any offence" does not fall within those exclusions and thus constitutes protected expression.

The Court accepted that crime prevention is a legitimate and important governmental purpose. However, it held that section 18(2)(b) is overbroad because it criminalises incitement to commit all offences, including trivial or non-serious offences that pose no real threat to democratic values, public safety, dignity, or the rule of law.

Applying section 36 of the Constitution, which sets the test for when rights may be limited, the Court found that the Riotous Assemblies Act went too far. It restricted freedom of expression more than was necessary to prevent crime, and because it was so broad, it risked discouraging people from speaking openly or forcefully about political issues.

The Court emphasised South Africa's history of suppressing political speech and warned against repeating that pattern through broadly worded criminal offences.

Critically, the Court held that less restrictive means were available to achieve crime prevention, namely limiting the offence to incitement of serious offences only. Because Parliament had chosen a formulation that swept too widely, the limitation of freedom of expression was not reasonable and justifiable.

Court order

The Court declared section 18(2)(b) of the Riotous Assemblies Act unconstitutional and invalid to the extent that it criminalises incitement to commit "any offence". The declaration of invalidity was suspended for 24 months to allow Parliament to remedy the defect. During the suspension period, the Court read the word "serious" into the provision as an interim measure.

Dissenting judgment

Majiedt J, with Jafta J and Tshiqi J concurring, dissented on the freedom of expression issue. The dissent accepted that section 18(2)(b) limits freedom of expression but held that the limitation was reasonable and justifiable under section 36.

The dissent emphasised South Africa's high levels of serious crime and characterised the offence of incitement as a crucial preventive tool, warning against weakening it by confining it to serious offences. The dissenting judgment argued that the majority exaggerated how much section 18(2)(b) would discourage people from speaking freely and did not give sufficient weight to the importance of the offence of incitement as a tool to prevent crime before it occurs.

Why the case matters

This judgment is an important guide to the limits of criminalising speech. It confirms that strong and even provocative political expression is protected by the Constitution unless it clearly falls outside that protection.

The Court held that laws aimed at preventing crime must be narrowly framed and should not be so broad as to discourage open political debate, particularly in light of South Africa's history of silencing dissent.[27]

11. Qwelane v South African Human Rights Commission [2021] ZACC 22[28]

This case concerned an article published in 2008 that expressed strongly negative views on homosexuality and same-sex relationships. The article provoked widespread condemnation, and the South African Human Rights Commission instituted proceedings against the journalist who wrote it, Mr. Qwelane, in the Equality Court. The Commission relied on a section of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (Equality Act) that defined hate speech to include the publication of material that could be hurtful, harmful or incite harm, or promote or propagate hatred. The Court found that the word "hurtful" was too broad. While it held that the article was harmful and propagated hatred towards members of the LGBTI+ community, it removed the word 'hurtful" from the Equality Act for being too broad.[28]

[27] Three sections of the Riotous Assemblies Act remain on the statute book, being sections 26, 17 and 18. Section 18(2(b) has not been amended as required by the court order, and the words "serious offence" has not been inserted to replace "any offence" yet.

[28] https://www.saflii.org/za/cases/ZACC/2021/22.html

Parties

The applicant was Jonathan Dubula Qwelane, a journalist and former diplomat. The first respondent was the South African Human Rights Commission. The Minister of Justice and Correctional Services was cited as the second respondent. A number of civil society organisations participated as amici curiae.

Background and facts

The case arose from a newspaper column written by Mr. Qwelane and published in 2008, which expressed strongly negative views on homosexuality and endorsed rhetoric comparing same-sex relationships to bestiality.

The article triggered widespread public complaints. The South African Human Rights Commission instituted proceedings in the Equality Court, alleging that the article constituted hate speech in terms of section 10(1) of the Equality Act.[29]

Mr. Qwelane challenged the constitutionality of section 10(1), contending that it unjustifiably limited freedom of expression and was vague and overbroad. The High Court upheld the hate speech complaint and dismissed the constitutional challenge. The SCA declared section 10(1) unconstitutional and dismissed the hate speech complaint. The matter came before the Constitutional Court for confirmation of the invalidity and for determination of the complaint.

Legal issues before the Court

The Constitutional Court was required to determine:

- Whether section 10(1) of the Equality Act unjustifiably limited the right to freedom of expression under section 16 of the Constitution.
- Whether the inclusion of the word “hurtful” rendered the provision vague and overbroad, contrary to the rule of law in section 1(c).
- How to balance freedom of expression with the rights to dignity and equality in the context of hate speech.
- Whether Mr. Qwelane’s article constituted hate speech under a constitutionally compliant interpretation of section 10.

[29] Section 10(1) at the time read: “Subject to the proviso in section 12, no person may publish, propagate, advocate or communicate words based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to (a) be hurtful; (b) be harmful or to incite harm; (c) to promote or propagate hatred”.

Court's findings and reasoning

Freedom of expression and hate speech

Majiedt J reaffirmed that freedom of expression is foundational to South Africa's constitutional democracy and protects robust, unpopular and offensive speech. However, it is not absolute. Section 16(2)(c) of the Constitution expressly excludes from protection advocacy of hatred based on listed grounds that constitutes incitement to cause harm.

The Court accepted that Parliament may regulate hate speech more broadly than the precise wording of section 16(2)(c), particularly to protect vulnerable groups and advance substantive equality. However, any limitation of expression must be carefully circumscribed, clear and proportionate.

Why "hurtful" was constitutionally too broad

The central constitutional defect identified by the Court was the inclusion of the word "hurtful" in section 10(1) of the Equality Act. The Court held that "hurtful" is inherently vague and subjective. Speech that offends, shocks or distresses is common in public discourse, especially in political, moral or religious debate, yet such speech lies at the core of protected expression.

Because "hurtful" lacks a clear, objective threshold, it may capture expressions that cause emotional offence without amounting to serious harm, incitement, or the propagation of hatred. This makes it difficult for individuals to know in advance whether their speech will be unlawful, creating a chilling effect on legitimate expression.

The Court emphasised that the rule of law requires laws limiting fundamental rights to be formulated with sufficient precision to guide conduct and constrain arbitrary enforcement. The term "hurtful" failed this standard and therefore rendered section 10(1) unconstitutional to that extent.

Balancing dignity, equality and expression

The Court rejected a simplistic hierarchy in which equality and dignity automatically trump freedom of expression. Instead, it emphasised the need for a careful constitutional balance. While dignity and equality justify robust protection against hate speech, the threshold must be high. Only expression that clearly intends to be harmful, to incite harm, and to promote or propagate hatred may be prohibited.

Once "hurtful" was removed, the remaining elements of section 10(1) were constitutionally permissible because they targeted serious forms of expression that undermine dignity and equality rather than mere offence.

Application to Mr. Qwelane's article

Applying the narrowed, constitutionally compliant version of section 10(1), the Court held that Mr. Qwelane's article went beyond merely offensive or controversial speech. In its language, imagery and social context, it dehumanised the LGBT+ community, reinforced stigma, and propagated hatred. It therefore constituted hate speech even without reliance on the word "hurtful".

Court order

The Constitutional Court confirmed the declaration of the constitutional invalidity of section 10(1) of the Equality Act to the extent that it included the word "hurtful". The declaration was suspended for 24 months to allow Parliament to remedy the defect, with an interim reading-in excluding "hurtful".

The Court upheld the appeal by the South African Human Rights Commission and declared that Mr. Qwelane's statements constituted hate speech under the constitutionally compliant version of section 10.

Why the case matters

This case is a leading authority on the constitutional limits of hate speech regulation in South Africa. It clarifies that freedom of expression protects even deeply offensive speech unless it crosses a high threshold of harm and hatred. At the same time, it affirms the State's obligation, under the Equality Act, to protect vulnerable groups from speech that entrenches inequality and dehumanisation.

Importantly, the judgment confirms that vague standards such as "hurtful" are constitutionally impermissible grounds for limiting expression, reinforcing the rule of law while preserving space for robust, critical and controversial public debate.

12. Mineral Sands Resources (Pty) Ltd and Others v Reddell and Others [2022] ZACC 37

The case concerns Strategic Litigation Against Public Participation (SLAPP) suits. In this case, mining companies had instituted SLAPP suits for millions of dollars against environmentalists, activists and journalists who had criticised their developments. The respondents argued that the SLAPP suits were designed to silence them, and, among other things, were a contravention of section 16 of the Constitution. The Court attempted to define what was required for a SLAPP suit defence (exception) to succeed and gave the environmentalists 30 days to amend their plea so that it complied. Their plea was based entirely on the argument that the mining company had an ulterior motive to silence them when it brought the SLAPP suits. The Court said more was needed, in particular that one would need to argue that the merits of the matter were also brought to silence them and defeat their exception.

Parties

The applicants were Mineral Sands Resources (Pty) Ltd and Mineral Commodities Ltd, together with two of their executives, Zamile Qunya and Mark Victor Caruso. They were the plaintiffs in defamation actions in the High Court. The respondents were Christine Reddell, Tracey Davies, Davine Cloete, Mzamo Dlamini, Cormac Cullinan and John Gerard Ingram Clarke, environmental lawists and commentators who publicly criticised the applicants' mining operations and were the defendants in the High Court. The Centre for Applied Legal Studies and the Southern Africa Human Rights Defenders Network were admitted as amici curiae before the Constitutional Court.

Background and facts

The applicants instituted three defamation actions against the respondents arising from public criticism of their mining operations, including lectures, interviews, publications and online commentary.

The respondents raised a special plea alleging that the actions were SLAPP suits. A SLAPP suit refers to legal proceedings, most commonly defamation actions, that are brought not primarily to vindicate a genuine legal right but to intimidate, burden or silence critics. The defining feature of a SLAPP suit is that the litigation is used as a strategic tool to deter public participation in matters of public interest, often by exposing critics to costly and protracted legal proceedings.

In this case, the SLAPP suits arose from environmentalists' public criticism of the applicants' mining operations. The respondents raised a special plea, alleging that the defamation actions brought against them by the mining companies constituted SLAPP suits. These actions were not genuinely intended to vindicate the applicants' reputation,

but to silence critics and deter public participation in environmental matters.

The environmentalists pleaded that the actions against them were brought for an ulterior purpose, formed part of a pattern of silencing critics, and violated their right to freedom of expression under section 16 of the Constitution.

The mining companies excepted to this plea, arguing that it did not disclose a defence in law. The High Court dismissed the exception, and the matter came before the Constitutional Court.

Legal issues before the Court

In relation to section 16 of the Constitution, the key issues were:

- Whether litigation allegedly brought to silence critics can constitute a violation of freedom of expression.
- Whether section 16 requires recognition of a SLAPP defence under South African law.
- Whether abuse of process can be established solely on the basis that litigation limits or chills expressive activity.

The broader constitutional tension was between:

- Section 16 (freedom of expression and public participation), and
- Section 34 (right of access to the courts, in this case by the mining companies), together with the common law right to protect reputation.

Court's findings and reasoning

Recognition of the importance of section 16

The Court recognised the centrality of section 16 in a constitutional democracy. Public debate, criticism of corporate actors, and environmental advocacy are forms of expression at the core of constitutional protection.

The Court recognised that SLAPP litigation may have a chilling effect on public participation, especially in environmental matters where meaningful public engagement is both constitutionally and statutorily required.

The Court accepted that, in some circumstances, litigation can operate as a tool to suppress expression. The Court was clear that section 16 does not provide blanket immunity from defamation proceedings. The Constitution protects both freedom of expression and the right to protect reputation. Defamation law itself represents a constitutional balancing of these rights.

A plaintiff is entitled to approach a court to vindicate their reputation. The mere fact that litigation may have a chilling effect does not, of itself, render it unconstitutional or abusive. Motive alone is insufficient to establish a section 16 violation

The respondents' SLAPP plea effectively argued that because the litigation was brought to silence criticism, it violated section 16 and constituted an abuse of process.

The Court rejected this approach

It held that:

- An ulterior motive alone cannot render otherwise sustainable litigation unconstitutional.
- A claim that is legally sustainable cannot be dismissed merely because it may also have a silencing purpose.
- The merits remain as important to the enquiry.

Section 16 must be balanced with section 34

The Court emphasised that recognising a motive-only SLAPP defence would unduly limit the right of access to the courts under section 34. A plaintiff cannot be deprived of the right to pursue a claim simply because of an alleged bad motive if the claim is legally tenable.

Thus, section 16 does not automatically override section 34 or the common-law protection of reputation.

Development of the common law

The Court declined to develop the common law to create a broad anti-SLAPP regime grounded in section 16. It noted that foreign jurisdictions regulate SLAPP suits through detailed legislation. Any reform to recalibrate the balance between expressive freedom and litigation rights would require careful, structured development, likely legislative in nature.

Court order

The Court upheld the exception to the SLAPP special plea brought by the mining companies, and the respondents were given 30 days to seek leave to amend their plea. Costs were apportioned, with the applicants ordered to pay 60% of the respondents' costs in the Constitutional Court.

Why the case matters

This judgment is significant for its treatment of section 16 in the context of strategic litigation.

The Court:

- Recognised the democratic importance of public participation and environmental advocacy.
- Recognised that SLAPP suits may chill expression.
- Refused to create a motive-only constitutional shield against defamation claims.
- Insisted that freedom of expression must be balanced with access to the courts and protection of reputation.

The case clarifies that section 16 does not automatically invalidate litigation alleged to have a silencing effect. To establish abuse of process in a constitutional sense, more is required than an allegation of improper motive. Merits remain central, and constitutional balancing must occur within established legal doctrine unless and until broader reform is undertaken.

13. Afriforum NPC v Nelson Mandela Foundation Trust and Others [2023] ZASCA 58[30]

The display of the old apartheid flag at the "Black Monday" protests in 2017 did not receive protection under section 16(1) of the Constitution and was held to constitute hate speech, unfair discrimination and harassment in terms of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (Equality Act).

Parties

The appellant was Afriforum NPC, and the first respondent was the Nelson Mandela Foundation Trust. The Minister of Justice and Constitutional Development and the Department of Justice and Constitutional Services were cited as respondents, and the South African Human Rights Commission participated and sought declaratory relief.

Background and facts

At some of the "Black Monday" protests held in October 2017 at multiple locations across the country, the old South African apartheid-era flag was publicly displayed. These demonstrations, organised by Afriforum and supported by various farming and

[30] https://www.saflii.org/za/cases/ZASCA/2023/58.html

agricultural organisations, aimed to highlight violent attacks on farms and farm murders.

The Nelson Mandela Foundation lodged a complaint with the Equality Court, arguing that the gratuitous public display of the old flag constituted hate speech, unfair discrimination and harassment under the Equality Act.

Afriforum opposed the application, arguing that such displays were protected by freedom of expression and that section 10 of the Equality Act applied only to "words", not symbols. The Equality Court ruled that any display of the old flag constituted hate speech, unfair discrimination and harassment. Afriforum appealed to the SCA.

Legal issues before the Court

The main issues were:

- Whether the gratuitous public display of the old flag constitutes hate speech under section 10(1) of the Equality Act.[31]
- Whether it amounts to unfair discrimination on the ground of race under section 7.[32]
- Whether it constitutes harassment under section 11.[33]
- Whether such a declaration unjustifiably limits the right to freedom of expression under section 16 of the Constitution.
- Whether private displays of the flag fall within the prohibition.

Court's findings and reasoning

The court held that the old flag is a potent symbol of apartheid, white supremacy and racial oppression. Its gratuitous public display communicates a message of racial superiority and nostalgia for apartheid.

Applying the objective test under section 10(1) of the Equality Act, the court found that the display is based on race, could reasonably be construed as demonstrating a clear intention to be harmful or to incite harm, and promotes or propagates hatred.

The court emphasised that hate speech undermines dignity, equality and the constitutional project of building a non-racial society. Under section 16(2) of the

[31] Section 10(10 states: 1) Subject to the proviso in section 12, no person may publish, propagate, advocate or communicate words based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to be harmful or to incite harm and to promote or propagate hatred.

[32] Section 7 states that no person may unfairly discriminate against any person on the ground of race. This includes dissemination or propagation of ideas that propound racial superiority or inferiority and the incitement of violence.

[33] Section 11 states that no person may subject any person to harassment.

Constitution, freedom of expression does not extend to hate speech.

It further held that the gratuitous public display of the old flag amounts to unfair discrimination under section 7 because it promotes racial superiority, and to harassment under section 11 because it seriously demeans and creates a hostile and intimidating environment for black South Africans.

However, the court limited the order to gratuitous public displays. It declined to make a definitive ruling on purely private displays within the home, holding that this issue was not properly before it. The order was made subject to section 12 of the Equality Act, which protects bona fide artistic, academic and journalistic expression.

The Court held that the gratuitous public display of the old flag constitutes hate speech, unfair discrimination and harassment under the Equality Act, and is not protected by section 16(1) of the Constitution because it falls within the exclusion in section 16(2)(c).

Court order

The appeal was dismissed, except that the order was amended to clarify that only gratuitous public displays of the old flag constitute:

- Hate speech in terms of section 10(1);
- Unfair discrimination on the basis of race in terms of section 7; and
- Harassment in terms of section 11;
- Subject to the section 12 provision.

There was no order as to costs.

Why the case matters

This judgment confirms that powerful racist symbols can constitute hate speech under the Equality Act, even in the absence of spoken words. The case clarifies the relationship between freedom of expression and equality, and affirms the constitutional commitment to dignity, non-racialism and the eradication of systemic racial subordination in post-apartheid South Africa.

Table of cases

Case citation	Key constitutional principles	Core rights established
South African National Defence Union v Minister of Defence [1999] ZACC 7	Members of the defence force are entitled to the same constitutional protections as others.	Defence Force members retain expressive rights subject to narrowly justified limits.
S v Mamabolo [2001] ZACC 17	Judges are not immune from criticism and freedom of expression includes the right to criticise judges.	It is permissible to criticise judges and the courts as long as such critique does not undermine the public confidence in the administration of justice as an institution.
D.A v Governing Body, Settlers High School and Others [2002] 4 All SA 294 (C)	The right to dignity and free expression must be adhered to in school disciplinary codes.	Religious and cultural practices of students should be tolerated as we are a diverse society.
Islamic Unity Convention v Independent Broadcasting Authority [2002] ZACC 3	Broadcasting restrictions may not be vague or overbroad. Nor must they go further than the section 16(2) restrictions in the Constitution.	Broadcast regulators must not overregulate freedom of expression nor go beyond the Constitution's limits on freedom of expression contained in section 16(2).
Laugh It Off Promotions CC v SAB [2005] ZACC 7	Protects satire and parody. Their expressive value outweighs commercial interests.	Parody is a protected form of expression. Trademark law cannot silence criticism.
The Citizen 1978 (Pty) Ltd and Others v McBride [2011] ZACC 11	Freedom of expression allows comment on a person's past behaviour if it is true and fair comment.	The case sets out what protected comment or fair comment should be.
Print Media South Africa v Minister of Home Affairs [2012] ZACC 22	Prior classification schemes can have a chilling effect on freedom of expression.	Press freedom is strengthened and prepublication censorship is restricted.
Pilane and Another v Pilane and Another [2013] ZACC 3; 2013 (4) SA 509 (CC); 2013 (7) BCLR 431 (CC)	A traditional community has the right to assemble and express criticism of the traditional authority.	The right to free expression and to protest cannot be restricted.
Masuku & Ano v SAHRC (1062/2017) [2018] ZASCA 180 (04 December 2018)	Freedom of expression can only be restricted in line with section 16(2).	It is not hate speech or a violation of 16(2) to engage in robust political debate.

Case citation	Key constitutional principles	Core rights established
Economic Freedom Fighters and Another v Minister of Justice and Correctional Services and Another [2020] ZACC 25.	The section of the Riotous Assemblies Act making it a crime to incite people to commit "any offence" is too broad and must be amended to "serious" offences only.	It is not a problem to incite people to commit crimes that are not serious when engaging in political activity.
Qwelane v South African Human Rights Commission [2021] ZACC 22	Hate speech requires advocacy of hatred plus incitement to harm.	Offensive speech that is hurtful is not automatically hate speech and the word "hurtful" is removed from the Equality Act.
Mineral Sands Resources (Pty) Ltd and Others v Reddell and Others [2022] ZACC 37	The right to have access to the courts (section 36 of the Constitution) must be balanced with section 16.	A defence (exception) to a SLAPP suit must address both the ulterior motive of the litigant and the merits of their argument.
Afriforum NPC v Nelson Mandela Foundation Trust and Others [2023] ZASCA 58	The Court held that the display of the old apartheid flag contravenes section 16 (2) (c) of the Constitution.	The public display of the old apartheid flag is hate speech, unfair discrimination and harassment.

Current enforceable rights

- Freedom of expression is broadly protected and lies at the core of South Africa's constitutional democracy, with political expression receiving the highest level of protection.
- Expression remains protected even if it is offensive, provocative, unsettling or unpopular.
- Only a narrow category of expression is excluded from protection: propaganda for war, incitement of imminent violence, and advocacy of hatred based on race, ethnicity, gender or religion that incites harm.
- Political speech, including protest-related advocacy and calls for mobilisation, may not be restricted unless it clearly crosses into serious harm or constitutionally defined hate speech.
- Incitement is protected expression unless it involves incitement to commit serious offences.
- Laws and court orders limiting expression must be precise, narrowly framed and proportionate; vague, overbroad or pre-emptive restraints are unconstitutional.
- Criticism of institutions and holders of public power, including courts and traditional authorities, is protected and may not be suppressed to preserve authority or unity.

- The Constitution strongly safeguards against measures that chill public debate or revive censorship, requiring the least restrictive means whenever expression is restricted.
- A successful amnesty outcome does not eradicate or make the past crimes invisible. Discussion about such acts are protected by section 16 and may be discussed publicly as true events.
- A SLAPP suit requires a defence that not only raises ulterior motive, but also deals with the merits of the litigants application.

Right to protest

> *The exercise of the right to assemble by trade unions and other organisations is an important constitutional issue. The right has earned its place in our constitutional legal order, in part because of the role that protests played in our country's transition from apartheid to democracy, and in part because of the role protest continues to play in holding government accountable to the people of South Africa. Because of this, the right to protest is not a right that can be easily limited.*[1]

Cases in this chapter

1. South African Transport and Allied Workers Union and Another v Garvas and Others [2012] ZACC 13; CCT 112/11 (13 June 2012) (Constitutional Court) 57
2. Pilane and Another v Pilane and Another [2013] ZACC 3; 2013 (4) SA 509 (CC); 2013 (7) BCLR 431 (CC) 60
3. Hotz v UCT (730/2016) 2016 ZASCA 159 (20 October 2016) 61
4. Patricia Tsoaledi and Others v The State (A222/2015) [2016] ZAFSHC (17 November 2016) 64
5. Khanyile v The State, KZN High Court (Pietermaritzburg), Case No 12428/2016, 22 December 2016 65
6. Mlungwana and Others v The State and Another [2018] ZACC 45 68
7. Rhodes University v Student Representative Council of Rhodes University and Others (Eastern Cape High Court) [2016] ZAECGHC 141 69
8. Students Representative Council of Rhodes University and Others v Rhodes University (Eastern Cape High Court) [2017] ZAECGHC 117 70
9. Dyantyi v Rhodes University and Others (Supreme Court of Appeal) 2023 (1) SA 32 (SCA) 71
10. Right to Know Campaign and Others v City Manager of Johannesburg Metropolitan Municipality and Another (49197/2021) [2022] ZAGPJHC 388; 2022 (5) SA 570 (GJ); [2022] 3 All SA 466 (GJ) (10 June 2022) 73

[1] Victor, J in Right to Know Campaign and Others v City Manager of Johannesburg Metropolitan Municipality and Another (49197/2021) [2022] ZAGPJHC 388; 2022 (5) SA 570 (GJ); [2022] 3 All SA 466 (GJ) (10 June 2022), para 3.

The Constitution

Section 17

Assembly, demonstration, picket and petition

Everyone has the right, peacefully and unarmed to assemble to demonstrate, to picket and to present petitions.

General points [2]

Exercising section 17 rights is often hindered by poor implementation of legislation, a lack of official training, and the increasingly common use of excessive force by both police and private security actors. Although the Constitution guarantees this right, the practical experience of communities, students, workers, women's organisations and environmental activists shows that protest remains fraught with challenges.

The legislative framework governing protest is set out primarily in the Regulation of Gatherings Act 205 of 1993, which regulates gatherings of more than fifteen people. The Act establishes a notification rather than a permission system. Convenors must appoint a person responsible for organising the gathering and give written notice, normally seven days in advance, setting out the purpose, date, time, route and expected number of participants, and indicating whether a memorandum or petition will be delivered. Meetings between the convenor, local authorities and the South African Police Service should take place in the days before the protest to assess risks and agree on logistics. A gathering may be prohibited only if authorities reasonably anticipate a real threat of serious traffic disruption, injury, or significant property damage that police would be unable to contain.

Demonstrations may not take place within 100 metres of courts or Parliament unless special permission is granted. Marshals must be appointed, and participants are prohibited from carrying weapons.

Although the statutory framework is relatively clear, municipal officials frequently impose requirements that are not authorised by law and treat the notification process as a

[2] This section draws on civil-society monitoring and advocacy materials published by the Right2Protest Project, available at https://www.r2p.org.za; research and published findings of the Private Security Industry Regulatory Authority, including Barriers for Control: The Private Security Industry and Student Protests in South Africa (March 2019), available at https://camprosa.co.za/wp-content/uploads/2024/11/PSIRA-Barriers.pdf; South African Police Service public-order policing policy (National Instruction 4 of 2014: Crowd Management During Public Gatherings and Demonstrations), available at https://www.saha.org.za/downloadfile.php?path=al2878%2Fal2878_a20.02.09.pdf; and contemporaneous media reporting on protest action and policing in South Africa, including Daily Maverick, available at https://www.dailymaverick.co.za/article/2019-11-13-right-to-protest-is-most-often-met-with-threats-and-violence/?utm_source=chatgpt.com

permission-seeking process. The courts have clarified this confusion and misapplication of the law in the Mlungwana case discussed below.

Some municipalities impose fees for protests. The City of Johannesburg adopted a tariff system for gatherings, assemblies and pickets, which was later declared unconstitutional in the Right to Know Campaign case (see below). The system, introduced by a by-law, required protesters to be charged based on certain categories, including the number of protestors. The judgment made clear that charging fees restricts access to a constitutional right, but it also left uncertain the position of other municipalities whose policies have not been tested. Such restrictions often only surface when challenged by organisations with the capacity to litigate.

The use of force during protests remains a pressing concern. The Act permits police to disperse a crowd only when there is a clear danger to persons or property, and requires officers to use only proportionate force. The use of weapons likely to cause death or serious injury is prohibited except in narrow circumstances. However, practice often diverges from the law. In 2021, police action during student protests at the University of the Witwatersrand led to the fatal shooting of a bystander. Civil society organisations noted that SAPS National Instructions lack clear operational guidelines, contributing to poorly managed and often violent dispersals of assemblies. Similar incidents have occurred in community and labour protests, and in some cases private security companies have used violence despite lacking the training or legal authority to conduct crowd-control operations.

Private security abuse was documented during the #FeesMustFall protests, with companies specialising in event management but lacking crowd-control expertise using excessive force. Complaints were lodged with the Private Security Industry Regulatory Authority, which confirmed unlawful conduct by several companies.

In other protests, such as those in North West mining communities, private security forces were accused of assaulting participants, prompting the Right2Protest Project (R2P) to lodge complaints with the regulator.

Police misunderstanding of the law also causes unnecessary confrontation. During the #CodeRed protest in August 2021,[3] organisers obtained special permission to assemble outside the Constitutional Court, yet police refused to allow protesters within 100 metres of the building despite the lawful authorisation.

Officers were unfamiliar with the legal requirements and responded aggressively, highlighting the gap between legislative protections and on-the-ground practice.

[3] This was a feminist protest to respond to gender based violence and femicide.

R2P, established in 2016 during the #FeesMustFall student protests, has played a significant role in addressing obstacles to protest. It is a coalition of civil society organisations that maintains data, challenges restrictions, holds state and private actors accountable, and operates a national hotline for legal assistance. R2P and its network of pro bono attorneys have assisted hundreds of protesters with arrests, bail applications, and defence against public violence charges, and have engaged in strategic litigation and police-accountability work. It has published a comprehensive toolkit for convenors, marshals and activists, covering compliance with the Act, timelines, prohibited behaviour, police standing orders, and post-protest steps such as documenting abuses and understanding one's rights when arrested. This practical resource supports protesters and could be adapted for use across the region.

Protest action in South Africa takes many forms and is driven by a wide range of social, political, gender, labour and environmental struggles. Student protests are a significant part of this landscape. The #FeesMustFall movement, beginning at Wits University in 2015, called for free and decolonised tertiary education and challenged colonial symbols at historically white universities. The protests spread nationally and were often met with force, including the use of rubber bullets, arrests and campus lockdowns. Some protesters were convicted of offences arising from clashes with police; the case of Kanya Cekeshe,[4] who attempted to set a police van alight and was sentenced to eight years in prison, remains a notable example. Although the protests achieved limited concessions, they also highlighted deep inequalities in higher education and introduced a new generation of political activism.

Women's protests have also shaped public discourse, particularly around gender-based violence. The #RUReferenceList, followed by the #AmINext and #TotalShutdownmovements, exposed rape culture, intimate partner violence, and poor policing, and demanded institutional accountability.

These protests sometimes led to severe sanctions against activists, such as the long-running disciplinary and legal proceedings faced by Rhodes University activist Yolanda Dyanti. The cases also criminalised the right to protest on campuses, intimidated student populations and weakened student movements across the board.

Environmental protests have grown in response to failures to implement environmental legislation and the state's continued reliance on fossil fuels despite climate commitments. Communities have challenged mining and energy projects that threaten land, livelihoods and ecosystems, and have organised demonstrations against harmful developments. Public pressure contributed to successful legal challenges, including the interdict halting Amazon's River Club headquarters and protests against Shell's proposed seismic surveys.

[4] See https://www.timeslive.co.za/news/south-africa/2019-12-24-feesmustfall-activist-kanya-cekeshe-is-paroled-from-prison/?utm_source=chatgpt.com

Community resistance in Xolobeni led to a landmark 2018 ruling requiring free and informed consent before mining can take place on communal land, later reinforced by the Constitutional Court in Maledu. However, environmental activists, particularly in rural areas, continue to face harassment and threats.

Trade unions also rely on protest as a key organising tool in contexts marked by severe inequality, unemployment and low wages. Labour demonstrations remain common, reflecting the central role of collective action in addressing workplace injustices.

Service-delivery protests have become one of the most common forms of community mobilisation in South Africa and now occur with regular frequency across municipalities. These protests, which make up most of the **27 protests that take place per day** in South Africa, typically arise from chronic failures in the provision of basic services, including water, sanitation, electricity, refuse removal, housing and municipal governance. Although national statistics are inconsistent, various reports indicate that hundreds of such protests take place annually, with some periods seeing extremely high levels of unrest. Communities often resort to protest because internal complaint mechanisms are ineffective, municipal responses are slow, and accountability for service failures is weak. These demonstrations are frequently met with police crowd-control measures, which at times escalate into conflict, including allegations of excessive force. Service-delivery protests have therefore become a significant barometer of public frustration with local government and illustrate how the right to protest functions as a critical avenue for expressing socio-economic grievances in the absence of responsive state action.

These varied experiences show that, although the legal framework protects the right to protest, its realisation depends heavily on state responses, the conduct of police and private security, and the willingness of municipalities to comply with the law. Civil society initiatives such as R2P have become essential to defending the right, supporting protesters, and building a culture in which assembly can take place safely and lawfully.

The cases discussed in the remainder of this chapter illustrate both the progress made and the persistent challenges in ensuring that protest remains a meaningful tool for democratic participation in South Africa.

Statistics

There are no comprehensive statistics on protest figures. This is due to limited media coverage and insufficient documentation from grassroots movements and police stations, particularly in rural communities. Different databases record different types of protest separately. For example, the CWAO Strike Barometer reports 83 strikes in 2023 and 84 in 2024.[5] The SAPS database, known as the Incident Registration Information

[5] Available at https://www.cwao.org.za/downloads/2024-Strike-Barometer-024.pdf?utm_source=chatgpt.com

System (IRIS), records “crowd incidents” that cover both peaceful and unrest-related gatherings. Kynoch, in a 2023 journal article, analyses IRIS data for 2018 to 2019, reporting 11 431 “crowd peaceful incidents policed” and 4 526 “crowd unrest incidents” over the 12-month period. Beyond early 2022, however, SAPS has not made IRIS data publicly available in a compiled form, and recent police annual reports do not disaggregate or report on protests or “crowd incidents”. As a result, IRIS remains an opaque internal dataset and cannot currently be used to produce transparent, up-to-date statistics on protest incidents. IRIS is not publicly released annually, and the SAPS website currently includes no IRIS data.[6]

On the other hand, the source Municipal IQ tracks service delivery protests, and the following table presents figures for the past five years. The table summarises the annual number of major service-delivery protests directed at municipalities in South Africa, based on data published by Municipal IQ’s Municipal Hotspots Monitor. These figures were sourced from academic analyses that reproduce Municipal IQ data, including S. Mamokhere (2023), and from media reports on Municipal IQ’s annual findings.[7]

Year	Number of major service-delivery protests
2013	155
2014	191
2015	164
2016	137
2017	173
2018	237
2019	218
2020	102
2021	121
2022	193

[6] G Kynoch, ‘Protest, policing and the crisis of public order in South Africa’ (2023) Journal of Southern African Studies, analysing IRIS data for 2018–2019 (article available via publisher at https://www.tandfonline.com)

[7] S Mamokhere (2023). 'Service Delivery Protests in South African Municipalities: Trends, Factors, Impacts and Recommendations,' Municipal IQ, Municipal Hotspots Monitor (as cited in media reports and academic literature), Media reports reproducing Municipal IQ statistics (2018–2019 peaks). Municipali IQ is available at https://www.municipaliq.co.za/

Cases

1. South African Transport and Allied Workers Union and Another v Garvas and Others [2012] ZACC 13; CCT 112/11 (13 June 2012) (Constitutional Court)[8]

SATAWU organised a march in the City of Cape Town, which resulted in damage to bystanders and members of the public. They sued SATAWU for damages under section 11(1) of the Regulation of Gatherings Act 205 of 1993, which holds organisations liable for riot damage that occurs as a result of a gathering or demonstration. The organisation has a defence if the damage did not fall within the objectives of the demonstration, was not foreseeable, and the organisation took reasonable steps to prevent it. SATAWU argued that section 11(2) was unconstitutional and that, if organisations could not use the defences in section 11(2), this could have a chilling effect on those seeking to organise protests. The High Court, SCA and Constitution rejected this argument, saying that section 11 did not interfere with the right to protest, but ensured a balance between protestors and other members of the public, requiring that organisers be bound to ensure the protest remains peaceful.

Parties

Applicants: South African Transport and Allied Workers Union (SATAWU) and COSATU.

Respondents: Eight individual and business owners affected by the riot damage; the Minister of Safety and Security.

Intervening party: City of Cape Town.

Amicus curiae: Freedom of Expression Institute.

Background and facts

The case arose from a May 2006 protest march organised by SATAWU during a volatile security-sector strike in Cape Town, in which approximately 50 people had already died. SATAWU complied with the Regulation of Gatherings Act: it gave notice, participated in negotiations with the police and City, and appointed marshals. Despite these precautions, the march deteriorated into violence, causing about R1.5 million in damage to shops, vehicles, and street vendors. Victims sued SATAWU under section 11(1) of the Act, which imposes statutory liability for "riot damage" on organisers. SATAWU denied liability and challenged the constitutionality of the phrase "and was not reasonably foreseeable" in section 11(2)(b), arguing that the statutory defence was irrational, internally

[8] https://www.saflii.org/za/cases/ZACC/2012/13.html

contradictory, and infringed section 17 of the Constitution (freedom of assembly).

SATAWU argued that the defence is available if the damage was not reasonably foreseeable (section 11(1)(b)), but that section 11(1)(c), which requires the organisation to take reasonable steps to prevent the damage, is impossible to fulfil if one did not reasonably foresee the damage occurring in the first place. Lower courts dismissed SATAWU's challenge, leading to this Constitutional Court appeal.[9]

Legal issues before the Court

- Whether section 11(2) of the Regulation of Gatherings Act is irrational and therefore unconstitutional under the principle of legality.
- Whether section 11(2) unjustifiably limits the right to freedom of assembly under section 17 of the Constitution.
- If a limitation exists, whether it is reasonable and justifiable under section 36.

Court's findings and reasoning

A majority judgment by Mogoeng CJ found that section 11(2) is rational, creates a real (though stringent) defence, and constitutes a justifiable limitation of section 17.

On the interpretation of section 11(2), the Court rejected SATAWU's argument that it was impossible to take reasonable preventive steps and to claim that harm was not reasonably foreseeable.

The Court held that reasonable steps taken early in planning can, by themselves, make certain harms no longer reasonably foreseeable, thus fulfilling both limbs of the defence. The majority emphasised that organisers must constantly assess risks and take preventive steps throughout the planning and execution phases of a gathering.
On whether section 17 is limited, the Court held that statutory liability and the costs of compliance may deter organisations from organising gatherings and thus constitute a

[9] Section 11 of the Regulation of Gatherings Act states: "11. Liability for damage arising from gathering.—
(1) If any riot damage occurs as a result of (a) a gathering, every organisation on behalf of or under the auspices of which that gathering was held or, if not so held, the convener, shall, subject to subsection (2), be jointly and severally liable for that riot damage as a joint wrongdoer together with any other person who unlawfully caused or contributed to such riot damage and any other organisation or person who is liable therefor in terms of this subsection; (b) a demonstration, every person participating in such demonstration shall be jointly and severally liable for that riot damage as a joint wrongdoer together with any other person who unlawfully caused or contributed to such riot damage and any other organisation or person who is liable therefor in terms of this subsection; (c) a gathering or demonstration contemplated in paragraph (a) or (b), any organisation which authorised, supported or ratified such gathering or demonstration shall be jointly and severally liable for that riot damage as a joint wrongdoer together with any other person who unlawfully caused or contributed to such riot damage and any other organisation or person who is liable therefor in terms of this subsection."

limitation of the right.

However, the Court stressed the constitutional importance of the right to assemble peacefully, describing it as central to our constitutional democracy and one of the principal means by which ordinary people can meaningfully contribute to the constitutional objective of advancing human rights and freedoms.

At the same time, the Court held that the limitation served a compelling purpose: to protect vulnerable members of the public from harm and to ensure that victims of riot damage have effective recourse.

Organisers choose to exercise the right to assemble, but bystanders have no choice in their exposure to harm. Imposing liability on organisers was therefore justified.

The Court stressed that the right must be exercised with due regard for the rights of others. The limitation struck an appropriate balance between freedom of assembly and the rights to life, physical security, dignity and property. There were no less restrictive means that would achieve the purpose of protecting the public.

A key statement of principle from Mogoeng CJ: “So the lessons of our history, which inform the right to peaceful assembly and demonstration in the Constitution, are at least twofold. First, they remind us that ours is a “never again” Constitution: never again will we allow the right of ordinary people to freedom in all its forms to be taken away. Second, they tell us something about the inherent power and value of freedom of assembly and demonstration, as a tool of democracy often used by people who do not necessarily have other means of making their democratic rights count” (para 63).

Concurring judgment (Jafta J, Zondo AJ concurring)

Jafta J agreed with the outcome but not with the majority’s reasoning. He found that section 11(2) does not limit section 17 at all. Jafta J held that subsections 11(1), (2) and (3) must be interpreted disjunctively, not conjunctively. In other words, they must be read as alternative bases of liability, not cumulative requirements. This means that each subsection establishes an independent and self-standing basis of liability and must not be read conjunctively, as if the requirements of all three must be met simultaneously.

Court order

The appeal was dismissed.

Why the case matters

This is the leading Constitutional Court decision on the scope of the right to freedom of assembly and on the constitutional validity of statutory liability for riot damage under the

Regulation of Gatherings Act.

The Court emphasised that peaceful assembly is a cornerstone of participatory democracy, particularly for poor and marginalised communities that lack other avenues to make their voices heard. It also stressed that the right must be exercised in a manner that respects others' rights to dignity, security, and property.

The Court distinguished the test for whether negligence has occurred from common law delict, which asks a narrow, fault-based question about whether the harm was reasonably foreseeable and whether reasonable steps were taken to prevent it. The Regulation of Gatherings Act asks whether some risk of harm could reasonably have been anticipated or foreseen, in broader terms. It does not require a prediction of precise damage, but rather an anticipation that some risk could arise. It looks at whether sensible steps were taken beforehand to manage that risk. So it is forward-looking and preventative. It is not trying to curtail the right but to facilitate it in a way that mitigates against causing harm to others.

The case therefore defines the constitutional balance between protest rights and public safety, ensuring that protest remains protected while deterring unlawful violence. It also strengthens the position of people who suffer loss, injury, or property damage as a result of a gathering by confirming that they may claim against the organising body identified by the statute, without having to identify or sue individual participants.

2. Pilane and Another v Pilane and Another [2013] ZACC 3; 2013 (4) SA 509 (CC); 2013 (7) BCLR 431 (CC)[10]

(See summary under Freedom of Expression)

Although the case was primarily decided under section 16, the Constitutional Court in Pilane v Pilane made clear that the right to protest and assemble under section 17 is closely intertwined with freedom of expression.

The Court affirmed that organising meetings, mobilising community members, and engaging in collective dissent against authority are core constitutional activities protected by the right to peaceful assembly and protest. It rejected the idea that such collective action may be suppressed simply to preserve order, unity, or traditional authority, emphasising that constitutional rights apply fully within traditional communities.

By setting aside an interdict that prevented community members from convening meetings and mobilising opposition, the Court confirmed that section 17 protects

[10] https://collections.concourt.org.za/bitstream/handle/20.500.12144/3677/Full%20judgment%20Official%20version%20%28715%20Kb%29-20435.pdf?sequence=13&isAllowed=y

peaceful, unarmed collective action aimed at expressing dissent and demanding accountability, even such protest occurs outside formal regulatory frameworks and challenges entrenched power structures.

Cross reference freedom of expression

3. Hotz v UCT (730/2016) 2016 ZASCA 159 (20 October 2016)[11]

The case concerned protest action at UCT during the #FeesMustFall protests in 2016. The university sought and was granted an interdict against five students, by the Cape Town High Court. The interdict prohibited them from entering campus and engaging in unlawful conduct. Evidence was led, accepted by both parties, that the five had erected shacks on a roadway that obstructed entrance and exit from the university, damaged property and art works, set fire to a university vehicle and threatened and intimidated staff and students. The SCA confirmed the interdict but narrowed its terms, warning that it did not want to supress the right to peaceful protest in any way.

Parties

The appellants were five individuals associated with the "Shackville" student protest at the University of Cape Town: Alexandria Gabriella Hotz, Masixole Mlandu, Chumani Maxwele, Slovo Magida and Zola Shokane. Some were registered students at UCT at the time, owhile thers were former students or had no formal status at the university.

The respondent was the University of Cape Town (UCT).

Background and facts

In February 2016, during the #FeesMustFall period, a protest known as "Shackville" took place on UCT's upper campus. Protesters erected an informal shack in the middle of Residence Road, a major campus thoroughfare, obstructing traffic and pedestrian access.

The protest aimed to highlight student housing shortages, unaffordable fees, and broader issues of transformation and inequality.

Over 15 – 17 February 2016, the protest escalated. The shack remained despite repeated requests from UCT to relocate it nearby. Protesters demarcated an exclusion zone, blocked roads, threatened and assaulted students and staff, spray-painted and defaced university property, removed and burned artworks from residences and other buildings, set fire to vehicles, including a university shuttle bus, and caused extensive damage to

[11] https://www.saflii.org/za/cases/ZASCA/2016/159.html

university property.

UCT obtained an urgent interim interdict prohibiting certain individuals from entering campus and engaging in unlawful conduct in a High Court case, University of Cape Town v Davids and Others.[12] The university applied for an interdict not only against the named respondents, but also people "associating themselves with unlawful conduct" at UCT.

On the return day, the High Court confirmed the interdict as a final order against the five appellants. The appellants appealed to the SCA.

Legal issues before the Court

The main issues were:

- Whether UCT had established the requirements for a final interdict, namely a clear right, an injury committed or reasonably apprehended, and the absence of an alternative remedy.
- Whether the appellants' conduct was protected by constitutional rights to protest, assemble and freedom of expression.
- Whether the interdict was overbroad or unjustifiably limited the appellants' constitutional rights.
- Whether it was acceptable for interdicts to be given against unnamed protesters.

Court's findings and reasoning

The Court emphasised that the case was not about the legitimacy or merits of student protests, but about whether unlawful conduct justified final interdictory relief.

The Court reaffirmed that protest action is constitutionally protected only if it is peaceful and unarmed, as required by section 17 of the Constitution. Once protest conduct becomes violent, destructive, threatening, or unlawfully interferes with others' rights, it loses constitutional protection.

UCT was found to have clear rights to control access to its property, protect staff and students, and prevent damage to its premises. The evidence showed repeated, serious infringements of those rights, including criminal conduct such as malicious damage to property, arson, intimidation, and obstruction of public roads.

The Court rejected the appellants' argument that necessity or the political importance of their cause justified exceeding legal limits. It held that courts cannot legitimise unlawful

[12] University of Cape Town v Davids and Others [2016] ZAWCHC 56; [2016] 3 All SA 333 (WCC)

conduct, even where grievances may be genuine or widely supported.

The Court further held that there was a reasonable apprehension of future harm because the appellants did not disavow their conduct and continued to justify it. Disciplinary processes or dialogue were not adequate alternatives to an interdict, as they did not provide equivalent protection against ongoing unlawful conduct.

However, the SCA narrowed the scope of the High Court's order, removing the blanket prohibition on entering the campus and limiting the interdict to specific unlawful acts.

It also stated that the persons included in an interdict must be reasonably identifiable. The order in an interdict must be clear enough for people to know whether they fall within the group bound by the interdict.

Court order

The appeal succeeded only to the extent that the interdict was narrowed.

The appellants were interdicted from:

- Erecting unauthorised structures on UCT property.
- Damaging, destroying or defacing UCT property.
- Participating in or inciting unlawful conduct or unlawful protest action on UCT premises.
- Inciting violence.

They were ordered to pay UCT's costs jointly and severally. Save for these amendments, the appeal was dismissed.

Why the case matters

The Hotz judgment is a leading authority on the legal limits of protest action in South Africa. It affirms that constitutional rights to protest and expression do not protect violent, destructive or coercive conduct. The case draws a clear line between protected dissent and unlawful action, particularly in institutional and educational settings.

Importantly, the judgment underscores the rule of law during periods of social upheaval, confirming that courts must protect rights on all sides and cannot excuse illegality on the basis of political purpose. At the same time, by narrowing the interdict, the Court recognised the need to avoid overly broad restrictions that unnecessarily chill lawful protest.

The one thing that is clear is that the court does not sanction interdicts against unnamed

and unidentified persons. This is important because the private sector attempts to restrict people's right to protest through vague and overly broad interdicts.

4. Patricia Tsoaledi and Others v The State (A222/2015) [2016] ZAFSHC (17 November 2016)[13]

94 protesters, involved in a peaceful protest, were charged and convicted for contravening section 12(1)(a) of the Regulation of Gatherings Act 205 of 1993. The High Court set aside the conviction, following Garvis and held that the failure to give notice to the authorities of the protest does not expose participants to criminal liability, in the case of a peaceful gathering.

Parties

The appellants were 94 protesters (members and supporters of the Treatment Action Campaign). The respondent was the State.

Background and facts

The appellants were convicted by the Regional Court of contravening section 12(1)(a) of the Regulation of Gatherings Act after attending two peaceful, unarmed gatherings outside Bophelo House in Bloemfontein in July 2014, without prior notice to the local authority. The protests concerned the dismissal of health workers and conditions within the Free State Department of Health. The gatherings were peaceful, with singing and chanting. Each appellant was sentenced to a fine of R600, alternatively three months' imprisonment, wholly suspended for three years.

Legal issues before the Court

The key issue was whether mere attendance at a peaceful gathering for which no prior notice had been given constitutes an offence under section 12(1)(a) of the Regulation of Gatherings Act, properly interpreted in light of section 17 of the Constitution and the principle of legality (*nullum crimen sine lege*).[14]

Court's findings and reasoning

The High Court held that section 12(1)(a) does not criminalise mere attendance at a peaceful gathering. Interpreted purposively and constitutionally, the provision targets

[13] https://www.saflii.org/za/cases/ZAFSHC/2016/217.html

[14] The essential meaning of this phrase is that a person cannot be convicted of a crime unless the conduct was clearly defined as a criminal offence in law at the time it was committed and it was recognised by the person as a crime when it was committed.

the convening of a gathering where notice was required but not given, not participation by attendees.

The Court rejected the state's argument that gatherings without notice are "automatically prohibited", emphasising that the Regulation of Gatherings Act establishes a facilitative and consultative framework rather than a system of prior permission.

Criminalising attendance would unjustifiably infringe section 17 and violate the principle of legality. In reaching this conclusion, the Court expressly confirmed the approach adopted by the Constitutional Court in Garvis.

Court order

The appeal was upheld, and the convictions and sentences of all appellants were set aside.

Why the case matters

The judgment confirms Garvis at High Court level, reinforcing that failure to give notice under the Regulation of Gatherings Act does not, per se, render a peaceful gathering unlawful and does not expose participants to criminal liability merely for attending. It strengthens the constitutional reading of the Act as a regulatory, not punitive, statute governing the exercise of section 17 rights.

5. Khanyile v The State, KZN High Court (Pietermaritzburg), Case No 12428/2016, 22 December 2016[15]

The case concerned a student activist Khanyile, who was refused bail after being charged with various offences relating to public violence. The Magistrate's Court refused bail, and this was confirmed by the KZN High Court on the basis that he had contravened earlier warnings and had embarked on violent behaviour.

Parties

The appellant was Bonginkosi Gift Khanyile, a student activist involved in the #FeesMustFall campaign. The respondent was the State.

Background and facts

The appellant was arrested and charged with several offences arising from his

[15] https://www.saflii.org/za/cases/ZAKZPHC/2016/114.html

participation in #FeesMustFall protests, including unlawful gatherings, incitement, public violence, and assault. He applied for bail pending trial, which the Magistrates' Court refused. At the time of his arrest, the appellant was already subject to warning conditions imposed in an earlier matter arising from protest action, including prohibitions on participating in unlawful gatherings and incitement. He appealed against the refusal of bail.

Legal issues before the Court

The central issue was whether the refusal of bail was correct in light of the constitutional right to protest under section 17 of the Constitution, and whether the appellant's continued detention was justified under section 60(4) of the Criminal Procedure Act 51 of 1977, particularly in relation to the risk of undermining the criminal justice system and public order.

Court's findings and reasoning

The Court accepted that the appellant's conduct occurred within the broader context of protest action, but held that section 17 protects only peaceful and unarmed assembly. The Court found that there was *prima facie* evidence that the appellant played a leading role in protests that became violent, including inciting the crowd, and that he breached court-imposed warning conditions. It emphasised that courts hearing bail applications do not determine guilt or the lawfulness of the protest itself, but assess risk based on allegations.

The Court concluded that the appellant's disregard for court-imposed conditions justified the finding that his release would undermine the criminal justice system and public order, notwithstanding the protest context.

Court order

The appeal was dismissed, and the refusal of bail was confirmed.

Why the case matters

In the High Court, the judgment attempts to set a boundary regarding section 17 rights. It argues that while peaceful protest is protected, protest that involves violence, incitement, or defiance of court orders may justify restrictive judicial responses.

Later development

Khanyile appealed to the Constitutional Court by way of an urgent application. Heads of argument were filed by both sides, but the Court did not issue a judgment. The matter was resolved by an agreed bail order, which the Court made an order of court on 1 March

2017. The heads of argument are important as indicative of constitutional positions, but they are not binding authority.

The agreement reached was that Khanyile be granted bail of R250. In addition, the order stated that he may not intimidate any member of staff or security personnel at the Durban University of Technology, nor obstruct the police or any security personnel in the performance of their duties.

Applicant's heads of argument (Khanyile)

The applicant argued that the repeated refusal of bail amounted to an unjustified infringement of constitutional rights arising from participation in protest action. Central to the argument was that the courts below failed to give proper weight to the constitutional status of peaceful protest under section 17 of the Constitution and to the principle that bail is not punitive. Khanyile contended that the lower courts effectively treated protest-related charges as inherently disqualifying for bail, without sufficient evidence that his release would endanger the public or the administration of justice.

He further argued that section 60(4)(d) of the Criminal Procedure Act (risk of undermining the criminal justice system) was misapplied. It was submitted that alleged participation in protest activity, even if disruptive, cannot justify detention, and that prior involvement in protests should not be equated with contempt for the rule of law.

The heads emphasised that the Regulation of Gatherings Act establishes a facilitative framework for protest, and that criminal law responses to protest must be constitutionally restrained. It was further argued that continued incarceration operated as a form of pre-trial punishment and had a chilling effect on the exercise of section 17 rights.

Respondent's heads of argument (The state)

The state argued that the matter was not about protest rights as such, but about bail and public safety. It contended that Khanyile's conduct went beyond peaceful protest and included incitement to violence, intimidation, and breach of court-imposed warning conditions. The state relied heavily on sections 60(4)(d) and (e) of the Criminal Procedure Act, arguing that Khanyile's release would undermine confidence in the criminal justice system and risk further disorder.

The state maintained that section 17 protects only peaceful and unarmed assembly, and that once a protest crosses into violence or incitement, it falls outside constitutional protection. The heads stressed that Khanyile had previously been subject to warning conditions restricting participation in unlawful gatherings, and that his alleged disregard for those conditions indicated a likelihood of non-compliance with bail conditions. On this

basis, the state submitted that detention was constitutionally permissible and necessary.

6. Mlungwana and Others v The State and Another [2018] ZACC 45[16]

The Social Justice Coalition organised a protest by fifteen of its members in Khayelitsha, which did not require the authorities' permission under the Regulation of Gatherings Act 205 of 1993. The gathering was attended by more than fifteen people without prior planning. They were charged under various sections of the Regulation of Gatherings Act for failing to comply with provisions requiring notification of the authorities. The court rejected the argument that they had committed a criminal offence and struck down the Act provision that criminalises peaceful gatherings as unconstitutional.

Parties

Applicants: Phumeza Mlungwana and Others (members of the Social Justice Coalition)
Respondents: The State; Minister of Police
Amici curiae: Equal Education; Right2Know Campaign; United Nations Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association

Background and facts

The applicants were members of the Social Justice Coalition (SJC), a community-based organisation campaigning for improved sanitation services in Khayelitsha. On 11 September 2013, fifteen SJC members travelled to the Cape Town Civic Centre to stage a protest highlighting inadequate sanitation. They deliberately limited their numbers to fifteen to avoid triggering the notice requirements for a "gathering" under the Regulation of Gatherings Act.

During the protest, more people joined, increasing the number of participants beyond fifteen. The protest remained peaceful throughout. Access to the Civic Centre was not blocked, no threats were made, and no property was damaged. Police officers instructed the protesters to disperse; when they did not, they were arrested.

Twenty-one protesters were charged with contravening section 12(1)(a) of the Regulation of Gatherings Act by convening a gathering without prior notice,[17] or with attending a prohibited gathering under section 12(1)(e).[18] Ten of the accused were convicted in the Magistrates' Court, although the court noted that the protest caused no

[16] https://www.saflii.org/za/cases/ZACC/2018/45.html

[17] Under section 12(1)(a), a convenor is liable for riot damage if the risk was reasonably foreseeable and reasonable preventative steps were not taken

[18] Section 12(1)(e) places the onus on the convenor to avoid liability for riot damage by proving that all reasonable preventative steps were taken.

harm and was peaceful. The accused were cautioned and discharged.

Legal issues before the Court

Whether section 12(1)(a) of the Regulation of Gatherings Act limited the right to assemble peacefully and unarmed under section 17 of the Constitution, and, if so, whether that limitation was reasonable and justifiable under section 36 of the Constitution.

Court's findings and reasoning

The Court held unanimously that section 12(1)(a) limited the right to assemble peacefully and unarmed. Criminalising the failure to give notice had a chilling effect on the exercise of the right to protest and went beyond mere regulation. The limitation was not justified because less restrictive means existed to manage peaceful assemblies.

Court order

The declaration of the constitutional invalidity of section 12(1)(a) was confirmed. The applicants' convictions and sentences were quashed, and the Minister of Police was ordered to pay costs.

Why the case matters

The judgment affirms that peaceful protest is a core constitutional right and that criminal sanctions for administrative non-compliance unjustifiably deter democratic participation. The court also clarified confusion surrounding the notice requirement for protests. The court stated that while notice is required, failure to provide it does not automatically render a protest unlawful. The court further noted that the requirement is to give notice, not to seek approval.

The Rhodes University cases

A number of cases have been heard by the courts arising from protest action at Rhodes in 2016. These are summarised briefly.

7. Rhodes University v Student Representative Council of Rhodes University and Others (Eastern Cape High Court) [2016] ZAECGHC 141[19]

The case arose from protests at Rhodes in 2016 against rape culture. The Court upheld students' right to protest but reiterated that unlawful and violent conduct that accompanies protest is not protected. It therefore granted a limited interdict.

[19] https://www.saflii.org/za/cases/ZAECGHC/2016/141.html

In April 2016, students at Rhodes University protested against "rape culture" on campus after an anonymous list ("#RUReferenceList") identifying alleged offenders circulated online. The protests, which began peacefully, escalated and at times disrupted classes, blocked access to parts of campus, and in some cases were linked to confrontations and allegations of assault. Rhodes University applied to the High Court in Grahamstown for an interim interdict to restrain protest activity, including broad wording aimed at "encouraging, facilitating and/or promoting any unlawful activities" on campus.

Section 17 implications

The High Court accepted that section 17 of the Constitution protects the right to protest peacefully and unarmed, including protest action on a university campus (paras 55–58). The Court recognised that protest may be disruptive and controversial without losing constitutional protection, and that the SRC's call for an academic shutdown, in principle, was a form of protected political protest (paras 63–66).

The Court held, however, that section 17 does not protect unlawful conduct. Acts of violence, intimidation, assault, kidnapping, or serious infringements of others' rights fall outside constitutional protection and may be restrained.

The Court refused to grant a broad interdict restraining protest generally, but granted targeted interdicts against specific individuals where there was evidence of unlawful conduct. The judgment emphasised that interdicts must be narrowly framed and directed at unlawful acts, not at peaceful protest itself.

The core finding was that peaceful protest, even when disruptive, is protected by section 17; unlawful conduct associated with protest is not, and only that conduct may be interdicted.

8. Students Representative Council of Rhodes University and Others v Rhodes University (Eastern Cape High Court) [2017] ZAECGHC 117[20]

The students opposed the confirmation of the final interdict against them arising from the abovementioned case. The High Court delivered a final interdict against certain named students and against certain protest-related conduct (i.e., it narrowed the terms of the final interdict).

Following the 2016 protests and interdict proceedings, the students (including SERI-represented individuals) opposed the confirmation of the final interdict against them.

In March 2017 the High Court delivered a final interdict against named students (rather

[20] https://www.saflii.org/za/cases/ZAECGHC/2017/117.html

than an indefinite class), restraining certain protest-related conduct.

Section 17 implications

The High Court reaffirmed that section 17 protects the right to peaceful and unarmed protest, including protest action on a university campus. It accepted that protest may legitimately be disruptive and challenging, and that disruption alone does not remove constitutional protection.

However, the Court held that section 17 protection is lost where protest conduct becomes unlawful, including conduct involving violence, intimidation, coercion, or serious interference with the rights of others. The Court emphasised that the Constitution does not protect protest tactics that compel participation, threaten safety, or prevent others from exercising their own rights, particularly the right to education.

Applying this approach, the Court granted a final interdict against named individuals, based on evidence that their conduct during the protests crossed the line from peaceful protest into unlawful behaviour. Importantly, the interdict was limited to specific forms of unlawful conduct and did not prohibit protest as such. The Court stressed that remedies restraining protest must be carefully confined to what is necessary to prevent unlawful conduct and should not operate as a general ban on protest or political expression.

9. Dyantyi v Rhodes University and Others (Supreme Court of Appeal) 2023 (1) SA 32 (SCA)[21]

Dyanti was expelled permanently from Rhodes at her formal disciplinary arising out of her involvement in the student protests. She challenged both the disciplinary findings and the sanction.

Yolanda Dyantyi was one of the students cited in the protest interdict obtained by Rhodes University during the 2016 campus protests. Following internal disciplinary proceedings, Rhodes imposed the most severe sanction available on her: permanent (lifetime) expulsion. from the university. Dyantyi challenged both the disciplinary findings and the sanction. The matter reached the SCA, which was required to consider whether Dyantyi's conduct fell within the protection of section 17 of the Constitution and whether the university had lawfully disciplined her for conduct arising in the context of a protest.

It held that it was appropriate that she was disciplined for her unlawful conduct, but set aside the sanction imposed on the applicant, which permanently excluded her. The Court

[21] https://www.saflii.org/za/cases/ZASCA/2022/32.html

remitted the matter back to the university for reconsideration of the sanction before a different proctor. The Court also ordered that Rhodes University must pay her costs, including the costs of two counsel.

Section 17 implications

The SCA affirmed that section 17 protects peaceful, unarmed protest, including protest on a university campus. The Court accepted that student protest is a legitimate and constitutionally protected form of political expression, even when it is disruptive, confrontational, or uncomfortable for institutional authorities.

However, the Court stressed that section 17 protection is conduct-specific, not status-based. Constitutional protection attaches to peaceful, unarmed conduct, not to participation in protest as such. Once a protester's conduct crosses into unlawful behaviour, including violence, assault, intimidation, coercion, or a serious infringement of others' rights, that conduct falls outside the scope of section 17.

The SCA emphasised that the Constitution does not shield unlawful conduct merely because it occurs under the banner of protest. Section 17 does not immunise individuals from accountability when protest activity escalates into conduct that threatens safety, dignity, or the rule of law.

Applying these principles, the SCA held that the disciplinary findings against Dyantyi were not based on her participation in the protest as such, but on findings of specific unlawful and coercive conduct, including intimidation and conduct exceeding the limits of peaceful protest. On the evidence, the Court was satisfied that her conduct went beyond mere protest and constitutionally protected assembly.

The SCA accordingly held that Rhodes University was entitled to discipline Dyantyi, notwithstanding that the conduct occurred in a protest context. Universities are entitled and obliged to enforce disciplinary rules designed to protect safety and the rights of others, even where those rules intersect with protest activity.

However, critically, the SCA did not finally endorse the lifetime expulsion. While it accepted that serious sanctions may be justified where protest conduct is unlawful, the Court approached the matter with caution and focused on legality, evidence, and fairness rather than the severity of punishment as such. The judgment underscores that disciplinary sanctions must still comply with principles of lawfulness, proportionality, and procedural fairness, even in highly charged protest settings.

The Court's core constitutional holding may be summarised as follows: section 17 protects peaceful and unarmed protest, but does not protect unlawful, violent, intimidating, or coercive conduct carried out under the guise of protest. Universities may

lawfully discipline individuals for such conduct without infringing the constitutional right to protest.[22]

10. Right to Know Campaign and Others v City Manager of Johannesburg Metropolitan Municipality and Another (49197/2021) [2022] ZAGPJHC 388; 2022 (5) SA 570 (GJ); [2022] 3 All SA 466 (GJ) (10 June 2022)[23]

The City of Johannesburg imposed a fee under its Tariff Determination Policy, which included a fee for protest action. The applicants approached the Court, arguing that the imposition of the fee was irrational, infringed the section 17 right to protest, and was unlawful. The Court agreed and declared the policy that levied fees on protest action, demonstrations, pickets, assemblies and gatherings unconstitutional.

The City of Johannesburg imposed a fee under its Tariff Determination Policy, which included a fee for protest action. The applicants approached the Court, arguing that the imposition of the fee was irrational, infringed the section 17 right to protest, and was unlawful. The Court agreed and declared the policy that levied fees on protest action, demonstrations, pickets, assemblies and gatherings unconstitutional.

Parties

The applicants were the Right to Know Campaign, the Gauteng Housing Crisis Committee and Keith Duarte, a protest convenor required to pay the respondents. The respondents were the City Manager of the Johannesburg Metropolitan Municipality and the Johannesburg Metropolitan Police Department. The South African Human Rights Commission (SAHRC) was admitted as amicus curiae.

Background and facts

The applicants challenged the City of Johannesburg's Tariff Determination Policy, which required convenors of protests to pay a fee after the section 4 meeting under the Regulation of Gatherings Act. The fee ranged from approximately R170 to R15 000 and, in practice, was treated as a prerequisite for full municipal and police support for a protest. The applicants argued that the policy was unlawful, ultra vires the Regulation of Gatherings Act, and unconstitutional because it limited the section 17 right to assemble, demonstrate, picket and present petitions, particularly for poor and marginalised

[22] In November 2025, the Constitutional Court (per Kollapen AJ) dismissed an application for leave to appeal this judgment arising from the Rhodes University student protest interdict litigation. The Court held that the matter raised no arguable constitutional issue warranting its attention, and that the case turned on factual findings by the lower courts that the applicants' conduct during the protests involved unlawful acts falling outside the protection of section 17 of the Constitution.

[23] https://www.saflii.org/za/cases/ZAGPJHC/2022/388.html

communities unable to afford the fee.

Legal issues before the Court

The Court was required to determine whether the City had lawful authority to levy protest-related fees; whether the policy complied with the constitutional principles of legality and rationality; whether the policy limited the right to protest under section 17 of the Constitution; and, if so, whether that limitation was justifiable.

Court's findings and reasoning

The Court held that the Regulation of Gatherings Act is the primary statute governing protests and contains no authorisation for municipalities to charge fees for gatherings. The City's reliance on general municipal tariff-setting powers could not override the Gatherings Act, rendering the policy ultra vires and unlawful.

The policy was also found to be irrational. The Court emphasised that section 17 imposes a positive duty on the state to facilitate peaceful protest, including by providing policing and traffic control. Conditioning the fulfilment of this duty on payment undermined the very purpose of the right and bore no rational connection to facilitating protest.

In constitutional terms, the Court held that charging fees constitutes a limitation on section 17. Drawing on Garvas and Mlungwana, it stressed that any measure that deters or discourages protest has a chilling effect on democratic participation. Even modest fees may inhibit protest, particularly where non-payment is perceived to render a gathering unlawful or inadequately protected.

Crucially, the Court focused on the policy's disproportionate impact on poor and marginalised people. It recognised that protest is often the primary means by which working-class and marginalised communities engage with the state and make their grievances visible. By increasing the cost of protest, the policy entrenched inequality, excluded those least able to pay, and undermined the constitutional purpose of section 17 as a vehicle for participatory democracy and accountability. The Court expressly acknowledged that the policy risked silencing the voices of those protesting about housing, service delivery and socio-economic exclusion; the very groups section 17 is designed to protect.

Court order

The Court declared the levying of fees under the City of Johannesburg's Tariff Determination Policy for gatherings, assemblies, demonstrations, pickets and petitions unconstitutional and unlawful, with effect from the date of the order, and ordered the City to pay costs.

Why the case matters

This judgment is a leading authority on section 17, confirming that the right to protest may not be made contingent on the payment of fees. It affirms the state's obligation to facilitate peaceful protest and explicitly recognises that financial barriers disproportionately silence poor and marginalised communities. The case situates protest as a core democratic right, particularly for those with limited access to formal political power.

Table of cases

Case citation	Key constitutional principles	Core rights established
South African Transport and Allied Workers Union and Another v Garvas and Others [2012] ZACC 13; CCT 112/11 (13 June 2012) (Constitutional Court)	Section 17 is a cornerstone of democracy and if it is to be limited the limitation must comply with section 36. Ie the limitation must be reasonable and justifiable.	The right to peaceful protest is protected. However, section 11(2) of the Regulation of Gatherings Act which imposes organiser liability may be a reasonable and justifiable limitation in certain cases.
Pilane and Another v Pilane and Another [2013] ZACC 3; 2013 (4) SA 509 (CC); 2013 (7) BCLR 431 (CC)	The right to organise meeings, mobilise community members and engage in collective protest if peaceful is a protected right.	Communities may engage in collective action in traditional communities and have rights to peaceful collective action aimed at expressing dissent.
Hotz v UCT (730/2016) 2016 ZASCA 159 (20 October 2016)	The right to engage in protest is limited to peaceful protest and seeking an interdict against unlawful, violent protest is a justifiable limitation.	Student protest is protected by section 17 as long as it is peaceful.
Patricia Tsoaledi and Others v The State (A222/2015) [2016] ZAFSHC (17 November 2016)	The Regulation of Gatherings Act does not criminalise peaceful protest.	Failure to comply with the Regulation of Gatherings Act by not giving notice to authorities does not expose organisers to criminal liability if protest is peaceful.
Khanyile v The State, KZN High Court (Pietermaritzburg), Case No 12428/2016, 22 December 2016	The right to protest must be protected.	Bail was refused to a student who engaged in unlawful and violent protest. However the Constitutional Court required bail to be given.
Mlungwana and Others v S [2018] ZACC 45	Criminalising lack of notice to authorities of a protest unjustifiably limits section 17 and spontaneous protest must be protected.	No criminal sanction for failure to give notice; protects spontaneous assembly.
Rhodes University v Student Representative	The court upheld the right of students to protest but	The court upheld both the rights of student to engage

Case citation	Key constitutional principles	Core rights established
Council of Rhodes University and Others (Eastern Cape High Court) [2016] ZAECGHC 141	held it had to be balanced against the right of the university to maintain protection to other students and staff.	in peaceful protest but also the right of the university to interdict students for unlawful and violent conduct.
Students Representative Council of Rhodes University and Others v Rhodes University (Eastern Cape High Court) [2017] ZAECGHC 117	The right to interdict students involved in protest action should be restricted to actual students and specific actions.	The court allowed an interdict to be granted but named particular students who engaged in unlawful conduct and certain protest action that was specified.
Dyantyi v Rhodes University and Others (Supreme Court of Appeal) 2023 (1) SA 32 (SCA)	The right to protest is a right to peaceful protest. If a protester engaged in disruptive, violent unlawful protest the institution where they engage in this conduct has the right to discipline them within reason.	The sanction given to a student who engages in unlawful protest action at a university must be proportional. A lifelong ban from the university is not considered reasonable.
Right to Know Campaign and Others v City Manager of Johannesburg Metropolitan Municipality and Another (49197/2021) [2022] ZAGPJHC 388; 2022 (5) SA 570 (GJ); [2022] 3 All SA 466 (GJ) (10 June 2022)	The right to protest cannot be limited or curtailed. Levying a fee to enable the exercise of the right creates a limitation that is irrational, unlawful and unconstitutional.	The right to protest, assemble, demonstrate, picket and gather cannot be limited by the municipality imposing a fee for such actions.

Current enforceable rights

- **Right to peaceful and unarmed protest**

Individuals and groups have an enforceable constitutional right to assemble, demonstrate, picket and present petitions peacefully and unarmed. Peacefulness is the defining threshold for constitutional protection. Protest does not lose protection merely because it is disruptive, unpopular, or politically confrontational.

(Confirmed across the jurisprudence; foundational articulation in SATAWU v Garvas and reaffirmed in Mlungwana.)

- **No criminalisation of peaceful protest for procedural non-compliance**

Peaceful protest remains constitutionally protected even where organisers fail to comply with procedural requirements such as giving notice under the Regulation of Gatherings Act. Criminal sanctions for convening or participating in a peaceful protest without notice are unconstitutional.

(Established in Mlungwana and Others v S.)

- **Right to spontaneous protest**

Section 17 protects spontaneous protests, including protests responding to urgent political or social events. The Constitution does not confine protest rights to pre-planned or officially authorised gatherings.

(Flowing directly from Mlungwana and applied in subsequent protest litigation.)

- **Protection against overly broad interdicts restraining protest**

Courts may grant interdicts to prevent unlawful conduct associated with protests, but such interdicts must be narrowly tailored. Broad or vague interdicts that restrain "encouraging", "promoting" or participating in protest generally, without proof of imminent or actual unlawful conduct, impermissibly chill section 17 rights.

(Applied in student protest litigation, including Rhodes University v SRC and related cases.)

- **Protest may be regulated, but not suppressed**

The state, municipalities and institutions may regulate protests to manage safety, traffic and competing rights, but regulation must be reasonable, proportionate and rights-affirming. Regulation may not be used as a mechanism to suppress dissent or to make protest practically impossible.

(Principle articulated in Garvas and consistently applied.)

- **Liability for protest-related harm requires clear legal thresholds**

Participants and organisers may be held civilly liable for protest-related damage only where statutory thresholds are met. The imposition of liability must respect section 17 and cannot be used indirectly to deter peaceful protest.

(From SATAWU v Garvas.)

- **Protest rights apply in institutional and campus settings**

Universities and other institutions are bound by the Constitution when responding to protest. While they may act against unlawful conduct (such as violence or serious damage), they may not rely on institutional rules, disciplinary codes or court orders to extinguish the core right to peaceful protest.

- **(Confirmed in Rhodes University v SRC litigation and subsequent student protest cases.)**

Courts will not extend protest rights beyond pleaded and procedurally sound claims

While section 17 rights are robustly protected, the Constitutional Court will dismiss applications that are procedurally defective or that seek relief not properly grounded in section 17. The dismissal of the November 2025 student application confirms that protest rights must be asserted through correctly framed constitutional claims.

(November 2025 Constitutional Court judgment dismissing the student application.)

- **Chilling effects on protest are constitutionally relevant**

Courts recognise that criminal sanctions, excessive civil liability, or overly broad interdicts can have a chilling effect on protest. Laws and remedies that deter people from engaging in peaceful protest are constitutionally suspect and must be strictly justified.

(Explicit in Mlungwana; implicit across protest jurisprudence.)

Environmental rights

> *The Constitution recognises the interrelationship between the environment and development; indeed it recognises the need for the protection of the environment while at the same time it recognises the need for social and economic development. It contemplates the integration of environmental protection and socio-economic development.*[1]

Cases in this chapter

1. Fuel Retailers Association of Southern Africa v Director General Environmental Management, Department of Agriculture, Conservation and Environment Mpumalanga Province and Others [2007] ZACC 13 86
2. Earthlife Africa Johannesburg v Minister of Environmental Affairs and Others [2017] ZAGPPHC 58; [2017] 2 All SA 519 (GP) 88
3. African Climate Alliance v Minister of Mineral Resources and Energy [2023] ZAWCHC 91
4. Company Secretary of ArcelorMittal South Africa Ltd and Another v Vaal Environmental Justice Alliance [2014] ZASCA 184..... 93
5. Minister of Mineral Resources and Energy and others v Sustaining the Wild Coast NPC and others [2024] JOL 64974 (SCA) 96
6. Hichange Management (Pty) Ltd v Cape Produce Company (Pty) Ltd t/a Pelts Products 2004 (2) SA 393 (E)..... 99
7. Wildlife and Environment Society of South Africa v MEC for Economic Affairs, Environment and Tourism, Eastern Cape Provincial Government and Others (Eastern Cape High Court, Case No 178/2004, 28 April 2005) 101
8. Trustees for the Time Being of GroundWork Trust and Another v Minister of Environmental Affairs and Others [2022] ZAGPPHC 208 104
9. Minister of Environmental Affairs v Trustees for the Time Being of GroundWork Trust and Others [2025] ZASCA 43 108
10. Director: Mineral Development, Gauteng Region and Sasol Mining (Pty) Ltd v Save the Vaal Environment and Others [1999] ZASCA 9 111
11. BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment & Land Affairs 2004 (5) SA 124 (W), Case No 03/16337 113

[1] Ngcobo J, Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others (CCT67/06) [2007] ZACC 13; 2007 (10) BCLR 1059 (CC); 2007 (6) SA 4 (CC) (7 June 2007), para 45.

12. MEC for Agriculture, Conservation & Environment v HTF Developers [2007] ZACC 25 116

13. Maccsand (Pty) Ltd v City of Cape Town and Others [2012] ZACC 7 118

14. Le Sueur and Another v eThekwini Municipality 2013 JDR 0178 (KZP)..... 120

15. Minister of Local Government, Environmental Affairs and Development Planning of the Western Cape v Lagoonbay Lifestyle Estate (Pty) Ltd and Others [2013] ZACC 39 (Constitutional Court)..... 122

The Constitution

Everyone has the right—

- to an environment that is not harmful to their health or well-being; and
- to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that—
- prevent pollution and ecological degradation;
- promote conservation; and
- secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

General points

Section 24 of the Constitution offers one of the most comprehensive environmental rights provisions globally, which are the rights people have to live in a safe, clean and healthy environment. This means having clean air to breathe, safe water to drink, land and housing that are not polluted, protection from harmful industries, and surroundings that support dignity and well-being. Environmental rights also protect natural resources, like rivers, soil, plants and animals, because people depend on these for their health, livelihoods and future. Van der Linde and Basson[2] describe section 24 as having two linked components: a duty on all actors not to create harmful environmental conditions, and a duty on the state to take reasonable measures to prevent pollution, promote conservation and secure ecologically sustainable development. Sustainable development is the unifying theme, requiring development that respects our environment while supporting social and economic well-being. The right is broad, covering natural systems, biodiversity, air, water and soil as well as cultural, aesthetic and amenity aspects of people's surroundings. "Health" includes physical, mental and social well-being, while "well-being" is open-ended and includes tranquillity, cultural and aesthetic values, and enjoyment of property. Harm to these interests may infringe the right even without direct physical injury. The reference to "present and future generations" embeds intergenerational justice in environmental decision-making. We must protect the environment for our children and theirs.

[2] Van der Linde, M. & Basson, E. "Chapter 50: Environment" in Constitutional Law of South Africa (CLoSA), 2nd ed., LexisNexis, 2013.

The National Environmental Management Act 107 of 1998 (NEMA) translates section 24 into a practical governance framework including environmental principles,[3] systems for environmental impact assessments, compliance tools, public participation and cost recovery. A number of related statutes, regulating water, waste, air quality, biodiversity, protected areas, mining and coastal management collectively give effect to the "reasonable measures" that include passing legislation, as required by section 24(b). Because environmental decisions span all spheres of government, disputes arise in diverse forums, and administrative remedies often need to be exhausted before litigation. Broad standing provisions allow individuals, communities and organisations to litigate in the public interest, an essential safeguard given that environmental harms often affect poor and marginalised communities. Section 24 also binds private actors, and courts generally adopt public interest and sensitive costs approaches to avoid discouraging legitimate environmental claims.

Although section 24 is structurally transformative as it links ecological protection[4] to dignity, equality, health and socio-economic well-being, the Constitutional Court has not consistently developed its jurisprudence on this right. Melanie Murcott[5] argues that the Court has been largely silent, with only limited engagements such as Fuel Retailers[6] and NSPCA (discussed in this section).[7] This gap is significant given the intensifying climate and ecological crises, which disproportionately harm vulnerable communities and undermine the enjoyment of all other rights.

She calls for a justice-oriented, transformative environmental constitutionalism that interprets section 24 in a way that integrates human rights, ecological sustainability, and

[3] NEMA's principles require that development be ecologically sustainable and socially and economically just; that decision-makers apply the precautionary principle where there is a risk of serious or irreversible harm; that polluters bear the costs of preventing and remedying environmental damage; that environmental justice is promoted so that poor and vulnerable communities are not disproportionately burdened by pollution; that the public is meaningfully informed and consulted; that environmental, social and economic impacts are assessed in an integrated manner; that decisions safeguard the interests of present and future generations; and that anyone who causes or may cause significant environmental harm has a duty of care to prevent or minimise it.

[4] In this section the term ecological refers to natural systems and the relationships between living organisms and their surroundings, and the processes that keep ecosystems functioning and healthy. Environmental, by contrast, is broader and includes both natural and human-made elements of our surroundings. It covers the quality of air, water, land, buildings, infrastructure, noise, waste, and all the conditions that shape how people live. Ecological protection means safeguarding natural systems and resources so they can continue to support healthy communities and future generations.

[5] Murcott Melanie, Minding the Gap: The Constitutional Court's Jurisprudence Concerning the Environmental Right (2023).

[6] Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others [2007] ZACC 13; 2007 (6) SA 4 (CC).

[7] National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development and Another [2016] ZACC 46; 2017 (4) SA 80 (CC).

intergenerational equity.

Krüger[8] also describes section 24 as a "silent right", noting that environmental issues frequently arise in matters involving land-use, water, mining and animal welfare, yet the Court seldom invokes the environmental right even when relevant.

She attributes this to the Court's discomfort with complex ecological issues and its tendency to subordinate environmental concerns to economic or administrative ones. She argues that relying on foreign institutional models is unnecessary; the Constitutional Court already has the authority to raise un-pleaded constitutional issues where needed. By consciously identifying the environmental dimensions of cases, as the court has done in its protective role in children's matters, the Court could close the jurisprudential gap and strengthen the protection of both people and ecosystems.

Together, these perspectives show a strong constitutional right supported by extensive legislation, active lower courts, and engaged communities, but an underdeveloped body of Constitutional Court jurisprudence. The cases that follow illustrate how section 24 is being interpreted, advanced, and sometimes constrained within this broader landscape.

What appears to be shifting in some very recent cases such as African Climate Alliance v Minister of Mineral Resources and Energy [2023] ZAWCHC (discussed below) is an awareness of climate change as something to be considered. If the state appeals it will be up to the Constitutional Court to ensure that the section 24 Constitutional right is advanced and protected.

Statistics

What the census 2022 says is needed for a good environment

Although Census 2022 is not an environmental study, the service-delivery report does identify conditions necessary to support a healthy environment and protect community well-being.

Waste management

The Census notes that mismanaged waste, pollutes the soil, air and water and can undermine both human health and economic development. It also refers to global targets calling for improved waste management to reduce cities' environmental impact.

[8] Krüger Ruth, The Silent Right: Environmental Rights in the Constitutional Court of South Africa, Constitutional Court Review 2019 Vol 9, 473–496.

Sanitation

The report defines sanitation as a system that affects both people and the environment. Unimproved sanitation systems, such as bucket toilets and unventilated pit latrines, pose risks to environmental health due to inadequate containment of waste.

Water

The Census links access to safe drinking water with a healthy environment. Protected water sources and reliable supply are presented as foundational to environmental and public health protection.

Municipal duties

A basic municipal service is defined as one that does not endanger public health, safety, or the environment. Municipalities are therefore expected to deliver services in ways that avoid environmental harm.

What census 2022 says households actually have

The Census measures access to certain basic services, which indirectly indicate how well the environment is being protected through municipal service delivery.

Water

91.3% of households use piped water, though many do not have water inside the dwelling and experience interruptions.

Sanitation

70.9% of households use flush toilets connected to sewer systems or septic tanks. The remainder rely on pit toilets, chemical toilets, or bucket systems, all of which pose environmental and health risks.

Waste removal

68.4% of households receive municipal refuse removal services. Approximately one-third still rely on their own dumps, communal dumps, or have no system at all.

Electricity

94.7% of households use electricity for lighting, although many still cook with wood, paraffin, or gas.

What the census does not report — and why the environmental picture is limited

Despite the references to environmental concerns, the Census does not provide meaningful environmental data. It does not report on air quality, water pollution, soil contamination, climate change, biodiversity, land degradation, or ecosystem health. There is also no information on environmental law enforcement, compliance, waste-reduction performance, or government investment in environmental protection.

Without measurements of pollution, ecological conditions, or environmental governance, the Census provides only a narrow and indirect picture of environmental health. This makes it an insufficient tool for analysing the state of the environment or assessing compliance with environmental rights and obligations.

The information is sketchy, incomplete, and of limited use for environmental analysis or accountability purposes.

Cases

Climate change and sustainable development

1. Fuel Retailers Association of Southern Africa v Director General Environmental Management, Department of Agriculture, Conservation and Environment Mpumalanga Province and Others [2007] ZACC 13[9]

The case concerned authorisation to build a filling station in White River Mpumalanga. The applicants argued it was not an environmentally sound decision to authorise the filling station. The court held that the environmental authorities need to consider applications broadly using the lens of sustainability. And this includes economic, social and environmental sustainability. A proliferation of filling stations is not good for the environment and permissions should not be given without proper consideration of the environmental impact.

Parties

Applicants: Fuel Retailers Association of Southern Africa
Respondents: Director General Environmental Management, Department of Agriculture, Conservation and Environment Mpumalanga Province, MEC Department of Agriculture, Conservation and Environment Mpumalanga Province, Minister of Water Affairs and Forestry, Regional Director of Water Affairs and Forestry, MEC Department of Transport and Public Works Mpumalanga Province, Mbombela Local Municipality, Lowveld Motors

[9] https://www.saflii.org/za/cases/ZACC/2007/13.html

(Pty) Ltd and four individuals associated with the Inama Trust

Background and facts

Inama Trust applied to the Mpumalanga environmental authorities for authorisation to build a filling station in White River, Mpumalanga. The Fuel Retailers Association of Southern Africa, an organisation representing the interests of fuel retailers and the applicant in the proceedings in the Constitutional Court, objected to the development of the filling station on various grounds, including concerns that it would have an adverse impact on the environment.

Legal issues before the Court

The central issue concerns the interpretation of Section 24 of the Constitution, specifically the environmental right to sustainable development. The applicant argued that the designated environmental authorities did not consider the full cumulative impact that the proposed filling station by Inama Trust would have. They alleged that the authorities failed to assess whether the development would be socially, environmentally, and economically sustainable as required by the laws of Section 24.

Court's findings and reasoning

Ngcobo J held that the obligation of the environmental authorities to consider socio-economic factors includes the duty to assess the impact of the proliferation of filling stations and the proposed stations on existing ones. He also held that the environmental authorities misinterpreted their obligation regarding granting authorisation for development, failing to fully ensure that the development would be socially, environmentally and economically sustainable. He reasoned that it is the obligation of the environmental authorities to consider these factors, recognising the environmental risks associated with the proliferation of filling stations and their eventual closure, as well as understanding the socio-economic sustainability of projects like these, to confirm whether the development would be viable in relation to other nearby filling stations.

Court order

Ngcobo J granted the application for leave to appeal and upheld the appeal. He set aside the decision of the environmental authorities granting authorisation to construct the proposed filling station and ordered the environmental authorities to reconsider the application by Inama Trust in light of the judgment. Additionally, he ordered the environmental authorities to pay the costs of the application.

Significance of case

This was the first case to recognise that sustainable development must be linked to

environmental protection. One cannot pursue unlimited economic growth without ensuring that the environment is preserved. As Ngcobo J states, "The environment and development are thus inexorably linked" (para 44).

2. Earthlife Africa Johannesburg v Minister of Environmental Affairs and thers [2017] ZAGPPHC 58; [2017] 2 All SA 519 (GP)[10]

The case concerned the proposed construction of Thabametsi a coal-fired power station in Limpopo. Earthlife, an environmental NGO challenged the authorisation based on the fact that no climate change impact assessment was made prior to the state authorising the power station. The court upheld the applicant's appeal, requiring the Minister to require a full climate change impact assessment prior to authorisation to build the power station be granted.

Parties

The applicant was Earthlife Africa Johannesburg, a non-profit organisation dedicated to environmental justice, acting in the public interest and as an interested and affected party. The respondents included the Minister of Environmental Affairs; the Chief Director: Integrated Environmental Authorisations, Department of Environmental Affairs; the Director: Appeals and Legal Review, Department of Environmental Affairs; Thabametsi Power Project (Pty) Ltd; and Thabametsi Power Company (Pty) Ltd.

Background and facts

The case involved the proposed construction of the Thabametsi coal-fired power station, a 1200 MW coal-fired power plant near Lephalale in Limpopo, intended to operate until at least 2061.

The Chief Director of the Department of Environmental Affairs approved environmental authorisation for the project on 25 February 2015 under the National Environmental Management Act 107 of 1998 (NEMA).

Earthlife appealed internally to the Minister of Environmental Affairs. On 7 March 2016, the Minister rejected the appeal but amended the environmental authorisation by adding a new condition (clause 10.5), requiring a climate change impact assessment to be carried out before the project begins, with the results to be reviewed by the Department.

Earthlife then filed a review application in the High Court, contesting both the original environmental authorisation and the Minister's appeal decision. The main factual complaint was that climate change impacts had not been properly assessed before the

[10] https://www.saflii.org/za/cases/ZAGPPHC/2017/58.html

authorisation was granted, despite coal-fired power stations being major contributors to greenhouse gas emissions.

Legal issues before the Court

The main legal issues were:

- Whether section 24(1) of NEMA mandates the consideration of climate change impacts as a necessary relevant factor before granting environmental authorisation for a coal-fired power station.
- Whether the failure to assess climate change impacts rendered the environmental authorisation unlawful, irrational, or unreasonable under the Promotion of Administrative Justice Act 3 of 2000 (PAJA).
- Whether the Minister was entitled to remedy the defect by imposing a post-authorisation condition requiring a climate change impact assessment.
- Whether the environmental authorisation should be revoked and referred back for reconsideration after a comprehensive climate change assessment has been carried out.

Court's findings and reasoning

The High Court ruled that climate change impacts are a relevant and mandatory factor to consider under section 24(1) of NEMA when deciding on granting environmental authorisation for a coal-fired power station. The Court highlighted that section 24(1) requires decision-makers to take into account "all relevant factors", including pollution, environmental degradation, and measures to safeguard the environment from damage.

Reading NEMA together with the Environmental Impact Assessment Regulations and section 24 of the Constitution, the Court found that climate change impacts are not optional or discretionary considerations. Coal-fired power stations are significant contributors to greenhouse gas emissions, and their climate impacts are both foreseeable and potentially severe over their operational lifetime.

The Court rejected the argument that impacts of climate change could be lawfully deferred to a later stage. It held that imposing a post-authorisation condition requiring a climate change impact assessment undermined the purpose of environmental authorisation, which is to inform the decision on whether an activity should be authorised in the first place and, if so, on what conditions.

The Court further determined that neither the Chief Director nor the Minister had adequately taken climate change impacts into account at the time of their respective decisions. This oversight rendered the decisions materially flawed, unreasonable, and

unlawful under PAJA. The Court emphasised that decision-makers cannot legally approve activities that harm the environment first and then attempt to evaluate the fundamental environmental risks afterwards.

Court order

The High Court reviewed and overturned the environmental authorisation granted for the Thabametsi power station, as well as the Minister's appeal decision. The matter was sent back to the Department of Environmental Affairs for further consideration, with instructions that a comprehensive climate change impact assessment must be carried out and taken into account before any new decision on environmental authorisation is made.

Why the case matters

This judgment is a landmark South African environmental law decision recognising climate change as a legally mandatory factor in environmental decision-making. It firmly establishes that climate change impacts must be evaluated before, not after, the approval of carbon-intensive projects.

The case enhances the constitutional environmental right in section 24 by associating it with climate change obligations, the precautionary principle, and intergenerational justice. It has significantly impacted subsequent litigation and policy discussions related to coal, energy planning, and South Africa's shift to a low-carbon economy, and is widely recognised as a landmark climate-justice ruling within South African jurisprudence.

However, while Earthlife Africa Johannesburg strongly affirms that climate change considerations are legally mandatory, it does not issue a radical judgement that fundamentally limits coal production. It enhances procedural accountability and environmental rationality but largely leaves South Africa's coal-dependent energy model unchanged, relying on improved decision-making rather than significant judicial intervention.

3. African Climate Alliance v Minister of Mineral Resources and Energy [2023] ZAWCHC[11]

The applicants, a group of environmental justice organisations contested the state's decision to include an additional 1 500 megawatts of new coal-fired power in the national energy plan. Their challenges was based on research indicating that such an increase in coal production would have negative climate change impacts, particularly regarding health, and particularly for children. The court upheld the challenge and set aside the plan to introduce this amount of coal-fired power on the basis of its negative effect on the environment, particularly in regard to health and children's health.

Parties

The applicants were the African Climate Alliance, Vukani Environmental Justice Movement in Action, and the trustees for the time being of Groundwork Trust. These organisations act in the public interest on environmental justice and climate change. The respondents were the Minister of Mineral Resources and Energy, the National Energy Regulator of South Africa (NERSA), the Minister of Forestry, Fisheries and the Environment, the President of the Republic of South Africa, and the Minister of Electricity. The Centre for Child Law and the Vaal Environmental Justice Alliance were admitted as amici curiae.

Background and facts

The case involved the South African government's choice to add an extra 1,500 megawatts of new coal-fired power to the national energy plan. The applicants challenged three connected decisions:

- The Integrated Resource Plan 2019 (IRP 2019), published on 18 October 2019, insofar as it made provision for 1,500 MW of new coal-fired power.
- The Minister's determination of 25 September 2020 under section 34 of the Electricity Regulation 4 of 2006, implementing the IRP coal allocation
- NERSA's agreement with the Minister's decision.

The applicants argued that these decisions would exacerbate climate change, damage human health, and unfairly impact children and future generations. They claimed that the decisions were unconstitutional, irrational, and inconsistent with the state's obligations under sections 24 and 28 of the Constitution, as well as unlawful under PAJA and the principle of legality.

[11] https://www.saflii.org/za/cases/ZAGPPHC/2024/1271.pdf

Legal issues before the Court

The key legal issues were:

- Whether the impugned decisions were reviewable, and if so, whether they were under PAJA or the principle of legality.
- Whether the state failed to consider the constitutional rights of children, particularly sections 24 and 28(2) of the Constitution, when deciding to add new coal-fired power.
- Whether the absence of evidence demonstrating consideration of health, environmental, and climate impacts rendered the decisions unconstitutional and unlawful.
- Whether the IRP and related determinations could be overridden to the extent that they authorised new coal-fired power.

Court's findings and reasoning

The High Court held that the impugned decisions were reviewable under the principle of legality, even where PAJA did not apply. The Court emphasised that exercises of public power must be rational, lawful, and consistent with the Constitution.

Crucially, the Court found that the Rule 53 record and the evidence before it were "ominously silent" on any consideration of the impact of the additional 1 500 MW of coal-fired power on children's rights, health, or the environment. The respondents were unable to demonstrate that these impacts had been meaningfully assessed or weighed in the decision-making process.

The Court placed particular weight on section 28(2) of the Constitution, holding that the best interests of the child are of paramount importance and must be actively considered when state decisions foreseeably affect children. Given the long-term climate and health consequences of coal-fired power, the failure to consider children's rights rendered the decisions constitutionally defective.

The Court dismissed the respondents' argument that there was no restriction of rights or that the applicants bore the burden of proving harm. In the absence of evidence that rights had been properly considered, the decisions could not be justified. The Court held that the state had failed to fulfil its constitutional obligations.

Court order

The Court upheld the constitutional challenge and issued the following key orders:

- The Minister's determination of 25 September 2020, insofar as it provided for 1 500 MW of new coal-fired power, was declared unconstitutional, unlawful, and invalid.
- NERSA's agreement with that determination was reviewed and overturned.
- The IRP 2019 was reviewed and set aside to the extent that it included provision for 1,500 MW of new coal-fired power.
- The first and second respondents were ordered jointly and severally to bear the costs of the application.

Why the case matters

This judgment is unexpectedly broad in South African climate and constitutional law. Unlike earlier cases such as Earthlife Africa Johannesburg, which concentrated on procedural environmental compliance at project level, this case directly invalidates national energy-planning decisions on constitutional grounds.

The Court strongly connects climate change, energy policy, and children's rights, and considers the failure to address long-term climate and health impacts as a critical constitutional fault. By invalidating parts of the IRP, the judgment extends beyond project-specific review and into the realm of national policy oversight.

At the same time, the reasoning remains grounded in legality and evidentiary failure rather than a categorical rejection of coal as an energy source. This tension between its practical impact and its doctrinal restraint makes the judgment both powerful and vulnerable. Given its implications for national energy planning and executive policy-making, it is highly likely to be appealed.

Information, transparency and public participation

4. Company Secretary of ArcelorMittal South Africa Ltd and Another v Vaal Environmental Justice Alliance [2014] ZASCA 184[12]

The case concerned access to information and the right the public has (in this case via the Vaal Environmental Justice Alliance (VEJA)) to records and plans made by major corporations that might affect the environment. VEJA requested records from ArcelorMittal to establish their plans in the Vereeniging areas to protect the environmental rights of surrounding communities. The court ordered ArcelorMittal to furnish all the requested records to VEJA.

[12] https://www.saflii.org/za/cases/ZASCA/2014/184.html

Parties

The appellants were the Company Secretary of ArcelorMittal South Africa and ArcelorMittal South Africa Ltd (ArcelorMittal), a major industrial steel producer operating plants in Vanderbijlpark and Vereeniging. The respondent was the Vaal Environmental Justice Alliance (VEJA), a non-profit voluntary association advocating for environmental justice in the Vaal Triangle.

Background and facts

VEJA submitted two requests to ArcelorMittal under the Promotion of Access to Information Act 2 of 2000 (PAIA). The first request was for ArcelorMittal's Environmental Master Plan for its Vanderbijlpark plant, along with progress reports on its implementation. The second request sought a broad range of documents related to compliance inspections, enforcement notices, rehabilitation plans, and the closure of the Vaal Disposal (dump) site at Vereeniging, where hazardous waste had historically been disposed of.

VEJA stated that the information was necessary to protect the constitutional right in section 24 of the Constitution (environment not harmful to health or wellbeing) and to ensure compliance with environmental legislation, including the National Environmental Management Act 107 of 1998 (NEMA), the National Environmental Management: Waste Act 59 of 2008 (Waste Act), and the National Water Act 36 of 1998 (Water Act).

ArcelorMittal denied both requests. It argued that VEJA had not met the threshold requirement in section 50(1)(a) of PAIA because it had not identified a sufficiently specific right, and that VEJA was trying to usurp the role of environmental regulators. ArcelorMittal also argued that the Environmental Master Plan was outdated, technically flawed, and irrelevant to its current operations.

VEJA approached the Gauteng Local Division of the High Court, which overturned the refusals and ordered ArcelorMittal to supply the requested records. ArcelorMittal appealed to the SCA.

Legal issues before the Court

The key issues before the SCA were:

- Whether VEJA had met the threshold requirement in section 50(1)(a) of PAIA by demonstrating that the requested records were "required for the exercise or protection of any rights".

- Whether reliance on section 24 of the Constitution, in combination with environmental legislation, was enough to justify a PAIA request against a private entity.
- Whether VEJA was unlawfully attempting to serve as a parallel environmental regulator.
- Whether the Environmental Master Plan could be refused on the basis that it was outdated or irrelevant.
- How PAIA should be interpreted in relation to private bodies whose activities have significant environmental impacts.

Court's findings and reasoning

The Court emphasised the growing constitutional and societal importance of environmental protection, transparency, and public participation. It reaffirmed that the word "required" in section 50(1)(a) of PAIA means "reasonably required" and must be assessed within the factual context of each case.

The Court held that VEJA had sufficiently identified the rights it aimed to protect. Section 24 of the Constitution, in conjunction with NEMA, the Waste Act, and the National Water Act 36 of 1998, explicitly recognises public participation, access to information, and transparent environmental governance.

Environmental degradation impacts the wider public, and civil society organisations play a crucial role in monitoring and advancing environmental rights.

The Court dismissed ArcelorMittal's claim that VEJA was trying to usurp the role of the state. Seeking access to information to evaluate compliance and potential harm is not the same as exercising regulatory authority. Information is often needed before litigation or regulatory action can be effectively taken.

On the Environmental Master Plan, the Court agreed that, even if outdated, it remained an essential baseline document. It contained extensive historical data gathered from years of specialist studies and had consistently been presented by ArcelorMittal as a key element of its environmental strategy, including in annual reports and interactions with regulators. Its supposed flaws and obsolescence could not justify outright dismissal, as those claims could only be properly assessed once the document was disclosed.

The Court also emphasised that PAIA applies horizontally. Although private bodies are not subject to the same disclosure obligations as the state, when their activities significantly impact constitutional rights and public interest, transparency is constitutionally required. ArcelorMittal's resistance to disclosure was inconsistent with both its public commitments to environmental engagement and the principles underlying

PAIA.

Court order

The appeal was dismissed. ArcelorMittal was ordered to submit all requested records to VEJA. Costs, including those for two counsel, were awarded against ArcelorMittal.

Why the case matters

This judgment reaffirms the right to access environmental information held by private corporations. It clarifies that civil society organisations can rely on section 24 of the Constitution and environmental statutes to meet the PAIA threshold when requesting information essential to safeguarding environmental rights.

The case highlights the importance of public participation, transparency, and accountability in environmental governance, even when information is held by private entities. It emphasises that environmental master plans, historical data, and compliance records cannot be hidden from scrutiny simply because they are inconvenient, contested, or outdated.

More broadly, the judgment firmly places environmental protection within constitutional values, highlighting intergenerational justice, sustainable development, and the importance of an active civil society in protecting the environment for both current and future generations.

5. Minister of Mineral Resources and Energy and others v Sustaining the Wild Coast NPC and others [2024] JOL 64974 (SCA)[13]

The NPC had, in the earlier judgment, challenged the authorisation given by the Minister to allow seismic exploration along South Africa's Wild Coast. This judgment holds that offshore oil and gas exploration decisions are subject to constitutional and administrative-law scrutiny, including strict requirements of meaningful consultation and consideration of community livelihoods, culture and environmental protection. However the court allowed a renewal of the authorisation to be granted.

Litigation history

The legal challenge to offshore seismic exploration along South Africa's Wild Coast has evolved through a series of interconnected legal proceedings spanning more than a decade. Impact Africa submitted an application in early 2013 for an offshore exploration right under the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA),

[13] https://www.saflii.org/za/cases/ZASCA/2024/84.html

supported by an Environmental Management Programme approved under the pre-2014 regulatory framework.

The exploration right was granted in 2014 and subsequently renewed in 2017 and again in 2020/2021. In late 2021, Shell, as operator, announced its intention to commence seismic surveys involving prolonged high-intensity underwater blasting. This prompted two urgent High Court applications.

One, initiated by Wild Coast communities and environmental justice organisations, resulted in an interim interdict halting the surveys and a full-bench judgment in September 2022 that set aside the exploration right and its renewals due to unlawful consultation and failure to consider relevant constitutional and environmental factors. A parallel urgent application by fishing and recreational organisations was dismissed. The Minister, Shell, and Impact Africa appealed to the SCA, while the successful applicants pursued a conditional cross-appeal concerning the requirement for environmental authorisation under NEMA.

Parties

The appellants comprised the Minister of Mineral Resources and Energy, Shell Exploration and Production South Africa BV, Impact Africa Limited, and BG International Limited. The respondents included Sustaining the Wild Coast NPC, members of the affected Wild Coast communities, the Dwesa-Cwebe Communal Property Association, individual community representatives, and public-interest environmental organisations ssuch as All Rise Attorneys for Climate and the Environment NPC, Natural Justice, and Greenpeace Environmental Organisation NPC.

Background and facts

In April 2014, the Minister granted an exploration right to Impact Africa for offshore oil and gas exploration along the Eastern Cape coast, to be exercised by Shell and BG. The right was renewed in December 2017 and again in July 2021. In October 2021, Shell announced it would commence seismic surveys involving repeated underwater airgun blasting over several months. Affected communities and environmental organisations approached the Eastern Cape Division of the High Court for urgent relief. An interim interdict was granted in December 2021. In September 2022, a specially constituted full bench reviewed and set aside the original exploration right and both renewals, finding that the decisions were procedurally unfair and failed to consider relevant factors, including community livelihoods, cultural and spiritual practices, and environmental impacts. The High Court declined to rule on whether an environmental authorisation under the National Environmental Management Act 107 of 1998 (NEMA) was required. The Minister, Shell, and Impact Africa appealed to the SCA.

Legal issues before the Court

The SCA was required to determine whether the review was barred by unreasonable delay under section 7(1) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA); whether the respondents were obliged to exhaust internal remedies under section 96 of the MPRDA; whether the grant and renewal of the exploration right complied with the requirements of procedural fairness and lawful decision-making under PAJA and the Constitution; whether relevant considerations were ignored; and what constituted appropriate, just and equitable relief under section 172(1)(b)[14] of the Constitution once unlawfulness was established.

Court's findings and reasoning

The SCA confirmed that the grant and renewal of an exploration right constitute administrative actions that engage section 33 of the Constitution and PAJA. It rejected the argument that the review was out of time, holding that neither affected communities nor the public had been given notice of the decisions themselves, as opposed to notice of the original application. The 180-day period only started once Shell's intention to begin seismic surveys became public in late 2021.

The Court further held that the failure to exhaust internal remedies was justified. Communities were not informed of appeal rights, seismic activities were imminent, and there was a reasonable apprehension of bias on the part of the Minister, making internal appeal procedures ineffective and illusory.

On the merits, the SCA upheld the High Court's finding that the consultation process was fundamentally flawed. Referencing Bengwenyama, the Court emphasised that meaningful consultation under the MPRDA and PAJA requires accessible notice, sufficient information, and a genuine opportunity to participate. Notices were issued in inappropriate languages and media, failed to reach affected communities, and did not allow for informed engagement. Consequently, decision-makers neglected to consider relevant factors, including impacts on customary fishing livelihoods, cultural and spiritual practices related to the ocean, and statutory coastal protection duties under the Integrated Coastal Management Act 24 of 2008. This made the decisions reviewable under section 6(2)(e)(iii) of PAJA. However, the SCA found that the High Court erred in its remedial approach by failing to properly engage section 172(1)(b) of the Constitution and by making an overly broad finding that authorising new oil and gas exploration was inherently inconsistent with South Africa's climate commitments. The Court stressed that

[14] Section 172(1)(b) provides: "(1) When deciding a constitutional matter within its power, a court—
(b) may make any order that is just and equitable, including—
(i) an order limiting the retrospective effect of the declaration of invalidity; and
(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

remedies must be proportionate, pragmatic, and tailored to the context.

Court order

The appeal was dismissed in essence, affirming the unlawfulness of the grant and renewals of the exploration right. However, the SCA amended the High Court's order by suspending the setting aside of the exploration right and its renewals until a further renewal application lodged in July 2023 under section 81 of the MPRDA is decided. The Court held that defects in the consultation process could be rectified through an additional public participation process as part of that renewal decision.

Why the case matters

This judgment reaffirms that decisions regarding offshore oil and gas exploration are subject to constitutional and administrative-law scrutiny, including strict requirements for meaningful consultation and consideration of community livelihoods, culture, and environmental protection. At the same time, it is controversial for its remedial approach. While confirming unlawfulness, the SCA prioritised proportionality, finality, and investment certainty by suspending the consequences of that finding and permitting a renewal process to proceed.

The case raises significant constitutional questions regarding the limits of just and equitable relief under section 172, the degree to which unlawful administrative actions may be temporarily upheld, and how courts should weigh the protection of rights against practical considerations in environmental and extractive-industry litigation.

The respondent has appealed against this SCA judgment to the Constitutional Court. The case was heard in September 2025, and a judgment is awaited.

Pollution, air quality and harm to health

6. Hichange Management (Pty) Ltd v Cape Produce Company (Pty) Ltd t/a Pelts Products 2004 (2) SA 393 (E)[15]

The case involved a tannery that was creating high levels of pollution to surrounding neighbours and the area. It requires that there is a duty of care on producers to ensure a clean and safe environment and it held that the state is obliged to enforce NEMA and ensure that companies comply with environmental legislation.

Willemien Du Plessis authored the key constitutional law implications of the case in a

[15] https://www.saflii.org/za/cases/ZAECHC/2005/14.rtf

journal article, which is summarised below (the case is unavailable).[16]

The article presents Hichange Investments *(Pty) Ltd v Cape Produce Co (Pty) Ltd* and Others 2004 (2) SA 393 (E) as an early and important development in South African environmental rights jurisprudence, particularly in giving concrete effect to section 24 of the Constitution through statutory enforcement under the National Environmental Management Act 107 of 1998 (NEMA).

The case arose from prolonged hydrogen sulphide pollution caused by a tannery, which the state repeatedly failed to control despite years of complaints, monitoring reports, and regulatory non-compliance. Against this backdrop of administrative inertia, the court was asked to intervene to protect health, property and environmental interests.

The article emphasises that *Hichange* is significant for its application of section 28 of NEMA,[17] which codifies the duty of care and incorporates the precautionary principle.[18] The court ordered the provincial environmental authority to compel the polluter to investigate, evaluate and assess the environmental impacts of its activities and to take reasonable measures to prevent further pollution. Crucially, this duty of care was enforced ex post facto, after harm had already occurred, demonstrating that environmental rights are not limited to preventive regulation but include corrective and remedial obligations where pollution persists.

Du Plessis links this directly to section 24(a) of the Constitution, which guarantees everyone the right to an environment not harmful to health or well-being. Although the court did not engage deeply with constitutional interpretation, the judgment indirectly vindicated environmental rights by insisting that statutory mechanisms be actively enforced to protect affected persons. The decision confirms that scientific uncertainty or regulatory complexity cannot justify inaction where pollution threatens constitutional environmental interests.

While critical of the court's reluctance to halt operations entirely, the article concludes that Hichange marks an important shift towards rights-based environmental governance. It affirms that environmental authorities have positive constitutional duties to act, and

[16] Du Plessis, Willemien, "Hichange – A New Direction in Environmental Matters? – Hichange Investments (Pty) Ltd v Cape Produce Co (Pty) Ltd t/a Pelts Products and Others 2004 (2) SA 393 (E)" (2004) 11 South African Journal of Environmental Law and Policy 135–151.

[17] Section 28 states: Every person who causes, has caused or may cause significant pollution or degradation of the environment must take reasonable measures to prevent such pollution or degradation from occurring, continuing or recurring, or, in so far as such harm to the environment is authorised by law or cannot reasonably be avoided or stopped, to minimise and rectify such pollution or degradation of the environment.

[18] The precautionary principle requires that where there is a credible risk of serious environmental or health harm, regulatory and remedial measures must not be delayed merely because scientific certainty is lacking. In South African law it is reflected in section 2(4)(a)(vii)–(viii) of the NEMA and supports a risk-averse, cautious approach that anticipates, prevents and, where necessary, minimises environmental harm, giving effect to section 24 of the Constitution.

that private litigants may invoke environmental legislation to enforce those duties in the public interest, anticipating later jurisprudence that treats environmental protection as integral to health, dignity and substantive constitutional justice.

7. Wildlife and Environment Society of South Africa v MEC for Economic Affairs, Environment and Tourism, Eastern Cape Provincial Government and Others (Eastern Cape High Court, Case No 178/2004, 28 April 2005)

The High Court recognised the important role of public-interest environmental litigation in giving effect to the section 24 right to an environment that is not harmful to health or wellbeing. However, it held that the protection against adverse costs orders in section 32(2) of the National Environmental Management Act 107 of 1998 applies only where environmental litigation is brought reasonably

Parties

The applicant was the Wildlife and Environment Society of South Africa (WESSA), a national environmental non-governmental organisation advocating for environmental protection.

The first and second respondents were the MEC for Economic Affairs, Environment and Tourism in the Eastern Cape, and the Director of Environmental Affairs in that department. The third respondent was Cape Produce Company (Pty) Ltd t/a Pelts Products, which operated a large tannery processing sheep skins and bovine hides.

The fourth respondent was C & M Consulting Engineers, the environmental consultants involved in the project.

Background and facts

Pelts Products sought authorisation to build and operate a waste-bed incinerator at its tannery. The incinerator was meant to dispose of solid tannery waste produced during leather processing.

The development was approved by the provincial environmental authorities under section 22 of the Environment Conservation Act 73 of 1989 after an environmental assessment process that included scoping reports and public participation.

WESSA participated in the environmental assessment process and raised concerns that the waste planned for incineration might contain high levels of hexavalent chromium, a toxic substance associated with leather tanning. It contended that the incinerator could release harmful pollutants into the atmosphere, threatening both the environment and human health. Due to these concerns, WESSA initiated review proceedings to overturn

the environmental authorisation.

It argued that the decision-makers had failed to properly consider the environmental risks linked to chromium emissions and that the approval thus compromised the constitutional environmental right in section 24 of the Constitution.

During the course of the litigation, however, it was revealed that the tannery had adopted a new waste-management system which separated chromium-containing effluent from the solid waste stream before chromium chemicals were added in the tanning process. This indicated that the waste to be incinerated contained only minimal naturally occurring chromium rather than the large quantities initially feared.

Once this became apparent from the respondents' answering affidavits, WESSA withdrew its review application.

Legal issues before the Court

Although the review was withdrawn, the court still needed to decide on the question of costs. In doing so, the court had to consider:

- The role of environmental public-interest litigation in realising the environmental right in section 24 of the Constitution.
- Whether litigants seeking to protect environmental rights should be shielded from adverse costs orders.
- The application of section 32(2) of the National Environmental Management Act 107 of 1998, which authorises courts not to award costs against litigants acting reasonably in the public interest or defending the environment.
- Whether WESSA acted reasonably in launching the litigation.

Court's findings and reasoning

The Court acknowledged the vital role played by environmental organisations in safeguarding the constitutional environmental right. Section 24 of the Constitution guarantees everyone the right to an environment that is not harmful to their health or well-being and mandates the state to protect the environment through reasonable legislative and other measures.

The Court recognised that organisations like WESSA help implement these constitutional duties by overseeing environmental decision-making and holding both the government and private entities accountable. Therefore, public-interest environmental litigation plays a vital role within South Africa's constitutional system.

The Court also recognised that section 32(2) of the NEMA reflects this constitutional

commitment by allowing courts to protect environmental litigants from adverse costs orders if they act reasonably out of concern for the public interest or environmental protection.

However, the protection provided by section 32(2) is not automatic. The court must decide whether the litigant acted reasonably and whether they made appropriate efforts to seek relief through other available means before approaching the court.

In this case, the court found that WESSA's concerns about chromium emissions were based on a misunderstanding of the waste management process used at the tannery. Its expert evidence relied on earlier scoping reports that described an outdated waste system rather than the final report explaining the new process.

The final scoping report clearly indicated that solid waste was removed before chromium chemicals were added in the tanning process, which meant that the chromium levels in the incinerated waste would be very low. Had WESSA and its experts properly examined the correct documentation, they would likely have realised that the environmental risk they feared did not exist.

Although the court accepted that WESSA acted in good faith and out of genuine concern for the environment, it held that the organisation had failed to exercise sufficient care in verifying the relevant facts before commencing litigation. Since the application was therefore unnecessary from the outset, the court concluded that the litigation had not been pursued reasonably.

Court order

The court ordered WESSA to pay the legal costs of the first and second respondents, including those arising from the withdrawal of the application.

Why the case matters

The case demonstrates the role of civil-society organisations in enforcing the constitutional environmental right in section 24 and affirms that public-interest environmental litigation is an important part of South Africa's environmental governance framework. At the same time, the judgment clarifies that the protective costs rule in section 32(2) of the NEMA applies only when environmental litigation is reasonably brought. Organisations seeking to uphold section 24 rights must therefore ensure that their factual and scientific foundations are solid before starting litigation.

8. Trustees for the Time Being of GroundWork Trust and Another v Minister of Environmental Affairs and Others [2022] ZAGPPHC 208[19]

This case concerned the environmentally degraded Highveld Priority Area where air pollution levels are extremely high and harmful to health. The court found that the environmental right set out in section 24 of the Constitution is immediately realisable and not dependent on the state's available resources or progressive realisation. The Minister was ordered to create proper regulations to ensure that residents in the affected areas were protected from an environment that was harmful to their health and wellbeing.

Parties

Applicants: Trustees for the Time Being of GroundWork Trust and Vukani Environmental Justice Alliance Movement in Action

Respondents: Minister of Environmental Affairs, National Air Quality Officer, President of the Republic of South Africa, MEC for Agriculture, Rural Development, Land and Environmental Affairs, Gauteng Province, MEC for Agriculture, Rural Development, Land and Environmental Affairs, Mpumalanga Province

Amicus curiae: United Nations Special Rapporteur on Human Rights and the Environment

Background and facts

This case concerns longstanding and severe ambient air pollution in the Highveld Priority Area, designated in 2007 under the National Environmental Management: Air Quality Act 39 of 2004 (Air Quality Act). The area includes major coal-fired power stations, petrochemical facilities, and mining operations and has, for more than ten years, consistently exceeded National Ambient Air Quality Standards.

An Air Quality Management Plan for the Highveld Priority Area ("the Highveld Plan") was issued in 2012. Its goal was to lower pollution to levels that meet national standards, with most targets planned for completion by 2020. The plan depended mainly on voluntary actions and explicitly anticipated enforceable regulations under section 20 of the Air Quality Act. However, no such regulations were enacted.

The government admitted that national standards were routinely surpassed, that the goals of the Highveld Plan were not achieved, that the plan was not adequately reviewed, and that residents faced serious health hazards. Despite this, successive Ministers failed

[19] https://www.saflii.org/za/cases/ZAGPPHC/2022/208.html

to enact binding regulations to implement and enforce the plan.

The applicants sought declaratory and mandatory relief, arguing that the persistent air pollution breached section 24(a)[20] of the Constitution and that the Minister's prolonged failure to regulate was unlawful and unconstitutional.

Legal issues before the Court

The Court was obliged to establish:

- Whether the prevailing air quality in the Highveld Priority Area constituted a breach of section 24(a) of the Constitution.
- Whether section 24(a) constitutes an unqualified and instantly realisable right.
- Whether the principle of subsidiarity prevented direct reliance on section 24(a), considering the existence of environmental legislation.
- Whether any limitation of section 24(a) can be justified under section 36 of the Constitution.[21]
- Whether section 20 of the Air Quality Act imposes a duty or merely confers discretion on the Minister to make regulations.
- How sustainability and intergenerational justice shape the interpretation of section 24.

Court's findings and reasoning

Section 24(a): unqualified and immediately enforceable

The Court held that section 24(a) creates a distinct, unqualified right to an environment that is not harmful to health or well-being. Unlike sections 26 and 27, and unlike section

[20] Section 24(b) was treated by the Court as distinct from section 24(a). While section 24(a) creates an unqualified and immediately enforceable right to an environment not harmful to health or well-being, section 24(b) imposes a qualified, programmatic obligation on the state to protect the environment for present and future generations through reasonable legislative and other measures aimed at preventing pollution, promoting conservation and securing ecologically sustainable development. Importantly, the Court held that section 24(b) operates to give effect to, rather than to limit or qualify, the minimum protection guaranteed by section 24(a); legislative and policy measures adopted under section 24(b) cannot be relied upon to justify ongoing harm that breaches section 24(a)

[21] Section 26 deals with the limitation of rights and states, "(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—
(a) the nature of the right;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose".

24(b), it is not internally qualified by progressive realisation, reasonableness or available resources.

Drawing on Constitutional Court jurisprudence concerning section 29(1)(a) (the right to basic education), the Court found that section 24(a) is immediately realisable. It entitles residents to protection against harmful environmental conditions in the present.

Given the admitted exceedances of national air quality standards and extensive evidence of health harm, the Court found that the conditions in the Highveld Priority Area represented an ongoing breach of section 24(a).

Subsidiarity

The respondents argued that, because legislation such as the Air Quality Act and NEMA had been enacted to give effect to the environmental right, the applicants were barred from relying directly on section 24(a).

The Court rejected this argument. It explained that the principle of subsidiarity does not apply when legislation and executive actions have failed to offer effective protection. In cases of regulatory inaction and systemic failure, litigants may directly invoke the Constitution. The presence of environmental legislation did not exempt the state from constitutional scrutiny.

Section 36 limitation

The Court held that subjecting residents to ongoing exposure to harmful air pollution amounted to a limitation of section 24(a). Such a limitation could only be justified under section 36 of the Constitution.

The respondents did not provide a valid justification under section 36. Merely citing complexity, economic reasons, energy policy, gradual improvements, or separation of powers was inadequate. Without a law of general application meeting section 36's requirements, the breach of section 24(a) was unjustified and unconstitutional.

Sustainability and intergenerational justice

The Court highlighted that sustainability underpins section 24 as a whole. Citing authority from the Constitutional Court and SCA, it reaffirmed that environmental protection and development are interconnected, and that the state acts as guardian of the environment for both current and future generations. The persistent failure to address significant air pollution demonstrated short-term thinking that conflicts with sustainable development and intergenerational justice.

Failure to promulgate regulations under the Air Quality Act

Despite section 20 of the Air Quality Act being written in permissive language, the Court ruled that, in context, it created a duty. Once a priority area is declared, voluntary measures have failed, and constitutional rights are being breached, the Minister is required to issue enforceable regulations. The Minister's extended failure to do so amounted to unreasonable delay, rendered the Highveld Plan ineffective, and was unlawful and unconstitutional.

Court order

The Court ordered that:

- The poor air quality in the Highveld Priority Area is declared to violate residents' section 24(a) constitutional right to an environment that is not harmful to their health and well-being.
- The Minister of Environmental Affairs is legally obliged to issue regulations under section 20 of the Air Quality Act to implement and enforce the Highveld Priority Area Air Quality Management Plan.
- The Minister is declared to have unreasonably delayed in preparing and implementing regulations to give effect to the Highveld Plan.
- The Minister is directed, within 12 months of the date of the order, to prepare, initiate and prescribe regulations under section 20 of the Air Quality Act to implement and enforce the Highveld Plan.
- In preparing the regulations, the Minister must carefully consider certain factors, including the enforceability of the plan, monitoring and reporting of emissions, public access to air-quality data, compliance and enforcement mechanisms, intergovernmental cooperation, regular review of the plan, and the treatment of minimum emission standards.
- Costs were awarded in favour of the applicants.

Why the case matters

This is a landmark judgment on environmental rights and air pollution. It affirms that section 24(a) is an unconditional, immediately enforceable right and cannot be diminished through progressive realisation, policy complexity or lengthy administrative delays. The case clarifies the limits of subsidiarity, affirms the centrality of section 36 in any attempt to justify environmental harm, and establishes that regulatory failure in the face of known risks can itself constitute a constitutional violation. It has broad significance for air-quality governance, climate-related litigation, and environmental accountability.

The Minister of Environmental Affairs appealed to the SCA as outlined below.

9. Minister of Environmental Affairs v Trustees for the Time Being of GroundWork Trust and Others [2025] ZASCA 43[22]

The SCA held that section 20 of the National Environmental Management: Air Quality Act 39 of 2004 (Air Quality Act), although framed in permissive language ("may"), created a power coupled with a duty required that regulations were necessary to implement and enforce the Highveld Priority Area Air Quality Management Plan. Because persistent unlawful air pollution showed that the plan was ineffective without binding enforcement measures, the Minister had a legal duty to make regulations.

Parties

Appellant: Minister of Environmental Affairs

Respondents: Trustees for the Time Being of GroundWork Trust, Vukani Environmental Justice Alliance Movement in Action, National Air Quality Officer, President of the Republic of South Africa, MEC for Agriculture, Rural Development, Land and Environmental Affairs, Gauteng, MEC for Agriculture, Rural Development, Land and Environmental Affairs, Mpumalanga

Amici curiae: UN Special Rapporteur on Human Rights and the Environment and the Centre for Child Law

Background

The appeal stemmed from the aforementioned 2022 High Court judgment, which declared that ongoing poor air quality in the Highveld Priority Area breached section 24(a) of the Constitution and that the Minister had a legal duty, under section 20 of the Air Quality Act, to promulgate regulations to implement and enforce the Highveld Priority Area Air Quality Management Plan.

The High Court additionally held that the Minister had unreasonably delayed and ordered the promulgation of regulations within 12 months, along with detailed remedial directions.

On appeal, the Minister did not dispute the declaration that section 24(a) had been breached. The appeal focused on whether section 20 created a legal duty to establish regulations and whether the High Court's remedial approach was allowable.

[22] https://www.saflii.org/za/cases/ZASCA/2025/43.html

Issues before the SCA

The SCA was required to determine:

- Whether section 20 of the Air Quality Act, which states that the Minister "may" prescribe regulations to implement and enforce a priority area air quality management plan, imposed a duty in the circumstances of this case.
- Whether the High Court was correct in determining an unreasonable delay.
- Whether the detailed directions issued by the High Court infringed the separation of powers.

Although the section 24(a) finding was not appealed, the SCA necessarily engaged with the constitutional and factual context underpinning that finding.

Court's findings and reasoning

- *Continuity with the High Court.* The SCA affirmed the High Court's core findings that residents of the Highveld Priority Area have, over many years, been exposed to air pollution detrimental to health and well-being, that this situation breaches section 24(a) of the Constitution, and that the Air Quality Act is legislation enacted to give effect to section 24(b) and must be interpreted in line with constitutional obligations.
- The SCA relied on the same uncontested evidence as the High Court, including departmental reports and socio-economic impact assessments demonstrating persistent exceedances of air quality standards, failure of voluntary compliance, and ongoing harm to vulnerable communities.
- *Interpretation of section 20 of the Air Quality Act*. The SCA upheld the High Court's conclusion that section 20 imposed a duty on the Minister in the circumstances, but refined the legal basis for that conclusion.
- The Court reaffirmed that statutory interpretation is a cohesive process requiring the examination of text, context, and purpose together in light of the Constitution. Although section 20 employs permissive language ("may"), the Court highlighted that permissive wording can grant a power alongside a duty.
- The SCA clarified that section 20 does not impose an absolute obligation in all cases. Instead, it grants a discretion that becomes a duty once a jurisdictional fact is established. That jurisdictional fact is necessity.
- Necessity is assessed objectively and does not rely on the Minister's subjective view. In this case, necessity was clearly proven. The Court highlighted the prolonged failure to meet the Highveld Plan's aims, the acknowledged lack of effectiveness of voluntary measures, internal departmental evaluations concluding that binding regulations were necessary, and the ongoing breach of section 24(a). The air

pollution remained dangerously above national standards, which was the factual basis for necessity. Once these conditions were present, the Minister was legally required to enact regulations. In that context, "may" effectively meant "must".

- *Constitutional framework and delay.* The SCA reinforced the High Court's reasoning by placing section 20 within a wider constitutional context, including sections 7(2), 24(a) and (b), and section 237 of the Constitution, which mandates constitutional obligations to be performed diligently and without delay.
- The Court dismissed reliance on progressive realisation or resource constraints as a justification for prolonged inaction, reaffirming that the right to an environment that does not harm health is not subject to the same internal limitations as traditional socio-economic rights.
- Even if section 20 were interpreted as granting a discretion, the SCA held that failing to exercise that discretion in situations of necessity would amount to an improper exercise of power and would be subject to review.
- *Remedy and separation of powers.* While upholding the declarations and the mandatory obligation to promulgate regulations, the SCA held that the High Court's detailed supervisory directions encroached too far into the executive domain. The Court therefore amended the order by removing those directions, while preserving the core declaratory and mandatory relief.

Court order

The appeal was dismissed, except for the modification of the High Court's order to remove the detailed remedial directions. The SCA confirmed that:

- The poor air quality in the Highveld Priority Area violates the constitutional right to an environment that is not harmful to health or well-being.
- The Minister has a legal obligation under section 20 of the Air Quality Act to establish regulations to implement and enforce the Highveld Priority Area Air Quality Management Plan.
- The Minister delayed unreasonably in doing so.
- The Minister must develop, introduce, and establish such regulations within 12 months.

Why the case matters

The SCA judgment consolidates and enhances the High Court's role in environmental constitutionalism. It affirms that prolonged regulatory inaction in the face of serious environmental damage is constitutionally unacceptable, clarifies when permissive statutory language creates binding obligations, and refines the scope of judicial remedies

without undermining substantive environmental protections.

Planning, mining, land-use and responsible state spheres

10. Director: Mineral Development, Gauteng Region and Sasol Mining (Pty) Ltd v Save the Vaal Environment and Others [1999] ZASCA 9[23]

Parties

Appellants: The Director: Mineral Development, Gauteng Region and Sasol Mining (Pty) Ltd

Respondents: Save the Vaal Environment (SAVE)- an association of local property owners and environmental advocates) and Ronsand Ranch (Pty) Ltd and three individual property owners along the Vaal River

Background and facts

Sasol Mining applied for a mining licence under section 9 of the Minerals Act 50 of 1991[24] to establish an open-cast coal mine on farms bordering the Vaal River.

SAVE, representing residents and landowners, opposed environmental concerns, most notably the destruction of the Rietspruit wetland, acid-water contamination of the Vaal Barrage, threats to fauna and flora, noise and dust pollution, and reduction in property value.

The Director of Mineral Development refused to consider SAVE's objections, arguing that environmental issues could only be addressed later when an Environmental Management Programme (EMP) was approved under section 39 of the Act. He granted Sasol Mining the licence without holding any public hearing. SAVE challenged this decision and succeeded in the Witwatersrand High Court.

The Director and Sasol Mining appealed to the SCA.

Legal issues before the Court

The main issue was whether the audi alteram partem rule (the right to be heard) applied to the Director's decision to grant a mining licence under section 9 of the Minerals Act. Specifically, whether persons affected by environmental concerns were entitled to a

[23] https://www.saflii.org/za/cases/ZASCA/1999/9.html

[24] The Minerals Act 50 of 1991 was largely repealed and replaced by the Mineral and Petroleum Resources Development Act 28 of 2002. The 2002 Act fundamentally changed the system by declaring that mineral resources are the common heritage of the people of South Africa and that the state is the custodian of those resources.

hearing before the licence was issued.

This raised an important constitutional question: how administrative fairness and environmental protection interact, especially in light of section 24 of the Constitution, which guarantees everyone the right to an environment not harmful to health or wellbeing and to have the environment protected for future generations.

Court's findings and reasoning

The SCA (Olivier JA, Mahomed CJ and others concurring) held that the audi alteram partem rule does apply at the licensing stage. Even though environmental approval was granted later under section 39, the granting of a mining licence "opens the door" to potentially irreversible activities. Therefore, interested and affected parties must be given an opportunity to object at the section 9 stage.

The Court reasoned:

- "Interested parties should at least be notified of the application and be given an opportunity to raise their objections in writing." (para 20) Under the South African Constitution, supported by the arguments presented by "Save" objecting to mining operations, all of Sasol's arguments were invalidated. The *audi alteram partem* rule was established to protect individuals from large bodies interfering with their lives through government bureaucracy. Sasol even attempted to argue that it was unjust to apply this rule to them, claiming that applying for a mining licence is not the same as starting the actual mining operation. The court dismissed this argument as fallacious, stating that the application for the licence indicates the intent and permits the possibility of future mining.

- Ultimately, the court rejected Sasol's appeal to proceed with acquiring a mining licence. This marked a development in South African constitutional law concerning the application of the audi alteram partem rule in environmental matters. The rule, originating in England in the 1800s and adopted by South Africa, was designed to protect individuals against potential harm from large entities within a capitalist framework.

- The enhancement allowed this rule to be applied to South Africa's constitutional definition of environmental rights, enabling residents to oppose activities like mining near their homes and imposing a duty on entities like Sasol to inform residents during the application process for a mining licence.

- The Court referred to the Brundtland Report's definition of sustainable development, which states "development which meets present needs without compromising the ability of future generations to meet their own needs," as the interpretive benchmark

for section 24(b).[25]

Court order

The appeal was dismissed with costs, including the costs of two counsel. The High Court's decision requiring that affected persons be given a hearing before a mining licence is granted was upheld.

Why the case matters

This case is regarded as the foundational precedent linking administrative fairness and environmental rights in South African law. It was the first appellate decision to incorporate section 24 into administrative procedures, establishing that:

- Environmental rights are tangible legal interests, not merely abstract policy goals, and they warrant procedural safeguards.
- Decision-makers need to evaluate environmental impacts as early as possible in any authorisation process.
- The audi alteram partem rule applies to all administrative acts that could have environmental consequences, even if those acts are preliminary.
- The case laid the groundwork for subsequent section 24 jurisprudence, such as Fuel Retailers [2007] ZACC 13 and Earthlife Africa (Thabametsi) [2017] ZAGPPHC 58, which further developed the sustainable-development principle.

11. BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment & Land Affairs 2004 (5) SA 124 (W), Case No 03/16337[26]

The applicant challenged the refusal of authorisation for a filling station, arguing that the Department unlawfully relied on a 3 km guideline. The Court held that environmental decisions under the Environment Conservation Act may include socio-economic factors and policy guidelines. The guideline was lawful and not rigidly applied. The decision was upheld and the application dismissed.

Parties

The applicant was BP Southern Africa (Pty) Ltd, a petroleum company seeking

[25] The Brundtland Report, formally "Our Common Future" was produced by a United Nations body in 1987 under a committee chaired by the Prime Minister of Norway. It developed key definitions and principles on sustainable development and economic growth and how these should be reconciled with protection of the environment. The report influenced the drafters of section 24 of the Constitution.

[26] https://www.saflii.org/za/cases/ZAGPHC/2004/18.html

authorisation to develop a filling station in Midrand. The respondent was the MEC for Agriculture, Conservation, Environment and Land Affairs, Gauteng, acting through the provincial environmental department as the competent authority under environmental legislation.

Background and facts

BP owned property zoned for a filling station and obtained municipal rezoning approval. Because filling stations are listed activities under the Environment Conservation Act 73 of 1989,[27] BP also required environmental authorisation.

The Gauteng Department refused approval, heavily relying on departmental guidelines that generally discourage allowing new filling stations within three kilometres of existing ones. The refusal cited conflicts with the guidelines, concerns about cumulative impacts, groundwater pollution risks, the precautionary principle, sustainability, and socio-economic impacts, including the proliferation of filling stations.

BP appealed internally without success and then submitted a review application, arguing that the Department had unlawfully and rigidly enforced an arbitrary distance rule and had improperly relied on economic considerations unrelated to environmental protection.

Legal issues before the Court

The key issues were:

- Whether the Department acted lawfully and reasonably in refusing environmental authorisation.
- Whether the Department was entitled, when applying section 22 of the Environment Conservation Act, to consider socio-economic factors, cumulative impacts, and sustainability concerns.
- How section 24 of the Constitution should guide the interpretation of pre-constitutional environmental laws and administrative decisions.
- Whether the departmental guidelines were unlawful or enforced rigidly and without proper regard to the merits.

Court's findings and reasoning

The Court dismissed BP's challenge and upheld the refusal of authorisation. Central to

[27] Most of the provisions of this Act have since been repealed or replaced by the National Environmental Management Act 107 of 1998 (NEMA), which now forms the core of South Africa's environmental law system. However, some provisions of the Environment Conservation Act 73 of 1989 remain in force.

the judgment is a thorough and influential interpretation of section 24 of the Constitution. The Court highlighted that environmental rights are justiciable constitutional rights and must be fully implemented in administrative decision-making.

Environmental protection encompasses not only the natural environment but also social, economic, and cultural aspects.

The Court held that section 24(b) expressly requires the state to ensure ecologically sustainable development while promoting justifiable economic and social progress.

This necessarily involves balancing environmental protection with socio-economic factors and recognising intergenerational equity. Development decisions must therefore look beyond immediate economic gains to consider long-term environmental and social impacts.

The Court rejected the argument that socio-economic factors fell outside the Department's mandate. It held that, properly interpreted through the lens of the Constitution and the National Environmental Management Act 107 of 1998 (NEMA), the concept of "environment" is broad and integrated. NEMA expressly requires consideration of socio-economic impacts, cumulative effects, sustainability, and a risk-averse, precautionary approach.

The Department was therefore entitled and indeed obliged to consider cumulative impacts such as groundwater contamination risks, the proliferation of filling stations, land-use sterilisation, and long-term sustainability. The precautionary principle justified refusing authorisation where uncertainty existed about environmental harm, particularly in light of evidence of a perched water table and pollution risks.

The Court further held that the guidelines were lawful policy instruments developed through public participation, consistent with constitutional and statutory obligations, and not rigid rules. On the facts, the Department had not applied them mechanically but had taken into account a range of relevant factors.

Overall, the decision was found to be rational, reasonable and consistent with section 24 and the evolving constitutional environmental framework.

Court order

The application for review was dismissed. The Department's refusal of environmental authorisation stood.

Why the case matters

This is a foundational South African environmental law judgment giving substantive

content to section 24 of the Constitution in administrative decision-making. It confirms that environmental governance must be integrated, precautionary and sustainability-focused, and that socio-economic considerations are an intrinsic part of environmental protection rather than an impermissible distraction from it.

The judgment is especially significant for its emphasis on intergenerational equity, cumulative impacts, and the constitutional recognition of environmental issues alongside property and economic rights. It signifies a clear shift away from a narrow, technocratic approach to environmental regulation towards a more holistic, rights-based, and constitutionally grounded perspective.

12. MEC for Agriculture, Conservation & Environment v HTF Developers [2007] ZACC 25[28]

The Court considered whether a directive under section 31A of the Environment Conservation Act requires prior public notice and comment under section 32. It held that section 31A enables swift, flexible responses to environmental harm and is not subject to the 30-day notice procedure. Instead, decisions must comply with procedural fairness under Promotion of Administrative Justice Act. The appeal was upheld and the directive found lawful.

Parties

Applicants: MEC for the Department of Agriculture, Conservation and Environment, Gauteng Province, and the Head of Department.

Respondent: HTF Developers (Pty) Ltd.

Background and facts

HTF planned a residential development on land designated by the provincial department as environmentally sensitive “virgin ground." The department believed that HTF’s clearing and construction activities posed a significant risk of environmental damage. Under section 31A of the Environment Conservation Act 73 of 1989 (ECA), the Head of Department issued a directive ordering HTF to halt development and submit an environmental management plan. HTF contested the directive, asserting that it was unlawful because the department did not follow the 30-day notice and comment procedure specified in section 32 of the ECA.

Legal issues before the Court

The main issue was whether the exercise of emergency environmental powers under

[28] https://www.saflii.org/za/cases/ZACC/2007/25.html

section 31A of the ECA is subject to the notice-and-comment procedure in section 32, which requires prior publication of a draft directive and at least 30 days for public comment.

Court's findings and reasoning

The Constitutional Court held that section 31A is not subject to the procedural requirements of section 32. The Court reasoned that the two provisions serve different purposes.

- Section 31A aims to tackle actual or threatened environmental damage caused by identifiable individuals and is intended to facilitate quick, adaptable action, even in urgent cases.
- Section 32 addresses legislative or regulatory measures of broad application and is designed to promote public participation prior to the adoption of major policy decisions.
- Interpreting section 31A as being limited by section 32 would undermine its purpose and result in unreasonable outcomes, especially when swift action is necessary to prevent environmental harm. The Court emphasised that environmental laws must be viewed in the context of section 24 of the Constitution and the principles outlined in the National Environmental Management Act (NEMA), which advocate for a risk-averse and cautious approach.
- Although section 31A is not subject to section 32, its exercise remains limited by procedural fairness requirements under the Promotion of Administrative Justice Act (PAJA). The affected party must be given adequate notice and a reasonable opportunity to make representations, but these requirements are flexible and may be adjusted where urgency justifies it. The 48-hour opportunity given to HTF was found to be procedurally fair in the circumstances.

Court order

The appeal was upheld. The SCA's decision was overruled, and it was declared that directives issued under section 31A of the ECA are not subject to the notice-and-comment procedure in section 32.

Why the case matters

This judgment is a leading authority on emergency environmental powers. It confirms that organs of state may act decisively to prevent or halt environmental harm without being delayed by lengthy public consultation procedures, provided that basic procedural fairness is observed.

The case affirms a purposive, constitutionally informed interpretation of environmental legislation and enhances the practical enforceability of the constitutional right to an environment that is not harmful to health or well-being.

13. Maccsand (Pty) Ltd v City of Cape Town and Others [2012] ZACC 7[29]

The Constitutional Court held that a mining right granted under the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA) does not override municipal zoning laws. Mining may only proceed if the land is appropriately zoned under the Land Use Planning Ordinance 15 of 1985 (LUPO). National mining regulation and municipal planning legislation therefore operate alongside each other.

Parties

The applicant was Maccsand (Pty) Ltd, a mining company that had obtained a mining permit and mining right. The first respondent was the City of Cape Town, the landowner and municipal planning authority. Other respondents included national and provincial ministers responsible for mining, environmental affairs, land reform, and local government. The Chamber of Mines of South Africa and Agri South Africa participated as amici curiae.

Background and facts

The Minister for Mineral Resources granted Maccsand a mining permit and a mining right under the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA) to mine sand dunes in Mitchell's Plain.

However, the land where the dunes were situated was owned by the City of Cape Town and classified as public open space or rural land under the Land Use Planning Ordinance 15 of 1985 (LUPO). The zoning did not allow mining.

Despite this, Maccsand commenced mining operations. The City approached the High Court for an interdict to halt the mining until the land was rezoned and the necessary environmental permissions were obtained.

The High Court granted the interdict. The SCA confirmed that LUPO applied to mining activities but set aside the part of the order relating to environmental authorisations under NEMA. Maccsand then appealed to the Constitutional Court.

[29] https://www.saflii.org/za/cases/ZACC/2012/7.pdf

Legal issues before the Court

The Constitutional Court had to determine:

- Whether a mining right or permit granted under the MPRDA authorises mining to proceed even if the land is not zoned for mining under LUPO.
- Whether municipal land-use planning laws apply to land used for mining.
- Whether the national mining legislation supersedes or overrides municipal planning legislation.

Court's findings and reasoning

The Court held that the MPRDA and LUPO regulate different subject matters and operate alongside each other. The MPRDA regulates mining and the exploitation of mineral resources, which falls within the competence of the national government. LUPO regulates land use and zoning, which falls within municipal planning powers.

Although mining is regulated nationally, it necessarily takes place on land. Municipal planning legislation, therefore, still applies to determine whether the land may be used for that purpose. The Court rejected the argument that applying LUPO would enable municipalities to veto national mining decisions. Instead, it clarified that the Constitution allows overlaps between different levels of government, and cooperation among them is necessary. The Court emphasised that the MPRDA itself states that mining rights are subject to "any relevant law", which includes land-use planning legislation such as LUPO.

Court order

The Constitutional Court:

- Granted leave to appeal.
- Dismissed the appeal.
- Confirmed that mining cannot proceed unless the land is appropriately zoned under LUPO.
- Refused the MEC's cross-appeal and application for direct access.
- Ordered the Minister for Mineral Resources to pay the City's costs in the Constitutional Court.

Why the case matters

This case clarifies the relationship between national mining law and municipal planning law. It confirms that a mining right granted under the MPRDA does not override local

land-use planning controls. Mining companies must therefore comply with municipal zoning laws and environmental regulations before mining can commence. More broadly, the case illustrates the constitutional principle of cooperative governance: different spheres of government may exercise overlapping powers, and their decisions must work together rather than displacing one another.

14. Le Sueur and Another v eThekwini Municipality 2013 JDR 0178 (KZP)[30]

The applicants challenged changes to a municipal planning scheme that introduced new zoning and land-use controls to protect environmentally sensitive areas. They argued that the municipality acted unlawfully and had no power to regulate environmental matters. The Court held that the changes were valid and properly adopted under transitional legal rules, and that municipalities may address environmental concerns as part of planning. The application was dismissed.

Parties

R A Le Sueur and Others v eThekwini Municipality and Others (KwaZulu-Natal High Court, Pietermaritzburg).

Background and facts

The applicants challenged amendments to the eThekwini Town Planning Scheme that introduced the Durban Metropolitan Open Space System (D-MOSS). They argued that the municipality lacked the constitutional authority to regulate environmental matters, contending that "environment" falls solely within the jurisdiction of national and provincial governments under Schedule 4 Part A of the Constitution.

Legal issues before the Court

Whether a municipality possesses the constitutional and statutory authority, via municipal planning instruments, to regulate environmental and biodiversity protection at the local level.

Court's findings and reasoning

The Court rejected the argument that municipalities are excluded from environmental regulation. It held that municipal planning, a Schedule 4 Part B functional area, necessarily includes environmental and conservation considerations. The Court emphasised that governmental powers are not exercised in "hermetically sealed compartments" and that

[30] https://www.saflii.org/za/cases/ZAKZPHC/2013/6.html

environmental governance is an area of concurrent and cooperative responsibility across all three spheres of government.

The Court based its decision on section 24 of the Constitution, which mandates all organs of state, including municipalities, to protect the environment through reasonable legislative and other measures. It also relied on section 152(1)(d), which designates promoting a safe and healthy environment as an objective of local government. National legislation, such as the Local Government:

Municipal Systems Act 32 of 2000 and NEMA, explicitly recognises the role of municipalities in environmental management through integrated development plans, spatial development frameworks, and land-use controls.

The Court held that environmental protection measures included in town planning schemes are not an unlawful expansion into the 'environmental' field by municipalities. Instead, they are a lawful exercise of municipal planning powers that inherently involve environmental protection at the local level.

Court order

The challenge to the municipality's authority to adopt the D-MOSS amendments was dismissed. The Court held that the municipality acted within its constitutional and statutory powers.

Why the case matters

The judgment confirms that municipalities have lawful authority to safeguard the environment through their planning tools. It states that biodiversity conservation, land-use regulation, and environmental protection are essential parts of municipal planning, and that local government has a constitutionally recognised role in environmental governance within a cooperative, multi-sphere system.

15. Minister of Local Government, Environmental Affairs and Development Planning of the Western Cape v Lagoonbay Lifestyle Estate (Pty) Ltd and Others [2013] ZACC 39 (Constitutional Court)[31]

The Constitutional Court held that the Land Use Planning Ordinance 15 of 1985 remained valid and authorised provincial involvement in certain rezoning decisions. For example, province can refuse rezoning applications based on planning and environmental considerations. However, subdivision decisions in this case fell within municipal authority, and the provincial refusal of subdivision was set aside.

Parties

The applicant was the Minister of Local Government, Environmental Affairs and Development Planning in the Western Cape Provincial Government. The first respondent was Lagoonbay Lifestyle Estate (Pty) Ltd, the developer proposing a large residential estate in the Southern Cape, and the second respondent was the George Municipality. The third respondent was the Cape Windlass Environmental Action Group, a local environmental organisation representing concerned residents.

Background and facts

Lagoonbay proposed a large-scale development on approximately 655 hectares of land near George in the Garden Route. The project included residential estates, golf courses, a hotel, and other facilities. To proceed with the development, Lagoonbay required several approvals, including amendments to the regional structure plan, environmental authorisation, rezoning, and subdivision approvals.

The land was initially designated as "Agriculture/Forestry" in the George and Environs Urban Structure Plan. The plan was amended in 2007 to allow for potential township development. However, a condition was imposed that the rezoning application still required provincial approval, as the development involved regional and provincial planning issues.

In 2010, the George Municipality approved Lagoonbay's applications for rezoning and subdivision. These applications were subsequently referred to the Provincial Minister, who rejected them in 2011. The Minister based his decision on provisions of the Land Use Planning Ordinance 15 of 1985 (LUPO) and determined that the development was undesirable due to factors such as environmental concerns, water supply risks, loss of agricultural land, economic uncertainties, and inconsistency with provincial spatial

[31] https://www.saflii.org/za/cases/ZACC/2013/39.pdf

planning policies.

Lagoonbay challenged the refusal in the High Court, arguing that under the Constitution, rezoning and subdivision decisions fell within the exclusive competence of municipalities as part of "municipal planning". The High Court rejected the challenge and upheld the Minister's decision.

The SCA overturned that decision. It held that rezoning and subdivision fell within municipal planning powers and that the Provincial Minister therefore lacked authority to refuse the applications. The Minister appealed to the Constitutional Court.

Legal issues before the Court

The Constitutional Court had to determine:

- Whether the Provincial Minister had the power under LUPO to decide the rezoning and subdivision applications.
- Whether LUPO's provisions allowing provincial involvement in such decisions have been impliedly repealed or amended by the Constitution.
- Whether the decisions of the Provincial Minister to refuse were lawful.
- Whether those decisions were reviewable under the Promotion of Administrative Justice Act 3 of 2000 (PAJA).

Court's findings and reasoning

The Court held that LUPO remained valid legislation and had not been impliedly repealed or amended by the Constitution. Since Lagoonbay had not directly challenged the constitutionality of LUPO, the Court had to decide the dispute on the basis that the Ordinance was still valid.

On the interpretation of LUPO, the Court held that the Provincial Minister was competent under the Ordinance to decide the rezoning application. The relevant structure plan amendment and LUPO provisions permitted provincial involvement in rezoning decisions where provincial planning interests were involved. The Minister's refusal of the rezoning application was therefore lawful.

However, the Court reached a different conclusion regarding the subdivision. Under LUPO and the applicable scheme regulations, municipalities were the authorised decision-makers for subdivision applications unless they chose to refer the matter to the province. In this case, the George Municipality had elected to decide the subdivision application itself. The Provincial Minister, therefore, lacked authority under LUPO to refuse the subdivision application.

The Court also dismissed Lagoonbay's challenges under PAJA regarding the substance of the rezoning decision. The Provincial Minister had wide discretion under LUPO to evaluate the "desirability" of the proposed development and had considered various planning and environmental factors. The decision was therefore neither irrational nor unreasonable.

Court order

The Constitutional Court granted leave to appeal and partially upheld the appeal.

- The Provincial Minister's refusal of the rezoning application was upheld as lawful.
- The Provincial Minister's refusal of the subdivision application was set aside because he lacked authority under LUPO.
- The subdivision application was remitted to the George Municipality for reconsideration in light of the Court's judgment.

Why the case matters

The case clarifies the relationship between provincial and municipal planning powers within the constitutional system of cooperative government. It confirms that older planning legislation such as the LUPO remains valid unless it is directly challenged and set aside.

The judgment also shows how section 24 environmental factors and wider planning policies can fairly influence land-use decisions. Provincial authorities may reject rezoning applications if developments endanger environmental sustainability, spatial planning objectives, or the careful use of natural resources.

Table of cases

Case citation	Key constitutional principles	Core rights established
Climate change and sustainable development		
Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Mpumalanga Province [2007] ZACC 13	Sustainable development is a constitutional value that underpins section 24. Obligation of developers is to balance environmental protection and socio-economic development.	Right to an environment protected through ecologically sustainable development that integrates environmental and socio-economic considerations.
Earthlife Africa Johannesburg v Minister of Environmental Affairs and	Section 24 right requires the state to ensure that full climate change impact	A power station can have major impact on the environment so climate

Case citation	Key constitutional principles	Core rights established
Others [2017] ZAGPPHC 58; [2017] 2 All SA 519 (GP)	assessments are undertaken prior to authorisations.	change impact assessments are mandatory prior to approval of carbon-intensive projects.
African Climate Alliance v Minister of Mineral Resources and Energy [2023] ZAWCHC	Climate change considerations are indispensable in energy-sector decision-making; failure to assess climate impacts undermines section 24(a) and (b).	The state must consider climate change impacts prior to introducing power solutions such as increased coal-fired power.
Information, transparency and public participation		
Company Secretary of ArcelorMittal South Africa Ltd and Another v Vaal Environmental Justice Alliance [2014] ZASCA 184	Information regarding private sector industrial development must be publicly available to ensure oversight of polluting activities.	Right of affected communities to access environmental information.
Minister of Mineral Resources and Energy and others v Sustaining the Wild Coast NPC and others [2024] JOL 64974 (SCA)	Meaningful consultation as a constitutional requirement; public participation must be genuine and accessible.	Right of communities to participate in decisions affecting their environment.
Pollution, air quality and harm to health		
Hichange Management (Pty) Ltd v Cape Produce Company (Pty) Ltd t/a Pelts Products 2004 (2) SA 393 (E)	Substantive content is given to health and well-being under section 24(a) and producers have a duty of care to prevent environmental degradation.	Right to an environment not detrimental to health and well-being.
Wildlife and Environment Society of South Africa v MEC for Economic Affairs, Environment and Tourism, Eastern Cape Provincial Government and Others (Eastern Cape High Court, Case No 178/2004, 28 April 2005)	Environmental litigation initiated by watch-dog groups is important litigation, but must be reasonably brought.	If an environmental NGO or activist group initiates environmental litigation, their factual and scientific foundations must be sound, or they risk adverse cost order.
Trustees for the Time Being of GroundWork Trust and Another v Minister of	Chronic air pollution constitutes an ongoing breach of section 24(a)	Right to clean air and an environment not harmful to health.

Case citation	Key constitutional principles	Core rights established
Environmental Affairs and Others [2022] ZAGPPHC 208	and there is a positive duty on the state to enforce air quality standards.	
Minister of Environmental Affairs v Trustees for the Time Being of GroundWork Trust and Others [2025] ZASCA 43	Confirmation that persistent unlawful air pollution violates section 24(a) and that there is a constitutional obligation on the state to prescribe regulations to control environmental harm.	Enforceable right to state action protecting health from air pollution.
Planning, mining, land-use and responsible state spheres		
Director: Mineral Development, Gauteng Region and Another v Save the Vaal Environment [1999] ZASCA 9	Environmental considerations must be assessed at the earliest administrative stage and objectors must be heard.	Right to procedurally fair environmental decision-making.
BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment & Land Affairs 2004 (5) SA 124 (W)	Environmental rights and environmental protection requires the state to ensure ecologically sustainable development.	Long term environmental consequences must be considered, and a proliferation of petrol stations is not desirable environmentally.
MEC for Agriculture, Conservation & Environment v HTF Developers [2007] ZACC 25	NEMA principles are binding on all organs of state and environmentally sound governance is constitutionally required.	Emergency environmental power may be used to prevent or halt harmful environmental activities by the private sector.
Maccsand (Pty) Ltd v City of Cape Town and Others [2012] ZACC 7	Parallel operation of mining, planning and environmental authorisations; horizontal application of environmental regulation.	Right to environmental protection through coordinated regulatory compliance.
Le Sueur and Another v eThekwini Municipality 2013 JDR 0178 (KZP)	Municipalities have authority to protect the environment and environmental protection is integral to municipal planning.	Right to environmental protection through local government regulation.
Minister of Local Government, Environmental Affairs and	Integrated environmental management across spheres of government;	Right to environmental protection through integrated, multi-sphere

Case citation	Key constitutional principles	Core rights established
Development Planning WC v Lagoonbay Lifestyle (Pty) Ltd [2013] ZACC 39; 2014 (1) SA 521 (CC)	constitutional permissibility of provincial oversight of municipal planning where environmental protection is implicated.	planning and development control.

Current enforceable rights

- Sustainable economic developed must be linked to environmental protection.
- Environmental authorisations must consider climate change.
- National energy planning must consider climate change and health impacts.
- The public has the right to have access to environmental information held by private corporations that impact on their safety and rights.
- Decisions regarding offshore oil and gas exploration are subject to constitutional and administrative law scrutiny.
- There is a duty of care on producers to ensure a safe and clean environment when undertaking commercial activities.
- Environmentalists and activists that speak out about environmental degradation can be protective against negative cost orders if the cases they bring are reasonable.
- Environmental rights are immediately realisable and not like some of the other socio-economic rights that may be progressively realised based on the availability of state resources.
- Prolonged regulatory inaction in the face of serious environmental damage is constitutionally unacceptable.
- Decision-makers need to evaluate environmental impacts as early as possible in any authorisation process.
- The audi alteram partem rule applies to all administrative acts that could have environmental consequences, even if those acts are preliminary.
- Organs of state may act decisively to prevent or halt environmental harm without being delayed by lengthy public consultation procedures, provided that basic procedural fairness is observed.
- A mining right granted under the MPRDA does not override local land-use planning controls. Mining companies must therefore comply with municipal zoning laws and environmental regulations before mining can commence.

- Municipalities have lawful authority to safeguard the environment through their planning tools and biodiversity conservation, land-use regulation, and environmental protection are essential parts of municipal planning.
- Provincial authorities may reject rezoning applications if developments endanger environmental sustainability, spatial planning objectives, or the careful use of natural resources.

Housing rights

> *It is not only the dignity of the poor that is assailed when homeless people are driven from pillar to post in a desperate quest for a place where they and their families can rest their heads. Our society as a whole is demeaned when state action intensifies rather than mitigates their marginalisation. The integrity of the rights-based vision of the Constitution is punctured when governmental action augments rather than reduces denial of the claims of the desperately poor to the basic elements of a decent existence.*[1]

Cases in this chapter

1. Government of the Republic of South Africa v Grootboom 2001 (1) SA 46 (CC) 136
2. Port Elizabeth Municipality v Various Occupiers [2004] JOL 13007 (CC) Constitutional Court Case No: CCT 53/03 139
3. President of the Republic of South Africa and Others v Modderklip Boerdery (Pty) Ltd 2005 (5) SA 3 (CC); 2005 (8) BCLR 786 (CC) 141
4. Occupiers of 51 Olivia Rd, Berea Township & another v City of Johannesburg & others, [2008] JOL 21386 (CC) 143
5. The Occupiers of ERF 101, 102, 104 and 112, Shorts Retreat, Pietermaritzburg v Daisy Dear Investments (Pty) Ltd & others, [2009] JOL 23840 (SCA) 146
6. Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others (Centre on Housing Rights and Evictions and Another, Amici Curiae) [2009] ZACC 16; 2010 (3) SA 454 (CC); 2009 (9) BCLR 847 (CC) (heard 21 August 2008; decided 10 June 2009) 146
7. City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another [2011] ZACC 33; 2012 (2) BCLR 150 (CC); 2012 (2) SA 104 (CC) 149
8. Occupiers of Skurweplaas 353 JR v PPC Aggregate Quarries (Pty) Ltd & others, [2012] JOL 28170 (CC) 152
9. Motswagae and others v Rustenburg Local Municipality and another (Lawyers for Human Rights as amicus curiae), [2013] JOL 30036 (CC) 153
10. Zulu and others v eThekwini Municipality and others 2014 (8) BCLR 971 (CC) 155
11. Occupiers of Erven 87 and 88 Berea v De Wet NO and another, 2017 (8) BCLR 1015 (CC) 157

[1] Sachs J, Port Elizabeth Municipality v Various Occupiers [2004] JOL 13007 (CC) Constitutional Court Case No: CCT 53/03, para 18.

12. Dladla and others v City of Johannesburg and another (Centre for Applied Legal Studies and another as amici curiae) [2017] JOL 39329 (CC) 159

13. Melani and Others v City of Johannesburg and Others [2016] ZAGPJHC 55; (2016) 3 All SA 1 (GJ) 161

14. Minister for Transport and Public Works: Western Cape & Others v Adonisi and Others (522/2021 & 523/2021) [2024] ZASCA 47 (12 April 2024) 163

15. Charnell Commando and Others v City of Cape Town and Another [2024] ZACC 27 167

16. Mchunu and Others v Executive Mayor, Ethekwini Municipality and Others (13904/2011) [2012] ZAKZDHC 78; 2013 (1) SA 555 (KZD) (19 September 2012) 169

17. Philane Hlophe and Residents of Chung Hua Mansions v City of Johannesburg (South Gauteng High Court, Case No. 48102/2012) 169

18. City of Johannesburg Metropolitan Municipality v Hlophe and Others [2015] ZASCA 16..... 170

The Constitution

Section 26

Everyone has the right to have access to adequate housing.

The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

Section 28(1)(c): Children

Every child has the right to basic nutrition, shelter, basic health care services and social services.

These provisions, taken together, establish both a general right of access to adequate housing for all, and a specific right to shelter for children, alongside constitutional protection against arbitrary eviction or demolition.

General points

This section briefly maps the progression of housing cases, indicating how clearly the cases progressed over time. All the cases mentioned are then summarised in detail for the remainder of the chapter.

Over time, it has become clear that the jurisprudence on section 26 of the Constitution has progressively given substantive and procedural content to the right of access to adequate housing. Through a series of landmark judgments, the Constitutional Court and higher courts have clarified the state's obligations, the role of municipalities, and the safeguards that must govern evictions and relocations.

Taken together, the cases establish both a duty to prevent homelessness and a framework for resolving housing disputes in a manner that is constitutionally just and equitable.

The Constitutional Court first engaged directly with section 26 in Government of the Republic of South Africa v Grootboom [2000] ZACC 19. The Court held that the state must adopt and implement a reasonable housing programme that is comprehensive, coordinated, and capable of responding to the needs of those in desperate circumstances.

This judgment confirmed that socio-economic rights are judicially enforceable and that housing programmes must include measures for people facing an immediate crisis, particularly those without shelter.

In Port Elizabeth Municipality v Various Occupiers [2004] ZACC 7, the Court linked section 26(3) of the Constitution to the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998. It held that eviction orders may be granted only if they are just and equitable, requiring courts to balance the rights of property owners against the personal circumstances of occupiers. The risk of homelessness was identified as a central and weighty consideration in this enquiry.

President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd [2005] ZACC 5 confirmed that the primary responsibility for resolving large-scale unlawful occupations lies with the state rather than with private landowners. The Court held that the state must be joined to eviction proceedings where its obligations are implicated and must participate in developing a solution that respects both the rights of occupiers and the interests of landowners.

The Court then established a set of procedural safeguards governing evictions and relocations. In Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg [2008] ZACC 1, it introduced the duty of meaningful engagement between municipalities and occupiers facing eviction. This obligation was extended in Residents of Joe Slovo Community, Western Cape v Thubelisha Homes [2009] ZACC 16, where the Court held that relocations must be accompanied by the provision of adequate temporary accommodation and must preserve the prospect of access to permanent housing.

A further strand of the jurisprudence concerned municipal obligations. In City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another [2011] ZACC 33, the Court confirmed that municipalities bear a constitutional duty to provide emergency accommodation where eviction would result in homelessness. This obligation requires advance planning and budgeting and renders municipalities necessary parties to eviction proceedings.

Subsequent cases reinforced this principle. In City of Tshwane Metropolitan Municipality v Skurweplaas 353 JR (Pty) Ltd [2012] ZASCA 96, the Court confirmed that even short-term occupiers may not be evicted into homelessness. In Mchunu v Executive Mayor of the eThekwini Municipality (KwaZulu-Natal High Court), the Court emphasised that municipal officials may be held personally accountable for failing to implement court-ordered housing remedies. Motswagae v Rustenburg Local Municipality [2013] ZAGPPHC 110 clarified that interference with occupation without a court order constitutes an unlawful eviction, while Zulu v eThekwini Municipality [2014] ZAKZDHC 6 held that demolitions are functionally equivalent to evictions and must comply with PIE.

Questions of enforcement and remedial supervision arose in the Hlophe litigation. The High Court employed a structural interdict to supervise municipal compliance with housing obligations. On appeal, both the SCA and the Constitutional Court confirmed that municipalities are bound by court orders, while cautioning that judicial remedies must respect the separation of powers and avoid undue intrusion into executive functions.

The Court also confirmed that municipalities are bound by national housing programmes. In Slovo Park Residents' Association v City of Ekurhuleni Metropolitan Municipality [2016] ZACC 35, it held that the Upgrading of Informal Settlements Programme, as set out in the National Housing Code, is binding and must be applied where its criteria are met. Berea v De Wet NO [2017] ZACC 18 required courts to conduct a full just-and-equitable enquiry even where occupiers consent to eviction and reaffirmed that municipalities must be joined where homelessness is a potential outcome. In Dladla v City of Johannesburg [2017] ZACC 42, the Court confirmed that residents in temporary emergency accommodation continue to enjoy constitutional rights, including dignity, privacy, and family life.

More recent cases have addressed the housing implications of urban redevelopment and gentrification. In Adonisi v Minister of Transport and Public Works (Western Cape) [2024] ZASCA 40, the SCA declined to order the provision of social housing on a specific site, emphasising the primacy of legislative and policy frameworks. By contrast, in Charnell Commando and Others v City of Cape Town and Another [2024] ZACC 27, the Constitutional Court held that the City's refusal to provide inner-city emergency accommodation was unconstitutional. It directed the City to adopt a Temporary Emergency Accommodation Policy and to provide accommodation reasonably close to residents' original homes.

Viewed cumulatively, the section 26 jurisprudence reflects a clear progression: from establishing the standard of reasonableness in Grootboom; to requiring just and equitable evictions in Port Elizabeth Municipality and Modderklip; to embedding meaningful engagement in Olivia Road and Joe Slovo; to imposing a concrete duty on municipalities to prevent homelessness in Blue Moonlight and its successors; to enforcing binding programme obligations in Slovo Park; and, finally, to confronting the spatial consequences of gentrification in Commando. Through this body of case law, section 26 has been progressively given substantive content and procedural force.

However, there is still a long way to go before the quality of human settlements meets a standard that one could comfortably regard as adequate and aligned with the vision in the Constitution. One of the main ongoing obstacles to a fair and just housing system is that low-income housing continues to be pushed to the peripheries of towns and cities, reinforcing the very spatial divide that existed during apartheid. As recent cases start to challenge this and argue for spatial equality, one can only hope that this becomes real for impoverished and excluded people.

Statistics[2]

These figures synthesise findings from Census 2022 and the General Household Survey (GHS) 2023 to provide a picture of housing and human settlements in South Africa. The data show the distribution of formal and informal dwellings, the scale of RDP and subsidised housing, the persistence of informal settlements, and government expenditure on housing subsidy programmes. Where figures differ between Census and GHS, averages are presented for clarity.

Dwelling types

Census 2022 reported that 88,5% of households lived in formal dwellings, 8,1% in informal dwellings, and 3,1% in traditional dwellings. By contrast, the GHS 2023 estimated that 83,5% of households lived in formal dwellings, 12,2% in informal dwellings, and 3,9% in traditional dwellings. Averaging these figures suggests that approximately 86% of households live in formal housing, 10% in informal dwellings, and 3,5% in traditional dwellings. Provincially, informal housing is most concentrated in the Western Cape, Gauteng, North West, and the Northern Cape, while traditional dwellings remain common in the Eastern Cape and KwaZulu-Natal. Informal dwellings are concentrated in metropolitan areas and secondary cities, reflecting ongoing urbanisation and migration pressures.

[2] Census 2022 and General Household Survey 2023

RDP and subsidised housing

Since 1994, government has added more than 3,4 million housing units and completed over 1,2 million serviced sites, alongside the transfer of title deeds for pre-1994 state rental stock. Census 2022 reported that 4,1 million households, or nearly 30% of all households, lived in RDP or subsidised housing. This illustrates the significant scale of the subsidy programme, though its distribution is uneven. Almost half of all RDP households (1,9 million) are located in metropolitan municipalities, with particularly large concentrations in Ekurhuleni (400 999 households), Johannesburg (379 373), and Cape Town (319 450). By contrast, rural municipalities such as John Taolo Gaetsewe in the Northern Cape recorded as few as 7 321 households in RDP housing. Smaller municipalities such as Kou-Kamma in the Eastern Cape and Ledwa-Teemane in the North West had extremely high proportions of RDP housing (over 70% of households).

Informal settlements

Informal settlements remain a critical housing challenge. Both Census 2022 and the GHS 2023 suggest that between 8% and 12% of households live in informal dwellings. Applying this range to South Africa's 17,8 million households, with an average household size of 3,5 people, indicates that around 5 million people reside in informal housing. However, this figure includes backyard shacks as well as informal settlements, so the figure for settlements specifically may be somewhat lower. The Department of Human Settlements reports that there are approximately 4 705 informal settlements nationally, though exact population figures for these are not always available. Media and research reports note concentrations in Gauteng, the Western Cape, and the Northern Cape, reflecting migration to urban areas and the persistence of poverty.

Housing subsidy funding and expenditure

Housing subsidy programmes are primarily funded through conditional grants administered by the Department of Human Settlements. In 2023/24, the Human Settlements Development Grant (HSDG) was allocated R13,77 billion, of which provinces spent 97% (R13,35 billion). For 2024/25, the HSDG allocation is R13,66 billion. The Urban Settlements Development Grant (USDG) received R8,71 billion, while the Informal Settlements Upgrading Partnership Grants were allocated R3,25 billion for provinces and R4,52 billion for municipalities. In total, the Department of Human Settlements' Vote 33 for 2024/25 amounts to R33,15 billion, of which R31,6 billion is transfer payments. These allocations underscore the significant financial commitment to subsidised housing, though delivery challenges remain, especially in well-located urban areas.

Conclusion

Taken together, the data show that the majority of South African households live in formal dwellings, with nearly a third benefiting from government-subsidised housing. Nonetheless, around 5 million people still live in informal conditions, demonstrating the depth of the housing backlog. The state continues to commit substantial resources to housing subsidy programmes, yet the uneven spatial distribution of both RDP units and informal settlements highlights the ongoing challenge of achieving spatial justice and integration in South Africa's cities and towns.

Cases[3]

1. Government of the Republic of South Africa v Grootboom 2001 (1) SA 46 (CC)[4]

This is a landmark judgment that both created a clear obligation on the state to provide emergency accommodation to people rendered homeless. It also set out the test for what a reasonable response by the state is, in regard to housing provision or any other state obligation. The state was ordered to provide emergency housing to Mrs Grootboom and her community.

Parties

Applicants: Irene Grootboom and others, representing approximately 900 adults and children who were living in desperate conditions following their eviction.

Respondents: Government of the Republic of South Africa, Cape Metropolitan Council, Oostenberg Municipality, and others.

Background and facts

- The applicants lived in an informal settlement in Wallacedene, Cape Town. Many had been on the state's housing waiting list for years without receiving a house.
- In 1999, they moved onto private land, from which they were evicted, leaving them without shelter in midwinter.
- They set up a temporary camp on a sports field in appalling conditions.

[3] The cases were identified primarily by working through the SERI website which contains almost the entire record of housing related cases since Grootboom. In addition, a useful publication was also drawn on for cases earlier than 2016: SERI: Evictions and Alternative Accommodation in South Africa 2000-2016: An analysis of the jurisprudence and implications for local government.

[4] https://www.saflii.org/za/cases/ZACC/2000/19.html

- It was argued that the government's housing programme failed to provide for those in crisis situations with no access to land, shelter, or housing, contrary to section 26 of the Constitution.

Legal issues before the Court

The case raised questions about the scope of the right of access to adequate housing under section 26(1) of the Constitution. It also required the Court to consider the extent of the state's obligation, under section 26(2), to take reasonable legislative and other measures, within its available resources, to progressively realise that right.

In addition, the Court had to determine whether the Housing Act 107 of 1997 and the housing programmes adopted under it were constitutionally compliant. A central issue was whether the state was obliged to provide immediate relief to people in desperate housing need who faced homelessness and were forced to live in intolerable conditions. Finally, the case required the Court to interpret the concept of progressive realisation and, in doing so, to develop a reasonableness standard applicable to socio-economic rights.

Court's findings and reasoning

- The Court established the "reasonableness yardstick" for assessing state compliance with socio-economic rights.
- Essential features of reasonableness are set out (paras 39–44, 99):
  - Responsibilities must be clearly allocated across all spheres of government.
  - Housing programmes must be comprehensive, coordinated, and flexible.
  - Programmes must include short-, medium- and long-term components, be continuously reviewed, and be balanced to address both structural needs and emergencies.
  - A programme that excludes a significant segment of society, particularly the most vulnerable, is unreasonable and unconstitutional.
  - Legislation alone is insufficient; it must be complemented by policies and implementation measures.
- The Court criticised the 1997 Housing Act and the National Housing Programme for failing to address emergency housing needs, particularly at the municipal level (paras 52, 58–59, 63–64, 66, 69).
- Progressive realisation means that accessibility must be steadily improved, barriers must be reduced, and the programme must adapt over time (para 45).

- The Court emphasised the interrelatedness of rights: housing is linked to dignity, equality, access to land, and other socio-economic rights (paras 19, 23–24, 44, 83).
- The Court clarified that adequate housing is more than "bricks and mortar": it also requires land, services (water, sanitation, electricity, roads), and finance (para 35).
- Importantly, it recognised the role of private actors and individuals: the state must enable others to provide housing through policy, finance, and planning frameworks (paras 35–37).
- Evictions that result in homelessness are constitutionally suspect (paras 89–90).

Court order

The Court issued a declaratory order that the state's housing programme was unreasonable because it failed to provide for people in crisis who were in desperate need of housing.

The state was directed to devise and implement a reasonable programme that would meet the needs of those in immediate need, alongside medium- and long-term housing plans.

Why the case matters

Grootboom remains the cornerstone of South African housing jurisprudence and the most influential judgment interpreting section 26 of the Constitution. It introduced the reasonableness standard that now governs the state's obligations across all socio-economic rights litigation.

The judgment had a direct impact on housing policy, influencing the design of Breaking New Ground (2004) and the National Housing Code (2009) by embedding a requirement that housing programmes be responsive to emergencies and the needs of vulnerable groups. It also shaped the Constitutional Court's subsequent housing jurisprudence, including Port Elizabeth Municipality, Olivia Road, and Blue Moonlight, all of which built on the principle that evictions and housing policy must be just, equitable, and attentive to the circumstances of the poorest members of society.

Finally, Grootboom confirmed that while the state is not required to provide every poor person with a house, it must adopt a diversified housing strategy that enables different forms of access to housing, ranging from self-build options to subsidies.

It entrenched the constitutional principle that the exclusion of those in desperate need is impermissible, that evictions may not result in homelessness, and that municipalities bear a legal obligation to act to prevent destitution.

2. Port Elizabeth Municipality v Various Occupiers [2004] JOL 13007 (CC) Constitutional Court Case No: CCT 53/03[5]

The case affirms that both property owners and occupiers have constitutional rights that require protection, and it held that, in this case, the state failed to manage the two competing sets of rights. It also set out the requirements of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) and the state's obligation to consider 3 issues before evicting people. These are 1. The circumstances of the occupiers 2. The length of time they have been in occupation. 3. Whether they will have alternative accommodation. In this case, it held the eviction to be unlawful.

Parties

Applicant: Port Elizabeth Municipality.

Respondents: A group of 68 unlawful occupiers (including 23 children) living in 29 shacks on privately owned land in the suburb of Lorraine, Port Elizabeth.

Background and facts

The respondents were 68 people, including 23 children, who occupied 29 shacks on privately owned land in Lorraine, a suburb of Port Elizabeth. They had lived there for periods ranging from two to eight years, many having moved after being evicted from other land, such as Glenroy. Some occupiers claimed they had initially received permission from a woman they believed was the owner.
The occupiers indicated they were willing to vacate the land if given reasonable notice and suitable alternative accommodation. The municipality proposed relocation to Walmer Township, but the occupiers rejected it as crime-ridden, overcrowded, and insecure. They also rejected Greenbushes as too far from their work and schools, instead suggesting Seaview or Fairview as alternatives. No meaningful engagement occurred, and the municipality pressed ahead with eviction proceedings in response to a petition by 1,600 neighbours and property owners.

Legal issues before the Court

Whether the eviction of the respondents would be “just and equitable” in terms of section 6 of PIE.

How to balance the property rights of landowners (protected by section 25 of the Constitution) with the housing rights and protection against arbitrary evictions set out in

[5] https://www.saflii.org/za/cases/ZACC/2004/7.html

section 26 of the Constitution.

Whether municipalities, as organs of state, bear a constitutional duty to consider and facilitate alternative accommodation before seeking to evict.

Court's findings and reasoning

Sachs J, writing for a unanimous Court, traced the history from the apartheid-era Prevention of Illegal Squatting Act 52 of 1951 (PISA) to the transformative framework of the PIE, which shifted the focus from automatic eviction to fairness, dignity, and equity. The title itself reflects this.

He explained that PIE fundamentally alters the law of eviction. PIE requires courts to decide whether eviction would be "just and equitable" after considering all relevant circumstances (paras 23–25).

The Court emphasised three factors: the circumstances of the occupation,[6] the length of time the occupiers have lived there, and the availability of suitable alternative accommodation (para 25). These are not exhaustive, and each case must be decided on its own facts (paras 30–31). Longer-term and more settled occupiers, especially families with children integrated into schools and work, enjoy stronger protection (para 27).

Although there is no absolute duty on municipalities to provide alternative land before eviction, courts should be reluctant to evict relatively settled occupiers without ensuring reasonable alternatives, even on an interim basis (paras 28–29). A municipality cannot simply point to a general housing programme; the actual situation of those facing eviction must be considered.

Sachs J stressed that PIE requires courts to bring "grace and compassion into the formal structures of the law" (para 37). Judges must balance ownership rights with the desperate needs of the homeless, informed by the constitutional values of dignity, equality, freedom and ubuntu (paras 33–35, 37). The Court emphasised that respectful engagement and mediation should ordinarily precede eviction, and that it would not usually be just and equitable to order eviction if such attempts had not been made (paras 39–43).

The municipality had taken only cursory steps and failed to consider the occupiers' needs or alternative sites. It treated them as "queue-jumpers" rather than recognising their long-term residence and vulnerability. The Court emphasised that mediation and

6 The "circumstances of the occupation" requires the court to look at how and why the occupiers came onto the land. Whether through desperation, eviction from elsewhere, or a genuine (even if mistaken) belief that they had permission. Also the court must look at the nature of the land itself, such as whether it is derelict private property or public land reserved for housing (para 26). In this way, the court must weigh the human and social context of the occupation, not just its legal unlawfulness.

dialogue should ordinarily precede eviction proceedings. Evictions should not deepen marginalisation but rather aim for humane and practical solutions.

Court order

The court dismissed the municipality's application for leave to appeal, thereby upholding the SCA's ruling that the eviction was unlawful.

Why the case matters

The judgment is a landmark in South African housing and eviction jurisprudence. It firmly established that evictions are not automatic and require a case-specific, just and equitable balancing of interests. It highlighted the constitutional interrelationship between section 25 (property rights) and section 26 (housing rights and protection against arbitrary eviction).

The Court infused eviction law with ubuntu, dignity, compassion, and fairness, signalling that municipalities must act as facilitators of negotiated, humane solutions rather than simply pursuing removals. As Sachs J explained: "Justice and equity oblige [the occupiers] to rely on this same resourcefulness in seeking a solution to their plight … The Constitution and PIE confirm that we are not islands unto ourselves" (para 41).

The decision has shaped subsequent eviction jurisprudence, emphasising judicial oversight, alternative accommodation, and mediation before eviction.

3. President of the Republic of South Africa and Others v Modderklip Boerdery (Pty) Ltd 2005 (5) SA 3 (CC); 2005 (8) BCLR 786 (CC)[7]

The case confirmed that both the rights of property owners and the rights of occupiers are protected by the Constitution. Courts need to balance these competing rights, but in this case, the solution was found in creating obligations on the state to ensure both sets of rights were realised.

Parties

The applicants were the President of the Republic of South Africa and the Minister of Agriculture and Land Affairs, supported by other organs of state. The respondent was Modderklip Boerdery (Pty) Ltd, the private owner of the land in question. Several organisations were admitted as amici curiae: Agri SA, representing commercial farmers, and the Nkuzi Development Association, the Community Law Centre of the University of the Western Cape, and the Programme for Land and Agrarian Studies at the University of

7 https://www.saflii.org/za/cases/ZACC/2005/5.html

the Western Cape, which represented the interests of landless and homeless communities.

Background and facts

The case concerned the occupation of Modderklip's farm near Daveyton, Gauteng. In 2000, people evicted from the nearby Chris Hani informal settlement moved onto the farm, and numbers grew rapidly, reaching approximately 40,000, forming the Gabon Informal Settlement. Modderklip obtained an eviction order from the Johannesburg High Court in 2001, but it was never enforced. The sheriff required the landowner to deposit millions of rands for enforcement, far more than the land was worth, and the police declined to act, describing the matter as a private dispute. Modderklip sought help from the state and even offered to sell the occupied portion at a reasonable price to the state, but no support was forthcoming. In the meantime, the occupiers formed a relatively stable community but had no alternative land or housing. Modderklip was thus left in an untenable position, unable to enforce its rights despite a valid court order.

Legal issues before the Court

The Constitutional Court had to decide whether the state had violated Modderklip's rights by failing to give effect to the eviction order (or by failing to compensate Modderklip) and whether the occupiers' rights to housing and protection against arbitrary eviction were implicated. The core issue was how to balance the constitutional protection of the property owner[8] under section 25 with the rights to housing and dignity under section 26.

Court's findings and reasoning

The Court stressed that the matter involved reconciling competing constitutional rights. Modderklip was entitled to have its property rights protected and to the enforcement of a valid eviction order, while the occupiers could not simply be cast onto the streets without violating their rights to dignity and housing. Langa ACJ said, "The solution to this problem must be found in a manner that is consistent with the Constitution. It must be one that respects the rights of the landowner and the occupiers, recognising that neither can be ignored" (para 43).

The Court emphasised that it was unreasonable for the state to remain passive when only state intervention could resolve the crisis. As Langa ACJ observed, "It is unreasonable for a private entity such as Modderklip to be forced to bear the burden which should be borne by the state of providing the occupiers with accommodation" (para 45). The Court

8 Section 25(1) of the Constitution states that no one may be deprived of property except in terms of the law of general application, and no law may permit arbitrary deprivation of property.

highlighted the rule of law and the constitutional right of access to the courts, noting that Modderklip had followed the law and obtained relief, yet was left without an effective remedy. "In this case, the State failed to take any steps to assist the applicant in enforcing the court order. The consequence was that the applicant was left without an effective remedy for a prolonged period of time, which is inconsistent with the rule of law" (para 51).

Court order

The Court held that the state, by failing to provide an effective mechanism to enforce the eviction order, had violated Modderklip's constitutional rights. It ordered the Department of Agriculture and Land Affairs to pay compensation to Modderklip for the land under occupation, calculated in accordance with the Expropriation Act. The residents of the Gabon settlement were permitted to remain until alternative land was made available by the state or the relevant authorities.

Why the case matters

The judgment is a landmark in constitutional and property law. It confirmed that property owners and occupiers each hold constitutional rights that must be respected and reconciled. The Court made clear that neither property rights nor housing rights are absolute, and that the state bears responsibility for managing the tension between them. The case also affirmed that court orders must be practically enforceable if the rule of law is to be upheld. By granting compensation to the landowner while allowing occupiers to remain until alternatives were provided, the Court crafted a pragmatic remedy that protected the dignity and rights of both parties and avoided social upheaval.

4. Occupiers of 51 Olivia Rd, Berea Township & another v City of Johannesburg & others, [2008] JOL 21386 (CC)[9]

The court held that meaningful engagement by the state with occupants that it seeks to evict is a prerequisite prior to an eviction. It emphasised that people cannot be rendered homeless and that the state has a duty to provide alternative accommodation in eviction proceedings. Engagement just be both collective and individual, transparent and aimed at preventing homelessness.

Parties

The applicants were the occupiers of 51 Olivia Road and 197 Main Street, two inner-city buildings in Johannesburg. The first respondent was the City of Johannesburg, joined by

9 https://www.saflii.org/za/cases/ZACC/2008/1.html

Rand Properties (Pty) Ltd, the Minister of Trade and Industry, and the President of the Republic of South Africa. Two organisations, the Centre on Housing Rights and Evictions and the Community Law Centre of the University of the Western Cape, were admitted as amici curiae. The matter was heard in the Constitutional Court, and the unanimous judgment was delivered by Yacoob J, with Langa CJ, Moseneke DCJ, Madala, Ngcobo, Nkabinde, Sachs, Skweyiya, Van der Westhuizen JJ and Mpati AJ concurring.

Background and facts

The City of Johannesburg sought to evict more than 400 residents from the two buildings under section 12(4)(b) of the National Building Regulations and Building Standards Act 103 of 1977. The City argued that the buildings were unsafe and unhealthy. The High Court interdicted the evictions, finding that the City's housing programme fell short of constitutional requirements, and directed the City to prepare a comprehensive plan to accommodate people in desperate need. The SCA overturned this decision, authorised the eviction, but required temporary accommodation for those most in need.

The occupiers approached the Constitutional Court, contending that the SCA had erred. They argued that their eviction without prior consultation violated their constitutional rights, that the City had not reasonably provided alternative accommodation, and that sections 12(4)(b) and 12(6) of the NBRA were unconstitutional. Two days after the hearing, the Constitutional Court issued an interim order requiring the City and the occupiers to "engage meaningfully" with each other. This process led to a settlement agreement on alternative accommodation and interim safety measures in the buildings.

Legal issues before the Court

The Court had to determine whether an eviction could be ordered in the absence of meaningful engagement, whether the City's housing plan complied with its obligations under section 26 of the Constitution, and whether sections 12(4)(b) and 12(6) of the NBRA were consistent with the Constitution. A further question was whether the City was required to consider the potential homelessness of the occupiers when making an eviction decision.

Court's findings and reasoning

The Court emphasised the centrality of meaningful engagement as a constitutional duty. It held that municipalities must engage with residents who may be rendered homeless by eviction, noting that such engagement is closely tied to the rights to dignity, life, and adequate housing. Yacoob J stated that "a municipality that ejects people from their homes without first meaningfully engaging with them acts in a manner that is broadly at odds with the spirit and purpose of the Constitution" (para 16). On this basis, the Court concluded that the SCA should not have granted eviction orders in the absence of

meaningful engagement (para 23).

With respect to the City's housing plan, the Court found it unnecessary to adjudicate on permanent housing solutions. The settlement agreement recorded that permanent housing would be developed in consultation with the occupiers. Given that negotiations were ongoing, the Court held it premature to evaluate the plan in general (paras 32–36).

On the NBRA, the Court distinguished between sections 12(4)(b) and 12(6). It accepted that, while the power to issue notices under section 12(4)(b) is not conditional on the right of access to housing, the City was nevertheless obliged to consider the risk of homelessness before issuing eviction notices. The SCA's contrary approach was criticised for failing to recognise the interrelationship between eviction decisions and the City's housing duties (paras 42–46). Regarding section 12(6), which criminalised continued occupation after a notice to vacate, the Court declared it unconstitutional. Section 26(3) of the Constitution prohibits eviction without a court order, and Yacoob J observed that "It follows that any provision that compels people to leave their homes on pain of criminal sanction in the absence of a court order is contrary to the provisions of section 26(3) of the Constitution" (para 49). Instead of striking down the provision entirely, the Court read in a proviso to limit its operation to cases where a court has already granted an eviction order.

Court order

The court granted leave to appeal and, in part, upheld the appeal. It set aside the orders of both the High Court and the SCA. Section 12(6) of the NBRA was declared unconstitutional and must be read as applying only to persons who continue to occupy property after a court has issued an eviction order. The Court ordered the City to pay the applicants' costs in all courts, noting that the proceedings could have been avoided had there been meaningful engagement from the outset (para 53).

Why the case matters

The judgment is a landmark in constitutional and property law. It confirmed that property owners and occupiers each hold constitutional rights that must be respected and reconciled. The Court made clear that neither property rights nor housing rights are absolute, and that the state bears responsibility for managing the tension between them. The case also affirmed that court orders must be practically enforceable if the rule of law is to be upheld. By granting compensation to the landowner while allowing occupiers to remain until alternatives were provided, the Court crafted a pragmatic remedy that protected the dignity and rights of both parties and avoided social upheaval.

5. The Occupiers of ERF 101, 102, 104 and 112, Shorts Retreat, Pietermaritzburg v Daisy Dear Investments (Pty) Ltd & others, [2009] JOL 23840 (SCA)[10]

Municipalities must be joined in eviction proceedings since they have a duty to provide emergency or alternative accommodation.

This case underscored that evictions may be carried out only in accordance with the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE), which requires a court order and a fair, just process. It further held that the municipality must be joined to eviction proceedings, given its constitutional duty to consider and, where necessary, provide emergency or alternative accommodation, ensuring that the eviction is not only procedurally correct but also substantively just and equitable.

6. Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others (Centre on Housing Rights and Evictions and Another, Amici Curiae) [2009] ZACC 16; 2010 (3) SA 454 (CC); 2009 (9) BCLR 847 (CC) (heard 21 August 2008; decided 10 June 2009)[11]

This case examined the conditions under which an occupation is unlawful under the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) and what constitutes a reasonable eviction. The community of around 20 000 people lived in informal dwellings on land the municipality wished to develop for low-income housing. It was necessary to remove them to enable the development to proceed, which required evicting and relocating them. The court found it reasonable for the occupiers to believe they had consent to live on the land, but also that it was reasonable for the state to evict them to construct the N2 Gateway project. The court order provided for their removal to temporary housing units and set out detailed specifications for the new settlement. It also required that 70% of the occupiers be relocated back into the N2 Gateway project when it was complete, and finally that there be ongoing engagement between the occupants and the municipality.

Parties

The applicants were residents of the Joe Slovo informal settlement, represented by their community committees. The respondents were Thubelisha Homes, the Minister for Housing, and the Western Cape MEC for Local Government and Housing. The City of Cape Town was the owner of the land, though it had not initiated the eviction proceedings. The Centre on Housing Rights and Evictions and the Community Law Centre at UWC were

10 https://www.saflii.org/za/cases/ZASCA/2009/80.html

11 https://www.saflii.org/za/cases/ZACC/2009/16.html

admitted as amici curiae.

Background and facts

Joe Slovo housed roughly 18,000–20,000 people. The government initiated the N2 Gateway Project to replace informal dwellings with formal housing. Eviction and relocation to Delft were sought to allow construction to proceed.

Initially, the residents and government worked together, but the relationship deteriorated due to disputes over affordability, the allocation of houses (including to backyard dwellers), and poor communication. The state proposed relocating approximately 20,000 residents to temporary relocation units (TRUs) in Delft to clear the land for development. The High Court ordered a phased eviction, and the residents appealed directly to the Constitutional Court.

Legal issues before the Court

The Constitutional Court had to decide whether the residents were "unlawful occupiers" under the PIE. If PIE applied, the Court then had to determine whether the eviction was just and equitable. The Court also had to assess whether the state's relocation and housing plan was reasonable in terms of section 26 of the Constitution.

Court's findings and reasoning

The Court issued a unanimous order but delivered five separate concurring judgments, each presenting different reasoning.

Yacoob J

Justice Yacoob provided the main factual account. He concluded that the residents did not have the owner's express or tacit consent to occupy the land. He set out a strict, actual-consent test. He emphasised that "consent" in PIE bears its ordinary meaning. "There is no reason why consent in the PIE Act should have another meaning. It means voluntary agreement" (para 57). The provision of basic municipal services was an act of humanitarian assistance, not consent to permanent settlement. He held that the residents were unlawful occupiers under PIE and that eviction was just and equitable, provided that detailed safeguards were included. He drafted the order that the Court ultimately adopted.

Moseneke DCJ

Deputy Chief Justice Moseneke accepted that the City had given tacit consent in earlier years, but emphasised that such consent was limited and had been withdrawn once the N2 Gateway Project required relocation. "It is common cause that no formal notice of the

termination of the consent to occupy was given… [but] the termination of the consent was also implicit" para 160).

He held that the residents were therefore unlawful occupiers at the time proceedings were brought. He stressed that although relocation may not have been the best practice, it was not unreasonable. He warned that courts should not replace the government's housing policy choices with their own. He supported eviction, on condition that Joe Slovo residents received guaranteed allocations in the new development and that meaningful engagement continued. He endorsed the 70% allocation undertaking: "…the government respondents properly conceded… at least 70 percent of the upgraded houses will be allocated to the applicants" (para 173).

He added that while in-situ upgrade might have been preferable, relocation was not unreasonable given the project schedule.

Ngcobo J

Justice Ngcobo agreed that the state's fulfilment of its constitutional duty to provide services could not, in itself, amount to consent. However, he found that the residents had tacit permission to remain until alternatives were made available, which later came to an end. By the time eviction proceedings were instituted, the residents were unlawful occupiers. He considered that the decisive question was whether eviction was in the public interest and whether it was just and equitable in light of constitutional values.

O'Regan J

Justice O'Regan accepted that there had been tacit consent for the residents to occupy the land, but stressed that this consent was limited in time and purpose and lapsed once the N2 Gateway Project began. She emphasised the need to balance property rights with constitutional housing rights. She argued that courts should show deference to legitimate housing policies adopted by the executive, provided that the eviction order contained safeguards to protect residents. She concluded that the supervised eviction order was just and equitable.

Sachs J

Justice Sachs expressed hesitation but ultimately supported the eviction. He emphasised the residents' dignity and legitimate expectations, noting that years of City conduct and service had fostered a form of tacit consent, which was later withdrawn for redevelopment. He insisted that fairness safeguards must be strengthened, including proper standards for temporary residential units (TRUs), meaningful engagement, and guarantees that Joe Slovo residents would benefit from the new housing. He viewed these conditions as essential to reconciling development goals with the rights of the poor.

Court order

The Court set aside the High Court order and replaced it with a new order. The order provided for a supervised, phased eviction and relocation to TRUs, with detailed specifications for the standard of temporary accommodation (for example, a minimum of 24 square metres, electricity, water, and sanitation). It required meaningful engagement between the state and the residents throughout the relocation process. It guaranteed that at least 70% of the new subsidised houses built on the Joe Slovo site would be allocated to current or former residents who applied and qualified. The respondents were ordered to pay half the applicants' costs in both the High Court and the Constitutional Court.

Why the case matters

The judgment confirmed that PIE applies to mass relocations and requires that evictions be just and equitable. It developed the concept of tacit consent in informal settlement contexts, showing how such consent may arise and be later withdrawn. The Court institutionalised meaningful engagement and crafted a supervised order that balanced eviction with guarantees of future housing, improved temporary accommodation, and ongoing participation by the residents. The case provided a template for complex eviction and redevelopment orders, illustrating how courts can supervise large-scale housing projects while protecting the rights and dignity of vulnerable communities.

7. City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another [2011] ZACC 33; 2012 (2) BCLR 150 (CC); 2012 (2) SA 104 (CC)[12]

The case held that when an eviction from private property will result in homelessness, the local authority has an obligation to provide emergency accommodation. In such circumstances, the private owner may have to exercise patience.

Parties

The applicant was the City of Johannesburg Metropolitan Municipality. The first respondent was Blue Moonlight Properties 39 (Pty) Ltd, the owner of the property at 7 Saratoga Avenue, Johannesburg. The second respondent was the group of occupiers of Saratoga Avenue, numbering 86 people. Lawyers for Human Rights appeared as amicus curiae. The judgment of the Constitutional Court was delivered by Van der Westhuizen J, with Moseneke DCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Mogoeng J, Nkabinde J, Skweyiya J and Yacoob J concurring.

12 https://www.saflii.org/za/cases/ZACC/2011/33.html

Background and facts

The occupiers lived in dilapidated commercial premises in Berea, Johannesburg. Many had resided there for years. Blue Moonlight purchased the property in 2004 with the intention of redeveloping it. In 2006, it sought eviction under the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE). The occupiers opposed the eviction, arguing that they would be rendered homeless. They successfully joined the City, arguing that the municipality bore constitutional obligations under section 26 to provide housing.

The High Court ordered eviction but required the City to pay rental compensation to Blue Moonlight and provide temporary accommodation. The SCA upheld the eviction but set aside the structural interdict against the City. It declared the City's housing policy unconstitutional because it excluded people evicted by private owners from emergency housing assistance and required the City to provide the occupiers with temporary emergency accommodation.

The City appealed to the Constitutional Court, arguing that it bore no responsibility to house people evicted by private landowners.

Legal issues before the Court

The Court had to decide:

Whether eviction would be just and equitable under PIE if it rendered the occupiers homeless.

Whether the City was constitutionally obliged to provide temporary emergency accommodation to people evicted by private landowners.

Whether the City's housing policy, which excluded such people, was unconstitutional.

How to balance the owner's section 25 property rights with the occupiers' section 26 rights of access to housing and protection against arbitrary eviction.

Court's findings and reasoning

The Court emphasised that PIE requires courts to balance the rights of owners and unlawful occupiers in a manner consistent with the Constitution. Blue Moonlight's property rights under section 25 were acknowledged, but they were not absolute. As the Court explained, "Of course a property owner cannot be expected to provide free housing for the homeless on its property for an indefinite period. But in certain circumstances an owner may have to be somewhat patient, and accept that the right to occupation may be temporarily restricted" (para 40).

The Court held that eviction without alternative accommodation would not be just and equitable, as it would result in homelessness. Section 26(3) prohibits eviction without a court order made after considering all circumstances, including the availability of alternative land (para 41).

Turning to the City's obligations, the Court rejected its argument that only the provincial and national governments bore responsibility. Local government, the Court held, has both the power and the duty to plan and budget for emergency housing, as required by section 9 of the Housing Act and sections 4, 8 and 73 of the Municipal Systems Act (paras 53, 67). Emergencies cannot be managed solely through ad hoc provincial applications; municipalities must proactively plan for them.

The Court found that the City's housing policy was unconstitutional to the extent that it excluded people evicted by private landowners from access to emergency accommodation. This exclusion amounted to unfair discrimination and undermined constitutional rights (paras 76–80). The City's interpretation of its limited role under Chapter 12 of the National Housing Code was "misplaced" and inconsistent with its constitutional obligations (para 54).

Court order

The Court dismissed the City's appeal and confirmed the SCA's finding that the City's policy was unconstitutional. The Court ordered the City to provide the Saratoga Avenue occupiers with temporary emergency accommodation. It also declared that the City was obliged to plan and budget proactively for such housing needs, rather than rely solely on the provincial government.

Why the case matters

This case extended the principle of Olivia Road by clarifying that municipalities cannot avoid responsibility for housing emergencies arising from private evictions. Local government is constitutionally obliged to act, plan and budget for emergency housing within available resources, even when evictions are sought by private owners. The judgment confirmed that eviction is only just and equitable if homelessness is avoided, and that municipal housing policies must be inclusive and non-discriminatory.

The Court emphasised the Constitution's transformative vision, stressing that property rights must be balanced with socio-economic rights to advance dignity, equality and social justice.

8. Occupiers of Skurweplaas 353 JR v PPC Aggregate Quarries (Pty) Ltd & others, [2012] JOL 28170 (CC)[13]

The court held that even short-term occupiers cannot be evicted without alternative accommodation being provided. In this case, the court held that the eviction date should be linked to the provision of alternative accommodation, and the local authority was tasked with finding land for the occupants one month before the eviction date, which was set approximately 4 months from the date of judgment, which was 7 December 2011.

The case concerned 50 families who had occupied land in Tshwane for a relatively short period, compared with cases such as Blue Moonlight. This was relevant because, under section 4(6) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE), the just and equitable enquiry for short-term occupiers places particular weight on whether eviction would cause homelessness. The court held that even short-term occupation does not weaken the constitutional imperative that people should not be made homeless by eviction, and that eviction must be linked to the provision of alternative accommodation.

Yacoob J also criticised the way the occupiers had been described in the High Court papers as "the people who intend invading" or "the unknown people who invaded" the land. The Court stressed that such terminology was demeaning, "detracts from the humanity of the occupiers, is emotive and judgmental, and comes close to criminalising the occupiers." It recommended that a neutral term such as "occupiers" be used (para 3).

Building on Blue Moonlight, the Court confirmed that municipalities have a constitutional duty to provide alternative housing and that eviction dates must be synchronised with such provision to avoid even a temporary period of homelessness.

13 https://www.saflii.org/za/cases/ZACC/2011/36.html

9. Motswagae and others v Rustenburg Local Municipality and another (Lawyers for Human Rights as amicus curiae), [2013] JOL 30036 (CC)[14]

This case demonstrates that state interference with a person's peace at home can constitute an eviction. The municipality hired a contractor to carry out work on the land where the occupants lived, and in doing so disturbed their occupation by excavating so close to one of the houses that the foundations of a particular home were exposed. The court held that this amounted to an eviction and that the municipality should have obtained a court order to carry out the work. Section 26(3) of the Constitution protects the right to undisturbed occupation.

Parties

The applicants were Pontsho Doreen Motswagae and fourteen other Rustenburg residents. The first respondent was the Rustenburg Local Municipality, and the second respondent was Promptique TR 9 CC, a contractor engaged by the municipality. Lawyers for Human Rights were admitted as amicus curiae.

Background and facts

The applicants occupied homes on state-owned land in Rustenburg. The buildings were dilapidated, and since 2004 the municipality had planned a redevelopment project that required the demolition of the existing houses. In April 2009, a contractor employed by the municipality brought a bulldozer onto the land and excavated directly next to the wall of the first applicant's home, exposing the foundations. Despite protests, the contractor returned in May 2009 to continue the work. The applicants applied to the High Court for an interdict to restrain the municipality and its contractor from interfering with their homes without a court order.

The High Court dismissed the application, finding that the applicants' right to privacy and occupation had not been infringed and that they would not suffer irreparable harm. It held that they should have objected when the municipality first decided to redevelop the land. The High Court also granted a counter-application restraining the applicants from obstructing the contractor. Both the High Court and the SCA refused leave to appeal. The applicants then approached the Constitutional Court.

Legal issues before the Court

The Constitutional Court had to decide:

14 https://collections.concourt.org.za/handle/20.500.12144/3685

- Whether section 26(3) of the Constitution protects the right to peaceful and undisturbed occupation of homes in the absence of a court order.
- Whether the municipality acted lawfully, reasonably and constitutionally in authorising construction works without obtaining an eviction order.
- Whether the intrusive construction constituted an eviction within the meaning of section 26(3).

Court's findings and reasoning

The Court held that section 26(3) is broad enough to protect the peaceful occupation of homes from disturbance in the absence of a court order. Yacoob J explained that "its provisions would be pointless and afford no protection at all if municipalities and other owners were permitted to disturb occupiers in their peaceful occupation of their homes without a court order" (para 12). Eviction does not only mean physical removal but may also consist of "the attenuation or obliteration of the incidents of occupation" (para 12).

The Court found that the excavation work significantly interfered with the applicants' peaceful occupation and amounted to a form of eviction. The municipality's argument that it had a servitudinal right to enter the property for public purposes was rejected: bulldozing next to people's homes without consent or a court order was "self-help" and unconstitutional (paras 13–14). The Court noted that the municipality itself had offered alternative accommodation, thereby recognising that its actions disturbed occupation (para 15). This suggested that the municipality was attempting to achieve eviction "through the back door" (para 16). The Court stressed that the rule of law forbids such conduct:

"Our society is based on the rule of law and the rule of law does not authorise self-help" (para 14).

Court order

The Constitutional Court granted leave to appeal and upheld the appeal. It set aside the High Court's order and interdicted the municipality and its contractor from performing construction work on the applicants' homes without their consent or a court order. The municipality was ordered to pay the applicants' costs in the High Court, the SCA, and the Constitutional Court.

Why the case matters

Motswagae clarified the scope of section 26(3). It confirmed that constitutional protection extends not only to outright evictions but also to any significant interference with peaceful occupation, including intrusive redevelopment works.

The case underscored that municipalities may not rely on their housing obligations to justify unlawful entry or disturbance and that they must obtain a court order before disrupting people's homes. It strongly affirmed the principle that government may not engage in "self-help" but must act through lawful processes, thereby strengthening the security of tenure of vulnerable occupiers.

10. Zulu and others v eThekwini Municipality and others 2014 (8) BCLR 971 (CC)[15]

The case concerned an eviction of a community by the eThekwini Municipality, which obtained a blanket anti-land invasion court order. The community was not part of the case, and the city proceeded to demolish their dwellings using this blanket order. The case ended up at the Constitutional Court. The Court found that in all eviction cases, the people affected by the eviction must be joined and be part of the case, since their rights are being affected, and both the Constitution and the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) require certain standards of justice to be met.

Parties

The case was brought by residents of Madlala Village, an informal settlement near Lamontville in Durban. The respondents were the eThekwini Municipality, the Minister of Police, and the MEC for Human Settlements and Public Works, KwaZulu-Natal. Abahlali Basemjondolo, a social movement of shack dwellers, joined as amicus curiae.

Background and facts

The residents had been living in Madlala Village since 2012. They had left rented back rooms in Lamontville when rents became too high, after a promise of RDP houses never materialised. They built informal homes on land earmarked for a state housing project.

The Municipality's Land Invasion Control Unit repeatedly demolished their homes — more than 20 times — without a court order. Each time, the residents rebuilt their homes.

In 2013, the MEC obtained a broad court order granting the Municipality and the police the power to stop any "invasions" or construction on the land. The residents who were already living there were not included in that case, even though the order directly affected them. They went to court to argue that they had a right to be heard.

Legal issues before the Court

The central issue was whether people already living on the land had the right to be part

15 https://www.saflii.org/za/cases/ZACC/2014/17.html

of a case that could be used to evict them.

The question was: can the government rely on broad “anti-land invasion” orders to demolish homes and remove people without complying with the protections set out in the Constitution and PIE?

Court’s findings and reasoning

The Court held that the residents clearly had a direct interest in the order because it could be used to prevent them from living in their homes, effectively an eviction. That meant they had the right to be part of the case.

The Court stressed that PIE and section 26(3) of the Constitution require that no one may be evicted from their home without a proper court process, in which all circumstances are considered and people are given a chance to be heard.

Court order

The Constitutional Court ruled in favour of the residents.

- They were granted the right to join the case.
- The Municipality and the MEC were ordered to pay their legal costs.

Why the case matters

The case confirmed that residents of informal settlements cannot be sidelined in cases that affect their homes. Court orders that have the effect of eviction must comply with PIE and the Constitution: no eviction without a fair hearing, consideration of all circumstances, and a finding that it is just and equitable.

The judgment sent a strong message that broad “anti-land invasion” orders cannot be used as a shortcut to demolishing homes or displacing poor communities without due process.

11. Occupiers of Erven 87 and 88 Berea v De Wet NO and another, 2017 (8) BCLR 1015 (CC)[16]

Some occupiers had consented to an eviction. It was held that their consent was neither real nor informed, as they did not know that the city would be obliged to provide alternative accommodation. Not all the occupiers were part of the matter; only four appeared. The court held that, in matters where an eviction is to take place, everyone affected must be present and the court needs to be fully informed of all the relevant facts in order to reach a judgment. Beyond this, it also required the city to be joined in the action, since it has an obligation to find alternative accommodation for evictees.

Parties

The applicants were 184 men, women, and children living in a block of flats on erven 87 and 88 Berea, Johannesburg, collectively cited as "the Occupiers." The first and second respondents were the joint liquidators of ML Rocchi Investments CC, which had owned the property since 1985 and was liquidated in 2011. The property was subsequently sold to Mr Calvin Maseko, a property developer who financed the litigation. The Poor Flat Dwellers Association was admitted as amicus curiae to highlight the wider implications of the case for flat dwellers facing eviction.

Background and facts

Many of the occupiers had lived in the Berea flats for decades. After the liquidation of the owner, the liquidators sold the property to a developer who sought to evict the residents to redevelop the site. Eviction proceedings under the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) were initiated.

At the first High Court hearing, four occupiers attended accompanied by a ward committee member, Mr Ngubane. They were only mandated to request a postponement. Instead, the liquidators' counsel presented a draft "consent" order, which the appearer occupiers and Mr Ngubane confirmed. The order provided for eviction within weeks. The remaining 180 occupiers were absent and unaware.

When the broader community realised that an eviction order had been granted, they secured legal representation from the Socio-Economic Rights Institute (SERI) and applied for rescission. Both the High Court and the SCA dismissed their rescission applications, prompting them to approach the Constitutional Court.

16 https://www.saflii.org/za/cases/ZACC/2017/18.html

Legal issues before the Court

The Court had to decide:

- Whether a consent eviction order relieves courts of their constitutional duty under section 26(3) of the Constitution and PIE to ensure that an eviction is just and equitable.
- Whether the occupiers had given valid and informed consent to the eviction.
- Whether the City of Johannesburg had to be joined in the proceedings, given the risk of homelessness.

Court's findings and reasoning

Mojapelo AJ, writing for a unanimous Court, held that the eviction order was invalid. The consent relied on was neither informed nor valid, as the appearing occupiers lacked the authority and understanding to waive constitutional rights on behalf of all residents. Importantly, the Court held that consent to eviction entails a waiver of rights under section 26(3) of the Constitution and PIE, which cannot occur without full knowledge and understanding.

The Court emphasised that section 26(3) and PIE make judicial oversight of evictions mandatory. Courts must conduct their own enquiry into whether an eviction is just and equitable, regardless of whether the parties present an agreed order. The High Court failed in its duty by rubber-stamping a draft consent order without investigating the occupiers' circumstances.

A key theme in the judgment was that a just and equitable order requires all relevant facts to be before the court. The Constitutional Court stressed that PIE obliges courts to weigh the rights of landowners against the risk of homelessness and the needs of vulnerable occupiers. This balancing cannot be done in the dark. Judicial oversight, therefore, is not a formality but a substantive duty to secure and consider information about the occupiers' personal circumstances, the availability of alternative accommodation, and the consequences of eviction. Without such information, no just and equitable order can be made.

The Court also held that the absence of the City of Johannesburg, which bore the duty to provide alternative housing in cases of eviction, was fatal. Following Blue Moonlight, the City had to be joined so that a court could properly assess what would happen to the occupiers if eviction were granted.

The order was erroneously granted "in the absence" of 180 occupiers, making rescission appropriate under Rule 42(1)(a). For the four appearer occupiers, the lack of informed consent meant the order had to be set aside under the common law.

Court order

The Constitutional Court granted leave to appeal, upheld the appeal, and set aside the High Court's refusal to rescind. It rescinded the 2013 eviction order and remitted the matter to the High Court for case management. The City of Johannesburg was joined as a respondent and directed to file a report within 30 days on the availability of land or emergency housing. No order as to costs was made.

Why the case matters

This case reinforced the principle that courts cannot abdicate their constitutional duty in eviction proceedings, even when eviction orders are presented as agreed or by consent. Consent does not displace the obligation to ensure that evictions are just and equitable under section 26(3) of the Constitution and PIE. The judgment clarified that fundamental protections cannot be waived without informed consent and that municipalities must always be joined where homelessness is at risk. It builds on Port Elizabeth Municipality v Various Occupiers, Blue Moonlight, and Changing Tides, underscoring that eviction law is infused with constitutional values of dignity, housing security, and substantive justice.

12. Dladla and others v City of Johannesburg and another (Centre for Applied Legal Studies and another as amici curiae) [2017] JOL 39329 (CC)[17]

The provision of alternative accommodation following an eviction must meet adequate standards. In this case, people were moved to a shelter that separated men and women and required them to leave every morning for the whole day. The court held that the shelter's rules infringed the applicants' rights to dignity, privacy, and freedom and security of the person.

Parties

The applicants were Nomsa Ellen Dladla and ten other residents of the Ekuthuleni Shelter, who had previously lived at Saratoga Avenue before their eviction by Blue Moonlight. The respondents were the City of Johannesburg, constitutionally obliged to provide temporary housing, and Metropolitan Evangelical Services (MES), a non-profit organisation contracted by the City to manage the shelter. The Centre for Applied Legal Studies (CALS) and the Centre for Child Law (CCL) appeared as amici curiae.

Background and facts

Following the Blue Moonlight order, the City relocated the applicants to the Ekuthuleni Shelter, managed by MES. Their accommodation was subject to stringent house rules.

17 https://www.saflii.org/za/cases/ZACC/2017/42.html

Rule 3, known as the lock-out rule, required residents to vacate the shelter between 08h00 and 17h30 daily, with readmission at 17h30 and the gates locked at 20h00. Rule 4, the family separation rule, prohibited opposite-sex partners from living together and separated children from caregivers, depending on age. The applicants argued that these rules forced them into unsafe conditions during the day, destroyed family unity, and subjected them to degrading treatment. The City defended the rules as part of its "managed-care policy" designed to foster independence and discourage dependency.

Legal issues before the Court

The Court had to decide whether, as temporary residents, the applicants were protected by the rights to dignity, freedom and security of the person, privacy, and access to adequate housing under sections 10, 12, 14 and 26 of the Constitution. The central issue was whether the lock-out and family separation rules infringed these rights, and, if so, whether the infringements could be justified under section 36 as reasonable limitations in an open and democratic society.

Court's findings and reasoning

The majority judgment of Mhlantla J, joined by Mogoeng CJ and others, found that the rules infringed the applicants' rights to dignity, privacy, and freedom and security of the person. The lock-out rule was described as "cruel, condescending and degrading" because it forced people onto the streets, deprived night-shift workers of rest, and treated adults as children who had to be shepherded in and out" (para 48). The family separation rule eroded the right to family life, integral to dignity, by dividing partners, parents, and children. Both rules undermined privacy by preventing residents from having a secure place of their own. They also endangered safety, exposing residents to violence on the streets, in breach of section 12 of the Constitution.[18]

Importantly, the Court held that the rights in sections 10, 12 and 14 apply to everyone, including those in temporary accommodation. The City's argument that the applicants had "diminished rights" because the shelter was not a permanent home was rejected (para 43). Mhlantla J stressed that fundamental rights do not depend on whether one lives in a permanent home or in temporary shelter.

Because the rules were contractual and not authorised by any "law of general application", they could not be justified under section 36.

[18]Section 12 of the Constitution protects freedom and personal security, including the right to be free from violence and from cruel, inhuman or degrading treatment. It prohibits the state from exposing people to harm or subjecting them to degrading conditions.

Court order

The Court granted leave to appeal and upheld the appeal. It declared that the lock-out and family separation rules infringed the applicants' rights to dignity, privacy, and freedom and security of the person under sections 10, 12 and 14. The City and MES were interdicted from enforcing the rules. They were ordered to permit opposite-sex partners who wished to do so to reside together in communal rooms at Ekuthuleni. The City was also directed to pay the applicants' costs, including those of two counsel, in all courts.

Why the case matters

This judgment is a landmark affirmation that constitutional rights follow people into temporary accommodation. The Court made clear that emergency housing provided by the state cannot be conditioned on rules that violate dignity, privacy, and family life. The decision underscores that house rules imposed through contracts with service providers must comply with the Constitution. By insisting that socio-economic measures be implemented in a manner consistent with rights, the case strengthens the jurisprudence flowing from Grootboom, Joe Slovo and Blue Moonlight. It also has broader significance because the City planned to apply these managed-care models in future shelters, and the ruling ensures that such policies must be aligned with constitutional protections.

13. Melani and Others v City of Johannesburg and Others [2016] ZAGPJHC 55; (2016) 3 All SA 1 (GJ)[19]

The case affirmed the right of the approximately 7 000 residents of the Slovo Park informal settlement to have their land upgraded rather than be moved a long distance to land where a new Greenfields development was proposed by the city. The city was ordered to implement the Upgrading of Informal Settlements Programme (UISP) on the existing site.

Parties

The applicant was a resident of Slovo Park, other residents and the Slovo Park Community Development Forum, representing approximately 7,000 residents of the Slovo Park informal settlement in Johannesburg.

The first respondent was the City of Johannesburg Metropolitan Municipality, with other respondents including municipal officials and entities involved in housing development.

[19] https://www.saflii.org/za/cases/ZAGPJHC/2016/55.html?utm_source=chatgpt.com

Background and facts

The residents of Slovo Park had been living in an informal settlement since the early 1990s. Despite years of engagement with the City, no progress was made towards upgrading their settlement. Instead, the City proposed relocating the residents to a greenfield site 11 kilometres away. The community rejected this plan and demanded in situ upgrading of their settlement under the national Upgrading of Informal Settlements Programme (UISP), introduced in 2004 as part of the National Housing Code. The UISP was specifically designed to provide for the incremental, participatory upgrading of informal settlements with full community involvement.

The residents brought the application after years of engagement, complaints, and unfulfilled undertakings by the City. They argued that the City's failure to pursue upgrading, and its insistence on relocation violated their constitutional right of access to adequate housing and the requirement of reasonableness under section 26 of the Constitution.

Legal issues before the Court

The central question was whether the City of Johannesburg was obliged to apply the UISP to the upgrading of informal settlements such as Slovo Park, and whether its refusal to do so violated the residents' constitutional right of access to adequate housing under section 26 of the Constitution. The Court also had to consider whether municipal housing policy must comply with the binding provisions of the National Housing Code.

Court's findings and reasoning

The Court held that the City's conduct was unreasonable and inconsistent with its constitutional obligations. It emphasised that the UISP is specifically designed to address the needs of long-standing informal settlements and prioritises in situ upgrading wherever possible. The City had failed to provide a rational, evidence-based justification for refusing to pursue upgrading at Slovo Park.

The Court rejected the City's argument that relocation was preferable, noting that relocation often results in social dislocation, loss of livelihoods, and further hardship. It found that the City had effectively ignored a binding national housing policy instrument and had failed to meaningfully engage with residents about upgrading options.

The Court stressed that section 26 requires proactive, reasonable measures, not prolonged inaction. Given the City's history of delay and non-compliance, ordinary declaratory relief was insufficient to secure residents' rights.

Court order

The Court declared the City's failure to apply the UISP unlawful and unconstitutional. It ordered the City to commence an in situ upgrading project at Slovo Park under the UISP within a reasonable period, in consultation with the community. The City was also ordered to pay the applicants' costs.[20]

Why the case matters

Slovo Park established that the UISP is binding on municipalities and not a matter of discretion. The judgment entrenches the principle that housing programmes must be reasonable, participatory, and aligned with constitutional obligations. It gives communities in informal settlements a powerful tool to demand in situ upgrading rather than relocation to distant sites. The case builds on earlier jurisprudence, such as Grootboom and Blue Moonlight, reinforcing the state's obligation to implement housing programmes in a way that respects dignity, participation, and the progressive realisation of rights.

14. Minister for Transport and Public Works: Western Cape & Others v Adonisi and Others (522/2021 & 523/2021) [2024] ZASCA 47 (12 April 2024)[21]

The case is awaiting a judgment at the Constitutional Court. The High Court found that the city of Cape Town and provincial housing authorities sale of properties in Sea Point should be set aside and that the state should consider the use of the sites for low income housing. It argued that there was an obligation on the state to reverse spatial apartheid. The SCA overturned the High Court judgment and set the sale should remain in place.

Parties

The appellants were the Minister for Transport and Public Works: Western Cape, the Premier of the Western Cape, the Provincial Government of the Western Cape, the Minister of Human Settlements: Western Cape, and the City of Cape Town. The respondents included Thozama Angela Adonisi and other individuals, Reclaim the City, and the trustees of Ndifuna Ukwazi Trust.

In a parallel matter, the National Minister of Human Settlements, the National Department of Human Settlements, and the Social Housing Regulatory Authority were also parties.

[20]The City initially appealed the order but then withdrew its appeal.

[21]https://www.saflii.org/za/cases/ZASCA/2024/47.html

Background and facts

The case concerned the Tafelberg property in Sea Point, Cape Town. This provincially owned property, previously used for a school and flats, was sold in 2016 by the Western Cape Government to the Phyllis Jowell Jewish Day School for R135 million. Civil society groups and individuals challenged the sale, arguing that the Province and the City had a constitutional and statutory duty to use the property for social housing, given apartheid-era spatial planning and the exclusion of poor and working-class people from well-located areas such as Sea Point.

Two applications were brought before the Western Cape High Court. The first sought to review and set aside the sale on the basis of constitutional obligations to provide access to land and housing and to reverse spatial apartheid. The second, brought by the National Minister of Human Settlements and others, argued that the Province had breached intergovernmental obligations by failing to consult the national government before disposing of the property. The High Court upheld both applications and set aside the sale. The Province, City, and others appealed to the SCA.

Legal issues before the Court

Whether respondents could rely directly on sections 25 and 26 of the Constitution, or whether the principle of constitutional subsidiarity required reliance on legislation such as the Housing Act 107 of 1997 and the Social Housing Act 16 of 2008.

Whether the Housing Act, the Social Housing Act, and related frameworks imposed a legal duty on the Province and the City to provide social housing on the Tafelberg site in Sea Point, and specifically whether the fact that the property was not located in a formally designated restructuring zone under the Social Housing Act affected the state's obligations.

Whether the sale of the Tafelberg property was unlawful for failure to comply with the Government Immovable Asset Management Act 19 of 2007 (GIAMA) and the Western Cape Land Administration Act 6 of 1998 (WCLAA).

Whether the Province had an obligation under the Intergovernmental Relations Framework Act 13 of 2005 (IGRFA) to consult the National Minister of Human Settlements before disposing of the property.

Court's findings and reasoning

The Court reaffirmed the principle of constitutional subsidiarity: once legislation has been enacted to give effect to a constitutional right, litigants must rely on that legislation or challenge its validity, not rely directly on sections 25 and 26 of the Constitution. Since the Housing Act, the Social Housing Act, and the Spatial Planning and Land Use Management

Act 16 of 2013 provide a detailed statutory framework, the respondents could not rely directly on sections 25 and 26.

Regarding the Tafelberg site in Sea Point, the Court held that neither the Constitution nor the legislation imposed a duty on government to provide social housing on that specific property. The respondents had argued that Sea Point fell within the kind of area contemplated for restructuring under the Social Housing Act, but the Court noted that Sea Point had not been designated as a restructuring zone. Restructuring zones are the statutory mechanism through which areas are formally prioritised for social housing investment. Without such a designation, the Social Housing Act could not be invoked to compel development at Tafelberg.

More broadly, the Court stressed that even within restructuring zones, government retains discretion over which sites to prioritise, as these decisions involve complex policy and resource considerations.

Concerning the GIAMA and WCLAA, the Court found that the Province had the statutory power to dispose of immovable assets under WCLAA. While GIAMA requires asset management plans, non-compliance with those requirements did not invalidate the sale. Regarding intergovernmental relations, the Court held that IGRFA did not impose a legal duty on the Province to consult the National Minister before selling the property.

The Court noted that neither the Province nor the City was ignoring the needs of the poor. The Province had released and subsidised other land parcels for social housing and was funding projects in areas such as Woodstock and Salt River that were already in development. The City, for its part, had established restructuring zones in partnership with the Social Housing Regulatory Authority and had several initiatives under way within those zones, including projects in Maitland, Salt River, and Woodstock. Together, the Court held, these efforts demonstrated that both spheres of government were taking measures to advance affordable housing and spatial integration, even if the Tafelberg site in Sea Point was not included.

Court order

The SCA upheld the appeal. The High Court orders were set aside and replaced with orders dismissing both applications. The sale of the Tafelberg property was therefore not declared unlawful, and the Province and the City were found not to have breached any constitutional or statutory duty.

Why the case matters

The judgment reinforced the principle of constitutional subsidiarity, holding that once legislation such as the Housing Act and the Social Housing Act has been enacted to give

effect to constitutional rights, litigants must rely on that legislation or challenge its validity, rather than rely directly on sections 25 and 26 of the Constitution.

Importantly, the Court addressed whether the state can be compelled to provide social housing on a specific site, namely the Tafelberg property in Sea Point. It held that while the government is constitutionally obliged to progressively realise the right of access to adequate housing and to advance spatial restructuring, these obligations do not translate into a judicially enforceable duty to develop social housing on a particular property. Decisions about the location of housing projects involve complex policy and resource allocations that fall within the executive's domain. In this case, the Court said that it was not for the courts to direct the province or the city to locate social housing. However, both remain accountable to judicial review for reasonableness and compliance with the statutory framework. The Court stressed that this conclusion was reinforced by the fact that Sea Point had not been designated as a restructuring zone under the Social Housing Act, which is the formal mechanism for prioritising areas for social housing investment.

The judgment has been criticised for limiting the ability of communities and civil society organisations to challenge land disposals in well-located urban areas by relying directly on the Constitution. It adopts a narrower conception of judicial enforcement than that of the High Court, which had foregrounded constitutional principles of spatial justice. At the same time, the case underscores the ongoing importance of restructuring zones, intergovernmental coordination, and legislative frameworks in shaping the state's housing obligations. It highlights the persistent tension between the judiciary's role in enforcing socio-economic rights and the executive's discretion in determining how, where, and when to allocate scarce land and resources.

The respondents have appealed to the Constitutional Court, which heard the case on 11 and 12 February. Judgment has been reserved.

15. Charnell Commando and Others v City of Cape Town and Another [2024] ZACC 27[22]

This case concerned the eviction of a number of families from housing they had occupied in Woodstock, Cape Town, for many generations. Their eviction was linked to the gentrification of Woodstock. The city initially offered them accommodation 30 kilometres away from Woodstock, and later 15 kilometres away. The residents refused to accept the accommodation. The court held that the city's failure to provide them with accommodation close to where they had lived for decades, near schools, jobs and community, was akin to relocating them in the way black people had been moved to the peripheries of cities during apartheid. It ordered the city to implement a programme of emergency housing for the inner city of Cape Town (which it did not have) and to ensure these families were accommodated close to their former homes, in the inner city.

Parties

The applicants were a group of families known as the "B[…] residents" of Woodstock, Cape Town. They included members of the Commando, Nel, Abels, Goliath, Fisher, Rodrigues, and Smith families, many of whom had lived in adjoining cottages in B[…] Street for generations under leases dating back to their grandparents. The first respondent was the City of Cape Town, while the second respondent, Woodstock Hub (Pty) Ltd, was the developer that purchased the property. Abahlali baseMjondolo, the national shack dwellers' movement, was admitted as amicus curiae.

Background and facts

The B[…] residents were long-standing members of the Woodstock and Salt River communities, which had historically resisted forced removals under apartheid's Group Areas legislation. They rented their cottages at modest rates ranging from R300 to R2 000 per month. In 2013, the property was bought by Woodstock Hub for redevelopment as part of a wave of gentrification in the inner city. These developments were encouraged by government tax incentives designed to stimulate private investment in urban renewal.

In 2015, Woodstock Hub initiated eviction proceedings under the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (PIE). An eviction order was granted in March 2016, and the residents sought the City's assistance to secure alternative accommodation. The City, however, denied any obligation to provide temporary emergency housing in the inner city, offering instead relocation to far-flung settlements such as Wolwerivier (30 kilometres) and later Kampies (15 kilometres) from Woodstock.

The residents rejected these offers because they would have been cut off from their jobs,

[22] https://www.saflii.org/za/cases/ZACC/2024/27.html

schools, health services and community networks. Supported by Ndifuna Ukwazi Law Centre, the residents approached the courts, arguing that the City's refusal entrenched spatial apartheid and forced poor, historically rooted families out of the city.

Legal issues before the Court

The central issue before the Court was whether the City of Cape Town bore a constitutional duty to provide temporary emergency accommodation in or near the inner city for residents facing eviction due to gentrification. The case raised the question of whether the City's blanket policy of excluding emergency housing from the inner city was reasonable under section 26 of the Constitution. The Court also had to consider whether this policy aligned with the requirements of PIE and with South Africa's international and policy obligations to avoid policies that exacerbate inequality and spatial apartheid.

Court's findings and reasoning

Writing for the majority, Mathopo J held that the City's conduct was both unreasonable and unconstitutional. He stressed that temporary emergency housing forms part of the right of access to adequate housing under section 26, and that by focusing exclusively on social housing (which these occupants could not afford) while neglecting emergency housing, the City failed to meet its obligations. The refusal to provide any emergency accommodation in the inner city compounded the legacy of spatial apartheid and effectively expelled the poorest and most vulnerable families from the urban centre. The Court directed the City to adopt a Temporary Emergency Accommodation Policy integrated with the National Emergency Housing Programme and to provide housing "as near as possible" to the residents' original homes in Woodstock.

In a separate opinion, Bilchitz AJ, writing with the concurrence of Dodson AJ, agreed that the City's policy was unconstitutional but approached the matter with a sharper focus on international law. He invoked the International Covenant on Economic, Social and Cultural Rights and the doctrine of non-retrogression, which prohibits policies that roll back existing levels of socio-economic rights. He reasoned that location is a crucial aspect of housing adequacy, as displacement far from places of work, education and healthcare entrenches inequality and undermines dignity. While concurring with the finding of unconstitutionality, he proposed a different remedy: the City should engage meaningfully with residents about suitable locations and report back to the High Court for supervision of compliance.

Court order

The Constitutional Court declared the City's implementation of the National Housing Programme unconstitutional to the extent that it excluded emergency housing from the inner city and failed to mitigate the effects of gentrification. It directed the City to develop

a reasonable Temporary Emergency Accommodation Policy and to provide the applicants with such accommodation in Woodstock, Salt River, or, failing that, within the broader Inner City Precinct within six months of the order. The residents could not be evicted until this was implemented. The City was further ordered to pay the applicants' costs in all three courts.

Why the case matters

This judgment marks a significant development in South Africa's housing jurisprudence. Building on Grootboom and Blue Moonlight, it confirmed that municipalities are obliged not only to provide housing in the abstract but also to ensure that emergency accommodation is made available in locations that preserve access to livelihoods, education and services. The case underscored that gentrification cannot be allowed to displace poor, long-standing urban residents without the state providing suitable alternatives close to their original homes. By insisting that the City's refusal perpetuated spatial apartheid, the Court affirmed that the constitutional right of access to housing requires both substantive adequacy and spatial justice.

Officials' obligations to carry out court orders: Key cases

16. Mchunu and Others v Executive Mayor, Ethekwini Municipality and Others (13904/2011) [2012] ZAKZDHC 78; 2013 (1) SA 555 (KZD) (19 September 2012)[23]

In Mchunu v Executive Mayor, eThekwini Municipality [2012] ZAKZDHC 65, the High Court held the Executive Mayor, Municipal Manager and Director of Housing personally accountable for ensuring compliance with an earlier order requiring various actions, including that families evicted from the Siyanda informal settlement be given houses in the Khulula project. Despite years of delay, the Court confirmed that municipal officials are constitutionally and statutorily obliged to take all necessary steps to secure compliance, rejecting arguments that the order was a nullity or that budgetary constraints excused non-performance. Hollis AJ stressed that "all orders of court, whether correctly or incorrectly granted, have to be obeyed until they are properly set aside" (para 15). The judgment reinforced that organs of state cannot disregard binding judicial orders and that municipal officials must act with diligence and urgency.

17. Philane Hlophe and Residents of Chung Hua Mansions v City of Johannesburg (South Gauteng High Court, Case No. 48102/2012)[24]

In Hlophe and Residents of Chung Hua Mansions v City of Johannesburg (South Gauteng

[23] https://www.saflii.org/za/cases/ZAKZDHC/2012/78.html

[24] https://www.saflii.org/za/cases/ZAGPJHC/2013/98.html

High Court, Case No. 48102/2012), Satchell J granted a structural interdict requiring the City not only to comply with its obligations under earlier eviction and housing orders but also to file regular reports detailing progress in providing alternative accommodation. The Court stressed that ongoing judicial supervision was warranted because of the City's repeated failures, remarking that effective relief demanded practical measures to ensure accountability. The judgment set out a detailed list of actions the City was required to adhere to in relation to its housing functions. This judgment went further than Mchunu by embedding continuous oversight into the remedy, laying the foundation for the SCA's later ruling in Hlophe.

18. City of Johannesburg Metropolitan Municipality v Hlophe and Others [2015] ZASCA 16[25]

The SCA confirmed, as in Mchunu, that municipal officials are constitutionally obliged to ensure compliance with court orders and that mandamus is a legitimate means to compel them to act. However, the SCA cautioned that such remedies must respect the separation of powers. Whereas Mchunu underscored the duty of officials to implement court orders, Hlophe clarified that judicial remedies cannot extend to the continuous management of municipal functions. The High Court's detailed supervisory order requiring ongoing reporting was struck down because it "went beyond what was competent" and intruded into executive responsibilities (paras 20–23). The case thus built on Mchunu by reinforcing the binding nature of court orders while refining the limits of judicial intervention.

Table of cases

Case citation	Key constitutional principles	Core rights established
Government of the Republic of South Africa v Grootboom 2001 (1) SA 46 (CC)	Established the reasonableness standard for socio-economic rights; State must adopt comprehensive, coordinated programmes that include provision for those in desperate need.	Right of access to adequate housing under s 26; obligation to provide emergency housing; evictions must not result in homelessness.
Port Elizabeth Municipality v Various Occupiers [2004] JOL 13007 (CC)	Eviction requires a just and equitable enquiry under PIE; courts must balance property rights and housing rights in light of dignity, equality, ubuntu and fairness.	Protection against arbitrary eviction is important and municipalities must consider occupiers' circumstances, length of occupation, and availability of alternative accommodation.

[25] https://www.saflii.org/za/cases/ZASCA/2015/16.html

Case citation	Key constitutional principles	Core rights established
President of the Republic of South Africa and Others v Modderklip Boerdery (Pty) Ltd 2005 (5) SA 3 (CC); 2005 (8) BCLR 786 (CC)	The rights of property owners must be balanced against the rights of occupier.	The state has an obligation to ensure both sets of rights are realised.
Occupiers of 51 Olivia Rd, Berea Township & Another v City of Johannesburg [2008] JOL 21386 (CC)	Meaningful engagement is a constitutional requirement prior to eviction; municipalities must consider potential homelessness.	Occupiers must be protected against eviction without consultation; emergency accommodation must be considered; invalidated provisions of NBRA that allowed eviction without a court order.
The Occupiers of ERF 101, 102, 104 and 112, Shorts Retreat, Pietermaritzburg v Daisy Dear Investments (Pty) Ltd [2009] JOL 23840 (SCA)	Evictions must comply with PIE and be substantively just and equitable; municipalities must be joined due to their housing obligations.	Right to adequate housing requires municipalities to provide or consider alternative accommodation in eviction cases.
Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others [2009] ZACC 16; 2010 (3) SA 454 (CC)	PIE applies to large-scale relocations; consent must be properly considered; eviction must be just and equitable with safeguards.	Right to housing under s 26 requires meaningful engagement with relocation providing adequate temporary housing and guarantees of return to permanent housing.
City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another [2011] ZACC 33; 2012 (2) BCLR 150 (CC)	Municipalities cannot avoid responsibility for emergency housing; eviction only just and equitable if homelessness is avoided.	Municipal duty to plan and budget for emergency housing. Must protect occupants against homelessness following private eviction.
Occupiers of Skurweplaas 353 JR v PPC Aggregate Quarries (Pty) Ltd & Others [2012] JOL 28170 (CC)	Even short-term occupiers cannot be evicted without alternative accommodation and eviction orders must be synchronised with housing provision.	Right to adequate housing protects against even temporary homelessness. Municipalities bear duty to provide alternatives.
Motswagae and Others v Rustenburg Local Municipality and Another [2013] JOL 30036 (CC)	Section 26(3) protects peaceful occupation and interference without a court order amounts to unlawful eviction.	Right to undisturbed occupation and municipalities cannot use redevelopment as a back-door eviction.
Zulu and Others v eThekwini Municipality and Others 2014 (8) BCLR 971 (CC)	Demolitions are inseparable from evictions; interim interdicts authorising	Evictions and demolitions must comply with PIE and s 26(3) and communities

Case citation	Key constitutional principles	Core rights established
	demolitions without court process are unconstitutional.	entitled to judicial process and fairness.
Occupiers of Erven 87 and 88 Berea v De Wet NO and Another 2017 (8) BCLR 1015 (CC)	Courts cannot rubber-stamp consent eviction orders; judicial oversight always required.	Right to just and equitable eviction enquiry; informed consent required; municipalities must be joined where homelessness at risk.
Dladla and Others v City of Johannesburg and Another [2017] JOL 39329 (CC)	Constitutional rights follow residents into temporary accommodation; house rules must comply with rights.	Right to dignity, privacy, and family life in temporary housing; City must ensure emergency housing respects constitutional rights.
Melani and Others v City of Johannesburg and Others [2016] ZAGPJHC 55; (2016) 3 All SA 1 (GJ)	If possible allow long established communities to remain where they are, instead of moving them.	The UISP should be used to upgrade the community where they are rather than move them a long distance away.
Minister for Transport and Public Works: Western Cape & Others v Adonisi and Others [2024] ZASCA 47	Constitutional subsidiarity requires reliance on legislation; courts cannot compel government to use specific sites for social housing.	No duty to provide social housing on specific land unless designated; government must act reasonably within statutory frameworks.
Charnell Commando and Others v City of Cape Town and Another [2024] ZACC 27	City's exclusion of emergency housing from inner city unreasonable and unconstitutional; reinforced duty to mitigate gentrification impacts.	Duty to provide emergency housing near original homes; prohibition on perpetuating spatial apartheid; requirement for Temporary Emergency Accommodation Policy.
Officials obligations to carry out court orders		
Mchunu and Others v Executive Mayor, Ethekwini Municipality and Others (13904/2011) [2012] ZAKZDHC 78; 2013 (1) SA 555 (KZD) (19 September 2012)	Officials can be held responsible for ensuring that court orders are complied with. And organs of state cannot disregard binding court orders.	The Executive Mayor, Municipal Manager and Director of Housing held personally accountable for ensuring compliance with court
Philane Hlophe and Residents of Chung Hua Mansions v City of Johannesburg (South Gauteng High Court, Case No. 48102/2012)	Court embedded continuous oversight into housing remedies through a structural interdict, requiring detailed reporting.	Strengthened accountability for municipal housing obligations; established foundation for later appellate rulings in Hlophe.

Case citation	Key constitutional principles	Core rights established
City of Johannesburg Metropolitan Municipality v Hlophe and Others [2015] ZASCA 16	Court held that municipal officials must implement court orders	Refined and to some extent curtailed court inteference.

Current enforceable rights

- No one can be rendered homeless, and even the poorest of the poor and the most vulnerable must be provided with some accommodation to prevent them from becoming homeless. The state is obliged to provide emergency accommodation.
- The courts must balance the rights of property owners with those of occupiers who require land and housing.
- PIE requires the court to establish the length of occupation, whether there is an alternative, and the circumstances of the occupiers before evicting people. For example, age, children, disability, and employment status must be considered.
- The state must meaningfully engage with occupants before evicting people and must provide alternative accommodation, and may not render people homeless.
- Evictions must be reasonable. If people are temporarily removed to make way for new developments, they must be relocated to accommodation that meets adequate standards. Similarly, if they are removed to shelters, the shelters must protect constitutional rights to dignity, privacy and family life.
- If an eviction from private property will result in homelessness, the state must be joined and must provide emergency accommodation.
- Even short-term occupiers must be provided with alternative accommodation by the state on eviction.
- Intense disturbance of occupiers by excavation constitutes an eviction, as the right to a home is the right to undisturbed occupation.
- In all eviction matters, the people affected by the eviction must be joined because their rights are being infringed. Blanket eviction orders are not permissible.
- The state should preferably upgrade long-standing informal settlement communities rather than relocate them to distant new areas.
- The state should be setting aside well-located land in cities for low-income housing and not perpetuating apartheid planning by placing low-income housing on the peripheries.

- Poor people who are evicted from areas undergoing gentrification in inner-city areas should be relocated close to their homes, schools and workplaces, not to distant areas.
- Municipal officials are constitutionally and statutorily obliged to comply with court orders. If necessary, the court will impose judicial supervision (or mandamae) to ensure compliance.

Land rights

> *The land is our whole lives: we plough it for food; we build our houses from the soil; we live on it; and we are buried in it. When the whites took our land away from us, we lost the dignity of our lives: we could no longer feed our children; we were forced to become servants; we were treated like animals … But in everything we do, we must remember that there is only one aim and one solution and that is the land, the soil, our world …*[1]

Cases in this chapter

1. First National Bank of SA Ltd t/a Wesbank v Commissioner for the South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance 2002 (4) SA 768 (CC); 2002 (7) BCLR 702 (CC) 182
2. Port Elizabeth Municipality v Various Occupiers [2004] JOL 13007 (CC) Constitutional Court Case No: CCT 53/03 183
3. Nhlabathi and Others v Fick, Land Claims Court, Randburg, Case No. LCC 42/02, decided 8 April 2003 184
4. Occupiers of 51 Olivia Road, Berea Township and Another v City of Johannesburg and Others [2008] ZACC 1 186
5. Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others [2009] ZACC[16] 187
6. Tongoane and Others v National Minister for Agriculture and Land Affairs & Others [2010] ZACC 10 (Case CCT 100/09) 187
7. Baleni and Others v Minister of Mineral Resources and Others (North Gauteng High Court, 2018) 189
8. Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Ltd and Another [2018] ZACC 41 191
9. Rahube v Rahube and Others [2018] ZACC 42 194
10. The Minister of Land Affairs of the RSA and others v O. Slamdien and others 1999 LCC 107/98 197
11. Department of Land Affairs v Witz [2000] LCC 152/98 199
12. Randall and Kietzmann v Minister of Land Affairs; Knott and Rudman v Minister of Land Affairs [2002] ZALCC 27; LCC 136/99 & LCC 1/2000 (Land Claims Court, 10 May 2002, Meer AJ, Moloto AJJ, Stephenson Assessor) 200
13. Alexkor Ltd and Another v Richtersveld Community and Others [2003] ZACC 18; 2004 (5) SA 460 (CC) 201

[1] Basson J in Baleni v Minister of Mineral Resources (2019) 2 SA 453 (GP) para 1 quoting Mr Petrus Nkosi.

14. Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd [2007] ZACC 12; 2007 (6) SA 199 (CC); 2007 (10) BCLR 1027 (CC) 205

15. Land Access Movement of South Africa and Others v Chairperson of the National Council of Provinces and Others [2016] ZACC22 208

16. Landman and Another v Ndlozi and Another [2004] ZALCC 38; LCC 80/2003 and LCC 81/2003 (19 October 2004) 210

17. Mwelase and Others v Director-General for the Department of Rural Development and Land Reform and Another [2019] ZACC 30 213

The Constitution

Section 25(5)

The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.

Section 25(6)

A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.

Section 25(7)

A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.

Section 25(8)

No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1).

Section 25(9)

Parliament must enact the legislation referred to in subsection (6).

General points[2]

Sections 25(5), (6) and (7) cover the socio-economic rights to land. "Each subsection provides the constitutional basis for a different sub-component of the land reform programme: … section 25 (5) offers the basis for land redistribution; … s 25 (6) provides for tenure reform, and s 25 (7) engages in land restitution. S 25(8) provides for the reform of law related to natural resources."[3]

There is a strong relationship between the right to housing (section 26) and the right to

[2] J Pienaar and J Brickhill, 'Property and the Constitution, Chapter 48' in S Woolman and M Bishop (eds), *Constitutional Law of South Africa* (2nd ed, Juta 2007) 123–168 was the source of this section available at (https://www.scribd.com/document/912905763/Chap48)

[3] Pienaar and Brickhill (n 2) para 48.1

land. Grootboom held that for a person to have access to adequate housing, there must be land (para 35).

Section 25(5) requires access to be on an equitable basis implying that land redistribution is aimed at redressing past historical imbalances. Various acts have been passed to promote land redistribution. These are

- Land Reform (Labour Tenants Act) Act 3 of 1996. This Act protects labour tenants. They are not only protected but can become landowners themselves.
- Extension of Security of Tenure Act 62 of 1997 (ESTA). This Act protects farm workers against eviction and provides for farm labourers to acquire land rights.
- The Provision of Land and Assistance Act 126 of 1993 is used to achieve the aims of the redistribution programme by enabling people without land or people wishing to attain land to get financial assistance to acquire shares in existing agricultural developments.
- Transformation of Certain Rural Areas Act 94 of 1998 (TCRA). Only covers people who occupied former Coloured rural areas.

Section 25 (6) deals with tenure reform and the right to tenure that is legally secure or comparable redress. Various laws have been enacted to realise this right.

- The Upgrading of Land Tenure Rights Act 112 of 1991 (ULTRA) provides for the automatic conversion of weaker, apartheid-era land rights (such as permissions to occupy, quitrent, or leasehold) into full ownership, registered in the Deeds Office. It aimed to simplify and "upgrade" tenure. A Constitutional Court case, Rahube v Rahube (2018), discussed below, ordered the government to amend the act to ensure that women can make claims or be heard in situations where they oppose claims.[4]
- Informal Protection of Informal Rights Act 31 of 1996 (IPILRA). A temporary measure requiring consent before deprivation of informal rights. It affirms that customary and other informal rights constitute legally recognised "property" within the meaning of section 25(6).[5]
- The Extension of Security of Tenure Act 62 of 1997 (ESTA) protects vulnerable occupiers.

Section 25 (7) deals with restitution of land to those people or communities that were dispossessed of property after June 1913 (after the Natives Land Act 27 of 1913) was

[4] The Upgrading of Land Tenure Rights Amendment Act 6 of 2021 was enacted to address the issue. The case can be found at https://www.saflii.org/za/cases/ZACC/2018/42.html

[5] While this Act was meant to be an interim measure, it has repeatedly been extended by Parliament and remains in force.

passed, which allocated 7% of land to black South Africans.[6] The door was opened for land claims to be lodged in terms of the Restitution of Land Rights Act 22 of 1994 (Restitution Act). The Land Claims Court was set up to hear land claims.

A recent highly critical document that looked at sections 25 (5), (6) and (7) was the High Level Report (HLP).[7]

Section 25(5) – Equitable Redistribution of Land[8]

The HLP found that the right to equitable access to land remains largely unrealised. Although section 25(5) requires the state to take reasonable legislative and other measures to foster conditions for equitable access, no dedicated law defines or operationalises this right, and it has never been tested judicially. Redistribution has been slow and declining since 2008, with only about 5.46 per cent of commercial agricultural land transferred to date. The Panel highlighted elite capture, where better-off individuals benefit over the poor, and noted that only 23 per cent of beneficiaries are women.

The leasehold system adopted through the State Land Lease and Disposal Policy (2013) was found to undermine tenure security, with many beneficiaries lacking recorded or enforceable rights. The Department of Rural Development and Land Reform (DRDLR) has failed to monitor impact, manage leases effectively, or provide consistent support. The HLP concluded that redistribution has been misdirected and under-resourced, calling for a National Land Reform Framework Bill to define "equitable access", establish transparent criteria for beneficiary selection, prevent corruption, and integrate redistribution, restitution, and tenure reform within a single legislative framework.

Section 25(6) – Security of Tenure[9]

The Panel found that tenure reform has failed to secure land rights for millions in both communal areas and on commercial farms. Despite the constitutional duty in section

25(6), implementation of ESTA and the Land Reform (Labour Tenants) Act 3 of 1996 (Labour Tenants Act) has been weak and marked by what the HLP termed a "total system failure".

Evictions and human-rights violations against farm dwellers and labour tenants have

[6] The Natives Land Act 27 of 1913 divided the country into areas for exclusive occupation by black African people (7%), and left the rest available for white, Coloured and Indian groups. The 1936 South African Development and Land Act 18 extended the area available to black African people to 13%.

[7] High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change (HLP), November 2017 available at https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/HLP_Report/HLP_report.pdf

[8] HLP pp 200 – 223

[9] HLP 286 - 297

continued “unabated”, and the DRDLR has never produced a costed plan to implement either Act. Recommendations include training for SAPS, amendments to both Acts, and the creation of a National Register of farm dwellers.

Section 25(7) – Restitution of Land Rights[10]

The report concludes that restitution has been slow, uneven, and administratively chaotic. Many claimants have waited decades without resolution; post-settlement support has been inadequate; and overlapping restitution and labour-tenant claims remain unresolved. The Commission on Restitution of Land Rights lacks capacity and consistent funding, and Parliament’s oversight has been weak. The Panel recommended that restitution be brought under a clear framework law (the same National Land Reform Framework Bill proposed for section 25(5)) to ensure transparency, timely settlement of claims, and integration with redistribution and tenure security measures. It emphasised that restitution has not met constitutional obligations to restore land or redress past dispossession in a manner that promotes equitable access and sustainable livelihoods.

Statistics

Overall land registration

By 2017, approximately 94% of South Africa’s total surface area of 121.9 million hectares was registered in the Deeds Office, with 6% (7.7 million ha) remaining as unregistered state trust land, mainly in the former homelands of the Eastern Cape and Limpopo.[11]

Ownership types

Of the registered land, individuals, companies, trusts, and community-based organisations collectively held around 89.5 million hectares, amounting to 90% of the total. Within this, individuals owned 37.8 million ha (39%), trusts 29.3 million ha (31%), companies 23.2 million ha (25%), and community-based organisations 3.55 million ha (4%).[12]

By race

Within the 37 million hectares of farms and agricultural holdings registered to individuals, white South Africans owned 26.66 million ha (72%), Coloured South Africans 5.37 million ha (15%), Indian South Africans 2.03 million ha (5%), and African South Africans 1.31

[10] HLP 224 - 244

[11] Department of Rural Development and Land Reform, Land Audit Report: Phase II – Private Land Ownership by Race, Gender and Nationality (Pretoria, 2017), available at https://www.gov.za/sites/default/files/gcis_document/201802/landauditreport13feb2018.pdf 6–7

[12] DRDLR, Land Audit Report Phase II (2017) 8–10

million ha (4%). “Other” and co-owners accounted for the balance.[13]

Limitations

The racial breakdown only applies to land registered to individuals. It does not extend to land registered to companies, trusts, or community-based organisations, which together account for more than half of registered land. Nor does it cover communal land in the former homelands, estimated at around 17 million ha. As a result, the 72% ownership figure for whites relates only to individually registered farms and holdings, not to the entire land base.[14]

Redistribution

Government targets

The African National Congress’s policy framework Ready to Govern (1992) committed to transferring 30% of agricultural land to black South Africans within the first five years of democracy.[15] This political ambition was formalised by government in the White Paper on South African Land Policy (1997), which set the same target for 2014.[16] The deadline was later shifted to 2025. With commercial agricultural land amounting to approximately 82 million hectares, the 30% target equates to 24.6 million hectares.

Evaluation of whether targets achieved

Multiple reviews confirm that the 30% target has not been achieved. The HLP reported that only about 8% of land had been transferred through land reform programmes since 1994, well below the target.[17] Ruth Hall has also observed that less than 10% of commercial farmland has been transferred to black South Africans.[18] Similarly, the Presidential Advisory Panel on Land Reform and Agriculture (2019) concluded that progress was very slow, with estimates ranging between 8% and 10%.[19]

According to DALRRD’s Annual Report 2023/24, during the 2019–2024 Medium-Term

[13] DRDLR, Land Audit Report Phase II (2017) 12–13

[14] DRDLR, Land Audit Report Phase II (2017) 5

[15] African National Congress, Ready to Govern (1992) available at https://www.anc1912.org.za/policy-documents-1992-ready-to-govern-anc-policy-guidelines-for-a-democratic-south-africa/ 22

[16] Department of Land Affairs, White Paper on South African Land Policy (Pretoria, 1997) available at https://www.gov.za/sites/default/files/gcis_document/201411/whitepaperlandreform.pdf 41

[17] HLP (n 1) 202–204

[18] Hall, R, “Reconciling the Past, Present, and Future: The Parameters and Practices of Land Restitution in South Africa” (2019) Journal of Agrarian Change 19(1) 23–46

[19] Department of Agriculture, Land Reform, Rural Development, Final Report of the Presidential Advisory Panel on Land Reform and Agriculture (Pretoria, 2019) 19, available at https://www.gov.za/sites/default/files/gcis_document/201907/panelreportlandreform_1.pdf

Strategic Framework, the state acquired and redistributed 1,542,402 hectares, including 30,530 ha for farm dwellers and labour tenants.[20] This represents about 1.9% of commercial agricultural land and only 6.3% of the hectares required to meet the 30% redistribution target of 24.6 million ha. In 2023/24 alone, 67,376 ha were allocated (exceeding the target of 42,456 ha), including allocations to women (127,252 ha), youth (111,071 ha), and people with disabilities (2,781 ha).[21]

Restitution

Restitution has proceeded in parallel, with 80,664 claims settled since 1994, benefitting about 2.1 million people and restoring 3.5 million ha of land. If one takes the baseline of total land being 121,9 million ha, then 3,5% restored is about 2,9% of the total land area. Or if one uses commercial agricultural land, of which there is 82 million ha, then the percentage is higher, being 4,3% of that land.[22]

Cases

Balancing rights

1. **First National Bank of SA Ltd t/a Wesbank v Commissioner for the South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance 2002 (4) SA 768 (CC); 2002 (7) BCLR 702 (CC)[23]**

This was an early case that interpreted section 25 of the Constitution. The Court held that section 25 protects property rights but always in balance with the Constitution's commitment to land reform and restitution, with subsections (4) to (9), including section 25(7)) emphasising redress for past dispossession.

Ackermann J emphasised that section 25 must be read as a whole, balancing the protection of property rights with the transformative objectives of land reform. He explained that subsections (4) to (9) (including section 25(5) to (7)) "underline the need for and aim at redressing one of the most enduring legacies of racial discrimination in the

[20] Department of Agriculture, Land Reform, Rural Development, Annual Report 2023/24 (Pretoria, 2024) 52–53 available at https://www.gov.za/documents/annual-reports/department-agriculture-land-reform-and-rural-development-annual-report-2

[21] Department of Agriculture, Land Reform, Rural Development (n18) 54–55

[22] Department of Agriculture, Land Reform and Rural Development, Addressing and redressing colonial injustice (media statement, 19 June 2024) "Through this restitution process … a total of 376 976 individuals and communities have benefited, with 3,895 935 ha of land returned to beneficiaries," available at https://www.gov.za/news/media-statements/agriculture-land-reform-and-rural-development-resolution-land-claims-19-jun?utm_source=chatgpt.com

[23] https://www.saflii.org/za/cases/ZACC/2002/5.html?utm_source=chatgpt.com

past, namely the grossly unequal distribution of land in South Africa" (para 49). The Court held that property protection is not absolute but subject to "societal considerations" and the broader constitutional commitment to social justice.

The Court set out a general framework for analysing deprivations and expropriations under section 25. First, it confirmed that "property" extends beyond land to include corporeal movables, such as vehicles. Second, any interference with property is a "deprivation," which must not be arbitrary. A deprivation is arbitrary if the law fails to provide sufficient reason for the removal of rights, or if there is no rational relationship between the means used and a legitimate purpose. Only once a deprivation is found can the court determine whether it amounts to expropriation, which requires compensation.

In short, *FNB* established that section 25 serves a dual function: it protects existing property rights while ensuring they are exercised in line with the Constitution's land reform and restitution objectives. It recognised the "inevitable tension" between individual property interests and social responsibilities, confirming that the purpose of section 25 is to strike a proportionate balance between the two.

2. Port Elizabeth Municipality v Various Occupiers [2004] JOL 13007 (CC) Constitutional Court Case No: CCT 53/03[24]

The case affirms that both property owners and occupiers have constitutional rights that require protection, but that sections 25(4) to (9) of the Constitution recognise that property rights are not absolute and ownership has to be balanced against the need to redistribute property and undo the grossly unequal distribution of land in South Africa.

In *Port Elizabeth Municipality v Various Occupiers*, the Court stressed that property rights under section 25 must be respected but are not absolute. As Sachs J observed, they must be "understood in the context of the need for the orderly opening-up or restoration of secure property rights for those denied access to or deprived of them in the past" (para 15). Subsections (4) to (9) of section 25, including section 25(5) and (6), were highlighted as central to redressing the "grossly unequal distribution of land in South Africa" (para 16), showing that ownership cannot be treated in isolation from the Constitution's transformative purpose.

The Court emphasised that section 25 creates duties on the state to foster equitable access to land and secure tenure. Sachs J noted that "the need to strengthen the precarious position of people living in informal settlements is recognised by section 25" through measures to enable access to land, secure tenure, and restitution for dispossession (para 19). In eviction cases, courts must therefore reconcile owners' rights

[24] https://www.saflii.org/za/cases/ZACC/2004/7.html?utm_source=chatgpt.com

with the rights of those protected under section 25(5) and (6), ensuring that any order is just and equitable within the broader project of land reform and tenure security.

Cross reference housing

Secure tenure (section 25 (6))

3. Nhlabathi and Others v Fick, Land Claims Court, Randburg, Case No. LCC 42/02, decided 8 April 2003[25]

The case revolved around whether a family could bury their deceased father and husband on a farm they had lived on for several decades that belonged to Fick, who had purchased it. The Court held that section 25(6) of the Constitution that provides for secure tenure, includes the right to bury members of one's family in the area where the family resided.

Parties

The applicants were members of the Nhlabathi family – MV, KL and JP Nhlabathi – seeking to bury their deceased father and husband, Kiti Elijah Nhlabathi. The respondent was WJJ Fick, the owner of Mooifontein farm.

Background and facts

Kiti Elijah Nhlabathi died in September 2002, having lived with his family on Mooifontein farm. His widow and children wished to bury him there, in line with their practice and cultural beliefs. The farm owner, Fick, refused permission and even locked the family out of the property. After negotiations failed, the family urgently applied to the Land Claims Court to compel the owner to allow the burial, relying on section 6(2)(dA) of ESTA, which grants occupiers the right to bury family members on land they occupy, provided certain conditions are met.

Legal issues before the Court

The Court had to decide several questions. First, it had to determine whether the applicants had the necessary standing to make burial arrangements, given that the respondent argued that another son, Ephraim, was entitled to do so. Second, it had to decide whether the first applicant qualified as an "occupier" under ESTA, because only an occupier may rely on section 6(2)(dA). Third, the Court had to consider whether section 6(2)(dA) was constitutionally valid in light of the property clause in section 25 of the Constitution and the argument that burial matters fall within provincial legislative

[25] https://www.saflii.org/za/cases/ZALCC/2003/9.html?utm_source=chatgpt.com

competence. Finally, it had to determine whether the statutory requirements for the exercise of a burial right were met: whether the deceased had been residing on the farm at the time of his death, whether there was an established practice of allowing burials on Mooifontein, and whether the burial right could be exercised without unjustifiably infringing the landowner's rights.

Court's findings and reasoning

The Court found that the first applicant, as the eldest son of the lawful union and with the support of family elders, had the necessary standing to decide on the burial. It held that he was an occupier under ESTA, having previously lived on the farm with the landowner's consent and without lawful termination of his rights. On the constitutionality of section 6(2)(dA), the Court upheld it, emphasising that it balances the occupier's cultural and religious rights with the owner's property rights and does not intrude on provincial powers.

Finally, the Court held that the deceased had been residing on the farm, that there was an established practice of family burials on Mooifontein, and that the landowner's rights did not outweigh the burial claim.

Court order

The Court authorised the applicants to bury Kiti Elijah Nhlabathi in the family graveyard on Mooifontein farm, subject to compliance with other applicable burial laws. No order as to costs was made.

Why the case matters

This case confirmed that the right to secure tenure under section 25(6) of the Constitution extends beyond residence alone; it also encompasses the ability of occupiers to live and die with dignity and to maintain cultural and familial practices, such as burial. The judgment gave effect to ESTA's purpose of protecting and securing the tenure of vulnerable occupiers and established that burial rights form part of that protection, striking a balance between property ownership and the constitutional imperatives of dignity, culture, and land reform.

4. Occupiers of 51 Olivia Road, Berea Township and Another v City of Johannesburg and Others [2008] ZACC 1[26]

The Court held that municipalities must take holistic decisions on eviction, integrating duties to ensure safe buildings with constitutional obligations to foster equitable access to land and secure tenure under section 25(5) and (6), requiring meaningful engagement with occupiers before eviction.

Although the Court's reasoning was centred on section 26, the judgment is significant for its implications for section 25(5) and (6). These subsections impose duties on the state to foster equitable access to land and provide secure tenure for those left vulnerable by past discriminatory laws. In *Olivia Road*, the Court stressed that eviction decisions by municipalities cannot be taken in isolation from their broader constitutional housing obligations.

Yacoob J held that it was inappropriate for municipal officials to separate their duty to ensure safe buildings from their duty to progressively realise housing rights; the City "must take a holistic decision in relation to eviction" which includes "taking into account the possible homelessness of the people concerned and the capacity of the City to do something about it" (para 44).

This reasoning resonates with section 25(5) and (6) because it recognises that municipalities, as organs of state, carry a constitutional responsibility to integrate land-use regulation with measures to secure tenure and equitable access to land. The Court's innovation of requiring meaningful engagement between occupiers and the City reflects these obligations: engagement ensures that people facing eviction are not treated as trespassers but as rights-holders whose tenure requires consideration and potential redress. In this way, the Court linked the immediate protection against homelessness under section 26 with the long-term transformative aims of section 25(5) and (6).

Cross reference housing

[26] https://www.saflii.org/za/cases/ZACC/2008/1.html?utm_source=chatgpt.com

5. Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others [2009] ZACC [27]

The Court held that relocation of long-standing informal settlement residents (as was the situation in this case), must be assessed against section 25(5) and (6), which oblige the state to foster equitable access to land and provide secure tenure or redress to those made vulnerable by past discrimination.

While the central issues in *Joe Slovo* concerned section 26, the Constitutional Court also addressed sections 25(5) and 25(6). Several judges emphasised that the Constitution not only protects ownership but also imposes obligations on the state to foster equitable access to land and secure tenure. Ngcobo J highlighted that section 25(5) requires the state to create conditions enabling citizens to gain access to land on an equitable basis, while section 25(6) obliges it to provide legally secure tenure or redress to those whose tenure remains insecure due to past discriminatory laws. These duties were relevant because the *Joe Slovo* residents had occupied the land for decades and developed established homes, which could not be disregarded as unlawful occupation alone.

The Court's reasoning shows that state-led relocation projects must be assessed against the transformative imperatives of section 25. Any programme to clear informal settlements, even if linked to housing delivery, must respect residents' rights to secure tenure and equitable access to land. In this way, *Joe Slovo* reinforced that section 25 is not only about protecting private ownership but also about affirming the tenure and land access rights of historically marginalised communities, thereby requiring the state to balance upgrading and relocation with constitutional redress.

Cross reference housing

6. Tongoane and Others v National Minister for Agriculture and Land Affairs & Others [2010] ZACC 10 (Case CCT 100/09)[28]

The Court declared the Communal Land Rights Act 11 of 2004 (CLARA) invalid for being passed under the wrong procedure, affirming that laws enacted to give effect to section 25(6) must both secure tenure substantively and be adopted through constitutionally proper processes.

[27] https://www.saflii.org/za/cases/ZACC/2009/16.html
[28] https://www.saflii.org/za/cases/ZACC/2010/10.html

Parties

Applicants: Stephen Segopotso Tongoane and three other community members, acting on behalf of rural communities affected by CLARA.

Respondents: Minister for Agriculture and Land Affairs, Minister for Provincial and Local Government, all nine provincial premiers, the Speaker of the National Assembly, the Chairperson of the NCOP, and the National House of Traditional Leaders.

Background and facts

The applicants were members of communities living on land held under customary law, whose tenure remained insecure by virtue of their lack of clear rights to their land. CLARA was enacted to give effect to section 25(6) of the Constitution, which provides that: "A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure, or to comparable redress".

The applicants challenged CLARA on two main grounds: (a) that Parliament had followed the wrong legislative procedure in passing the Act (tagging it as a section 75 Bill instead of a section 76 Bill),[29] and (b) that CLARA in substance failed to secure tenure and in fact undermined the tenure rights of communities.

Legal issues before the Court

Whether CLARA was procedurally invalid because it was not passed through the correct process involving the provinces (section 76).

Whether CLARA substantively complied with section 25(6), given that it purported to secure tenure but was argued to undermine tenure security.

Court's findings and reasoning

The Court emphasised that section 25(6) recognises the land tenure consequences of colonialism and apartheid: "Section 25(6) of the Constitution reflects recognition of the land tenure consequences of colonialism and apartheid. In summary, those consequences may be characterised as insecurity of tenure, pressure on land, and

[29] This refers to a procedural challenge concerning how CLARA was enacted. The applicants argued that Parliament followed the wrong legislative procedure by treating CLARA as an "ordinary Bill not affecting provinces" under section 75 of the Constitution, when it should have been treated as an "ordinary Bill affecting provinces" under section 76. The distinction matters because section 76 requires greater involvement by provincial legislatures through the National Council of Provinces. The applicants contended that CLARA substantially affected provincial interests, including land administration, traditional leadership, and customary law, and that Parliament's failure to follow the section 76 procedure rendered the Act constitutionally invalid.

overlapping and sometimes contradictory rights" (para 18).

On the procedural issue, the Court held that CLARA dealt extensively with matters listed in Schedule 4 (traditional leadership and indigenous law) and therefore had to be passed as a section 76 Bill, requiring provincial participation. Because it was incorrectly tagged as a section 75 Bill, the entire Act was unconstitutional and invalid.

Although the Court did not rule on the substantive challenge, the judgment underscored that legislation enacted to implement section 25(6) rights must be constitutionally sound in both process and content. Communities had argued that CLARA undermined rather than secured tenure, and the Court noted these concerns, reinforcing that section 25(6) obliges the state to enact laws that provide real, effective security of tenure or comparable redress.

Court order

CLARA was declared unconstitutional and invalid in its entirety due to being enacted under the wrong legislative procedure. The Court suspended the order of invalidity for 18 months to allow Parliament to enact valid legislation.

Why the case matters

Tongoane is pivotal in affirming section 25(6) rights by holding that tenure security is a constitutional right directly linked to the history of racially discriminatory land laws, and that Parliament's duty to give effect to it must be discharged through proper, participatory law-making. The Court stressed that laws passed to implement section 25(6) must not only be substantively consistent with tenure-security obligations but also be enacted through constitutionally mandated procedures, ensuring both legitimacy and protection for vulnerable communities.

Equally important, the judgment recognised the **constitutional status of customary law**, noting that CLARA dealt "in substantial measure" with indigenous law and traditional leadership, both Schedule 4 matters (para 56). The Court affirmed the power and importance of customary law as a living source of law central to land tenure reform.

7. Baleni and Others v Minister of Mineral Resources and Others (North Gauteng High Court, 2018)[30]

The Interim Protection of Informal Land Rights Act 31 of 1996 (IPILRA) requires the state to not only consult with a community who may be displaced by mining operations, but to also acquire their consent.

[30] https://www.saflii.org/za/cases/ZAGPPHC/2018/829.html

Parties

Applicants were members of the Umgungundlovu community in the Xolobeni area of the Wild Coast. Respondents included the Minister of Mineral Resources and the mining company seeking a mining right.

Background and facts

The applicants occupied and used land held under customary law in the Xolobeni area, where a mining company sought to mine mineral sands. The Minister granted a mining right following a consultation process. The community opposed the mining, arguing that it would deprive them of their land and livelihoods and that they had not consented to it.

Legal issues before the Court

Whether the community held informal land rights protected by IPILRA, and, if so, whether the Minister could lawfully grant a mining right over that land on the basis of consultation alone, without the community's consent. The central issue in *Baleni* was not whether the consultation was adequate or with the correct representatives, but whether it was sufficient at all.

Court's findings and reasoning

The Court held that the applicants held informal land rights under IPILRA, arising from their occupation and use of the land in terms of living customary law. IPILRA protects such rights against deprivation without consent, unless expropriation occurs in accordance with law. The Court found that the consultation requirement in the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA) could not override IPILRA. Where IPILRA applies, consultation is insufficient: the free, prior and informed consent of the rights-holders is required before a mining right may be granted.

Court order

The Court declared that the Minister lacked the power to grant a mining right over the community's land without complying with IPILRA, including obtaining the community's consent.

Why the case matters

Baleni affirms the legal force of informal and customary land rights in providing for secure tenure. It establishes that community consent, not mere consultation, is required before mining can proceed on land protected by IPILRA, thereby fundamentally strengthening the position of rural and customary communities facing extractive development.

8. Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Ltd and Another [2018] ZACC 41[31]

In the case of Sedibelo Platinum, the CEO believed that when the company started negotiations with the community, all the boxes were ticked. They had communicated with the traditional authority of the Bakgatla-Ba-Kgafela, who were the registered owners of the land. They thought they had received the required permissions, but the Court decided otherwise, holding that the people on the land, who dwell and work the land, were the ones that should have been consulted. Once consulted, if they do not support the mining operations, a mining company cannot simply deprive them of their tenure without their consent or lawful expropriation. The Court held that the mining company must follow statutory dispute-resolution processes before eviction, with the right-holders.

Parties

Applicants: Grace Masele Mpane Maledu and 37 other members of the Lesetlheng Community, descendants of the families that collectively purchased the farm Wilgerspruit 2 JQ in 1919.

Respondents: Itereleng Bakgatla Mineral Resources (Pty) Ltd (IBMR) and Pilanesberg Platinum Mines (Pty) Ltd (PPM), holders of mining rights over the same land.

Amici Curiae: Mr Mdumiseni Dlamini and the Land Access Movement of South Africa (LAMOSA).

Background and facts

In 1919, thirteen families from the Lesetlheng village community in North West purchased the farm Wilgerspruit. Because black people were legally barred from owning land, the farm was registered in the name of the Minister of Native Affairs "in trust for the Bakgatla-Ba-Kgafela" (BBK) community. The Lesetlheng families, however, were the true beneficial owners, having paid for and demarcated the land among themselves, with clear records of contributions and use.

The families and their descendants lived, farmed, and sustained themselves there for almost a century. Under the democratic dispensation, their occupation was protected by the IPILRA), which recognises and safeguards informal land rights where people occupy or use land without formal title but with lawful and continuous possession. IPILRA prohibits the deprivation of such rights without the holders' consent or lawful

[31] https://www.saflii.org/za/cases/ZACC/2018/41.html

expropriation with compensation.

In the early 2000s, the mining company Sedibelo Platinum (through IBMR and PPM) began prospecting on the farm. Believing that the BBK traditional authority represented all affected people, the company sought consent from the chief and entered into a mining agreement in 2008. The Lesetlheng families, who were never consulted, objected, arguing that they, not the BBK community at large, held the actual rights to the farm. They later discovered that the chief had received hundreds of millions of rand from the mining arrangement and that the Department of Mineral Resources had approved the mining right based on this flawed consent.

When the families protested, they faced arrests and an eviction order obtained by PPM. Both the High Court and the SCA upheld the eviction, treating the mining right as trumping the community's occupation. The families then approached the Constitutional Court.

Legal issues before the Court

- Whether the mining companies were obliged to follow the dispute-resolution procedure in section 54 of the MPRDA before seeking eviction.
- Whether the applicants' informal rights under IPILRA had been lawfully terminated, and whether their consent was required before they could be deprived of occupation.
- Whether the failure to consult the families violated their constitutional right to legally secure tenure under section 25(6) of the Constitution.

Court's findings and reasoning

The Constitutional Court, in a judgment by Justice Petse, held that the applicants were holders of informal land rights protected under IPILRA and, by extension, under section 25(6) of the Constitution, which guarantees that persons with insecure tenure resulting from past racial discrimination are entitled to legally secure tenure or comparable redress.

The Court rejected the notion that a mining right supersedes existing occupation or use of land. It held that IPILRA rights cannot be extinguished without consent unless the land is lawfully expropriated and compensation is paid. The consent of the traditional authority, or of the broader Bakgatla-Ba-Kgafela community, was insufficient; the specific right-holders, the Lesetlheng families, had to be consulted directly.

Furthermore, the Court found that the mining companies had failed to comply with section 54 of the MPRDA, which sets out a process for resolving disputes between mining right holders and occupiers, including compensation and, if necessary, expropriation.

Instead of following this statutory path, the companies had sought eviction orders. The High Court's order was therefore invalid.

The judgment integrated constitutional, statutory, and customary law principles: the Court read IPILRA and the MPRDA together to ensure that development does not undermine tenure security. As Justice Petse observed, mining rights do not automatically displace existing rights in land, and the state, as trustee of communal land, bears a duty to protect vulnerable right-holders from arbitrary deprivation (para 19).

Court order

The Constitutional Court upheld the appeal, set aside the eviction order, and directed that PPM and IBMR must first comply with section 54 of the MPRDA and engage meaningfully with the Lesetlheng families. It confirmed that the applicants' informal land rights remained intact and could not be terminated without their consent or lawful expropriation. Costs were awarded to the applicants.

Why the case matters

Maledu affirms that informal and communal landholders enjoy constitutionally protected tenure security equivalent to formal ownership. The decision operationalises section 25(6) of the Constitution and IPILRA as key instruments of restorative justice for those historically excluded from ownership by racial laws.

By recognising that "a mining right does not trump the rights of occupiers of the land", the Court re-centred the right to dignity, livelihood, and participation within the extractive economy. The ruling compels mining companies to consult directly with those living on and using the land, not merely with traditional authorities, and to follow lawful, participatory dispute-resolution mechanisms before attempting eviction.

In the aftermath of the judgment, the Lesetlheng community and PPM negotiated a comprehensive settlement that included significant compensation, access to alternative farmland, community procurement and employment benefits, and oversight mechanisms for accountability.

9. Rahube v Rahube and Others [2018] ZACC 42[32]

H Rahube, the brother of M Rahube, sought to evict her from the family property she lived on, claiming to be the holder of the right to the land. He based this on the fact that his name appeared on the deed of grant issued to him as the head of the family in 1987. The problem was that Proclamation 293 of 1962 recognised only male members of families as heads of households, so M Rahube's name did not appear on the deed. To make matters worse, when the Upgrading of Land Tenure Rights Act 112 of 1991(ULTRA) was passed, it automatically converted the rights people held under their apartheid deeds of grant into ownership. It did not hold hearings to determine whether there were other claimants. In this case, M Rahube won the right not to be evicted, and the section of ULTRA that allowed the conversion was struck down as unconstitutional. The government was given 18 months to rectify this

Parties

Applicant: Matshabelle Mary Rahube, an African woman who lived on family property in Mabopane, North West, and sought to vindicate her right to equality and secure tenure.

Respondents: Hendsrine Rahube, her brother, whose name appeared on a deed of grant under apartheid laws, and the MECs for Housing and Land Affairs, the Minister for Rural Development and Land Reform, the Registrars of Deeds (Pretoria and Vryburg), and the City of Tshwane.

Background and facts

The Rahube siblings grew up on the family property at Stand 2328, Block B, Mabopane. Their grandmother had been the de facto[33] owner, but under apartheid's racially and patriarchally discriminatory laws, African women could not hold formal land rights. When she died in 1978, the family continued to occupy the property.

In 1987, Matshabelle's brother, the first respondent, was nominated as the "head of the family" in terms of Proclamation R293 of 1962, which governed townships in so-called "Black areas". The following year, a deed of grant was issued to him under the apartheid-era system, which recognised only men as heads of households and excluded women from registering rights in land.

[32] https://www.saflii.org/za/cases/ZACC/2018/42.html

[33] That meant she lived on the property and was considered by herself and her family and community as the owner, even though she did not have legal title.

In 1991, the ULTRA was enacted. It aimed to convert apartheid-era forms of tenure into ownership. However, section 2(1) of ULTRA automatically converted the rights of registered holders, mostly men, into ownership, without providing any process for others living on the land, often women, to make claims or be heard.

When ULTRA came into effect in the North West in 1998, the first respondent became the legal owner of the property, excluding the applicant, who had lived there for decades.

When her brother tried to evict her in 2009, Ms Rahube discovered that the automatic conversion had taken effect and that she had lost her right to the land. She challenged the constitutionality of section 2(1) of ULTRA, arguing that it entrenched gender inequality and violated women's rights to equality, dignity, and housing security. It did so by automatically enabling apartheid permit holders, invariably men, to obtain ownership through their deeds of grant or other permits.

Legal issues before the Court

- Whether section 2(1) of ULTRA was constitutionally valid in automatically converting apartheid-era tenure rights into ownership without a hearing for affected parties.
- Whether this conversion violated section 9 of the Constitution (equality and non-discrimination) and women's rights to dignity, property, and access to housing.
- What remedy and form of relief would be just and equitable, given the long-standing operation of the statute

Court's findings and reasoning

The Constitutional Court, in a unanimous judgment by Justice Goliath AJ, confirmed the High Court's order declaring section 2(1) unconstitutional. Justice Goliath began by recalling the universal principle that "all human beings are born free and equal in dignity and rights" (para 1), noting that under apartheid this was "not true for the majority of South Africans" and least of all for African women, who endured "three-fold discrimination based on race, class and gender" (para 2).

The Court found that Proclamation R293, under which the original land rights were created, was explicitly patriarchal. It defined "family" in relation to the male "head of the family" and used only masculine pronouns to describe who could hold a certificate or deed of grant (paras 29–31). This legal regime excluded women from property ownership, entrenching their economic and social dependence on male relatives.

Section 2(1) of ULTRA perpetuated that injustice. By automatically converting existing deeds of grant into ownership without any process to review or include unregistered occupants, it carried forward the effects of patriarchal apartheid law into the democratic era. The Court held that this amounted to indirect gender discrimination and violated

sections 9(1) and 9(3) of the Constitution, which guarantee equality before the law and prohibit discrimination on the basis of sex and gender (paras 36–47).

The Court reaffirmed that the state bears a constitutional duty under section 25(5) to take reasonable measures to ensure equitable access to land. ULTRA, intended as a redress measure, failed to meet that standard because it entrenched rather than dismantled historical inequalities (para 49). As Goliath AJ observed, "A reasonable step to ensure equitable access to land must do something to counteract pre-existing inequitable access. Otherwise, it leaves intact inequity" (para 51).

The Court further held that section 2(1) lacked any rational or fair procedure for notice, consultation, or review, thereby depriving affected women of due process and compounding discrimination (paras 52–59).

Court order

The Court confirmed the constitutional invalidity of section 2(1) of the ULTRA to the extent that it violated women's rights to equality and dignity. The order was made retrospective to 27 April 1994, with safeguards to avoid disrupting bona fide transactions:

- Property already transferred in good faith to third parties, inherited through finalised estates, or upgraded to ownership by women acting in good faith would remain valid.
- Parliament was given 18 months to enact a constitutionally compliant process for determining ownership and occupation rights.
- The first respondent was interdicted from transferring or encumbering the u7Mabopane property until such legislation was enacted.
- The Minister for Rural Development and Land Reform was ordered to pay the applicant's costs, including those of two counsel.

Why the case matters

Rahube is a judgment that exposes how patriarchal laws continued to shape women's access to land long after apartheid and affirms the Constitution's transformative mandate to dismantle those legacies.

The Court's reasoning integrates gender, dignity, and property rights within a human rights framework. It insists that remedial legislation such as ULTRA must not merely convert titles but must "promote the participation of women in social, economic and political spheres while advancing the spirit, purport and objects of the Constitution" (para 2).

By declaring that automatic conversion of rights without participation entrenches

structural inequality, the Court affirmed that land and housing policy must be inclusive, participatory, and attentive to historic gendered exclusions. The decision transforms the narrative of land reform from one of administrative regularisation to one of human rights realisation, particularly for women who have been historically excluded from ownership and dignity within their own homes.[34]

Cross reference gender

Restitution (section 25(7))

10. The Minister of Land Affairs of the RSA and others v O. Slamdien and others 1999 LCC 107/98[35]

The Slamdiens purchased land in 1955, which was later declared a "Coloured group area". In 1970, the state bought the property to build a "Coloured school". The Slamdiens claimed restitution from the Land Claims Court. The Court declined to restore their property to them or to award compensation, holding that restitution under section 25(7) requires a direct causal link between dispossession and a racially discriminatory land law or practice, and that it rejected a claim based on the building of a segregated Coloured school.

Parties

Applicants: Minister of Land Affairs and Minister of Public Works

Respondents: Omar Slamdien and Moegamat Salie Slamdien (claimants)

Third Respondent: Chief Land Claims Commissioner

Background and facts

The first respondent purchased property in Surrey Estate, Cape Town, in 1955. In 1957, the area was proclaimed a "Coloured Group Area" under the Group Areas Act 41 of 1950, and the transfer was registered in his name in 1960. In 1970, the state purchased the property to build a racially segregated "Coloured" school.

The Slamdiens vacated the property, and the school was built on a consolidated erf that included their land. They later lodged a restitution claim under the Restitution Act, seeking the restoration of the property or alternative redress.

[34] ULTRA has been amended as required by the Court by means of the Upgrading of Land Tenure Rights Amendment Act 6 of 2021.

[35] https://www.saflii.org/za/cases/ZALCC/1999/6.html

Legal issues before the Court

- Whether the loss of the property was a "dispossession of a right in land" as a result of past racially discriminatory laws or practices as required by section 2(1)(a) of the Restitution Act (which gives effect to section 25(7) of the Constitution).[36]
- Whether the dispossession was caused by the Group Areas Act (a racially discriminatory law) or by the establishment of a segregated Coloured school (an alleged racially discriminatory practice).
- How to interpret the phrase "as a result of" in section 2(1)(a) of the Restitution Act.

Court's findings and reasoning

The Court emphasised that sections 25(7) and 2(1)(a) of the Restitution Act must be interpreted purposively, in line with the Constitution's commitment to remedying forced removals caused by racially discriminatory land laws. The Court held that the Group Areas Act was a racially discriminatory law squarely within the scope of section 25(7). However, the Court held that the establishment of a racially segregated school was not a "racially discriminatory practice" in relation to land rights**,** since its discriminatory effect was directed at education, not the exercise of land rights.

On causation, the Court held that for a restitution claim to succeed, there must be a direct causal link between the dispossession and a racially discriminatory law or practice. It rejected an overly broad interpretation that would open the "floodgates" to claims based on any racially segregated institution. The Court emphasised that restitution is intended to address the specific wrong of forced removals and dispossessions linked to racially discriminatory land laws and practices.

Court order

The Court held that the respondents were not entitled to restitution because their dispossession was not sufficiently connected to a racially discriminatory law or practice within the meaning of section 25(7) of the Constitution and section 2(1)(a) of the Restitution Act.

Why the case matters

This case illustrates the limits of section 25(7) restitution claims. While confirming that the Group Areas Act is a racially discriminatory law within the meaning of the Constitution, the Court restricted the scope of restitution to dispossession directly caused

[36] Section 2(1)(a) of the Restitution of Land Rights Act 22 of 1994 states: "A person shall be entitled to restitution of a right in land if -
(a) he or she is a person dispossessed of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices;"

by racially discriminatory land laws and practices. The judgment underscores that restitution is intended to redress the particular injustice of forced removals under apartheid's land regime, not all forms of racial discrimination by the state.

It highlights the centrality of causation and purposive interpretation in determining the ambit of restitution rights under the Constitution.

11. Department of Land Affairs v Witz [2000] LCC 152/98[37]

This case was brought by a white person who argued that he was dispossessed and entitled to compensation. His grandfather owned investment land in an area declared a "Coloured area" under the Group Areas Act 41 of 1950. Some of this land was left to Witz's father, who took ownership of it to sell. The Court held that his decision to take the land to sell meant he was not dispossessed of it, as set out in the Restitution Act. Section 25(7) requires proof of a real deprivation of rights in land caused by racially discriminatory laws.

This case concerned a restitution claim under the Restitution Act. The claimant, Witz, sought financial compensation for properties in Grassy Park that his grandfather had purchased in 1947. After the area was declared for "Coloured occupation" under the Group Areas Act, his father inherited the properties subject to a permit requiring subdivision and sale to Coloured persons. Witz argued that these forced sales at below-market prices amounted to a racially discriminatory dispossession.

The Land Claims Court, however, found no dispossession as contemplated by the Restitution Act or section 25(7) of the Constitution. It held that Jack Witz had voluntarily applied for a permit, elected to acquire the properties, and chose to sell them piecemeal as an investment. The Court rejected the argument that mere restrictions on sale (such as the land being sold only to "Coloured" persons) amounted to dispossession. He was not prevented from selling them, and his deprivation of rights was not caused by racially discriminatory laws but by his inheriting land with a restriction. The Court emphasised that section 25(7) requires proof of a real deprivation of rights in land caused by racially discriminatory laws. The claim was dismissed on this basis, although the Court acknowledged that the restitution scheme is not limited to poor or disadvantaged claimants.

[37] https://www.saflii.org/za/cases/ZALCC/2000/42.pdf

12. Randall and Kietzmann v Minister of Land Affairs; Knott and Rudman v Minister of Land Affairs [2002] ZALCC 27; LCC 136/99 & LCC 1/2000 (Land Claims Court, 10 May 2002, Meer AJ, Moloto AJJ, Stephenson Assessor)[38]

The claimants were white farmers who sought compensation because their farms had been forcibly sold to the South African Development Trust. They had been incorporated into the Ciskei homeland. The case confirmed that dispossession under racially discriminatory homeland consolidation laws constitutes restitution-worthy loss under the Restitution Act and agreed that the farmers should be compensated.

Parties

- In *LCC 136/99*: Charles Stanley Randall and Marjorie Faith Kietzmann (claimants) v Minister of Land Affairs (respondent).
- In *LCC 1/2000*: Andrew George Knott and Lynette Nadine Rudman (claimants) v Minister of Land Affairs (respondent).

Background and facts

The claimants sought restitution under section 2 of the Restitution Act, arguing that their family farms in the Peddie and Victoria East districts were forcibly sold to the South African Development Trust (SADT) under the racially discriminatory Development Trust and Land Act 18 of 1936. These farms were earmarked for incorporation into the Ciskei homeland during the 1970s and 1980s. The claimants alleged that the "sales" were coerced, as white landowners in "released areas" were pressured to sell or face expropriation. The respondent conceded that the Act was discriminatory but argued that the sales were voluntary and based on fair compensation.

Legal issues before the Court

Whether the claimants had been "dispossessed of rights in land" as a result of racially discriminatory laws or practices within the meaning of section 2(1) of the Restitution Act, thereby qualified for restitution.

Court's findings and reasoning

Meer AJ held that:

- The Development Trust and Land Act and the "released area" system were racially discriminatory, aiming to remove white farmers and reserve land for Black occupation

[38] https://www.saflii.org/za/cases/ZALCC/2002/18.pdf

within the homelands.

- Although the sales were formally by agreement, they occurred under duress. The claimants were compelled to sell under threat of expropriation and were effectively excluded from continued ownership or use of their farms once the areas were proclaimed "released areas".
- The evidence from state officials and farmers showed that the transactions were not between willing buyers and willing sellers.
- The Court rejected the argument that white farmers were excluded from restitution, emphasising that the Restitution Act applies to all persons dispossessed by racially discriminatory laws, regardless of race or wealth, citing Minister of Land Affairs v Slamdien and Others [1999] 1 All SA 608 (LCC).

Court order

The Court declared that:

- The Randall claimants were dispossessed of their rights in land in respect of the farms Umtata Mouth No 213 and Grassflat (Woodlands) No 214, district Peddie.
- The Knott claimants were dispossessed of rights in land in respect of farms Klipfontyn No 206, Boschfontein No 207, No 208, and Portion 1 of Schoon Uitkyk No 205, in the district of Victoria East. The claimants were entitled to proceed to the next stage to prove a lack of just and equitable compensation. No order as to costs was made.

Why the case matters

The case confirmed that dispossession under racially discriminatory homeland consolidation laws constitutes restitution-worthy loss under the Restitution Act. Importantly, it clarified that eligibility for restitution depends on the nature of the dispossession, not on the race or economic status of the dispossessed.

13. Alexkor Ltd and Another v Richtersveld Community and Others [2003] ZACC 18; 2004 (5) SA 460 (CC)[39]

The Richtersveld Community sought restitution or compensation after being evicted from their land by Alexkor, a state-owned diamond-mining company, after 19 June 1913. The Court recognised their ownership of the land, based on customary law and including the right to minerals. It remitted the case to the Land Claims Court to decide on the compensation.

[39] https://www.saflii.org/za/cases/ZACC/2003/18.html

Parties

- *Appellants:* Alexkor Limited (a state-owned diamond-mining company) and the Government of the Republic of South Africa.
- *Respondents:* The Richtersveld Community and its members, represented collectively under the Restitution Act.

Background and facts

The Richtersveld, in the north-western Northern Cape, had been inhabited by the Nama people for centuries. The community claimed that it was dispossessed of land along the Atlantic coast (the "subject land") after 19 June 1913 through racially discriminatory practices, when the state granted the land in full ownership to Alexkor for diamond mining. The Land Claims Court dismissed the claim, holding that dispossession was not racially discriminatory. The SCA reversed that decision and recognised the community's right to restitution.

At issue was whether the Richtersveld Community held a "right in land" within the meaning of section 2(1) of the Restitution Act, and whether such right survived British annexation in 1847 and the subsequent treatment of that right under colonial law.

Legal issues before the Court

- Whether the community's indigenous land rights before annexation constituted ownership or a "customary law interest" within the meaning of the Act.
- Whether those rights survived the British Crown's annexation in 1847.
- Whether the community was dispossessed after 19 June 1913 "as a result of past racially discriminatory laws or practices", as required by section 2(1)(d) of the Act and section 25(7) of the Constitution.
- Whether minerals and precious stones formed part of the community's ownership.

Court's findings and reasoning

Recognition of indigenous law and customary ownership

The Court emphasised that the community's land rights must be understood through indigenous law, not through the prism of Roman-Dutch or English common law: "A dispute between indigenous people as to the right to occupy a piece of land has to be determined according to indigenous law without importing English conceptions of property law" (para 50).

It held that indigenous law is "an integral part of our law," deriving its force and validity from the Constitution and "feeding into, nourishing, and fusing with" the South African

legal system (para 51).

Under Nama customary law, land was communally owned. Members had the right to occupy and use the land and its resources, and outsiders could not do so without permission. The SCA's finding was endorsed: "The land belonged to the Richtersveld community as a whole and all its people were entitled to the reasonable occupation and use of all land held in common by them and its resources" (para 58).

Inclusion of mineral rights

The Court found extensive historical evidence that the community mined and traded in copper and other minerals before annexation and that they granted mineral leases to outsiders. It concluded that "communal ownership of the land included communal ownership of the minerals and precious stones" (para 64).

Effect of British annexation (1847)

Annexation did not extinguish indigenous ownership. The Court adopted the principle that a change in sovereignty does not automatically deprive inhabitants of their private property rights: "The courts will assume that the British Crown intends that the rights of property of the inhabitants are to be fully respected" (para 69, citing Oyekan v Adele). It therefore held that the Richtersveld Community's indigenous-law ownership survived annexation.

Continuity of rights after (1913)

The Court rejected the argument that the Crown Lands Acts of 1860 and 1887 extinguished the community's rights, noting that these statutes expressly provided that land "occupied bona fide and beneficially without title deed" should not be treated as Crown land until the Governor decided the claim (para 73). Since the Governor never decided upon or extinguished the community's claim, the community's ownership persisted. The Court held that the community "remained in occupation of the subject land at the time of annexation and continued to be until its eviction after the discovery of diamonds in the 1920s" (para 78).

Recognition of indigenous ownership as a "Right in Land"

The Court confirmed that communal ownership under indigenous law qualified as a "right in land" under section 2(1) of the Act and section 25(7) of the Constitution. It affirmed that "the real character of the title that the Richtersveld Community possessed in the subject land was a right of communal ownership under indigenous law" (para 62).

Dispossession through racially discriminatory practices

The Court upheld the SCA's finding that the community's dispossession in the 1920s resulted from racially discriminatory laws and practices: the state ignored the community's rights and transferred ownership to Alexkor, a state-owned enterprise, for diamond exploitation. The dispossession fell squarely within section 2(1)(d) of the Act.

Court order

The Court unanimously dismissed the appeal, confirming the SCA order. It held that:

- The Richtersveld Community had a "right of communal ownership under indigenous law" over the subject land, including its minerals and precious stones.
- That right survived British annexation and remained in effect after 19 June 1913.
- The community was dispossessed after 1913 through racially discriminatory laws and practices.

The case was remitted to the Land Claims Court to determine the form of restitution (land restoration or equitable redress).

Why the case matters

Alexkor v Richtersveld recognises indigenous law of ownership as part of South Africa's constitutional property regime. It affirms that communal land tenure predating colonial sovereignty constitutes a legally enforceable "right in land" protected under section 25(7) of the Constitution and the Restitution Act.

The Court's insistence that indigenous law must be interpreted "on its own terms" (para 55) and not "through the prism of common law" (para 56) marked a fundamental shift in South African jurisprudence. It also recognised mineral and resource rights as integral to indigenous ownership, thereby expanding the scope of restitution beyond surface occupation to include sub-surface wealth.

The decision advanced both substantive equality and restitutional justice, confirming that the Constitution protects rights derived from pre-colonial legal systems and that the post-apartheid state must restore or compensate for their unjust deprivation.

14. Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd [2007] ZACC 12; 2007 (6) SA 199 (CC); 2007 (10) BCLR 1027 (CC)[40]

The Court held that the Popela community, long-standing labour tenants on the Boomplaats farm, were forced off the land in 1969 because apartheid's racist laws had stripped labour tenants of protection and made their eviction easy. Although private owners carried it out, the dispossession was still a consequence of the broader apartheid system aimed at removing black land rights. The Court confirmed that they were a community in law and entitled to restitution, emphasising that land-reform laws must be read generously to remedy historical injustice and restore dignity.

Parties

The applicants were the *Department of Land Affairs* and members of the *Popela Community,* descendants of the Maake family who had lived and worked on the farm Boomplaats (later Goedgelegen) in Limpopo. The respondent was *Goedgelegen Tropical Fruits (Pty) Ltd,* the farm's current registered owner.

Background and facts

The Popela community's ancestors had occupied Boomplaats since the 1800s, living, farming, and burying their dead there. Their indigenous ownership was lost when white settlers registered ownership in 1889, converting them into labour tenants compelled to work for the landowner. By 1969, under the apartheid system, the white owners, the Altenroxel brothers, unilaterally terminated the community's remaining labour tenancy rights, seeking a more controllable waged workforce. The Popela community claimed restitution under section 2(1) of the Restitution Act, asserting that the dispossession of their labour tenancy rights in 1969 was the result of racially discriminatory laws and practices.

Legal issues before the Court

The Constitutional Court had to decide:

- Whether the Popela community qualified as a "community" dispossessed of a right in land after 1913.
- Whether their dispossession was "as a result of" past racially discriminatory laws or practices.
- Whether restitution or equitable redress should be granted.

[40] https://www.saflii.org/za/cases/ZACC/2007/12.html

Central to the dispute was the interpretation of the phrase "as a result of past racially discriminatory laws or practices" in section 2(1) of the Restitution Act.

Court's findings and reasoning

Moseneke DCJ delivered the unanimous judgment, adopting a purposive interpretation of both section 25(7) of the Constitution and the *Restitution Act,* emphasising that restitution law must be read in light of its remedial purpose to correct historical racial injustices in land ownership.

- **Definition of "Community"**: The Court rejected a narrow, tribal-based understanding. It held that the Popela community, despite no longer being governed by a traditional leader, remained a cohesive group with shared rules for land access and use, thus meeting the statutory definition of a community.
- **Racially Discriminatory Context**: The Court traced the legislative grid of oppression, including the Natives Land Act 27 of 1913, the Native Trust and Land Act 18 of 1936, the Prevention of Illegal Squatting Act 52 of 1951, and the Bantu Laws Amendment Act 42 of 1964, which collectively destroyed black landholding and entrenched labour tenancy as a racially discriminatory institution. The forced abolition of labour tenancy under Government Notice 2761 of 1970 was part of this system.
- **As Moseneke DCJ observed**, "the narrative has all the hallmarks of forcible dispossession of indigenous ownership of land, which in time, degenerated into dispossession of mere labour tenancy" (para 6).
- **Causation ("as a result of")**: The Court rejected the "but for" test used by lower courts, holding that the phrase "as a result of" should be understood broadly to mean "as a consequence of", not "solely as a consequence of". Causation need not be direct; a dispossession could be a product of the racially discriminatory framework that made it possible. Moseneke DCJ wrote that the apartheid laws created a "grid of integrated repressive laws … aimed at furthering the government's policy of racial discrimination" (para 70). The dispossession of the Popela community was "a consequence of" that grid.

The Court linked this broader causal interpretation to the historical structure of racial domination in landholding. It explained that although the Altenroxel brothers acted as private individuals, their ability to evict and dispossess the Popela community flowed directly from the apartheid legal framework that had entrenched white ownership and rendered black labour tenants legally vulnerable. As Moseneke DCJ put it, "Without the effect of apartheid laws, policies and practices on the land rights of black people, the Altenroxels would never have had the power to do what they did" (para 71).

- **Restitution and Equity**: The Court found that the loss of labour tenancy rights in 1969 occurred within the apartheid framework that disempowered black occupiers and deprived them of legal protection. The applicants' dispossession was therefore "as a result of" racially discriminatory laws and practices, entitling them to restitution under section 25(7) of the Constitution.

The judgment reaffirmed that the *Restitution Act* must be interpreted purposively and generously to achieve its transformative aims. As Moseneke DCJ explained, "The scheme of the Act is to restore rights in land and the dignity it brings to those who were affected by the racial discrimination that resulted in their dispossession" (para 78). A narrow or technical approach would defeat the very object of the statute. This underscored that the constitutional promise of land reform could not be achieved by applying restrictive common-law tests to restitution claims.

Court order

The Constitutional Court granted leave to appeal and upheld the appeal. It declared that the Popela community had been dispossessed of rights in land as a result of racially discriminatory laws and practices and was therefore entitled to restitution or equitable redress under the Restitution Act. The matter was remitted to the Land Claims Court to determine the appropriate form of restitution or compensation.

Why the case matters

Goedgelegen **interprets causation and historical context in restitution law**. It firmly established that dispossession by private actors could still qualify as "a result of" racially discriminatory laws if it occurred within the apartheid legislative and social framework. It also confirmed that communities without formal tribal structures qualify for restitution.

The judgment expanded access to land restitution for labour tenants and other dispossessed communities, recognising the enduring impact of apartheid's racial geography and embedding a purposive, equitable approach to constitutional land justice. It affirmed that the right to restitution must be applied to realise the Constitution's commitment to transformation, equality, and the restoration of dignity for those dispossessed by apartheid land laws.

Moseneke DCJ's statement is relevant. "In enacting the Restitution Act, the legislature must have been aware that apartheid laws on land were labyrinthine and mutually supportive, and in turn spawned racist practices" (para 66).

"It must be added that the government policy of abolishing labour tenancy was not simply driven by callous economic motives to create more cheap black labour. Nor was it merely a push to replace feudal forms of productive relationships with market-based ones. It was

part of the grand apartheid design. Its notorious objective was to eliminate any vestiges of black land rights in what was designated as white South Africa. The goal was to cut any residual legal ties that identifiable black families and communities had to identifiable pieces of land" (para 75).

15. Land Access Movement of South Africa and Others v Chairperson of the National Council of Provinces and Others [2016] ZACC22

The applicants challenged the Restitution of Land Rights Amendment Act 15 of 2014 on the grounds that it was unfair to existing claimants and had been adopted through a constitutionally defective legislative process. The Constitutional Court set the Amendment Act aside on procedural grounds, holding that Parliament had failed to facilitate adequate public participation as required by the Constitution.

Parties

The applicants were the Land Access Movement of South Africa (LAMOSA) and several land-rights organisations and Communal Property Associations representing communities with restitution claims. The respondents included the Chairperson of the National Council of Provinces (NCOP), the Speaker of the National Assembly, the Speakers of the provincial legislatures, the Minister of Rural Development and Land Reform, the Chief Land Claims Commissioner, the President of South Africa, and several community organisations.

Background and facts

The Restitution of Land Rights Act 22 of 1994 allowed people dispossessed of land after 19 June 1913 to lodge claims for restitution, but the deadline for lodging claims was 31 December 1998. Many eligible claimants missed this deadline.

In 2014, Parliament enacted the Restitution of Land Rights Amendment Act, which reopened the land claims process on 1 July 2014, with a cut-off date of 30 June 2019.

The reopening of the claims process also raised concerns about fairness. The Court did not decide this issue, as the case turned on a procedural point, but it noted the applicants' argument that allowing new claims without ring-fencing existing claims could prejudice claimants who had lodged claims before the 31 December 1998 deadline and had already waited many years for their claims to be resolved.

The applicants challenged the constitutional validity of this amendment. Their main argument was procedural: Parliament, particularly the National Council of Provinces (NCOP) and provincial legislatures, had failed to fulfil its constitutional obligation to

facilitate adequate public participation in the legislative process, as required by sections 72(1)(a) and 118(1)(a) of the Constitution.

The challenge arose because the NCOP processed the Bill under a very compressed timetable of about four weeks. Provincial legislatures held public hearings with extremely short notice, often only a few days, sometimes without translations of the Bill, and sometimes in locations that many affected communities could not reasonably attend. The applicants argued that this deprived the public, especially rural communities affected by land restitution, of a meaningful opportunity to participate.

Legal issues before the Court

The Constitutional Court had to decide:

- Whether Parliament, through the NCOP and provincial legislatures, had complied with its constitutional obligation to facilitate public involvement in the legislative process.
- Whether, if not, the Restitution of Land Rights Amendment Act was therefore unconstitutional and invalid.

Court's findings and reasoning

The Court emphasised that South Africa's democracy is both representative and participatory. Sections 59, 72 and 118 of the Constitution require legislatures to give the public a meaningful opportunity to participate in law-making. The test is whether Parliament acted reasonably in facilitating that participation.

The Court found that the NCOP's timetable was unreasonably truncated. Provinces were given only a few days to notify the public and hold hearings on legislation with major social and economic consequences. This made meaningful participation impossible.

The Court also identified serious flaws in the provincial consultation processes, including inadequate notice, hearings held in limited locations, a lack of translations of the Bill, and insufficient time for communities, especially rural communities, to prepare submissions.

Because the NCOP relied on these flawed provincial processes, the overall legislative process failed to meet the constitutional standard for reasonable public participation.

Court order

The Court declared that Parliament had failed to fulfil its constitutional obligation to facilitate public involvement.

As a result:

- The Restitution of Land Rights Amendment Act was declared invalid.
- The declaration of invalidity took effect on the date of judgment.
- The Commission on Restitution of Land Rights was prohibited from processing land claims lodged after 1 July 2014 until Parliament enacted valid legislation to reopen the claims process.
- Claims lodged before the original deadline of 31 December 1998 could continue to be processed.

Why the case matters

The judgment is an important affirmation of participatory democracy in South Africa. It confirms that legislatures must give the public a genuine opportunity to participate in law-making, particularly when legislation affects fundamental rights, such as land restitution.

The case also illustrates the Constitutional Court's willingness to invalidate legislation where Parliament fails to comply with its constitutional procedural obligations, even when the legislation addresses a highly important policy issue such as land reform.

Redistribution[41]

16. Landman and Another v Ndlozi and Another [2004] ZALCC 38; LCC 80/2003 and LCC 81/2003 (19 October 2004)[42]

This case centred on whether two families who lived and farmed on the Landman land were farm labourers or labour tenants. If they were farm labourers, Landman could evict them from the farms if he followed the correct procedures. If they were labour tenants, they could not be evicted while their application under the Labour Tenants Act for compensation or land acquisition, if lawfully submitted, was still pending. The Court clearly distinguished between labour tenants and farm labourers and held that the respondents were labour tenants and could not be evicted.

[41] It is sometimes hard to categorise these cases as matters dealing with tenure and matters dealing with redistribution. Cases dealing with the rights of labour tenants have been categorised as redistribution cases as they enable a class of rural land farmers to acquire land that they have lived and worked on for generations.

[42] https://www.saflii.org/za/cases/ZALCC/2004/19.html

Parties

The applicants were Johannes Abraham Landman (tenant of the farms) and Japie Olivier Landman (owner of the farms). The respondents were Nayitsheni Ndlozi and Mdubane Gama, who lived and worked on the farms Uitkomst and Baroveldt respectively.

Background and facts

Both respondents lived with their families on the farms where they were employed and were permitted to keep livestock and cultivate small gardens. Mr Ndlozi had been on Uitkomst since 1987, and Mr Gama had lived on Baroveldt since childhood, his father having worked there since 1963. In November 2002, both men were dismissed and told to vacate the farms. They refused, whereupon the Landman brought eviction applications against them under the Extension of Security of Tenure Act 62 of 1997 (ESTA).

The respondents opposed eviction, contending that they were labour tenants in terms of the Land Reform (Labour Tenants) Act 3 of 1996 ("the Labour Tenants Act") and that they had lodged applications for land acquisition under section 16(1) of that Act. They argued that section 14 of the Labour Tenants Act expressly prohibits the eviction of labour tenants while such an application is pending, except in special circumstances that make eviction just and equitable. At the time of the litigation, this provision appeared as section 14 of the Act (para 3, fn 4).

The evidence before the court confirmed that both respondents had lodged their applications for the acquisition of land under Chapter III of the Act. They first lodged their claims on 19 March 2000 and re-lodged them on 8 January 2001 with the Director-General of Land Affairs (now the Department of Agriculture, Land Reform and Rural Development), thereby meeting the statutory cut-off date of 31 March 2001. Since those claims were still pending, section 14 provided them with legal protection against eviction.

At a pre-trial conference, three preliminary issues were separated for decision: whether each respondent was a labour tenant; whether they had lodged claims timeously; and whether proper notice of eviction had been given under section 11 of the Act. The latter two issues were settled in favour of the respondents, leaving only the question whether they were labour tenants.

Legal issues before the Court

The principal question was whether the respondents were "labour tenants" or "farmworkers" under the Labour Tenants Act. The statutory definition of a labour tenant in section 1 requires that:

- the person resides or has the right to reside on a farm;

- the person has or had the right to use cropping or grazing land on the farm in return for providing labour; and
- the person's parent or grandparent also resided on a farm and had similar rights and obligations.

These requirements must be read conjunctively (all three must be satisfied), and if all three are met, the person is presumed not to be a farmworker unless the contrary is proved (section 2(5)).

A farmworker, in contrast, is an employee whose contract provides that remuneration is paid predominantly in cash or other payment, rather than in the right to occupy and use land. The determination therefore depended on whether the respondents' remuneration consisted mainly of land-use rights or of cash payments.

Court's findings and reasoning

Judge Gildenhuys heard detailed oral and expert evidence. Both respondents earned modest cash wages of between R100 and R200 per month, received two 80-kg bags of mealie-meal monthly, and were entitled to one month's annual leave. They were allowed to reside permanently on the farms, keep cattle, goats, pigs and fowls, cultivate vegetable gardens, and use the grazing lands extensively.

Expert valuers compared the monetary value of the cash and in-kind remuneration with the value of housing and grazing rights. The analysis showed that the right to occupy and use land substantially outweighed the cash component.

For Mr Ndlozi, the value of land-use benefits was estimated at about R550 per month, compared with R340 in cash and in-kind payments. For Mr Gama, the respective figures were about R985 versus R540. Even on the most conservative calculation, the right to occupy and use land was the predominant form of remuneration.

The applicants themselves conceded that the respondents' main means of survival came from their livestock and grazing, and that the wages were merely "pocket money". Judge Gildenhuys therefore found that remuneration was given predominantly in the right to occupy and use land, and that the respondents were not farmworkers. Since the other elements of the definition were satisfied, both were labour tenants within the meaning of the Act.

Court order

The Land Claims Court declared in both matters (LCC 80/2003 and LCC 81/2003) that:

- Each respondent is a labour tenant as defined in the Land Reform (Labour Tenants) Act 3 of 1996.
- Each respondent lodged a claim timeously under Chapter III of that Act.
- Proper notice of the intended eviction had been given.

Why the case matters

This decision clarified how to distinguish between a "labour tenant" and a "farmworker" under the Land Reform (Labour Tenants) Act. It confirmed that the definition must be read conjunctively and that, where the three elements are satisfied, the person is presumed to be a labour tenant unless the landowner proves otherwise.

Importantly, the judgment affirmed that once a person has lodged a claim for the acquisition of land under Chapter III of the Labour Tenants Act, they may not be evicted while that claim is pending, in terms of section 14. Until such claims are finalised, the applicant enjoys statutory protection against eviction. In the cases of Ndlozi and Gama, their timely applications for land acquisition ensured that they could remain on the farms and that any eviction attempt had to be stayed. The case therefore strengthened the tenure security of labour tenants and their families, illustrating how the Act gives effect to the constitutional goal of promoting land reform and protecting vulnerable farm dwellers.

17. Mwelase and Others v Director-General for the Department of Rural Development and Land Reform and Another [2019] ZACC 30[43]

The Court recognised the situation of labour tenants to be disastrous. Under the Land Reform (Labour Tenants) Act 3 of 1996, labour tenants were given the right to obtain ownership of the land they had occupied, sometimes for many generations. The Department of Rural Development and Land Reform failed for nearly two decades to process their claims or refer them to the Land Claims Court as required by the statute. The Constitutional Court ordered the Department to appoint a special master to oversee the processing of over 11 000 claims. The Court did not consider this order to be judicial overreach, as it was clear that something extraordinary was required to ensure the claims were processed.

Parties

- *Applicants:* Bhekindlela Mwelase, Jabu Agness Mwelase N.O., Mndeni Sikhakhane, Bazibile Gretta Mngoma N.O., and the Association for Rural Advancement (AFRA).

[43] https://www.saflii.org/za/cases/ZACC/2019/30.html

- *Respondents:* Director-General of the Department of Rural Development and Land Reform and the Minister of Rural Development and Land Reform.

Background and facts

The applicants were labour tenants or their representatives living on the Hilton College Estate in KwaZulu-Natal. In June 2000, they lodged applications under section 16 of the Land Reform (Labour Tenants) Act 3 of 1996 (the Labour Tenants Act) to acquire ownership of the land they occupied. The Department of Rural Development and Land Reform failed for nearly two decades to process or refer their applications to the Land Claims Court as required by the statute.

The applicants' experiences exemplified a wider systemic failure. By 2016, the Department itself acknowledged that almost 11,000 labour tenant applications lodged before the 2001 cut-off date remained unresolved. The Department repeatedly failed to comply with court orders requiring reports, plans, and implementation timelines. In light of this persistent failure, the applicants sought structural relief: the appointment of a special master to supervise and assist the Department in implementing the Act.

The Land Claims Court granted this relief in 2016, finding that the Department's prolonged inaction violated sections 10, 25(6), 33, 195 and 237 of the Constitution. The Court held that a special master would assist the Department in developing an implementation plan and expediting the processing of claims.

The SCA overturned the order, holding that the appointment of a special master was a "textbook case of judicial overreach" and that such a role was inappropriate in South Africa. It ruled that the Department itself should remain responsible for policy and implementation. The applicants then appealed to the Constitutional Court.

Legal issues before the Court

- Whether the Land Claims Court's order appointing a special master of labour tenants violated the principle of separation of powers.
- Whether such an appointment fell within the judicial power to grant "just and equitable" relief under section 172(1)(b) of the Constitution.
- Whether the Minister of Rural Development and Land Reform was in contempt of court for failing to comply with earlier court orders.

Court's findings and reasoning

Cameron J delivered the majority judgment (Froneman, Khampepe, Madlanga, Mhlantla, Nicholls AJ and Theron JJ concurring). The Court emphasised that the case concerned not merely administrative inefficiency but the state's ongoing failure to realise the

constitutional promise of land reform under section 25(6).

The Court traced the origins of the Labour Tenants Act, noting that it was enacted to secure tenure and ownership for a class of people whose land occupation and labour relationships had been historically exploitative and racially defined. The Department's failure to implement the Act had effectively denied these rights to tens of thousands of poor rural South Africans for over twenty years.

The Court held that the Land Claims Court had not exceeded its powers. It acted within its mandate as a specialist court empowered to conduct proceedings on an inquisitorial basis under section 32(3)(b) of the Restitution Act. Given the Department's repeated non-compliance and incapacity, the appointment of a special master was an appropriate, innovative, and necessary remedy to ensure the effective realisation of constitutional rights.

Cameron J rejected the argument that the order breached the separation of powers. He stated that the branches of government share a constitutional duty to give effect to the Bill of Rights and that judicial intervention may be warranted when administrative dysfunction renders rights meaningless. The Court drew analogies with Black Sash Trust v Minister of Social Development [2017] ZACC 8, Treatment Action Campaign [2002] ZACC 15, and Doctors for Life [2006] ZACC 11, in which judicial oversight ensured government compliance without supplanting executive functions.[44]

The Court described the Department's conduct as a case of bureaucratic inertia and administrative lethargy that had jeopardised both land reform and public trust (paras 12, 40 – 42, 48 – 51). It affirmed that judicial restraint does not mean judicial timidity where fundamental rights are at stake.

Court order

The Court granted leave to appeal and allowed the appeal. It set aside the order of the SCA and reinstated the Land Claims Court's order appointing a special master for labour tenants.

The Department and the Minister were ordered to pay costs, including those of two counsel.

[44] In Black Sash Trust v Minister of Social Development [2017] ZACC 8, Treatment Action Campaign [2002] ZACC 15, and Doctors for Life International v Speaker of the National Assembly [2006] ZACC 11, the Constitutional Court affirmed that courts may exercise supervisory and remedial powers to ensure government compliance with constitutional obligations, and that such oversight does not violate the separation of powers merely because it has practical implications for executive action.

Why the case matters

Mwelase affirms the judiciary's duty to craft innovative and practical remedies to realise socio-economic rights. It confirms that courts may supervise administrative implementation where state failure renders statutory rights illusory without violating the separation of powers.

The judgment underscores that land and dignity are central to South Africa's constitutional project. It exposes deep institutional failures in the land reform programme and represents a turning point in the enforcement of land rights for labour tenants under section 25(6) of the Constitution.

The Court's recognition of the special master as a legitimate remedial mechanism has broad significance for public interest litigation, showing how courts may ensure effective compliance with socio-economic rights obligations through structural relief.

Table of cases

Case citation	Key constitutional principles	Core rights established
Balancing rights		
First National Bank of SA Ltd t/a Wesbank v Commissioner for the South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance 2002 (4) SA 768 (CC); 2002 (7) BCLR 702 (CC)	Section 25 must be read as a whole: it both protects property and advances land reform and restitution. Property protection is not absolute and is limited by broader constitutional commitments to equality and social justice.	Establishes a general framework for section 25: property (including movable property) is protected against arbitrary deprivation, but this protection is balanced against the state's duty to take measures (under 25(5)–(7)) to remedy past land dispossession and promote equitable access to land.
Port Elizabeth Municipality v Various Occupiers [2004] JOL 13007 (CC), CCT 53/03	Property rights under section 25 are important but must be interpreted in light of the need to open up and restore secure property rights for those historically denied access.	Affirms that the state and courts must balance owners' rights with the need to redistribute land and secure access for vulnerable occupiers, so that eviction and land-use decisions advance equitable access to land

Case citation	Key constitutional principles	Core rights established
		rather than entrench past spatial injustice.
Secure tenure (s 25(6))		
Nhlabathi and Others v Fick, Land Claims Court, Randburg, Case No. LCC 42/02, decided 8 April 2003	Section 25(6) secure tenure encompasses more than bare residence; it includes rights necessary for dignified family and cultural life. ESTA must be read to protect occupiers' cultural and religious practices	Confirms that secure tenure for farm occupiers includes the right, in appropriate circumstances, to bury family members on the land where they live, as part of dignified, culturally rooted tenure.
Occupiers of 51 Olivia Road, Berea Township and Another v City of Johannesburg and Others [2008] ZACC 1	Municipalities must take "holistic" decisions on eviction, integrating building safety duties with constitutional obligations to foster equitable access to land and secure tenure. Meaningful engagement is required as part of respecting occupiers as rights-holders, not trespassers.	Establishes meaningful engagement as a procedural safeguard for people facing eviction, linking protection against homelessness to longer-term duties to secure and improve tenure for vulnerable urban occupiers.
Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others [2009] ZACC 16	Relocation and upgrading programmes must be assessed against section 25(5) and (6), which impose positive duties on the state to foster equitable access to land and provide redress to those whose land rights were undermined by apartheid.	Confirms that large-scale relocation of informal settlement residents must be designed and implemented in a way that enhances, rather than weakens, residents' access to land and long-term tenure, giving concrete effect to the redistributive purpose of section 25(5).
Tongoane and Others v National Minister for Agriculture and Land Affairs & Others [2010]	Section 25(6) recognises the legacy of insecure tenure, overlapping rights and pressure on land in	Confirms that communities with insecure tenure under customary or communal

Case citation	Key constitutional principles	Core rights established
ZACC 10 (Case CCT 100/09)	communal areas. Laws giving effect to section 25(6) must both substantively secure tenure and be enacted through the correct, participatory legislative procedure (section 76).	arrangements are entitled to constitutionally sound legislation that genuinely strengthens their tenure; defective laws (like CLARA) that threaten or fail to secure tenure can be struck down.
Baleni and Others v Minister of Mineral Resources and Others (North Gauteng High Court, 2018)	IPLIRA requires the state to not only consult the community who may be displaced by mining operations on their land, but must also obtain their consent.	A community with informal and customary land rights must not only be consulted when mining operations are to take place on their land, but must give their free, informed consent for such activities.
Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Ltd and Another [2018] ZACC 41	Informal and communal land rights protected by IPILRA and section 25(6) cannot be overridden by mining rights without consent or lawful expropriation. The state and companies must consult actual right-holders, not only traditional authorities, and follow statutory dispute-resolution mechanisms.	Establishes that a mining right does not automatically trump occupiers' informal land rights. Holders of such rights enjoy constitutionally protected tenure security; they cannot be deprived of occupation without their informed consent or fair expropriation with compensation.
Rahube v Rahube and Others [2018] ZACC 42	Legislation aimed at upgrading tenure (ULTRA) must promote, not entrench, equality and equitable access to land. Automatically converting patriarchal apartheid permits into ownership for men alone perpetuates gender	Establishes that land reform measures must be gender-responsive: equitable access to land includes dismantling patriarchal ownership patterns and ensuring women can participate equally in ownership and decision-making over

Case citation	Key constitutional principles	Core rights established
	discrimination and violates the state's duty under section 25(5) to counteract inequitable access.	family property.
Restitution (section 25(7))		
The Minister of Land Affairs of the RSA and others v O. Slamdien and others 1999 LCC 107/98	Restitution under section 25(7) and the Restitution Act requires a causal link between dispossession and racially discriminatory land laws or practices. Not every loss linked to apartheid-era state action qualifies; the focus is specifically on forced removals related to discriminatory land measures.	Clarifies that restitution is limited to dispossession of rights in land directly caused by racially discriminatory land laws or practices, narrowing the scope of eligible claims but affirming the centrality of causation.
Department of Land Affairs v Witz [2000] LCC 152/98	Section 25(7) requires proof of a genuine deprivation of rights in land; mere restrictions on sale or disadvantageous market conditions do not amount to "dispossession" for restitution purposes, especially where the owner voluntarily elects to retain and sell the property.	Confirms that restitution is aimed at people who were actually dispossessed of land rights, not at compensating every person financially disadvantaged by apartheid-era regulations, and that white owners are not excluded but must meet the same test.
Randall and Kietzmann v Minister of Land Affairs; Knott and Rudman v Minister of Land Affairs [2002] ZALCC 27; LCC 136/99 & LCC 1/2000 (Land Claims Court, 10 May 2002, Meer AJ, Moloto	Homeland consolidation and forced sales under the Development Trust and Land Act can constitute racially discriminatory dispossession under the Restitution Act. Eligibility for restitution turns on	Establishes that coerced "sales" to the SADT under homeland consolidation policy amount to restitution-worthy dispossession, confirming that all victims of racially discriminatory land laws,

Case citation	Key constitutional principles	Core rights established
AJJ, Stephenson Assessor)	the nature and cause of dispossession, not on the race or wealth of claimants.	including white farmers, may qualify if the statutory requirements are met.
Alexkor Ltd and Another v Richtersveld Community and Others [2003] ZACC 18; 2004 (5) SA 460 (CC)	Indigenous law is an integral part of South African law, and communal ownership under customary law is a "right in land" protected by section 25(7). Indigenous ownership (including mineral rights) can survive annexation and must be recognised on its own terms, not through common-law concepts alone.	Recognises a community's customary-law ownership, including mineral rights, as a basis for restitution where such rights were extinguished through racially discriminatory state action, significantly extending restitution to indigenous and communal land claims.
Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd [2007] ZACC 12; 2007 (6) SA 199 (CC); 2007 (10) BCLR 1027 (CC)	Restitution law must be interpreted purposively and generously in light of apartheid's "grid" of repressive land laws. Dispossession by private owners can still be "as a result of" racially discriminatory laws where apartheid legislation made such eviction possible and stripped black labour tenants of protection.	Confirms that long-standing labour tenants dispossessed under apartheid's legal framework are entitled to restitution. The case broadens causation under section 25(7), recognising that communities without formal tribal structures can claim restitution where their dispossession flowed from systemic racial land laws.
Land Access Movement of South Africa and Others v Chairperson of the National Council of Provinces and Others [2016] ZACC 22	The Court held that any legislative process requires adherence to the Constitution. In particular there must be adequate public participation in the adoption of new	The restitution amendments proposed in the in the Restitution of Land Rights Amendment Act re-opening the application for restitution process

Case citation	Key constitutional principles	Core rights established
	legislation.	was declared invalid.
Redistribution		
Landman and Another v Ndlozi and Another [2004] ZALCC 38; LCC 80/2003 and LCC 81/2003 (19 October 2004)	The definition of "labour tenant" must be interpreted to capture those whose primary remuneration is the right to occupy and use land, rather than wages. Where the definition is met, there is a presumption against "farmworker" status and eviction is restricted while land claims are pending.	Clarifies that labour tenants enjoy stronger statutory and constitutional tenure protection than ordinary farmworkers, including protection against eviction while their claims to acquire land under the Labour Tenants Act are unresolved.
Mwelase and Others v Director-General for the Department of Rural Development and Land Reform and Another [2019] ZACC 30	Persistent state failure to implement land reform legislation (Labour Tenants Act) undermines section 25(6)'s guarantee of secure tenure for labour tenants. Courts may grant structural relief, including appointing a special master, to ensure effective realisation of land and tenure rights.	Affirms labour tenants' constitutional entitlement to tenure security and ownership opportunities promised by statute, and recognises that courts may supervise state administration where inertia makes those tenure rights illusory.

Current enforceable rights

Section 25 (1), 25 (5) and 25(7)

- Section 25 protects property rights, but these must be balanced against the Constitution's commitment to land reform and restitution. While both property owners and occupiers have constitutional rights that require protection, property rights are not absolute, and the Constitution requires that unequal apartheid land distribution be addressed.
- The state must act to expand equitable access to land and may not adopt laws, policies, or decisions that entrench apartheid-era or gender-based land inequality.

Section 25 (6)

- Secure tenure requires a place to live and if on a farm, a place to live includes having a place to bury one's family.
- Eviction from land cannot take place without meaningful engagement with occupiers.
- If an eviction is sought from an unlawful occupation, consideration must be given to the length of time occupants have lived on the land, their circumstances, alternative land and the location of alternatives.
- The consent of occupants who hold informal rights under IPILRA on land is required before a mining right can be issued to a third party over their land.
- The consent required for a mining company to start mining on land that is occupied must come from the occupants themselves. The people who live and work on the land need to be consulted and not the traditional authority for the larger areas.
- ULTRA, the act that automatically converted apartheid tenure forms to ownership, now incorporates provisions to give all interested parties and occupants notice of an application for conversion, an opportunity to object, systems for instituting inquiries to determine land tenure rights, and provisions that allow aggrieved persons to apply to the court for relief.

Section 25(7): Restitution

- In order to succeed in a restitution claim, the applicant must show a direct causal link between their dispossession and a racially discriminatory land law. E.g. The Group Areas Act or Land Act.
- In order to succeed under the Restitution Act, the applicant must be able to show that a real dispossession and deprivation of land rights caused by a racially discriminatory law took place. If they chose to sell the land it could not be claimed that they were dispossessed.
- Labour tenants who have been waiting for decades to be given rights of ownership in terms of the Land Reform (Labour Tenants) Act 3 of 1996 might have their claims heard as a result of the Constitutional Court appointing a special master to oversee the processing of claims.[45]
- The cut-off date for land claims was 31 December 1998. There are approximately 6 685 outstanding "old order claims" of the over 80 000 lodged. Parliament

[45] In October 2022 GroundUp reported that 45% of labour tenant claims submitted to the government were unresolved and that in September 2024, DLRRD reported that only 11 422 claims out of over 20 523 were resolved. GroundUp estimated, based on the department's annual targets which are extremely low, it will take 30 years to resolve all the cases.

introduced the Land Rights Amendment Act (2014) to extend the deadline, but the Act was struck down by a Constitutional Court case, Land Access Movement of South Africa and Others v Chairperson of the National Council of Provinces and others (2016). Therefore, no new claims can be made beyond 31 December 1998.

The right to have access to health care services

> *Access to health care services in South Africa, … has historically been skewed in terms of race, gender, socio-economic status, sexual orientation, disability and a number of other arbitrary grounds…. Systems, structures and institutions established to deliver health care services … continue to reflect disproportionate bias in favour of dominant grouping in South African society.*[1]

Cases in this chapter

1. Soobramoney v Minister of Health (KwaZulu-Natal) (R), [1998] JOL 1825 (CC) 229
2. Minister of Health and Others v Treatment Action Campaign and Others (1), 2002 (10) BCLR 1033 (CC) 231
3. Lee v Minister for Correctional Services (Treatment Action Campaign and others as amici curiae) 2013 (2) BCLR 129 (CC) 233
4. Oppelt v Head: Health, Department of Health, Provincial Administration: Western Cape 2015 (12) BCLR 1471 (CC) 236
5. Makana People's Centre v Minister of Health and Others [2023] ZACC 15; 2023 (5) SA 1 (CC); 2023 (8) BCLR 963 (CC) 236
6. Cancer Alliance v Member of Executive Council for Health Gauteng Province and Others (2024/071038) [2025] ZAGPJHC 357; [2025] 2 All SA 668 (GJ); 2025 (9) BCLR 1004 (GJ) (27 March 2025) 242
7. Section27 and Others v Member of the Executive Council for Health, Gauteng and Others, Gauteng Division of the High Court, Johannesburg, 2022/ judgment delivered 2023) 244
8. In the Arbitration between: Families of Mental Health Care Users Affected by the Gauteng Mental Marathon Project and National Minister of Health of the Republic of South Africa, Government of the Province of Gauteng, Premier of the Province of Gauteng and MEC of Health: Province of Gauteng, 2018 236
9. Nel v Vertex Pharmaceuticals Inc (2023) - Court of the Commissioner of Patents .. 247

[1] Soobramoney v Minister of Health (KwaZulu-Natal) 1998 (1) SA 765 (CC) para 74 (O'Regan J, minority)

The Constitution

The Constitution states that everyone has the right to access health care services, including reproductive health care (section 27 (1) (a)). The state must take reasonable legislative and other measures within its available resources to progressively realise these rights (section 27(2)), and no one may be denied emergency medical treatment (section 27(3)).

Furthermore, every child has the right to basic healthcare services (section 28(1)(c)), and everyone has the right to an environment that is not harmful to their health or wellbeing (section 24(a)).

General points

- The Constitution states that everyone has a right to access "health services". The International Covenant on Economic, Social and Cultural Rights (ICESCR) highlights the importance of preventing, treating, and controlling disease. Health services should therefore be preventative, curative, rehabilitative, and include health education, regular screening programmes, treatment of diseases, illnesses, injuries, and disabilities. They should also include the provision of essential drugs and encompass mental health treatment and care.[2]
- The health budget for the 2023/4 fiscal year was approximately R222.6 billion, accounting for about 9.4% of the national budget.
- The National Health Act 61 of 2003 envisions a unified health system for the country, complemented by private healthcare services.
- The state employs a means test to decide who is eligible for free medical services.
- Emergency medical treatment cannot be refused to anyone by any healthcare provider or facility, whether public or private. The National Health Act and the Constitution require that anyone needing emergency care, such as in the case of an accident, must be treated immediately, even if they do not have private health insurance. Private hospitals must stabilise such patients before requesting payment or transferring them to a public facility. Similarly, private ambulances are obliged to transport and stabilise the patient before transferring them.
- Under the National Health Act, healthcare providers must inform users of their health status, except where disclosure would not be in the user's best interest. They are required to explain diagnostic and treatment options available, including the

[2] Committee on Economic, Social and Cultural Rights. General Comment No. 14: The Right to the Highest Attainable Standard of Health (Article 12 of the Covenant), UN Doc E/C.12/2000/4 (2000), paras 9,12 and 17, available at https://www.ohchr.org/sites/default/files/Documents/Issues/Women/WRGS/Health/GC14.pdf

associated risks, benefits, costs, and consequences. Users have the right to refuse treatment, and the consequences of such refusal must be clearly communicated. Communication must be in language and terms that the user can understand, taking literacy levels into account (section 6). Personal information must be safeguarded in accordance with the Protection of Personal Information Act 4 of 2013 (POPI).

- Pregnant or breastfeeding women are entitled to free medical services.
- All children have the right to free basic healthcare.
- Section 14 of the National Health Act states that all information about a health care user, including their health status, treatment, or stay in a health facility, is confidential and may not be disclosed without the user's written consent, unless required by law or a court order, or where non-disclosure would pose a serious threat to public health. If a user is unable to give consent, disclosure may be made to a person legally authorised to act on their behalf. The person responsible for a health establishment must implement control measures to safeguard patient records and prevent unauthorised access. Users also have the right to access their health records, subject to prescribed procedures. These confidentiality protections are reinforced by POPI.
- The question arises as to what a 'sufficient' level of medical services provided by the state should be. The ICESCR states that services must be available in adequate quantity. This includes hospitals, clinics, and other health-related facilities. There must be trained medical staff and essential medicines. All of this must be accessible to everyone without discrimination. It should be physically within reach of all, especially the most vulnerable. Payment should be based on fairness. The ICESCR provides four criteria for 'sufficient': availability, measured by hospital beds, doctor-patient ratios, and medicine availability; accessibility, including geographical distribution and waiting times; acceptability, which assesses whether the service meets ethical and cultural standards; and quality, determined by whether the service is of adequate standard, as reflected in life expectancy, maternal and infant mortality, treatment outcomes, and immunisation coverage. This is known as the AAAQ Framework. The following table offers a loose illustration of how the AAAQ Framework can be applied to South Africa.

AAAQ Framework

AAAQ	Definition	Examples from South Africa
Availability	Sufficient quantity of functioning public health and health care facilities, goods, services, and programmes.	Existence of public hospitals and clinics in both urban and rural areas; availability of ambulances and mobile clinics.
Accessibility	Health care must be accessible to everyone without discrimination: physically, economically, and in terms of information.	Free primary health care for pregnant women and children under six; rural outreach programmes.
Acceptability	Health facilities and services must respect medical ethics, be culturally appropriate and sensitive to gender and life-cycle requirements.	Informed consent in treatment procedures; respect for traditional medicine under the Traditional Health Practitioners Act 22 of 2007.
Quality	Health facilities, goods, and services must be scientifically and medically appropriate and of good quality.	Maternal Mortality Ratio (MMR): 88 deaths per 100,000 live births in 2020. Infant Mortality Rate (IMR): 24,1 deaths per 1,000 live births in 2021. Life Expectancy at birth (2021): 61,95.[3]

- Another key question is what the state's obligation is regarding the provision of health care services. Our Constitution obliges the state to progressively realise this right within available resources. Following from Government of the Republic of South Africa and Others v Grootboom and Others [2000] ZACC 19 (Grootboom) and the reasonableness test, the state should have in place the following:
  - A comprehensive programme that provides access to healthcare services.
  - The health programme should focus on progressively implementing the right within the available resources.
  - Legislative measures should be implemented to achieve this, supported by appropriate, well-directed policies and programmes.

[3] Statistics South Africa. Mid-Year Population Estimates 2022 (Statistical Release P0302), pp 10–12.

– Programmes that meet the needs of the most desperate.[4]

Statistics

Use of public health facilities. The vast majority of individuals living in South Africa, around 84 out of every 100 people, depend on the public health care system. Many undocumented people also rely on public health facilities for access to health care. Public health facilities are used most pervasively in Limpopo (83,6% of people go there first), Eastern Cape (81,2%), and Mpumalanga (79%). While in the Western Cape, only 57,5% use public facilities as their first choice. This points to the different economic conditions in these three provinces, where Limpopo and the Eastern Cape are two of the poorest provinces, explaining why their populations use public health facilities to a greater extent than people in the Western Cape.[5]

Medical aid coverage. The number of individuals covered by a medical aid scheme is 15,7% of the population, amounting to 6,219,400 people. People living in the Western Cape and Gauteng, the two most affluent provinces, have higher levels of medical aid coverage than those in Limpopo and the Eastern Cape. 25,7 % of individuals in the Western Cape are on private medical aids, while only 5% of individuals in Limpopo are. In Gauteng, 22,4% of individuals are on medical aid. Membership in a medical aid is also influenced by race, with 71,7% of white individuals being members compared to 9,8% of black Africans. 41,3% of Indian/Asian individuals belong to medical aid schemes, and 19,6% of coloureds. The South African Human Rights Commission reported in 2018 that 82 out of every 100 South Africans fall outside the medical aid net.[6]

Standard of care. Public health facilities often lack sufficient resources such as staff, medication, and infrastructure. The SAHRC has highlighted various challenges within the public health sector, including critical shortages of emergency transport, long waiting times, overcrowded conditions, poor hygiene, outdated equipment, under-staffing, and discriminatory attitudes towards vulnerable groups. While clinics offer basic services at the local level, patients are referred to hospitals for more serious conditions, and those hospitals direct complex cases to designated facilities.

Despite this referral system, backlogs and extended waiting lists are common.

Number of public facilities. According to the National Department of Health's Annual

[4] Pillay, K "Implementation of Grootboom: Implications for the right of access to health care services" (2003) 6 Potchefstroom Electronic Law Journal 1 at 63.

[5] Statistics South Africa. General Household Survey, 2023, Figure 5.2, p 20, available at https://www.statssa.gov.za/publications/P0318/P03182023.pdf

[6] South African Human Rights Commission. Access to Health Care. Johannesburg: South African Human Rights Commission, 2018, p 3 available at https://www.sahrc.org.za/home/21/files/FINAL%20Access%20to%20Health%20Care%20Educational%20Booklet.pdf

Report for 2021/22, as of March 2022, South Africa had 407 public hospitals and 3,863 public clinics.[7]

HIV treatment statistics. As of March 2024, 95% of people living with HIV knew their status, 79% of those living with HIV are on anti-retroviral treatment (ART), while 93% of the estimated proportion of patients on ART were virally suppressed at 12 months.[8]

Cases

1. Soobramoney v Minister of Health (KwaZulu-Natal) (R), [1998] JOL 1825 (CC)[9]

The case considered whether the state's denial of kidney dialysis to Mr Soobramoney was justified. The Court held that chronic kidney failure does not constitute an emergency, and does not require emergency medical treatment. It found that the hospital's policy to only to give dialysis to those people that qualify for kidney transplants was reasonable and that the availability of dialysis, which is an expensive treatment, is a right that is subject to available resources, which the state must make available on a progressive basis.

Parties

The applicant was Mr Soobramoney, a man with a chronic illness suffering from irreversible kidney failure. The respondent was the Minister of Health for KwaZulu-Natal, responsible for managing the state hospital that had denied him access to renal dialysis treatment.

Background and facts

Mr. Soobramoney suffered a stroke in 1996 and was diagnosed with ischaemic heart disease, cerebrovascular disease, and irreversible chronic renal failure. His life could only be sustained through ongoing renal dialysis. The Addington State Hospital in Durban provided dialysis solely to patients eligible for a kidney transplant or in cases of acute but reversible renal failure. Mr. Soobramoney did not qualify under this policy. He filed an urgent application with the Durban and Coast Local Division of the High Court, contending that the refusal infringed on his constitutional rights.

[7] National Department of Health. Annual Report 2021/22. Pretoria: National Department of Health, 2022, p 46, available at https://www.health.gov.za/wp-content/uploads/2022/10/2022-Annual-Report-Compressed.pdf

[8] Ibid, p 15.

[9] https://www.saflii.org/za/cases/ZACC/1997/17.html

Legal issues before the Court

- Whether the state's refusal to provide dialysis treatment to the applicant infringed his constitutional right of access to healthcare services under section 27(3) or section 11 (the right to life).
- Whether the hospital's policy constituted an unreasonable restriction on access to treatment under sections 27(1) and (2) of the Constitution.
- Whether resource-based criteria for access to life-prolonging treatment align with constitutional values and obligations.

Court's findings and reasoning

- The Court held that judicial review of health policy is limited to ensuring that decisions regarding the allocation of scarce medical resources are not irrational or discriminatory.
- The Court determined that emergency medical treatment refers to sudden and unforeseen situations requiring immediate medical intervention, such as injuries from accidents or acute health crises. Chronic renal failure was not considered a form of emergency contemplated in section 27(3) of the Constitution.
- The Court rejected the idea that every individual has an immediate, enforceable claim to all types of healthcare. Instead, the right to health care is one of progressive realisation, and the state is not obligated to do the impossible. It must act reasonably within its means to expand access gradually.[10]

The Court found that Mr. Soobramoney was not entitled to treatment under section 27(3) because his condition was neither urgent nor unforeseen. The hospital policy that limited dialysis to patients with a chance of recovery or a transplant was considered reasonable and did not breach section 27(1) or (2). The Court highlighted the rational basis for allocating limited resources.

The right to life under section 11 was not deemed to impose a duty on the state to preserve life in all situations, particularly where this involves complex policy decisions regarding the distribution of scarce health resources.

Court order

The application for free dialysis was dismissed. The Court ruled that the health authorities did not breach the Constitution. The hospital's criteria were deemed rational, fair, and a

[10] Para 14. This was later confirmed in Minister of Health and Others v Treatment Action Campaign and Others (No 2) [2002] ZACC 15 (Minister of Health v TAC) and in Government of the Republic of South Africa and Others v Grootboom and Others [2000] ZACC 19 (Grootboom).

necessary means of managing resource limitations. The applicant's rights under sections 27 and 11 were not infringed.

Why the case matters

- The Court defined "emergency medical treatment" narrowly under section 27(3) as referring to sudden, unexpected conditions requiring immediate intervention.
- The Court confirmed that socio-economic rights are subject to available resources and do not establish an absolute entitlement to treatment.
- Supported the legitimacy of rationing medical care based on objective medical criteria.
- Recognised the state's discretion, within reason, in deciding how to allocate limited health resources.
- Rejected a broad interpretation of the right to life that would impose unsustainable obligations on the state.

2. Minister of Health and Others v Treatment Action Campaign and Others (1), 2002 (10) BCLR 1033 (CC)[11]

The Court held that the state's restriction of the use of Nevirapine at only 18 sites in the country, instead of the whole country was not reasonable. The drug was safe, was affordable and hospitals and clinics had the capacity and experience to administer it. The Court ordered the state to roll out the drug nationally.

Parties

The applicants were the Minister of Health and the Members of the Executive Council (MECs) for Health in nine provinces, collectively forming the government body responsible for implementing national and provincial health policies. The respondents were the Treatment Action Campaign (TAC), a civil society organisation advocating for health, and other parties representing affected individuals.

Background and facts

The applicants were appealing a High Court judgment that ordered them to extend the use of the drug Nevirapine across the entire country to reduce the risk of mother-to-child transmission (MTCT) of HIV. The drug was registered for use in South Africa, but the state was restricting its distribution to 18 pilot sites. Many public hospitals and clinics capable

[11] https://www.saflii.org/za/cases/ZACC/2002/15.html

of providing the drug were prevented from doing so because the state argued it needed to establish more counselling infrastructure and test the feasibility of a broader rollout. The respondents had argued in the High Court that this excluded poor and rural women from accessing life-saving medication and infringed their constitutional rights.

Legal issues before the Court

First, the Court had to determine whether the government's policy of limiting the use of Nevirapine to a few pilot sites was a breach of section 27(1) and (2) of the Constitution,

which guarantees everyone the right to access health care services, including reproductive health care, and requires the state to take reasonable legislative and other measures within available resources to progressively realise this right.

Second, the Court needed to consider whether the policy failed to meet the standard of reasonableness as established in Grootboom, especially where it excluded medically eligible patients from accessing services that were otherwise feasible to provide.

Third, the issue of whether the rights of children under section 28(1)(c), to basic health care services, had been violated by the policy was raised. Finally, the Court was asked to determine the extent to which courts can intervene in socio-economic policy decisions and whether the judiciary may issue structural relief requiring the executive to take positive steps towards fulfilling constitutional obligations.

Court's findings and reasoning

The judgment reaffirmed several key principles: that socio-economic rights are justiciable and enforceable by the courts; that the standard of compliance is reasonableness; and that the absence of financial resources cannot justify policies that are irrational, exclusionary, or fail to respond to immediate and pressing needs. It also affirmed the courts' role in crafting structural interdicts or supervisory orders to ensure compliance with constitutional obligations where systemic failures are evident.

The Court analysed the facts and evidence. It then applied the reasonableness test to determine that restricting Nevirapine to 18 pilot sites was unreasonable. The government's safety concerns were unfounded because the drug was registered, considered safe, and affordable. The Court rejected the exclusion of the drug from public hospitals and clinics that had the capacity, infrastructure, and medical expertise to implement the MTCT programme but were prevented from doing so by government policy. It stressed that reasonableness requires policies to be not only logically sound but also inclusive and practically responsive to those in need. The existence of provincial differences, especially in the Western Cape, showed that broader implementation was both possible and constitutionally necessary. The Court found that the government's

approach failed to respond to a recognised health crisis affecting tens of thousands of children each year. Consequently, the state did not meet the constitutional standard for reasonable conduct under section 27(2).

Court order

The Court dismissed the state's appeal and upheld the High Court's declaratory and mandatory relief. It stated that the state was constitutionally required to ensure Nevirapine is available at all public health facilities where it is medically necessary, and that such access cannot be limited by policy decisions that conflict with constitutional obligations. The Court ordered the respondents to remove restrictions on Nevirapine's distribution and instructed the government to implement reasonable measures to expand counselling, testing, and support infrastructure needed for preventing mother-to-child transmission (MTCT). Adopting a supervisory approach, the Court required the government to report on actions taken to comply with the order. This decision marked a significant milestone in South African jurisprudence, showcasing the Court's readiness to issue structural relief in socio-economic rights cases. The specific mandatory relief ordered required the government to immediately lift restrictions on Nevirapine, allow and facilitate its use where medically indicated, and train counsellors to support its implementation. The Court did not issue a comprehensive supervisory order.

Why the case matters

The case confirmed that courts can enforce socio-economic rights and require government compliance with constitutional obligations. It reinforced that resource constraints do not justify exclusionary policies when reasonable alternatives exist. The judgment set a precedent on the nature of state duties under section 27, introduced a structural order as a tool for judicial enforcement, and established that inclusive access to essential healthcare for the most vulnerable is constitutionally required.

3. Lee v Minister for Correctional Services (Treatment Action Campaign and others as amici curiae) 2013 (2) BCLR 129 (CC)[12]

The Court held that the prison authorities failed to provide a safe enough environment to prevent prisoners from contracting tuberculosis and that but for Lee being incarcerated, he would not have contracted the illness. His damages claim against the state was successful.

[12] https://www.saflii.org/za/cases/ZACC/2012/30.html

Parties

The applicant in this case was Dudley Lee, who had been detained at Pollsmoor prison. He filed a delictual claim against the Minister of Correctional Services for damages arising from contracting tuberculosis (TB) during his detention. The respondent was the Minister of Correctional Services. The Treatment Action Campaign and others were admitted as amici curiae.

Background and facts

Dudley Lee was detained at Pollsmoor prison between 1999 and 2004. During his incarceration, he contracted tuberculosis, a disease to which he had not previously been exposed. Pollsmoor prison was found to be overcrowded, poorly ventilated, and lacking adequate TB prevention, control, and treatment measures. Lee's primary contention was that the prison authorities had negligently failed to implement a proper TB control programme, which would have prevented his infection.

Legal issues before the Court

The main issue was whether the state, through the Department of Correctional Services, was delictually liable for Lee's contraction of TB. This raised questions about the extent of the state's duty of care and the standard of reasonable conduct given the circumstances.

The Court discussed the difficulty of applying the traditional "but-for" test for causation in cases where harm results not from a single negligent act but from a broader systemic failure. In other words, it examined the cause of Lee contracting TB and found that there was no direct cause. However, it concluded that he would not have contracted TB but for the negligence of the prison authorities. The Court argued that the "but-for test should be developed in accordance with the spirit, purport and objects of the Bill of Rights, specifically section 27, 34 and 35 read with sections 172 and 173 … as well as the norms and values which underlie the Constitution" (para 26). It also stated that there is no universal formula for establishing a causal link.

Usually, this test examines whether the harm would have happened but for the defendant's conduct. However, Lee was unable to identify a specific moment or individual responsible for him contracting TB in Pollsmoor prison. The harm stemmed from general failures, such as inadequate TB prevention and control in an overcrowded, poorly ventilated prison. The Court acknowledged that demanding strict proof in such circumstances would be unfair and impractical. Instead, it adopted a more flexible, common-sense approach, questioning whether the state's failure significantly increased the risk of harm. It concluded that it did. This modified approach to the but-for test enabled the Court to determine that the state's systemic negligence substantially

contributed to Lee's infection, even if precise causation could not be scientifically demonstrated. The judgment clarified that in cases of institutional failure, courts should focus on whether there exists a sufficiently close link between the harm and the failure, rather than insisting on exact proof.

The Court confirmed that the state, like any other legal entity, can be held delictually liable for damages caused by its negligence. It stated that the responsibilities of the Department of Correctional Services include taking reasonable steps to safeguard prisoners from foreseeable harm. The failure to establish an adequate TB management system was a breach of this responsibility.

Court's findings and reasoning

The High Court initially ruled in favour of Lee, but the SCA overturned that decision, concluding that Lee had not demonstrated factual causation. However, the Constitutional Court reinstated the High Court's ruling, asserting that demanding Lee identify the specific person or moment that caused his infection imposed an unfair and unrealistic evidentiary burden. Instead, the Court embraced a more equitable approach to causation in cases of systemic omission.

The Court found that the failure to implement a reasonably adequate TB control programme materially increased Lee's risk of infection and thus satisfied the test for factual causation. It held that common sense and justice required a flexible approach to the "but-for" test in circumstances involving public health failures in institutional settings. "Causation is not based on mathematics or statistics. Ultimately, it is a matter of common sense whether the facts establish a sufficiently close link between the harm and the conduct" (para 40).

Court order

The Constitutional Court overturned the SCA decision and affirmed that the Minister of Correctional Services was responsible for the harm Lee suffered. It stated that the state had violated its constitutional and legal obligations and confirmed that delictual liability had been proven.

Why the case matters

This case marks a landmark in the development of South African delict law, especially concerning systemic omissions and public health failures in institutional contexts. It clarified that causation should not be seen as a rigid scientific test but as a means to achieve fair outcomes, particularly when harm results from the state's failure to enforce constitutionally mandated protections. It established an important precedent for subsequent cases, including Cancer Alliance (discussed later), by endorsing a flexible,

equitable approach to causation in constitutional delict claims where state neglect endangers fundamental rights.

4. Oppelt v Head: Health, Department of Health, Provincial Administration: Western Cape 2015 (12) BCLR 1471 (CC) [13]

This case does not pronounce on the right to health other than to confirm that a spinal injury is of its nature a medical emergency and requires emergency medical treatment. The only other direct constitutional law issue raised in the case related to section 195(1) which the Court used to assess the hospital's service obligations in the light of various administrative failures that took place in Mr Oppelt's treatments. Section 195(1) provides, among other things that, public bodies must be professional, efficient, accountable, transparent and effective. Read with section 27(3) it indicates that refusal or inability to respond to a spinal injury is in breach of the Constitution.

5. In the Arbitration between: Families of Mental Health Care Users Affected by the Gauteng Mental Marathon Project and National Minister of Health of the Republic of South Africa, Government of the Province of Gauteng, Premier of the Province of Gauteng and MEC of Health: Province of Gauteng, 2018 [14]

The Life Esidimeni Arbitration, presided over by Justice Dikgang Moseneke in 2018, addressed the deaths and suffering of mental health care users who were transferred from Life Esidimeni facilities to unlicensed and ill-equipped NGOs under the Gauteng Department of Health's Marathon Project. The arbitration found the state responsible for multiple constitutional violations and awarded compensation, including R1 million in constitutional damages, to the families of patients who died.

Parties

The claimants were families of mental health care users who died or were harmed after being transferred from Life Esidimeni facilities during the Gauteng Department of Health's "Mental Health Marathon Project". The arbitration concerned three categories of claimants:

- 63 families whose relatives died after being transferred from Life Esidimeni facilities.

[13] https://www.saflii.org/za/cases/ZACC/2015/33.html

[14] https://www.saflii.org/cgi-bin/disp.pl?file=za/cases/ZAGPPHC/2024/676.html&query=the%20near%20life%20near%20esidimeni%20near%20inquest

- Four additional families whose relatives died during or as a result of the transfers.
- 68 mental health care users who survived the transfers but suffered trauma and morbidity, together with their families.

The respondents were the National Minister of Health, the Government of the Province of Gauteng, the Premier of Gauteng, and the Gauteng MEC for Health.

Background and facts

For more than three decades the Gauteng Department of Health contracted the private provider Life Esidimeni to care for long-term mental health care users. In 2015 the Department terminated this contract, citing deinstitutionalisation policy, concerns raised by the Auditor-General about "evergreen contracts", and the need to reduce costs.

Under what became known as the Mental Health Marathon Project, the Department relocated 1,711 mental health care users from Life Esidimeni facilities between October 2015 and June 2016. The patients were transferred to state hospitals, poorly resourced and often unlicensed NGOs, and in some cases to family homes.

Many of the receiving NGOs lacked adequate facilities, trained medical staff, food, medication, or proper licences. Patients were transported in degrading conditions, often without medical records or proper planning. Families were generally not consulted or informed about where their relatives had been moved.

The consequences were catastrophic. At least 144 mental health care users died, often as a result of neglect, starvation, dehydration, and lack of medical care. More than 1,400 surviving patients experienced trauma, illness and ongoing harm, and the whereabouts of some patients remained unknown for a considerable period.

Following a public outcry, the Health Ombud's 2017 report found that the deaths were unlawful and negligent and recommended that compensation and redress be determined through arbitration. Justice Dikgang Moseneke was appointed to preside over the arbitration proceedings, which took place between October 2017 and February 2018.

Constitutional rights violated

Justice Moseneke held that the conduct of the Gauteng Department of Health and the responsible authorities violated multiple constitutional rights, including:

- Human dignity (section 10)
- Right to life (section 11)
- Freedom and security of the person, including protection from cruel, inhuman or degrading treatment (section 12)

- Right of access to health care services (section 27)

He also emphasised that families were entitled, under section 38 of the Constitution, to approach the law to vindicate these rights.

Duties of public officials

The arbitration emphasised that public officials exercising public power must act in accordance with constitutional principles of transparency, responsiveness and accountability (section 1 of the Constitution). Public administration must be ethical, efficient, impartial and accountable in terms of section 195. Justice Moseneke stressed that the Gauteng MEC for Health was constitutionally obliged to act lawfully and was accountable both individually and collectively to the Legislature.

Constitutional breaches

The decision to terminate the Life Esidimeni contract and to implement the Marathon Project was found to be irrational, unlawful and unconstitutional. The award described the conduct of the state as a "blatant breach of the law and the Constitution" and a demonstration of "deeply disgraceful disregard of constitutional obligations".

The arbitration also found that the decisions violated the constitutional principle of rational decision-making, which forms part of the rule of law.

Constitutional damages and redress

The government argued that compensation should be limited to ordinary common-law damages. Justice Moseneke rejected this argument, holding that multiple constitutional rights had been violated and that constitutional remedies were necessary.

He stated that it would be "strange if not bizarre" to deny constitutional remedies simply because the harm did not fit neatly into common-law categories.

Each family of a deceased mental health care user was awarded:

- R20,000 for funeral expenses
- R180,000 for emotional shock and psychological trauma
- R1,000,000 in constitutional damages

Additional counselling, support services, and memorialisation measures were also ordered for families and survivors.

Why the case matters

The Life Esidimeni Arbitration is one of the most significant accountability processes in South African health rights jurisprudence. It affirmed that constitutional damages may be awarded where systemic state conduct violates fundamental rights, particularly the rights of vulnerable groups such as mental health care users.

6. Makana People's Centre v Minister of Health and Others [2023] ZACC 15; 2023 (5) SA 1 (CC); 2023 (8) BCLR 963 (CC)[15]

The case held that the provisions of the Mental Health Care Act 17 of 2002 (MHCA) dealing with involuntary admission of mental health care users, (sections 33 and 34), are not unconstitutional. The MHCA provisions, including the Review Board process, provide adequate procedural protections, and that the Review Board is an independent body with fair procedures.

Parties

The applicant was the Makana People's Centre, a non-profit organisation advocating for socio-economic rights, including through public interest litigation. The respondents were the Minister of Health and the nine provincial MECs for Health. The MEC for Health, Western Cape, was separately represented and abided by the Court's decision but submitted explanatory affidavits.

Background and facts

Makana challenged the constitutionality of sections 33 and 34 of the MHCA, which regulate the involuntary admission and treatment of mental health care users. The High Court declared these provisions unconstitutional because there was no automatic and independent review at the time of, or soon after, initial detention.

Section 33 of the MHCA outlines the procedure for involuntary admission, stating that two mental health care practitioners must examine the individual, and only if their findings concur can the person be admitted involuntarily. Section 34 details what occurs after the person is admitted. During the first 72 hours, an initial assessment must be conducted, and if the mental health care professionals involved believe the patient requires involuntary admission, an application must be submitted to the Review Board within seven days.

The Review Board then has thirty days to decide whether to confirm the application for

[15] https://www.saflii.org/za/cases/ZACC/2023/15.html

involuntary admission, after which it proceeds to the High Court for a final decision.

Chapter IV of the Act, which governs the Mental Health Review Boards, was also found to be constitutionally deficient because it did not provide what the High Court considered to be "sufficient independence". This referred to the fact that the MECs were empowered to appoint and remove Review Board members and determine their remuneration without detailed criteria or an independent process. The concern was that this could undermine the Review Boards' impartiality, potentially making them beholden to executive authority (paras 1–4, 6–8).

Legal issues before the Court

- Whether sections 33 and 34 of the MHCA limited rights under sections 10, 12(1), and 34[16] of the Constitution. Section 33 details the procedure for the 72-hour assessment of individuals subject to involuntary mental health care, while section 34 pertains to the continuation of involuntary care and referrals to the Review Board and the High Court.
- The related question was whether these restrictions on rights were justified under section 36 of the Constitution. Section 36 of the Constitution states: "The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom."
- Whether Chapter IV of the MHCA failed to ensure sufficient independence for Review Boards. Chapter IV (sections 18–24) mandates MECs to establish Review Boards, details the qualifications of board members, their appointment, term, remuneration, and removal procedures. The High Court found these provisions inadequate because they did not sufficiently protect the boards from executive control.
- The suitable remedy and costs order.
- The Court highlighted the two aspects of the right to liberty: substantive (just cause) and procedural (fair process). It described the right to liberty under section 12(1)(a) of the Constitution as comprising both substantive and procedural elements. Substantively, the deprivation of liberty must not be arbitrary – it should be based on a legitimate purpose, such as safeguarding the individual or others. Procedurally, the process by which liberty is restricted must be fair, involving adequate notice, qualified decision-makers, and opportunities for appeal.
- Not all restrictions on liberty need to be examined by a court at the moment of detention. Flexible procedures are acceptable as long as they are fair.

[16] Section 10 is the right to dignity, section 12(1) the right not to be deprived of freedom arbitrarily or without just cause and section 34 is the right to have a dispute resolved before a court or independent forum.

- Fairness depends on context: involuntary mental health treatment differs markedly from penal detention and should be governed with suitable safeguards, not necessarily through court procedures.
- The independence of the Review Boards must be sufficient given their role, but the MEC's involvement in appointments and remuneration does not undermine independence.

Court's findings and reasoning

The Court agreed that involuntary inpatient treatment constitutes a deprivation of liberty under section 12(1)(a) of the Constitution. However, it found that such deprivation was not arbitrary, because the MHCA sets out detailed, multi-stage procedures involving several qualified professionals, appeals, and final judicial review.

The Court concluded that Review Boards provided adequate procedural safeguards and had sufficient independence, even though MEC was involved in their appointment and remuneration. Institutional bias was unlikely because the MEC did not directly manage either the Review Boards or the professionals involved in treatment decisions. Once established, they operate independently.

The Court examined international law but found no binding norm requiring immediate judicial review of involuntary admissions. Comparisons to English law demonstrated that South Africa's safeguards were even more comprehensive. The Court dismissed the High Court's reliance on Life Esidimeni and the SAHRC report to challenge the constitutionality of the MHCA, as these pertained to implementation failures rather than legislative flaws.

Court order

The Constitutional Court declined to uphold the declarations of invalidity of sections 33 and 34 of the MHCA, which provide for the involuntary detention of mental health patients, made by the High Court.

Why the case matters

This judgment upholds the constitutionality of the MHCA's provisions on involuntary admission and treatment, clarifying that sufficient procedural safeguards are in place without immediate judicial review. The Court emphasised the importance of specialised, context-sensitive mechanisms such as Review Boards for safeguarding the rights of vulnerable persons with mental illness.

7. Cancer Alliance v Member of Executive Council for Health Gauteng Province and Others (2024/071038) [2025] ZAGPJHC 357; [2025] 2 All SA 668 (GJ); 2025 (9) BCLR 1004 (GJ) (27 March 2025)[17]

The Cancer Alliance brought the action as a result of the collapse of oncology services at the Charlotte Maxeke Johannesburg Academic Hospital. It held that given that funds were allocated to the hospital to restore services after a fire, and that the hospitals failed to do anything, the state was liable to pay constitutional damages. In addition the state was order to restore the services. The failure was held to be in direct breach of section 27 and 28(1)(c).

Parties

The applicant in this case was the Cancer Alliance, a national coalition of civil society organisations, advocacy groups, and individuals working to improve cancer prevention and treatment in South Africa. The respondents included the Minister of Health, the MEC for Health in Gauteng, and the Charlotte Maxeke Johannesburg Academic Hospital (CMJAH), a public health institution tasked with providing oncology services in the province, among its other services.

Background and facts

The case originated from a pattern of systemic failures in the public health sector, especially in providing oncology services at CMJAH and other public health facilities. Cancer Alliance filed the application as a public interest litigant in response to widespread and persistent reports of the collapse of oncology services in Gauteng's public hospitals. The crisis was characterised by a shortage of oncologists, long waiting times for diagnosis and treatment, delays in procuring essential medicine, and administrative inefficiencies that left oncology units effectively paralysed.

The situation was worsened by a fire in April 2021 at CMJAH that destroyed important parts of the oncology ward and led to its temporary closure. Despite the urgent public need, the government did not speed up the rebuilding process. Several tenders were issued for repairing and rebuilding the damaged facilities, but these were neither awarded nor finalised, leading to extended inaction and stagnation.

Compounding these failures, the Gauteng Department of Health had been allocated ring-fenced funds specifically for the procurement of oncology equipment and the restoration of services, which it failed to spend. The department cited procurement bottlenecks and

[17] https://www.saflii.org/za/cases/ZAGPJHC/2025/357.html

poor contract management as reasons for this. The underspending of these earmarked allocations further delayed critical infrastructure upgrades and prolonged the breakdown in service delivery.

The dysfunction in oncology services had serious consequences for patients, particularly children and economically marginalised individuals who depend on the public health system for access to life-saving care. Reports submitted to the Court highlighted specific cases where patients with treatable cancers were either not diagnosed in time or were not given the proper treatment, resulting in unnecessary suffering and death. The Cancer Alliance provided evidence showing that these failures were not isolated but rather reflected a widespread pattern of state neglect and mismanagement.

The applicant argued that these systemic deficiencies constituted a breach of the constitutional rights of affected individuals, notably the right to access health care services, the right to life, and the right to dignity. The state's failure to respond effectively to the collapse of oncology services was described as a violation of its positive obligations under the Constitution and relevant statutory frameworks. Cancer Alliance sought declaratory relief and constitutional damages to uphold the rights of affected individuals and to compel the state to take concrete measures to restore oncology services.

Legal issues before the Court

The case raised questions about the state's constitutional obligations to provide access to healthcare services, especially for vulnerable groups such as children and the socio-economically disadvantaged. The core legal issues concerned whether the state's failure to address the systemic collapse of oncology services amounted to a breach of the rights to healthcare, life, and dignity. It also inquired whether public interest litigation could be used to secure declaratory and compensatory relief for widespread administrative and policy failures, and whether constitutional damages were suitable in this context.

Court’s findings and reasoning

The Court accepted the applicant’s evidence that the public oncology services in Gauteng had collapsed due to systemic mismanagement, infrastructural decay, and prolonged inaction following the CMJAH fire. It concluded that the state had breached its constitutional obligations under both section 27 and section 28(1)(c), given its failure to take reasonable and timely steps to restore services. The Court rejected the argument that resource constraints or procurement challenges could justify continued neglect in circumstances where lives were at risk and funds had already been allocated. It held that the respondents had failed to meet even the minimum core obligations of the right to healthcare.

Court order

- Declared that the failure of the Gauteng Department of Health to devise and implement a plan to provide radiation oncology services to backlog cancer patients was unlawful and unconstitutional.
- Ordered the provincial health respondents to update the backlog list of cancer patients.
- Directed them to take all necessary steps to provide radiation oncology services to backlog patients, including through public or private facilities.
- Ordered them to file progress reports with the Court on the steps taken and the long-term plan to provide radiation oncology services.
- Granted the Court ongoing supervisory jurisdiction through reporting obligations.

Why the case matters

This judgment is significant because it affirms that systemic administrative and infrastructural failures can give rise to justiciable claims under the socio-economic rights provisions of the Constitution. The case is noteworthy as it demonstrates the Court employing structural constitutional remedies to uphold section 27 when systemic administrative failures endangered patients. Additionally, the case contributes to the evolving case law on public interest litigation and state accountability amid ongoing service delivery failures.

8. Section27 and Others v Member of the Executive Council for Health, Gauteng and Others, Gauteng Division of the High Court, Johannesburg, 2022/ judgment delivered 2023)

The Court held that the practice at certain hospitals in Gauteng of requiring undocumented and migrant pregnant and lactating women and children under six to pay fees for services was to end immediately. It affirmed their rights to free health services and required the respondents to ensure all policies, circulars, ordinances and practices be amended to reflect this.

Parties

The applicants were Section 27, along with three foreign women who had been denied free healthcare while pregnant or when seeking treatment for their young children. The respondents were the Gauteng Member of the Executive Council (MEC) for Health, the Gauteng Department of Health, the national Minister of Health, and the Charlotte Maxeke Johannesburg Academic Hospital.

Background and facts

Section 27 initiated the case in May 2022 following repeated instances where pregnant and lactating women, along with children under six, were unlawfully denied free healthcare at public facilities.

- One applicant, an asylum seeker six months pregnant, was told to pay R2 000 at Steve Biko Academic Hospital and later R20 000 at Charlotte Maxeke Hospital. She did not receive adequate care and lost her baby.
- Another applicant, an unemployed Zimbabwean national with a South African-born child with health complications, was forced to sign acknowledgement-of-debt forms for R34 404, R43 196, and R50 000 for surgeries at Charlotte Maxeke, and even R5 000 to open a file.
- A third applicant, a Zimbabwean asylum seeker who was six months pregnant, was asked to pay over R1 000 for consultations and R15 000 for delivery.

Hospital staff justified these demands based on a 2020 Gauteng Department of Health policy that classified asylum seekers as full-paying patients and limited free care to emergencies. Officials failed to apply exemptions that cover pregnant and lactating women and children under six.

Legal issues before the Court

The key issues were:

- Whether the 2020 Gauteng policy and related practices denying free healthcare to this patient group were lawful.
- Whether the policy conflicted with section 4(3)(a) of the National Health Act 61 0f 2003, which guarantees free healthcare for pregnant and lactating women and children under six at public clinics and community health centres.
- Whether the denial of care violated section 27(2) of the Constitution, which grants everyone the right to access healthcare services within available resources, and section 28(1)(2), which gives every child the right to basic healthcare.

Court's findings and reasoning

The Court held that the Hospital Ordinance 14 of 1958 and Gauteng's 2020 regulations were invalid to the extent that they required pregnant women, lactating women, and children under six to pay for treatment when they are entitled to free services. The Court found that provincial officials' interpretation and application of the 2020 policy were unlawful, discriminatory, and inconsistent with both the National Health Act and the Constitution.

Court order

- The Court declared the Hospital Ordinance 14 of 1958 invalid, as well as the Gauteng Regulations published in General Notice 1426, November 2001, and all other policies or circulars issued by the respondents to be unlawful, to the extent that they require pregnant and lactating women and children under six to be classified for fees assessment when they have a right to free health care services.
- The Gauteng MEC and Department of Health were instructed to amend the 2020 policy by October 2023 to explicitly guarantee this patient group access to free care, regardless of nationality or documentation, unless they have medical aid or have entered South Africa specifically to seek care.
- The national Minister of Health is to issue a circular to all provinces by 15 May 2023 affirming these rights, and to ensure posters communicating the entitlement are displayed in all public facilities by 17 July 2023.
- All respondents must file affidavits confirming compliance within five days of the deadline, and attend Court on 23 October 2023 to report on implementation.

Why the case matters

The case effectively ended a pattern of discriminatory practices against migrant women and children. It confirmed that constitutional and statutory rights to healthcare services extend to all persons in South Africa, regardless of nationality or documentation status. The case is significant for reinforcing equality, dignity, and the universality of socio-economic rights, while ensuring that public health facilities communicate and enforce these rights in practice.

In the arbitration between:

Families of Mental Health Care Users Affected by the Gauteng Mental Marathon Project and National Minister of Health of the Republic of South Africa, Government of the Province of Gauteng, Premier of the Province of Gauteng and MEC of Health: Province of Gauteng, 2018

The Life Esidimeni Arbitration, presided over by Justice Dikgang Moseneke in 2018, addressed the deaths and suffering of mental health care users who were transferred from Life Esidimeni facilities to unlicensed and ill-equipped NGOs under the Gauteng Department of Health's Marathon Project. The arbitration found the state responsible for multiple constitutional violations and awarded compensation, including R1 million in constitutional damages, to the families of patients who died.

9. Nel v Vertex Pharmaceuticals Inc (2023) - Court of the Commissioner of Patents[18]

The case involves pharmaceutical patent abuse and how it affects poor and vulnerable patients. Vertex Pharmaceuticals held the patent for cystic fibrosis medications, in particular Trikafta. This life saving medication was not available in South Africa. A generic was available but Vertex's patent protection blocked its importation into South Africa. The case was settled when Vertex agreed to reduce the price and introduce Trikafta into South Africa. The case is important for establishing that pricing of medicine must not exclude poor and vulnerable users owing to unaffordability.

Parties

Applicants: Cheri Nel - South African patient with cystic fibrosis (First Applicant) and the Cystic Fibrosis Association - patient advocacy organisation (Second Applican*t)*

Respondent: Vertex Pharmaceuticals Inc. (an American pharmaceutical company holding patents for cystic fibrosis medicines)

Amici Curiae: Treatment Action Campaign (TAC) and Doctors Without Borders (MSF), represented by Section 27.

Court: Court of the Commissioner of Patents (High Court of South Africa, Gauteng Division, Pretoria)

Background and facts

Cheri Nel, a South African patient with cystic fibrosis, needed access to Trikafta, a life-saving medicine produced by Vertex Pharmaceuticals. Although available in the United States and other countries for years, Vertex had not registered or marketed Trikafta in South Africa, making it inaccessible to local patients who urgently required it.

However, Vertex held patents in South Africa that prevented other companies from importing or manufacturing generic alternatives. A generic version called Trixacar was available internationally at roughly one-tenth the cost of Trikafta, but Vertex's patent protection blocked its importation into South Africa.

Nel, facing a life-threatening condition without access to the medicine, was compelled to consider relocating abroad for treatment. The case underscored how pharmaceutical companies can secure patent protection in countries where they choose not to market their products, effectively preventing vulnerable patients from accessing essential

[18] https://www.msf.org.za/sites/default/files/2023-05/Nel%20v%20Vertex%20-%20MSF%20affidavit%20in%20TAC%20application.pdf

medicines.

On 7 February 2023, Nel's legal team submitted a Notice of Motion requesting a compulsory licence that would override Vertex's patents and permit the importation of generic versions of the cystic fibrosis medicine into South Africa. This would have been the first compulsory licence granted for medicines in South Africa.

Legal issues before the Court

The case raised several important issues regarding constitutional and patent law.

Constitutional Right to Healthcare (Section 27): Whether patent laws that restrict access to life-saving medicines breach the constitutional right to healthcare, especially for vulnerable patients who cannot afford costly patented drugs.

Patent abuse: Whether Vertex's conduct in holding patents without marketing the medicine in South Africa constituted "patent abuse" under South African patent law, thereby violating the rights of cystic fibrosis patients.

Compulsory licensing: Whether the circumstances justified granting South Africa's first compulsory licence on medicines to override patent protection in favour of public health needs.

Balancing Intellectual Property and Human Rights: How to reconcile pharmaceutical companies' intellectual property rights with patients' fundamental right to access essential medicines.

State's Constitutional Obligations: Whether the state's failure to ensure access to essential medicines through compulsory licensing mechanisms violated its positive obligations under Section 27 to progressively realise the right to healthcare.

Court's findings and reasoning

Case status: The case was discontinued in August 2024 before a final judgment could be made.

Reason for discontinuation: Vertex Pharmaceuticals lowered the price of Trikafta in South Africa, making it more accessible to patients and rendering the compulsory licence application unnecessary.

Court order

No final court order was issued as the case was withdrawn or discontinued in August 2024 following Vertex's decision to reduce pricing for the South African market.

Why the case matters

This case marks a significant attempt to use section 27 (right to healthcare) to challenge pharmaceutical patent abuse that affects poor and vulnerable patients. Although it was discontinued when Vertex lowered their prices, it set important precedents for using constitutional rights to challenge intellectual property laws that restrict access to essential medicines. The case showed the potential for compulsory licensing as a constitutional remedy and demonstrated how individual patients can use strategic litigation to pressure pharmaceutical companies into reconsidering pricing practices that exclude vulnerable communities.

The case offers a blueprint for future constitutional challenges to pharmaceutical patents and highlights important gaps in South Africa's patent system where companies can hold patents without ensuring access to medicines. The case has contributed to both domestic and international debates about balancing intellectual property rights with constitutional healthcare obligations, demonstrating how vulnerable communities can use constitutional litigation to push for access to life-saving treatments.

Table of cases

Case	Key Constitutional Principle	Core Right to Health Issue
Soobramoney v Minister of Health (KwaZulu-Natal), 1998 (1) SA 765 (CC)	Confirmed that socio-economic rights are subject to reasonable limitations and available resources; narrowly defined “emergency medical treatment”.	Refusal of chronic renal dialysis due to resource limitations.
Minister of Health and Others v Treatment Action Campaign and Others, 2002 (10) BCLR 1033 (CC)	State must take reasonable legislative and other measures to progressively realise health rights; courts can issue structural interdicts for enforcement.	Restrictive policy on HIV prevention (Nevirapine) access was not acceptable, a roll out nationally was required.
Lee v Minister for Correctional Services, 2013 (2) BCLR 129 (CC)	Established flexible “but-for” test in systemic omissions; developed delict in line with constitutional rights to health and dignity.	Damages payable by state if there is systemic failure to prevent TB in prisons leading to infection.

Case	Key Constitutional Principle	Core Right to Health Issue
Oppelt v Head: Health, Department of Health, Provincial Administration: Western Cape, 2015 (12) BCLR 1471 (CC)	Confirmed emergency treatment under section 27(3); emphasised ethical and efficient public administration under section 195.	Failure to provide emergency spinal treatment unacceptable.
In the Arbitration between: Families of Mental Health Care Users Affected by the Gauteng Mental Marathon Project and National Minister of Health of the Republic of South Africa, Government of the Province of Gauteng and others, 2018	Health care must include respecting human dignity (section 10), the right to life (section 11), freedom and security of person and the right to be free from all forms of violence and not to be tortured or treated in a cruel , inhuman or degrading way (section 12).	The right of mental health care users to access to health care and be treated in accordance with the Constitution is paramount.
Makana People's Centre v Minister of Health and Others, [2023] ZACC 15	Clarified section 12 liberty rights and procedural fairness; upheld constitutionality of MHCA safeguards.	The MHCA provides adequate safeguards and review processes in the case of involuntary admissions.
Cancer Alliance v Member of the Executive Council for Health, Gauteng Province and Others, [2023] ZACC 26	Affirmed justiciability of socio-economic rights; systemic state failure affecting access to health care.	Collapse of oncology services in Gauteng and administrative failure and mismanagement requires court intervention and ongoing supervisory jurisdiction.
Section27 and Others v Member of the Executive Council for Health, Gauteng and Others, Gauteng Division of the High Court, Johannesburg, 2022/ judgment delivered 2023)	Undocumented migrants are entitled to the same health care rights as South Africans.	The practice of requiring undocumented migrants to pay fees for health services was unconstitutional.

Case	Key Constitutional Principle	Core Right to Health Issue
Nel v Vertex Pharmaceuticals Inc (2023) - Court of the Commissioner of Patents	Patent laws that restrictict access to life saving medicines breach constitutional rights to health care, particularly for vulnerable patients.	Private pharmaceutical companies must not engage in patent abuse.

Current enforceable rights

- *Emergency illnesses*. Certain illnesses and conditions are considered to require urgent treatment, and delays in treatment are not deemed reasonable. For example, a spinal injury needs immediate attention, and cancer patients must be treated according to international best practice, which means no more than a three-month delay in starting oncology treatments such as radiation, chemotherapy, and, if necessary, surgery. Over time, this list may expand as people take the state to court to demand timely treatments.re than a three-month delay in initiating oncology treatments such as radiation, chemotherapy and if required, surgery. In time, this list may increase as people take the state to court in order to demand certain treatments timeously.
- *Restricting access.* Some state policies that limit access to certain treatments are considered reasonable. For example, the availability of dialysis has been restricted by some provinces to only those who are strong and healthy enough to be candidates for kidney transplants. The state currently cannot provide free dialysis to all kidney patients. Therefore, pursuing litigation for an expensive treatment that the state offers does not always result in a successful outcome.
- If a prisoner contracts a disease that they would not have contracted if they were not in prison, the state must pay damages to that prisoner. The “but-for” test should be interpreted flexibly and in accordance with the Constitution.
- *Extending access*. The state must take reasonable legislative and other measures to progressively realise access to health. In the case of HIV/AIDS, this required extending access to Nevirapine to all expectant mothers. Many other conditions may arise that obligate the state to progressively realise health rights by broadening the reach of treatments as much as possible. During the COVID pandemic, immunisation was extended widely across the country. In fact, a case in 2024 brought by the Covid Care Alliance NPC and others against the President sought to halt the rollout of COVID vaccinations, particularly among minors.

- *Migrant rights*. In Section 27 and Others v Gauteng Department of Health and Others, Gauteng High Court, 14 April 2023 (unreported), the Court held that all pregnant and lactating women, regardless of nationality or documentation status, are eligible for free public health care services at public health establishments. Prior Gauteng provincial policies had denied access to undocumented migrants. The law is currently clear that undocumented migrants have access to public health services. The National Health Act 61 of 2003 states at section 4(3) that the state must provide free primary health to all users and to children under six and pregnant or lactating women if they are not covered by medical aids. Users are defined as people receiving treatment and do not exclude foreign migrants. (Cross refer to migrant rights)
- *Mental health.* Patients can be detained against their will, but fair procedures must be followed and independent review (section 12(1)(a) of the Constitution).
- Patients in state health care facilities are to be treated with dignity, and their right to life, freedom, and security of person, including protection from cruel, inhuman, or degrading treatment, must be respected.

The right to have access to sufficient food

> *South Africa is a country of contrasts, extremes, and paradoxes. Leafy suburbs sit adjacent to tin-shack townships. Obscene wealth and luxury consumption co-exist with extreme poverty and deprivation, resulting from the world's highest level of income inequality. There is more than enough food to feed everyone, but hunger and malnutrition are widespread. Child stunting is rising, but so is obesity. Supermarkets are making super-profits while millions of consumers remain hungry.*[1]

Cases in this chapter

1. Minister of Environmental Affairs and Tourism v George [2006] SCA 57 (RSA) 258
2. Huang v Head, Grootvlei Prison [2008] JOL 21089 (O) 259
3. Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd 2009 (1) SA 337 (CC) 262
4. Competition Commission v Pioneer Foods (Pty) Ltd (15/CR/Feb07, 50/CR/May08) [2010] ZACT 9; [2009] 2 CPLR 323 (CT) (3 February 2010) 265
5. Mukaddam v Pioneer Foods (Pty) Ltd and Others 2013 (10) BCLR 1135 (CC) 267
6. Black Sash Trust v Minister of Social Development and Others 2017 ZACC 8 269
7. Gongqose and Others v Minister of Agriculture, Forestry and Others, Gongqose and S (1340/16, 287/17) [2018] ZASCA 87; [2018] 3 All SA 307 (SCA); 2018 (5) SA 104 (SCA); 2018 (2) SACR 367 (SCA) (1 June 2018) 270
8. Tiger Brands Limited v Pillay (2019/25309; 2018/12835; 2019/36431) [2020] ZAGPJHC 160 (23 June 2020) 273
9. Equal Education v Minister of Basic Education 2021 (1) SA 198 (GP) 275
10. South African Human Rights Commission v Agro Data CC & Another (Afriforum, Centre for Applied Legal Studies and Commission for Gender Equality intervening as Amici Curiae) (39/2023) [2024] ZASCA 121; [2024] 4 All SA 66 (SCA); 2024 (6) SA 443 (SCA) (15 August 2024) 277

[1] Submission to the South African Human Rights Commission (SAHRC) National Inquiry into the Food Systems of South Africa, Union Against Hunger Team, March 4, 2026. available at https://unionagainsthunger.org/submission-to-the-south-african-human-rights-commission-sahrcnational-inquiry-into-the-food-systems-of-south-africa/

The Constitution

- Section 27(1)(b) of the Constitution guarantees everyone the right of access to sufficient food and water, which the state is to progressively realise.
- Section 28(1)(c) guarantees every child the unqualified and immediate right to basic nutrition.
- Section 35(2)(e) grants detained and sentenced persons the right to adequate nutrition, including provision for cultural and religious dietary needs where reasonably practicable.
- Section 7(2) requires the state to respect, protect, promote, and fulfil the right to food.
- Section 8(2) allows the right to food to be enforced against private parties where their conduct affects its realisation.
- Section 8(3) requires courts to develop the common law to give effect to the right to food where no legislation exists.

General points

- There is limited case law in South Africa delineating the content of this right. One reason advanced for this is that the right to food is largely dependent on the realisation of other rights. For example, the right to food requires access to land, water, education, employment and income generation, and social security. Nkrumah argues that the right to food is tied to the rights to equality, dignity, life, health care, water, social assistance and education. If access to these rights is improved, it would positively impact the right to food.[2]
- There is no single piece of national legislation or policy that promotes the right to food. Instead, there are several pieces of legislation and various state policies that advance the right. For example, the Department of Basic Education's school feeding scheme, the Department of Agriculture's food production programme, and the Department of Social Development's grants address food security in different ways.
- Provision of food by the state is limited to the following:
  - Feeding schemes in schools (the National School Nutrition Programme) that provide balanced daily meals to over 9 million learners, with a focus on economically disadvantaged areas.

[2] B. Nkrumah, "Opening Pandora's box: a legal analysis of the right to food in South Africa" (2019) 52 De Jure Law Journal 47.

  - There are ad hoc social assistance programmes, such as short-term feeding schemes in areas facing food scarcity, where the state provides food parcels.
  - Social Relief of Distress (SRD) Grants, administered by the South African Social Security Agency (SASSA), provide temporary financial support to individuals and households facing hardship. While not directly providing food, they enable beneficiaries to purchase food.
  - Food is provided to prisoners by the state.
  - Public hospitals provide food for patients.
- It has been argued that the social assistance programmes of the Department of Social Development have been inadequate.[3]
- The right to sufficient food under section 27(1)(b) differs from most international instruments that include clauses on the right to food, as they usually refer to the right to 'adequate' food.[4]
- The right to food is primarily exercised in contexts where food is produced and distributed by private actors. As a result, enforcing this right often requires addressing private entities rather than the state. Nevertheless, Section 7(2) of the Constitution obliges the state to respect, protect, promote, and fulfil the rights in the Bill of Rights. This includes a duty to prevent private parties from infringing on individuals' access to adequate food. Therefore, even in a privatised food system, the state bears a constitutional responsibility to regulate and intervene where necessary to safeguard this right. It is thus arguable that poor and marginalised individuals may have a justiciable claim against the state for failing to ensure that their right to food is effectively protected and realised.
- The food industry in South Africa is concentrated in a small number of food-producing companies that exercise substantial control over food pricing and distribution.
- Further, section 8 of the Constitution provides that the Bill of Rights can bind a natural or juristic person. If no legislation exists to give effect to a right, the common law must be developed to do so.
- Class actions are a useful way to protect and extend the right to food.

[3] Nkrumah, p 52. He indicates a number of examples throughout the paper on insufficiencies of social assistance programmes such as delays in payment, quantum of payments and duration of programmes that result in food inadequacy for the poor.

[4] Article 11 of the International Convention on Economic, Social and Cultural Rights (ICESCR) refers to the right to adequate food and the Food and Agriculture Organisation of the United Nations (FAO) refers to adequate food. This is defined as the right to have regular, permanent and unrestricted access, either directly or by means of financial purchases, to quantitatively and qualitatively adequate and sufficient food….

Statistics

The Statistics South Africa report on food security in 2019, 2022 and 2023: Evidence from the General Household Survey, 27 February 2025.

Moderate and severe food insecurity: This report uses the internationally recognised Food Insecurity Experience Scale (FIES) to assess moderate and severe levels of food insecurity. Moderate food insecurity refers to a reduced ability to access nutritious food, often leading to lower-quality diets and smaller portions, while severe food insecurity involves a complete lack of food, hunger, or going a whole day without eating.

Food security has declined: Nationally, food insecurity has worsened. Moderate to severe food insecurity rose from 15.8% in 2019 to 19.7% in 2023, and severe food insecurity from 6.4% to 8.0%.

Household breakdown: Female-headed households were consistently more affected than male-headed households, with 21.5% experiencing moderate to severe food insecurity in 2023. Black African-headed households had the highest insecurity levels (21.7% moderate to severe in 2023), followed by Coloured-headed households (21.0%), with White-headed households the least affected (2.8%).

Provincial statistics: The provinces with the highest food insecurity in 2023 were Northern Cape, North West, Mpumalanga and KwaZulu-Natal, while Limpopo reported the lowest. Traditional areas recorded the highest levels of food insecurity, compared with farms and urban areas.

Metros: In the metropolitan areas, Mangaung had the highest rates of food insecurity, with 25.1% of female-headed households experiencing moderate to severe food insecurity in 2023, while the City of Tshwane had the lowest. Urban areas had lower overall rates of food insecurity.

Key influencing factors: The report identifies key factors, including household employment, agricultural involvement, reliance on social grants, household size, and educational attainment. Households without employed members, those receiving grants as their main income, and those with low educational attainment were especially vulnerable.

Larger and extended households also faced greater risk, and, unexpectedly, those engaged in agricultural activities reported higher levels of food insecurity, likely due to their already vulnerable circumstances.

Food insecurity by province in South Africa

Province	Moderate to Severe (%)	Severe (%)
Northern Cape	34.5	16.6
North West	29.7	12.5
Mpumalanga	26.6	10.8
KwaZulu-Natal	24.4	9.9
Eastern Cape	20.6	5.0
Free State	19.9	8.5
Gauteng	17.3	6.7
Western Cape	14.8	6.3
Limpopo	5.7	2.1

Key questions

- What is the state's obligation in regard to food provision?

Other than the absolute right to food that all children have under section 28(1)(c) of the Constitution and the right of detained people to adequate nutrition, the right of everyone to access sufficient food under section 27(1)(b) is not defined in the case law and is qualified by the provision being within the state's available resources. Currently, therefore, the state's obligation in regard to food provision is not settled.

- How much food is sufficient?

Unlike in the case of water, where a national policy, confirmed by the Constitutional Court, has set a minimum amount of water the state should provide to each household, in the case of food no such minimum exists in national policy. Nor have courts defined what constitutes a sufficient amount of food to ensure food security.[5]

- How should the price of food be managed so that poor people can afford to be food secure?

Currently, there is no state regulation of food pricing, although there has been case law

[5] The International Covenant on Economic, Social and Cultural Rights (ICESCR) in General Comment No. 12 (1999) defines adequate food at para 6; the Food and Agriculture Organisation expand on General Comment No. 12 to give a more qualitative definition of adequate food; and Sustainable Development Goal 2 – Zero Hunger (UN 20230 Agenda) says " End hunger, achieve food security and improved nutrition and promote sustainable agriculture". It targets access to safe, nutritious and sufficient food year-round and the eradication of malnutrition.

on bread pricing (see below, Competition Commission v Pioneer Foods case).

Cases

1. Minister of Environmental Affairs and Tourism v George [2006] SCA 57 (RSA)[6]

The case is primarily procedural, but it was brought on behalf of 5 000 artisanal fishers who had been denied equitable access to marine rights and resources. Their case was brought in the first place to the Equality Court on the basis of unfair discrimination and denying them equitable access to marine resources. The SCA said they had the right to do so, and that it was up to whether the Equality Court would hear it or not, as a matter that concerns equality.

Parties

The respondents were individual small-scale (artisanal) fishers and organisations representing approximately 5 000 artisanal fishers. These fishers relied on traditional, low-technology methods to catch fish for local sale and barter, and to feed themselves and their families. The appellant was the Minister of Environmental Affairs and Tourism.

Background and facts (food context only)

The artisanal fishers argued that they had been denied just and equitable access to fishing rights and marine resources. Their livelihood depended on small-scale fishing not only as an economic activity but also as a means of subsistence, providing food for themselves and their families.

They contended that the allocation system for fishing rights excluded or marginalised them, effectively undermining their ability to access the marine resources necessary for food and survival.

The fishers brought proceedings in both the High Court and the Equality Court. In the Equality Court, they sought an inquiry under section 21(1) of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (Equality Act), alleging that the Minister's conduct resulted in unfair discrimination that denied them equitable access to marine resources.

Food and socio-economic rights dimension

Although the SCA did not decide the substantive merits of the fishers' claims, the judgment recognises that the claims implicated access to socio-economic rights,

[6] https://www.saflii.org/za/cases/ZASCA/2006/57.html

including section 27 of the Constitution.

The fishers' case was grounded in the idea that exclusion from fishing rights undermined their ability to secure food and sustain their communities. Access to marine resources was framed not merely as a commercial privilege but as integral to subsistence, livelihoods, and food security.

Significance for food rights

The case illustrates an important intersection between equality law and food rights.

- Small-scale fishers may frame exclusion from natural resources as both an equality issue and a socio-economic rights concern.
- Access to food can depend on access to productive resources (in this case, marine resources).
- The Equality Act may provide an additional procedural avenue for communities who argue that systemic exclusion from resource allocation undermines their dignity and subsistence.

The SCA did not decide whether the fishers were entitled to fishing rights or whether their food-related claims succeeded. Instead, it dealt only with a procedural issue (whether the Equality Court's refusal to refer the matter was appealable). However, the case is significant in recognising that access to fishing rights may implicate constitutional rights to equality and socio-economic rights, including access to sufficient food. It also found that they could take their matter to the Equality Court, which could decide whether it was an equality matter.

2. Huang v Head, Grootvlei Prison [2008] JOL 21089 (O)[7]

A group of five Taiwanese prisoners serving long prison sentences were permitted from 1999 to 2003 to make their own food with raw produce they supplied in accordance with their cultural traditions. The prisons authority removed this right in early 2003 without explanation or reasons being given. The Court held that the prisoners could retain rights that had already been extended to them, and that they had a right to adequate food in prison, and food that took account of their cultural or religious practices where practical.

Parties

[7] Not available on SAFLII. But referred to in S. Abdool Karim & P. Kruger, Unsavoury: How effective are class actions in the protection and vindication of the right to access to food in South Africa? (2021) South African Journal on Human Rights 37(1) 59 at fn 42.

The applicants were five Taiwanese (Chinese) prisoners serving long sentences at Grootvlei Prison in Bloemfontein. The respondents were the Head of Grootvlei Prison and the relevant prison authorities.

Background and facts

From 1999 until early 2003, the applicants were permitted to receive raw food and to prepare their own meals in accordance with their Eastern cultural tradition. They bore the costs themselves, and one of the applicants served as chef. The arrangement was implemented with the knowledge and approval of the relevant authorities.

In early 2003, the concession was withdrawn without notice or explanation. The applicants contended that this unilateral termination infringed their constitutional rights. The respondents denied that any formal concession had been granted and argued that, even if it had, it was merely a discretionary privilege rather than an enforceable right.

The applicants approached the court for an order directing the prison authorities to allow them to continue receiving and preparing raw food in line with their cultural practices.

Legal issues before the Court

The Court had to determine:

- Whether the applicants had in fact been granted a concession to receive and prepare their own culturally appropriate food.
- Whether the withdrawal of that concession was lawful.
- Whether sentenced prisoners retain residual constitutional rights to culturally appropriate food under section 35(2)(e) of the Constitution.
- Whether section 8(3) of the Correctional Services Act 111 of 1998 (which requires dietary regulations, where reasonably practicable, to take account of religious requirements and cultural preferences) supported the applicants' claim.
- On whom the onus lay to justify the limitation of prisoners' rights.

Court's findings and reasoning

The Court found, on the facts, that the applicants had indeed been granted a concession to receive and prepare raw food from 1999 until early 2003. That arrangement had not been lawfully revoked.

The Court rejected the respondents' attempt to distinguish between a "concession" and a "right". Relying on the common-law residuum principle, affirmed in constitutional jurisprudence, the Court held that a sentenced prisoner retains all rights not lawfully

taken away. As stated in Goldberg v Minister of Prisons and endorsed in later authority, whatever rights have not been taken away remain.

The Court emphasised that section 35(2)(e) of the Constitution entitles sentenced prisoners to "adequate nutrition". This must be understood in the broader context of humane conditions of detention and in light of section 8(3) of the Correctional Services Act , which requires dietary regulations, where reasonably practicable, to take account of religious requirements and cultural preferences.

The respondents failed to provide any logistical, financial, or practical reason why the applicants could not continue to receive and prepare their culturally appropriate food. The applicants had not demanded that the food be provided at state expense, and there was no evidence that the arrangement had disrupted prison operations.

The Court held that the state bears the onus of justifying limitations on prisoners' residual rights. In the absence of justification, the denial of culturally appropriate food violated the applicants' constitutional entitlement to humane conditions of detention and adequate nutrition.

The Court concluded that providing special food for the applicants was "reasonably practicable" within the meaning of section 8(3) and consistent with fundamental constitutional rights.

Court order

- The Court ordered the respondents to allow the applicants to receive raw food and to prepare it in the Grootvlei Prison kitchen in accordance with their Eastern tradition.
- The respondents were ordered to pay the costs of the application.
- The applicants were granted leave to approach the Court, on duly amplified papers, for an order that their special food be provided at state expense should they wish to pursue this relief.

Why the case matters

This case is significant for its affirmation of the residuum principle in the constitutional era: prisoners retain all rights not lawfully limited. It confirms that the right to "adequate nutrition" under section 35(2)(e) extends beyond mere caloric intake and may encompass the cultural and religious dimensions of food.

The judgment recognises that socio-economic rights within prisons must be interpreted through the lens of dignity and humane treatment. It underscores that limitations on prisoners' rights require justification and that an administrative characterisation of a

benefit as a "concession" does not remove it from constitutional scrutiny.

3. Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd 2009 (1) SA 337 (CC)[8]

The case was a dispute between two parties over a land sale. The constitutional issue involved whether agricultural land could be reclassified by a local authority for a different purpose. The Constitutional Court held that because agricultural land is so important for food production, it should only be the Minister who has the power to reclassify agricultural land for non-agricultural purposes.

Parties

The applicant was Wary Holdings (Pty) Ltd (the seller of the land) and the first respondent was Stalwo (Pty) Ltd (the purchaser). The Minister of Agriculture and Land Affairs intervened in support of the applicant. Two entities were admitted as amici curiae because their own land sale agreements depended on the same legal question.

Background and facts

The dispute concerned a written agreement under which Wary Holdings sold certain subdivided portions of a farm near Port Elizabeth to Stalwo for industrial use.

At the time of the agreement, the land:

- Fell within the jurisdiction of the Nelson Mandela Metropolitan Municipality (a Category A municipality).
- Had previously been classified as agricultural land before the first elections for transitional local councils in 1994, and
- Had not obtained the written consent of the Minister of Agriculture for subdivision and sale in terms of the Subdivision of Agricultural Land Act 70 of 1970.

Wary Holdings later sought to withdraw from the agreement, arguing that the land remained "agricultural land" under the Act and that the Minister's written consent was required for subdivision and sale. Without such consent, the agreement was invalid.

The High Court agreed with the seller and held the agreement invalid. The SCA overturned that decision, holding that once the land fell within the jurisdiction of a modern municipality, it ceased to be agricultural land for the purposes of the Act.

Wary Holdings then appealed to the Constitutional Court.

[8] https://www.saflii.org/za/cases/ZACC/2008/12.html

Legal issues before the Court

The Constitutional Court had to determine:

- Whether the interpretation of the definition of "agricultural land" in the Subdivision of Agricultural Land Act raised a constitutional issue.[9]
- Whether land classified as agricultural land immediately before the first election of transitional councils retained that status permanently by virtue of the proviso added in 1995.
- Whether the Minister of Agriculture retained the power to regulate the subdivision of such land, even after the establishment of "wall-to-wall" municipalities.
- Whether the interpretation adopted by the SCA undermined the constitutional allocation of powers between national and local government.

Whether section 39(2) of the Constitution required the Act to be interpreted in a manner that promotes the spirit, purport and objects of the Bill of Rights, including:

- section 24 (environment),
- section 25(5) (equitable access to land), and
- section 27(1)(b) (access to sufficient food).

Court's findings and reasoning

The Court (per Kroon AJ, majority) held:

- This was a constitutional matter. The case concerned the distribution of powers between the spheres of government and the interpretation of legislation in light of the Constitution.

The proviso (an extra sentence added in 1995), which stated that all agricultural land prior to the election of councils was to remain agricultural land, was not intended to apply only while the temporary local councils existed. It provided that land considered agricultural land before the first democratic local elections in the 1990s would remain so. This was done to ensure that, during the major changes to local government after apartheid, the

9 A proviso was added to the Subdivision of Agricultural Land Act. It was inserted into the definition of "agricultural land" in section 1 of that Act by a presidential proclamation in 1995, during the transition to democracy. It said that if land was considered agricultural land before the first democratic local elections in the 1990s, it was to stay agricultural land. This was done to make sure that, during the changes to local government after apartheid, the national government would still be able to protect and control farmland, instead of losing that power overnight.

national government would still be able to protect and control farmland, rather than lose that power overnight. The SCA had misunderstood the purpose of the proviso. The proviso was enacted to protect the functional area of agriculture, not to promote the restructuring of local government. It concerned agriculture and national policy, not municipal autonomy.

- National and municipal powers can coexist. The enhanced constitutional status of municipalities does not mean that national control over agricultural land disappears. Municipal zoning and subdivision powers can operate alongside the Minister's powers under the Act. Such overlap is constitutionally permissible.

The interpretation must uphold constitutional rights. The Court explicitly linked the regulation of agricultural land to the right of access to sufficient food in section 27(1)(b). It emphasised that:

- The right to food includes availability (a sufficient national food supply) and accessibility (people's ability to obtain food).
- Excessive fragmentation of farmland may undermine both elements.
- National oversight of agricultural land supports food security, environmental protection, and equitable access to land.

The majority therefore concluded that land classified as agricultural land immediately prior to the first transitional elections remained agricultural land for the purposes of the Act unless properly excluded.

Court order

The Constitutional Court granted leave to appeal and set aside the SCA's order, reinstating the High Court's order. As a result, the sale agreement was invalid because the Minister's written consent had not been obtained.

Why the case matters

Wary Holdings is far more than a mere technical land sale dispute.

It establishes that:

- The national government retains a role in regulating agricultural land, even within municipal boundaries.
- The governance of agricultural land affects food security, environmental protection and equitable access to land.

- Courts must interpret legislation in light of the Constitution's structural design and of socio-economic rights.
- The right to food (section 27(1)(b)) encompasses national policy considerations regarding land preservation and agricultural sustainability.

The judgment affirms that land use regulation must serve broader constitutional commitments, particularly the protection of poor and vulnerable communities whose food security depends on sustainable agricultural systems. It therefore provides a constitutional foundation for harmonising agricultural policy, spatial planning, and socio-economic rights in South Africa.

4. Competition Commission v Pioneer Foods (Pty) Ltd (15/CR/Feb07, 50/CR/May08) [2010] ZACT 9; [2009] 2 CPLR 323 (CT) (3 February 2010)[10]

The Competition Commission penalised Pioneer Foods for colluding with other bread producers to fix the bread price. The basis of the penalty was that this adversely affected the price of bread, which is a stable for poor people.

Parties

The applicant was the Competition Commission and the respondent was Pioneer Foods (Pty) Ltd, through its bread baking divisions, Sasko and Duens. Tiger Brands (Albany Bakeries), Premier Foods (Blue Ribbon) and Foodcorp (Sunbake) were implicated in related cartel conduct. Some entered into consent orders and paid administrative penalties.

Background and facts

The Competition Commission investigated allegations that the major bread producers had engaged in cartel conduct in contravention of section 4(1)(b)(i) and (ii) of the Competition Act 89 of 1998.

The Tribunal found that Pioneer Foods, together with Tiger Brands and Premier Foods:

- fixed the price of bread, including agreeing to increase the price of a standard loaf by 35 cents;
- coordinated the timing of those increases;
- capped reseller or distributor discounts; and
- divided markets and customers across certain regions.

[10] https://www.saflii.org/za/cases/ZACT/2010/9.html

Bread is a staple food in South Africa and is consumed daily by millions of people, particularly in low-income households. The collusion occurred amid rising input costs (including wheat and fuel), yet rather than competing independently, the firms agreed to coordinate their price increases.

In December 2006, Pioneer and its competitors agreed to increase the price of a standard loaf by 35 cents, increase the discounted price of toaster bread, stagger the implementation dates, and cap discounts to agents in certain areas. The Tribunal found that these agreements were not unilateral business decisions but the result of coordinated meetings and communications between competitors.

Legal issues before the Tribunal

The Tribunal had to determine whether the conduct of Pioneer Foods amounted to price fixing or market division in contravention of section 4(1)(b)(i) and (ii) of the Competition Act.

Tribunal's findings and reasoning

The Tribunal found that Pioneer had participated in a cartel to fix bread prices and coordinate trading conditions. It rejected Pioneer's attempts to characterise its conduct as unilateral or as merely parallel responses to rising costs. Although wheat and fuel prices had increased, that did not justify coordination with competitors. The Tribunal emphasised that similar cost pressures do not excuse collusion.

The Tribunal was particularly critical of attempts by Pioneer's senior executive to distance himself from meetings and to minimise the scope of the agreements. It found that Pioneer's conduct went beyond isolated coordination and amounted to comprehensive contraventions of section 4(1)(b)(i) and (ii) of the Competition Act.

The Tribunal reaffirmed that price fixing is among the most egregious violations of competition law. As the SCA of Appeal had previously stated (quoted by the Tribunal): "Price-fixing is inimical to economic competition, and has no place in a sound economy… The fact that price-fixing has occurred is by itself sufficient to brand it incapable of redemption." (para 37)

Although the judgment does not include an extended socio-economic analysis of food security, it recognises the centrality of bread in the national market and the seriousness of collusion in such a staple market. The Tribunal described the industry as one in which the four primary bakeries together held 50–60% of the domestic bread market, underscoring the power of these firms over a basic necessity.

The case shows how collusion in essential goods markets directly harms consumers and entrenches economic vulnerability.

Tribunal order

The Tribunal ordered Pioneer to cease and desist from the prohibited conduct and pay an administrative penalty of 10% of its relevant 2006 bread turnover (excluding the Western Cape turnover already penalised).

The total penalty imposed on Pioneer in respect of both complaints was R195 718 614.

Why the case matters

This case, concerning staple food markets, confirms that price fixing and market division are per se unlawful; cost pressures do not justify collusion or cartel conduct. In essential goods markets, such conduct has particularly serious public consequences. It added that competition law enforcement is an important mechanism for protecting consumers, especially poor households, from inflated food prices.

5. Mukaddam v Pioneer Foods (Pty) Ltd and Others 2013 (10) BCLR 1135 (CC)[11]

This case revolved around the rights of around 100 small food producers to join together in a class action against a few major food conglomerates whose practices were anti-competitive and were affecting both their ability to sell food, and to keep food prices affordable for poor people. The Constitutional Court allowed the class action on the basis of it being in the interests of justice, and for poor and vulnerable people's rights to food.

Parties

The applicant was Mr Imraahn Ismail Mukaddam, a bread distributor operating in the Western Cape. The respondents were: Pioneer Foods (Pty) Ltd, Tiger Consumer Brands Ltd, and Premier Foods Ltd. The Legal Resources Centre appeared as amicus curiae.

Background and facts

Mukaddam was one of approximately 100 informal bread distributors in the Western Cape. He purchased bread in bulk from major producers and supplied it to informal traders, who in turn sold it to consumers.

In 2006, the Competition Commission investigated the respondents for anti-competitive conduct in the bread industry. The investigation led to Tiger Brands entering into a settlement agreement and paying a substantial penalty, while Pioneer Foods was found guilty by the Competition Tribunal and fined approximately R196 million (see above case).

Mukaddam and other distributors alleged that the cartel conduct harmed them directly.

[11] https://www.saflii.org/za/cases/ZACC/2013/23.html

They claimed that, as a result of collusion, discounts (commissions) were capped, reducing their margins, new distributors were excluded from routes, and their livelihoods as small-scale entrepreneurs were harmed.

They sought certification to bring a class action for damages against the bread producers. The High Court refused certification, and they appealed to the SCA, which dismissed the appeal, holding that the proposed claims were not legally tenable and that exceptional circumstances were required for an "opt-in" class action.

Mukaddam then approached the Constitutional Court.

Legal issues before the Court

Although the case was framed procedurally as a class action certification, the underlying dispute concerned collusion in the bread industry, a staple food market with direct implications for poor communities.

From a food justice perspective, the key issues were:

- Whether small-scale bread distributors, who form part of the informal food distribution network, could use a class action to claim compensation for harm caused by cartel conduct in the bread market.
- Whether the courts should permit collective litigation where anti-competitive conduct in a staple food sector allegedly reduced commissions, capped discounts and excluded new entrants, thereby undermining informal food distribution systems.
- Whether procedural barriers to class actions should be applied strictly, even where economically vulnerable actors seek redress for harm caused by unlawful conduct in an essential goods market.
- Whether, in a context involving the distribution of a staple food, the interests of justice required a flexible and access-enhancing approach to certification.

In short, although the immediate legal question concerned class action certification, the broader issue was whether those at the margins of the food economy would be given meaningful access to justice when dominant corporate actors distort staple food markets.

Court's findings and reasoning (food-focused lens)

The Court's reasoning has clear implications for food systems and for vulnerable actors within them.

The Court held that certification must be guided by the interests of justice and applied flexibly. Informal bread distributors operate on thin margins and limited capital. Requiring them to litigate individually would likely make redress impossible. A class action

may be the only realistic way to challenge unlawful conduct in the staple food market.

The Court also found it premature to declare the claim untenable. The Competition Tribunal had already found unlawful price-fixing in the bread industry, and section 65 of the Competition Act permits civil damages claims following such findings. Whether the distributors could ultimately prove loss was a matter for trial, not for summary dismissal at certification.

Finally, the Court stressed that certification should be an instrument of justice, not a barrier. In staple food markets, this ensures that vulnerable participants in informal food networks are not shut out of accountability processes when dominant firms distort the market.

Why the case matters (food and socio-economic justice lens)

Mukaddam is significant not because it directly declares a right to food, but because it strengthens procedural access to justice in disputes arising from staple food markets.

Bread is a core component of food security in South Africa. In this case, the distributors were small-scale intermediaries in the food supply chain, serving low-income communities. Their exclusion from routes and reduction in commissions affected not only their livelihoods but also the resilience and affordability of local food distribution systems. The Court reinforced the constitutional commitment to meaningful access to the courts for economically marginalised actors.

In practical terms, Mukaddam affirms that when corporate conduct in staple food sectors causes harm, those at the bottom of the food economy are not without recourse.

6. Black Sash Trust v Minister of Social Development and Others 2017 ZACC 8[12]

While this case emphasised the critical importance of social grants, it also mentioned food (see summary under social security). The court's reasoning made clear that the constitutional right to food, although not directly invoked, was materially at stake. For millions of recipients, social grants are the only means of acquiring food and sustaining themselves. The court's intervention prevented a catastrophic failure of access to food and preserved a minimum floor of subsistence for the poor. In doing so, it operationalised the principle that the state must take reasonable measures, within its available resources, to realise socio-economic rights progressively and must not regress from existing levels of protection.

Cross reference social grants

[12] https://www.saflii.org/za/cases/ZACC/2017/8.html

7. Gongqose and Others v Minister of Agriculture, Forestry and Others, Gongqose and S (1340/16, 287/17) [2018] ZASCA 87; [2018] 3 All SA 307 (SCA); 2018 (5) SA 104 (SCA); 2018 (2) SACR 367 (SCA) (1 June 2018)[13]

Members of the Dwesa-Cweba communities in the Eastern Cape were required to obtain permits to fish in areas where their communities had fished for centuries. The SCA held that customary rights are protected by the Constitution and that the communities should be left to fish as they had always done.

Parties

Appellants: Malibongwe David Gongqose and others (members of the Hobeni community), together with the Hobeni, Mendwane and Cwebe communities.

Respondents: Minister of Agriculture, Forestry and Fisheries; Minister of Environmental Affairs; and the state.

Background and facts

The appellants were members of the Dwesa-Cwebe communities in the Eastern Cape. These communities historically relied on marine and forest resources for their livelihoods and cultural practices. Fishing was part of a long-standing customary system regulating access to natural resources.

The Dwesa-Cwebe Marine Protected Area (MPA) was declared in 2000 under section 43 of the Marine Living Resources Act 18 of 1998 (MLRA) on a strict "no-take" basis, with no fishing or harvesting permitted without a permit.

On 22 September 2010, the appellants were arrested for attempting to fish in the MPA without permits. They admitted they had no permits but argued that they were exercising a customary right to fish, thereby rendering their conduct lawful.

Food dimension

The evidence showed that fish provided direct subsistence for families. The first appellant testified that the fish caught provided food for their households, and any surplus was sold locally to support their children's education. The communities are among the poorest in South Africa, and the ban caused significant hardship. Thus, fishing was not recreational or commercial in the industrial sense — it was tied to food security, subsistence, survival and dignity.

[13] https://www.saflii.org/za/cases/ZASCA/2018/87.html

The Magistrates' Court convicted them. The High Court upheld the convictions, finding that they should have applied for exemptions. The matter came before the SCA.

Legal issues before the Court

The central questions were:

- What is the constitutional status of customary law?
- Did the appellants prove the existence of a customary right to fish?
- Did the MLRA extinguish that customary right?
- If not extinguished, was their conduct unlawful?

In substance, the Court had to determine whether a customary subsistence fishing right could operate as a defence to a criminal charge.

Court's findings and reasoning

Constitutional status of customary law

The Court emphasised that customary law is an independent source of law under section 211(3) of the Constitution. Courts must apply customary law when applicable, subject only to the Constitution and to legislation that specifically deals with customary law.

Existence of a customary fishing right

The Court accepted extensive historical and expert evidence showing that the Dwesa-Cwebe communities had, for centuries, regulated access to marine resources through customary norms.

The High Court itself had accepted that these rights existed and were internally regulated (for example, by not catching juvenile fish).

Food and subsistence

The Court recognised that customary fishing was not merely cultural symbolism. It was central to livelihoods and food. The evidence demonstrated that:

- Fish were a primary source of food for households.
- Surplus was sold locally to support families.
- Loss of access caused material hardship to already impoverished communities .

Importantly, the Court noted that customary law itself contained conservation principles, including sustainable harvesting practices. Thus, customary subsistence fishing and

conservation were not mutually exclusive.

Did the MLRA extinguish customary rights?

The Court held that a customary right can be extinguished only by legislation that specifically addresses customary law. The MLRA, prior to its 2014 amendment, did not specifically address or extinguish customary fishing rights. Therefore, the customary right survived.

Unlawfulness

Because the customary right had not been extinguished and because customary law has constitutional status, the exercise of that right constituted "necessary authority" and rendered the conduct lawful.

The Court rejected the High Court's view that the appellants had to apply for a permit or exemption before exercising their customary right.

Court order

The SCA granted special leave to appeal and set aside the appellants' convictions and sentences.

Why the case matters (food focus)

This is an important judgment on food rights and customary access to natural resources.

First, it recognises that access to food sources (in this case, marine resources) may be protected by customary law, not only by statutory schemes.

Second, it affirms that subsistence fishing, tied to survival and food security, cannot be criminalised unless legislation expressly and constitutionally extinguishes that right.

Third, it bridges environmental protection and food security. The Court held that customary systems of sustainable harvesting can coexist with conservation and that impoverished communities with long-standing connections to resources have a strong interest in sustainability.

Fourth, the case strengthens constitutional protection for socio-economic survival strategies rooted in custom, which is directly relevant to broader food security debates in South Africa, particularly in rural and coastal communities.

The case stands at the intersection of customary law, environmental regulation and the right to food, and affirms that criminal law cannot override subsistence rights without clear constitutional justification.

8. Tiger Brands Limited v Pillay (2019/25309; 2018/12835; 2019/36431) [2020] ZAGPJHC 160 (23 June 2020)[14]

The case concerned access to information sought by representatives of thousands of consumers affected by a food related disease, listeriosis. The companies involved sought to cover up information relating to the contaminated food. The Court held that the information should be released as the public has a right to information about safety, testing and food production.

Parties

The applicants were Tiger Brands Limited and related companies responsible for the Enterprise Foods factory in Polokwane and the respondents were representatives of the certified listeriosis class action, acting on behalf of thousands of affected consumers.

Background and facts

The case arose from the 2017–2018 listeriosis outbreak, one of the most serious foodborne disease outbreaks in South African history. More than 1,000 people were infected, and over 200 died. Many infections affected newborn babies, and there were miscarriages and stillbirths.

Investigations by the National Institute for Communicable Diseases traced the outbreak to ready-to-eat processed meat products produced at the Enterprise Foods factory in Polokwane.

A class action was authorised in two stages: first, to determine whether Tiger Brands was liable for the contaminated food; second, to determine damages.

This judgment concerned subpoenas issued to obtain documents relating to food production, testing, quality control and safety compliance.

Legal issues before the Court (food focus)

The Court had to decide:

- Whether victims of a large-scale food contamination outbreak were entitled to obtain extensive documentation about food safety practices.
- Whether documents relating to testing, contamination risks, and quality control in a food production facility were relevant to determining liability.

[14] https://www.saflii.org/za/cases/ZAGPJHC/2020/160.html

- Whether claims of commercial confidentiality could limit disclosure in a case involving widespread public health harm.

Court's findings and reasoning (food focus)

Lamont J emphasised that in a case involving a catastrophic foodborne outbreak, access to relevant information is central to uncovering the truth.

The Court held that:

- The documents sought, which included testing data and internal quality control material, were relevant to determining how contamination occurred.
- The fact that the documents were numerous did not invalidate the subpoenas.
- Confidentiality is not an automatic shield against disclosure, particularly in matters of significant public health concern.
- The judgment emphasised that food safety testing exists to control quality and, where necessary, to disclose results to those dealing with contamination risks. Transparency in food production processes was therefore essential in a case of this scale.

Court order

The Court refused to set aside the subpoenas and required compliance, subject to appropriate procedural safeguards. Thus, information was made available to the respondents.

Why the case matters (food lens)

This judgment strengthens accountability in the food industry. It confirms that when contaminated food causes widespread illness and death, affected communities are entitled to full access to relevant safety and testing information.

Although the right to food under section 27(1)(b) was not expressly invoked, the decision reinforces core elements of that right: food must not only be available and accessible but also safe. By prioritising transparency in food production and safety processes, the Court supported the constitutional values underpinning food security and public health.

9. Equal Education v Minister of Basic Education 2021 (1) SA 198 (GP)[15]

During the COVID-19 a school feeding programme that had been in operation since 1994 and served approximately 9 million children nationally was abruptly stopped. This case called for its urgent reinstatement. In the judgment the court affirmed the rights of children to education (which is severely compromised if children are hungry), the right to food, the right to dignity and the best interests of the child. It called for the immediate reinstatement of the daily food programme.

Parties

Applicants: Equal Education and two School Governing Bodies.

Respondents: Minister of Basic Education, MECs of Education for all provinces, Minister of Finance. Amicus Curiae: Children's Institute.

Background and facts

The case was brought urgently after the reopening of schools on 8 June 2020, by which point millions of learners had still not received meals under the National Schools Nutrition Programme (NSNP), despite repeated government undertakings.

The programme, which had been in place since 1994 and served nine million children daily, was abruptly interrupted during the COVID-19 lockdown, cutting off the only consistent source of nutrition for many learners from poor and food-insecure households.

Legal issues before the Court

The court had to decide:

- Whether the failure of the DBE and the provincial departments to provide the NSNP to all qualifying learners during the pandemic constituted a violation of the learners' constitutional rights.
- Whether the state's obligations under sections 27(1)(b), 28(1)(c), 28(2), and 29(1)(a) of the Constitution require the state to proactively resume and expand the NSNP.
- Whether the DBE's and provincial governments' response constituted an unjustifiable limitation of these rights.

[15] https://www.saflii.org/za/cases/ZAGPPHC/2020/306.html

Courts's findings and reasoning

Potterill ADJP emphasised that "hunger is not an issue of charity, but one of justice" and that the suspension of the NSNP had immediate and severe consequences for vulnerable children (para 88). The court made clear that state conduct that "impairs the existing protection of the right" to nutrition is constitutionally impermissible, citing the negative obligation to avoid retrogression (para 44). The suspension of the NSNP was found to be a retrogressive measure that unjustifiably infringed learners' socio-economic rights, particularly the right to basic education (section 29(1)(a)), the right to sufficient food (section 27(1)(b)) and the best interests of the child principle (section 28(2)).

The Minister and MECs argued that nutrition was only an incidental benefit of the state's duty to provide basic education. The court rejected this argument, holding that basic nutrition is not a peripheral or discretionary benefit, but a constitutional obligation which the DBE had itself embraced as part of its mandate (paras 40–42). It noted that the Department's own policy documents and international treaty reports had consistently cited the NSNP as fulfilling the right to food, education, and development.

Court order

The Court held that the suspension of the NSNP during the COVID-19 lockdown violated the constitutional and statutory rights of learners to basic nutrition and education.

Why the case matters

The judgment reaffirmed that children have a constitutional right to basic nutrition under section 28(1)(c), which is unqualified and immediate, and not subject to progressive realisation (para 54). The court held that the NSNP is more than a welfare programme. It is a lifesaving mechanism "targeted to those who are poor and food insecure" and which "supplements the nutrition of half of all children in the country, three quarters of all learners and a fifth of the total population" (para 32). The court observed that the NSNP delivers essential nutrients, especially protein, vegetables and fruit, and directly affects learners' health, concentration and academic performance. Its withdrawal was described as a "colossal disaster for the distribution of food to poor children" (para 26).

In a powerful statement on constitutional interpretation, the Court concluded: "The Constitution envisages that section 28 of the Constitution will protect those children ... Interpreting the Bill of Rights promoting human dignity, equality and freedom can never allow for the hunger of a child and a constitutional compliant interpretation is simply that the Department must in a secondary role roll out the NSNP, as it has been doing." (para 53) The Court thus ordered a structural interdict requiring the Minister and MECs to submit detailed implementation plans and regular progress reports to ensure full and

equitable reinstatement of the NSNP.

This judgment is a definitive affirmation of the socio-economic right to food for school-going children and sets a precedent for state accountability in ensuring that no child is denied their constitutional right to nutrition, even in times of national crisis.

Cross reference children and education

10. South African Human Rights Commission v Agro Data CC & Another (Afriforum, Centre for Applied Legal Studies and Commission for Gender Equality intervening as Amici Curiae) (39/2023) [2024] ZASCA 121; [2024] 4 All SA 66 (SCA); 2024 (6) SA 443 (SCA) (15 August 2024)[16]

(This case is summarised under Water because it concerns both the right to food and the right to water).

In South African Human Rights Commission v Agro Data CC and Another, the SCA considered the SAHRC's attempt to enforce directives aimed at restoring access to borehole water for poor, elderly and vulnerable farm occupiers. The deprivation of water was framed as a violation of section 27(1)(b) of the Constitution, which guarantees the right of everyone to access sufficient food and water. The case presented a direct intersection between the right to water and the socio-economic right to food, as the lack of water imperilled subsistence farming and livestock, both essential to the occupiers' survival and nutrition.

The SAHRC found that the respondents' actions violated not only section 27(1)(b) but also sections 10 (dignity) and 6(2)(e) of the Extension of Security of Tenure Act 62 of 1997. It ordered that water access be restored within seven days, citing that denial of water was "appalling, dehumanising and impacts on their rights to dignity and life" (para 4). The Court reiterated the UN's position that "water is life's matter and matrix mother and medium. There is no life without water" (para 2), and emphasised that water is "fundamental to everyone's health, dignity and prosperity."

Although the SCA ultimately held that the SAHRC does not have the power to issue binding directives, it confirmed the Commission's constitutional mandate to investigate human rights violations and take steps to secure redress through appropriate channels, such as the courts (paras 45–49). The Court stressed that failure to restore water to poor farm dwellers seriously undermines the Bill of Rights, particularly the right to food, and noted that "any deprivation of clean water to people is appalling, dehumanising and impacts on their rights to dignity and life" (para 4).

[16] https://www.saflii.org/za/cases/ZASCA/2024/121.html

The SCA's judgment underlined the significance of the right to food by affirming its interdependence with access to water, livelihoods, and dignity. While it limited the binding effect of the SAHRC's directives, it recognised that denial of essential resources like water directly violates the rights of marginalised communities, especially farm occupiers who rely on land and water for subsistence and food security.

This case reinforces the interpretation of section 27 as encompassing a holistic view of food rights that includes access to resources necessary for food production. The right of everyone to access sufficient food is intricately connected to the right to water. It also reaffirms that socio-economic rights must be protected not only by the courts but also through proactive investigation and advocacy by Chapter 9 institutions, whose findings, though not binding, must be taken seriously and acted upon where rights violations are at stake.[17]

Cross reference water (without the water, food could not be produced).

Table of cases

Case citation	Key constitutional principles	Core rights established
Minister of Environmental Affairs and Tourism v George [2006] SCA 57 (RSA)	The right to bring a matter to the Equality Court if constitutional rights are being violated.	While not having the hearing, the SCA held that the fishermen could bring their matter to the Equality Court.
Huang v Head, Grootvlei Prison[2008] JOL 21089 (O)	Right to adequate nutrition under detention (section 35(2)(e) of the Constitution).	Culturally appropriate food access in detention is permitted.
Wary Holdings v Stalwo (Pty) Ltd 2009 (1) SA 337 (CC)	National responsibility to prevent retrogression in food security (section 27).	Subdivision of agricultural land not permitted without Ministerial consent as it reduces food production.
Competition Commission v Pioneer Foods (Pty) Ltd (15/CR/Feb07,	Anti-competitive conduct undermines socio-economic rights and the right to food	Cartel conduct by bread producers not acceptable as it inflates staple food prices affecting the poor.

17 The SAHRC appealed the judgment – particularly on its right to issue enforceable directives, and the Constitutional Court heard the appeal in late 2025. Its judgment is awaited.

Case citation	Key constitutional principles	Core rights established
50/CR/May08) [2010] ZACT 9; [2009] 2 CPLR 323 (CT) (3 February 2010)	(section 27).	
Mukaddam v Pioneer Foods and Others 2013 (10) BCLR 1135 (CC)	Access to justice and procedural fairness for poor economic actors.	A class action is permissible when justice is served. In this case the applicants were over 100 small producers facing loss of livelihood in staple food distribution owing to cartels.
Black Sash Trust v Minister of Social Development and Others [2017] ZACC 8	Right to social assistance and dignity (section 27, 10, 1(d)). State cannot reduce level of support it already provides.	Social grants are a pathway to food access for vulnerable groups.
Gongqose and Others v Minister of Agriculture, Forestry and Others, Gongqose and S (1340/16, 287/17) [2018] ZASCA 87; [2018] 3 All SA 307 (SCA); 2018 (5) SA 104 (SCA); 2018 (2) SACR 367 (SCA) (1 June 2018)	Customary law and customary practices must be adhered to when applicable (section 111 (3) of the Constitution.	The Dwesa-Cweba communities had customary rights to fishing going back for centuries. Because such rights had not been extinguished and because customary law has constitutional status, they had the right to continue fishing.
Tiger Brands v Pillay (2019/25309; 2018/12835; 2019/36431) [2020] ZAGPJHC 160 (23 June 2020)	Access to information regarding safety of food cannot be denied.	Unsafe food class action for mass public health violation entitled to access information on safety, testing and food production systems.
Equal Education v Minister of Basic Education 2021 (1) SA 198 (GP)	Unqualified right to basic nutrition for children (section 28(1)(c)).	Suspension of school nutrition scheme violates children's right to food.
South African Human Rights Commission v	A lack of water endangers subsistence	Denial of water required for food production (cross

Case citation	Key constitutional principles	Core rights established
Agro Data CC & Another 2024 (6) SA 443 (SCA) (15 August 2024)	farming and therefore access to food.	ref water). Status of SAHRC questioned by respondents as a body with power to enforce its directives. (Appealed)

Current enforceable rights

- Cases concerning equitable access to food resources can be brought to the Equality Court.
- Prisoners are entitled to food that is compatible with their cultural or religious nationalities and practices.
- The subdivision of agricultural land cannot proceed without the consent of the Minister of Agriculture, as agricultural land is critical to food production.[18]
- Big cartels that produce food, particularly food for low-income people, will be penalised if they collude to fix prices.
- Class actions are permitted when justice will be served. Small food producers were able to bring a class action to challenge anti-competitive cartel practices.
- Social security grants are of critical importance in alleviating food insecurity. The continuation of payments must be preserved.
- Customary practice in food acquisition cannot be removed if it is an existing practice that has not been extinguished, because customary law has constitutional status.
- The public has a right to access information regarding food production, food production safety standards and testing.
- Children's school feeding programmes cannot be stopped, as the right to education is compromised when children are hungry, and children's nutrition is an immediately realisable right.

[18] The Subdivision of Agricultural Land Repeal 64 of 1998 was enacted to repeal the 1970 Act but section 1 of the 1998 Act which was the actual repeal provision was never brought into force by proclamation. This means that the 1970 Act remains in force.

The right to have access to sufficient water

> *Water is life. Without it, nothing organic grows. Human beings need water to drink, to cook, to wash and to grow our food. Without it, we will die. It is not surprising then that our Constitution entrenches the right of access to water…. Although rain falls everywhere, access to water has long been grossly unequal. … The achievement of equality, one of the founding values of our Constitution, will not be accomplished while water is abundantly available to the wealthy, but not to the poor.*[1]

Cases in this chapter

1. Mazibuko and Others v City of Johannesburg, 2010 (3) BCLR 239 (CC) 285
2. Mshengu and others v Msunduzi Local Municipality and others, [2019] JOL 45319 (KZP) 288
3. Concerned Residents of Flag Boshielo West and others v Sekhukhune District Municipality and others [2020] JOL 48355 (GP) 291
4. Eskom Holdings SOC Limited v Vaal River Development Association (Pty) Limited and others and a related matter, 2023 (5) BCLR 527 (CC) 291
5. South African Human Rights Commission v Agro Data CC & Another (39/2023) [2024] ZASCA 121; [2024] 4 All SA 66 (SCA); 2024 (6) SA 443 (SCA) (15 August 2024) 294

[1] O'Regan J, Mazibuko and Others v City of Johannesburg 2010 (3) BCLR 239 (CC), para 1-2.

The Constitution

Section 27(1) (b) and Section 27(2)

Everyone has the right to access… sufficient food and water, and the state must take reasonable legislative and other measures within its available resources to achieve the progressive realisation of this right.

General points

- "Although rain falls everywhere, access to water has long been grossly unequal. This inequality is evident in South Africa. While piped water is plentifully available to mines, industries, some large farms and wealthy families, millions of people, especially women, spend hours laboriously collecting their daily supply of water from streams, pools and distant taps."[2]
- The state is the ultimate provider of water, as it has a constitutional duty to ensure that all people in the country have sufficient access.
- Water can be supplied in a variety of ways, including through reservoirs, boreholes, water trucks, neighbourhood taps and by piping it into houses. Water is a natural resource made available in urban and peri-urban areas by local authorities. On farms and in rural areas, water is sourced from rivers, dams, boreholes and natural springs.
- SERI's report on water states that the annual rainfall in South Africa is only 495 mm, compared with the world average of 1 033 mm. According to Stats SA's community survey, 85.5% of households have access to piped water.[3] In 2022, 8,7% of households had no access to basic water at all.[4]

Statistics

Water statistics as set out in General Household Survey, 2023[5]

Currently, 87% of the population have access to piped or tap water in their dwellings, in the yard, at a neighbour's tap, or at public or communal taps. 59% have piped water in

[2] Mazibuko judgment, para 2.
[3] Socio-Economic Research Institute *Claiming Water Rights in South Africa 2020 16 f/n p 20* available at https://www.seri-sa.org/images/SERI_Water_report_FINAL_WEB.pdf
[4] Census 2022 Statistical Release, Distribution of households by access to piped water, Census 1996 – 2022, Figure 8.8 p 74, available at https://census.statssa.gov.za/assets/documents/2022/P03014_Census_2022_Statistical_Release.pdf
[5] Available at https://www.statssa.gov.za/publications/P0318/P03182023.pdf

their dwellings, 22% have piped water in their yards, and 8,9% have piped water on a community stand. 8,7% do not have access to piped water.

The Western Cape (99, 3%) and Gauteng (97, 6%) have the highest percentage of households with access to drinking water, closely followed by the Free State (93, 3%). Limpopo (64, 2%) and the Eastern Cape (67, 2%) have the lowest provision. Although there was a 2, 2,6% rise in access, five provinces show a decline since 2002. Limpopo (-9, 9,6%), Mpumalanga (-3, 3,9%), Northern Cape (-2, 2,4%), Free State (-2, 2,3%), and Gauteng (-1, 1,1%) have seen declines. The report adds that despite this overall decline, more households have tap water in 2023 than two decades earlier.

Tap water inside the dwelling rose from 40, 4% of households to 45, 2% in 2023. The second most common source of water after tap water in the home is piped water on the household's site or yard (29, 8%). Other sources of water, such as boreholes, rainwater tanks, and neighbours' taps, are found in around 2, 2,3% of households, with springs, wells, streams, rivers, and other sources under 1. 1.4%. The report says that while overall access to water improved, 3, 3,3% of households still had to fetch water from rivers, streams, stagnant water pools, dams, wells, and springs in 2023. The number of households with access to piped water from municipalities increased by 60, 4% between 2004 and 2023, expanding from 9, 2 million to 15, 2 million households in the period.

The statistics show that 74% of households took less than 30 minutes to fetch water. More than 35% of households reported a dysfunctional water supply service in 2023, with Mpumalanga recording the highest number of interruptions (66%), followed by the Northern Cape (59%) and Limpopo (57%). In metropolitan areas, a smaller percentage of households reported water interruptions (22%). During water interruptions lasting two days or longer, people relied on water from various sources. Nationally, 27% relied on water from water tankers or vendors, 6,2% from springs, wells, dams, pools, rivers, and streams. Rainwater tanks (4,2%) and boreholes (6%) were also used.[6]

While statistics tell us something about water provision, they do not tell the whole story. In big cities like Johannesburg, there may be access to piped water, but households in Houghton, with piped municipal water in individual dwellings, will experience access differently from residents in the overcrowded buildings in Hillbrow, where water supplies may be far less secure and prone to frequent disruption. In rural areas and small towns, access is more likely to be from communal taps, neighbours' taps, and possibly further afield from rivers and dams.

The constitutional right to water must be seen against this backdrop of uneven supply

[6] The General Household Survey 2023, Stats SA, pp 29 – 36. Note there is a discrepancy between stats in the General Household Survey and the Key Statistics 2022 on the StatsSA website. According to the Household Survey 13% of people do not have access to piped water, (87% do), whereas the Stats SA website reports that 8,7% of dwellings have no access to piped water. It is not clear which of these stats are more accurate.

and access, which generally favours the wealthy.

Various questions arise as follows:

What does the Constitution say about water? Because the right is for "everyone", no one can be excluded on the basis of nationality, race, gender or ability. The state must respect, protect, promote and fulfil the right to water (Section 7(2) of the Constitution). This means the right entails both a negative and a positive duty. The negative duty is that the state must respect existing rights to water by refraining from interfering with any access people may already have, such as by cutting off water supplies.

How much water is sufficient*?* In 2001, the Department of Water Affairs and Forestry promulgated the Free Basic Water Policy,[7] which set the national minimum standard for basic water supply at 25 litres of potable water per person per day or 6 kilolitres per household per month, with a minimum flow rate of at least 10 litres per minute. The water must be within 200 metres of a household, and no consumer can be without a supply for more than seven full days in a year. This was confirmed in the Mazibuko case, summarised below.

How much should water cost? The Free Basic Water Policy provides that, if a person falls within a certain economic level, free basic water must be supplied by the municipality, or, if there is an intermediary, by the intermediary. This means that private owners of land that supply water cannot charge more for water than the municipality would charge, and, like municipalities, such owners must comply with the Free Basic Water Policy.[8]

Municipalities are required by the Municipal Systems Act 32 of 2000 to develop indigent policies to facilitate the provision of free basic services to poor households.

Which level of government is responsible for providing water? Local government is responsible, as set out in Part B of Schedule 4 of the Constitution, read with section 156. Executive authority is conferred on municipalities for the administration of water and sanitation services. Currently, there are eight metropolitan municipalities and 44 district municipalities, each divided into local municipalities that together make up the district municipalities.

Specifically, the municipality designated as a Water Services Authority in terms of the Water Services Act 108 of 1997 (Water Services Act) is responsible, unless the Water

[7] Available at https://ws.dws.gov.za/wspd/UserControls/DownloadImportFiles.aspx?enc=amo++ONsgvUdNl8KWUPnO4+crN03D9/BsCSWgIXy3hQ=

[8] Similarly, an owner of a building/structures where the water is centrally controlled must provide occupants with water. In such cases the owner is considered to be the intermediary, and failure to provide water would be unlawful. This is according to the Water Services Act which provides for an intermediary. Section 25 places a legal duty on intermediaries.

Services Authority has entered into a contract with a Water Services Provider or an intermediary exists.

What about water in rural areas and on farms? Private landowners are not water authorities, but if they control water on their property, they have an obligation to provide access to water for others as intermediaries. This is usually through a contract or authorisation from a Water Services Authority. They are treated as intermediaries once they have control of access. If they do not have a contract with a water authority, they are not free from their obligations. They have different duties. They must not unreasonably prevent access to existing water, and they must not prevent municipalities from entering their land to install water infrastructure, even if they are not contracted to be a Water Services Authority. If they employ farm workers who live on their farms, or if they have lease agreements with labour tenants, it is implied that they must supply water by virtue of these contracts, since these occupants would not have access to other water.

Cases

1. Mazibuko and Others v City of Johannesburg, 2010 (3) BCLR 239 (CC)[9]

The City of Johannesburg's water policy was challenged by Phiri residents (Soweto) on two grounds. Firstly, the free basic allowance of 6 kilolitres per household was considered too low, and secondly, that prepaid metres caused automatic cut-offs when the free water was depleted. The Constitutional Court found the water amount to be reasonable in the circumstances, noting that the Constitution provides for progressive realisation, and it did not view prepaid metres as problematic, as they do not lead to permanent discontinuations of supply.

Parties

The applicants were five residents of Phiri. The first respondent was the City of Johannesburg, the second respondent was Johannesburg Water (Pty) Ltd, and the third respondent was the national Minister of Water Affairs and Forestry. The Centre on Housing Rights and Evictions acted as amicus curiae.

Background and facts

The case arose from the City of Johannesburg's implementation of "Operation Gcin'amanzi" (save water), a programme introduced in Phiri in 2004 to address severe water losses, ageing infrastructure, and widespread non-payment for water services in Soweto. Much of the water piping in the area dated from the 1940s and 1950s and had

[9] https://www.saflii.org/za/cases/ZACC/2009/28.html

deteriorated significantly, causing extensive leakage and unaccounted-for water.

As part of the project, the City replaced old pipes and introduced new water-management measures. These included the installation of prepaid water meters for households that opted for a full water connection, while offering an alternative of a yard standpipe with a restricted flow. All households received a free basic water allocation of 6 kilolitres per household per month, in line with national regulations, with charges applying once this amount was exceeded.

The applicants challenged both the adequacy of the free basic water allocation and the lawfulness of the prepaid water meters. They argued that 6 kilolitres per household per month was insufficient, particularly for large households, and that prepaid meters caused automatic cut-offs once the free allocation was exhausted, which they said was unlawful and unconstitutional.

The High Court found in favour of the applicants, holding that the City's water policy was unreasonable and ordering that 50 litres of free water per person per day be provided, and also declaring the prepaid meter system unlawful. The SCA overturned much of that decision, holding instead that 42 litres per person per day was sufficient, and referred the policy back to the City.

The matter then came before the Constitutional Court, which was required to determine the proper interpretation of the right of access to sufficient water in section 27 of the Constitution and the extent to which courts may define the content of that right.

Legal issues before the Court

- Whether the City of Johannesburg's Free Basic Water policy, which provides 6 kilolitres per household per month, conflicts with Section 27 of the Constitution or Section 11 of the Water Services Act.
- Prepaid meters:
  - Whether the installation of prepaid water meters in Phiri was lawful under statutory and constitutional provisions.
  - Whether prepaid meters led to unauthorised cut-offs of water services.
  - Whether the introduction of prepaid meters unlawfully affected Phiri residents through unfair discrimination or procedural unfairness.

Court's findings and reasoning

Section 27(1)(b) and 27(2) of the Constitution: Everyone has the right to access sufficient water, and the state must take reasonable measures, within available resources, to progressively realise this right.

The Water Services Act: Sections 3 and 4(3) regulate basic water supply and the limitation or discontinuation of water services. Regulation 3(b) of the National Water Standards Regulations sets the minimum standard for basic water supply services as:

a) A minimum of 25 litres of potable water per person per day or 6 kilolitres per household per month.
b) At a minimum flow rate of at least 10 litres per minute.
c) Within 200 metres of a household, with an effectiveness such that no consumer is without a supply for more than seven full days in any year.

*Progressive steps***.** The Court found that Section 27(2) of the Constitution requires the state to take reasonable, progressive measures rather than impose an immediate, quantifiable water entitlement on demand. The Free Basic Water policy met the national minimum standards and was informed by complex socio-economic factors, including affordability and resource constraints.

The current amount is sufficient. The Court rejected the applicants' proposal to set a quantified entitlement of 50 litres per person per day, affirming that policies must be assessed contextually against a reasonableness standard. The city's policy was flexible and continuously revised to meet the needs of indigent households, including an additional 4 kilolitres for registered indigents.

The installation of prepaid meters is not unconstitutional. The installation of prepaid water meters was upheld as authorised by municipal by-laws and aligned with sustainability mandates under the Municipal Systems Act and the Constitution. The Court held that prepaid meter suspensions do not violate Section 4(3) of the Water Services Act, as they do not amount to permanent discontinuations requiring procedural safeguards. They impose temporary cut-offs that can be rectified by payment.

It is not discriminatory to have prepaid water meters in some areas and not others. Claims of unfair discrimination and procedural unfairness relating to the rollout of prepaid meters were dismissed, as the policy was justified by water losses in Soweto and extensive community consultation was evidenced.

The measures did not disproportionately disadvantage users and aimed to achieve equitable resource distribution.

“Thus, the positive obligations imposed upon government by the social and economic rights in our Constitution will be enforced by courts in at least the following ways.” (para 67) O’Regan further states that if the government takes no steps to realise the rights, the courts will require it to do so. If the government adopts measures that are unreasonable, the courts will similarly require that they be reviewed to meet the constitutional standard of reasonableness. From *Grootboom,* it is clear that a measure will be unreasonable if it

makes no provision for those most desperately in need. If the government adopts a policy with unreasonable limitations or exclusions, as in *Treatment Action Campaign No* 2, the court may order that they be rectified. Finally, the obligation of progressive realisation imposes a duty upon government continually to review its policies to ensure that the right is progressively realised (para 67).

Court order

The Court held that the City's Free Basic Water policy and the installation of prepaid meters were not unconstitutional or unlawful. The orders of the High Court and the SCA were set aside.

Why the case matters

Mazibuko is an important case on the enforcement of socio-economic rights, particularly the right of access to sufficient water under section 27 of the Constitution. The Constitutional Court upheld the City of Johannesburg's Free Basic Water policy, finding that the provision of 6 kilolitres per household per month was constitutionally sufficient on the evidence before it. However, the Court assessed this against a standard of reasonableness rather than by defining a universally applicable minimum core entitlement. The case is significant for confirming that courts will not prescribe fixed service levels, while affirming that water policies remain subject to constitutional scrutiny and must be reasonable, flexible, and responsive to the needs of poorer households.

2. Mshengu and others v Msunduzi Local Municipality and others, [2019] JOL 45319 (KZP) [10]

The case concerns the obligations of a municipality to provide basic water and sanitation services to people residing within its jurisdiction. The applicants were labour tenants living on private property without access to water, sanitation, or refuse removal services. They approached three municipalityies for assistance, but the municipalities cited as respondents failed to provide the requested services. The judgment affirms that municipalities may not shift responsibility onto private landowners. They bear the primary statutory and constitutional duty to ensure the provision of basic services to residents within their area.

Parties

Applicants: Zabalaza Mshengu (first applicant), Thabisile Ntombifuthi Ngema (second applicant), and the Association for Rural Advancement (third applicant).

[10] https://www.saflii.org/za/cases/ZAKZPHC/2019/52.html

Respondents: Msunduzi Local Municipality (first respondent), Umshwathi Local Municipality (second respondent), Umgungundlovu District Municipality (third respondent) and others.

Background and facts

The applicants, including elderly labour tenant Mr Zabalaza Mshengu (who passed away during the proceedings), resided on privately owned farms within the jurisdiction of the Msunduzi and uMshwathi Local Municipalities. They lived in substandard housing without access to potable water, basic sanitation, or refuse collection. Water had to be fetched from distant and unreliable sources, and sanitation was rudimentary or non-existent, causing indignity and health risks.

Attempts by the applicants to secure services through correspondence with municipalities and government departments were unsuccessful.

The third applicant, the Association for Rural Advancement, supported the application in the public interest and on behalf of other similarly placed farm occupiers and labour tenants. Relief was sought in the form of declaratory, mandatory, and structural interdicts compelling the municipalities to provide access to basic municipal services.

Legal issues before the Court

- Whether the failure of the Msunduzi, uMshwathi, and uMgungundlovu municipalities to provide basic services to farm occupiers and labour tenants constituted a breach of constitutional and statutory obligations.
- Whether landowners should have been joined to the proceedings because of the potential impact on their property.
- Whether budgetary constraints and existing Integrated Development Plans (IDPs) excused the failure to provide services.
- The appropriate remedy, including whether structural relief and court supervision were warranted.

Court's findings and reasoning

- The Court confirmed that, regardless of land ownership, the municipality has the obligation to provide people with sufficient water, as required by the Constitution and the legislation.
- Landowners cannot reasonably refuse a municipality access to their land to enable the municipality to install infrastructure to facilitate access to water. The Extension of Security of Tenure 62 of 1997 provides that no farm dweller shall be denied or deprived of access to water.

- Landowners do not have a direct statutory obligation to provide water services unless they have been contracted to do so by the Water Services Authority. Nevertheless, the Court held that they have a secondary obligation under sections 8 and 27 of the Constitution and the Water Services Act, which confirm that landowners cannot refuse a municipality access to install infrastructure.
- The Court found that the first respondent (Msunduzi), as the Water Services Authority, had a clear statutory and constitutional obligation to provide water and sanitation services.
- The uMshwathi and uMgungundlovu (the second and third respondents) could not rely on the fact that they were not Water Services Authorities to avoid responsibility, particularly for refuse collection and basic municipal services.
- The IDPs were found inadequate for failing to prioritise the needs of vulnerable groups, particularly farm occupiers and labour tenants.
- Budgetary constraints and separation of powers could not justify breaching constitutional obligations.
- The Court emphasised the need for meaningful implementation, plans, and monitoring to progressively realise the right to basic services.

Court order

The Court held that the first, second and third respondents' failure to provide basic sanitation, sufficient water, and refuse collection to farm occupiers and labour tenants was inconsistent with the Constitution. The Court issued a mandatory interdict compelling compliance with national standards, ordered the preparation of detailed plans within six months, and required monthly reporting and supervision.

Why the case matters

The case affirms that municipalities bear the primary constitutional and statutory duty to ensure that farm occupiers and labour tenants have access to basic water, sanitation and refuse removal, even when they live on private land. The Court rejected attempts by municipalities to shift responsibility to landowners or to rely on general policies and budgetary constraints, holding that vulnerable rural residents must be specifically planned for and prioritised. Crucially, the judgment confirms that failing to adopt and implement a reasonable, targeted plan to realise these basic services is unconstitutional, and it authorised structural relief and ongoing judicial supervision to secure compliance. This makes the case an authority on rural service delivery, municipal accountability, and the enforceability of socio-economic rights under sections 26 and 27 of the Constitution.

3. Concerned Residents of Flag Boshielo West and others v Sekhukhune District Municipality and others [2020] JOL 48355 (GP)[11]

This case concerns the fact that the Sekhukhune District Municipality failed to comply with an August 2017 High Court judgment requiring it to provide water to the residents of Flag Boshielo West, and was in contempt of court. On 29 November 2019, the municipality was held in contempt of court. In order to succeed in such a case, it had to be shown that the respondent was male fides in not complying. This could not be shown in the case, so the application for contempt of court and the dismissal of the acting Municipal Manager of Sekhukhune were dismissed.

Cross reference housing - municipal officials

4. Eskom Holdings SOC Limited v Vaal River Development Association (Pty) Limited and others and a related matter, 2023 (5) BCLR 527 (CC)[12]

Eskom unilaterally cut the electricity supply to certain communities in the Vaal area after a dispute Eskom had with the municipalities in the area over their non-payment for electricity. The Court confirmed both the High Court and SCA judgments, which ruled that Eskom's actions violated the residents' rights and showed no acknowledgement of the consequences the electricity reductions had on water supply and sewage, leaving residents in appalling conditions. The Constitutional Court upheld the decisions of the two lower courts. Even though Eskom did not have a direct contractual dispute with the residents, but with the municipalities, it was obliged to take into consideration the cut-offs and reductions had on communities, and how such actions violated their constitutional rights. At the very least it should have followed a fair procedure.

Parties

The applicant was Eskom Holdings SOC Limited. The first respondents were the Vaal River Development Association and the Lekwa Ratepayers Association, acting on behalf of residents of the Ngwathe Local Municipality and the Lekwa Local Municipality, respectively. The municipalities themselves were cited as respondents, as were the relevant Premiers and MECs for Cooperative Governance and Traditional Affairs. The National Energy Regulator of South Africa and the Minister responsible for energy were also joined.

[11] https://www.saflii.org/za/cases/ZAGPPHC/2020/442.html

[12] https://www.saflii.org/za/cases/ZACC/2022/44.html

Background and facts

Eskom Holdings SOC Limited ("Eskom") supplies bulk electricity to the Ngwathe and Lekwa Municipalities under contracts that set out the notified maximum demand (NMD) levels. These levels specify the maximum amount of electricity that Eskom will supply to a municipality. If this amount is exceeded, the municipality must pay penalties.

In this case, the municipalities consistently failed to pay Eskom for the electricity supplied. In addition, there were extensive illegal connections in the area, enabling people to access electricity for free, and there was insufficient infrastructure, impeding Eskom's ability to meet demand above the NMD levels.

In July 2020, Eskom reduced electricity supply to NMD levels, citing the municipalities' failure to address illegal connections, payment defaults, and infrastructure shortcomings. This reduction caused significant disruptions, including failures in water supply, sewage systems, healthcare services, and educational institutions in the municipalities, which were described as an "unfolding human and environmental catastrophe".

The Vaal River Development Association and Lekwa Ratepayers Association, representing affected residents, filed urgent applications for interim relief, seeking to restore electricity supply pending a review of Eskom’s decision.

The High Court granted interim interdicts compelling Eskom to restore supply to pre-reduction levels, finding that Eskom's actions had seriously infringed residents' constitutional rights, including dignity, life, water, and education.

The SCA upheld the High Court's ruling, finding that Eskom had failed to take the reasonable steps required by the Constitution and the Intergovernmental Relations Framework Act 13 of 2005 (IRFA) to resolve disputes with the municipalities before reducing supply.

Eskom appealed, arguing that it has no direct duty to supply residents and that its actions complied with the contractual terms and obligations under the Electricity Regulation Act 4 of 2006 (ERA).[13]

Legal issues for the Court

- Does Eskom owe a constitutional or statutory duty to the affected residents regarding the electricity supply?

[13] The Electricity Regulation Act governs the regulation of electricity, including the roles and responsibilities of energy suppliers and the framework for electricity distribution.

- Can Eskom reduce electricity supply to NMD levels without engaging in reasonable negotiations under IRFA and constitutional principles?
- Are the residents entitled to an order compelling Eskom to supply electricity under their constitutional rights?
- Does the principle of subsidiarity preclude residents from relying directly on constitutional rights rather than on the ERA mechanisms?

Court's findings and reasoning

Fair procedure was not followed. The Court's majority judgment, delivered by Madlanga J, focused on Eskom's administrative decision and its direct impact on the residents' constitutional rights, including dignity, life, access to water, and education. The Court noted that these rights had been materially and adversely affected by Eskom's reduction in electricity without following a fair procedure under the Promotion of Administrative Justice Act 3 of 2000 (PAJA).[14]

Respect constitutional rights. The Court held that section 7(2)[15] of the Constitution obliges Eskom, as an organ of state, to respect rights by refraining from conduct that results in their violation. It found that Eskom failed to respect residents' rights by not taking adequate steps to prevent the severe consequences of the reduction decision.

Principle of subsidiarity. The Court rejected Eskom's reliance on the principle of subsidiarity, finding that the ERA, while comprehensive, did not adequately address claims for the protection of residents' rights arising from harm such as a sudden reduction in supply without notice. Eskom's failure to engage in procedural fairness or to pursue reasonable steps to resolve intergovernmental disputes, as required by the IRFA (an act designed to provide mechanisms and procedures to facilitate the settlement of intergovernmental disputes), further invalidated its actions.

A strong prima facie case for procedural unfairness under PAJA was identified, justifying the continuation of the interim interdict preventing Eskom from reducing electricity supply.

Court order

The Court dismissed Eskom's appeal against the interdict preventing it from reducing electricity supply. It held that Eskom's actions violated several constitutional rights of the residents. As an organ of state, Eskom had a duty to give people notice and an opportunity to make representations. Section 4(1) of PAJA requires that procedure be fair.

[14] Promotion of Administrative Justice Act 3 of 2000.

[15] Section 7(2) states that "the state must respect, protect, promote and fulfill the rights in the Bill of Rights."

The interim interdict was upheld, compelling Eskom to restore electricity supply levels to those in place before the reduction, pending the final adjudication of the residents' PAJA review. The majority judgment did not address the dispute between Eskom and the City of Johannesburg as to whether IRFA or the ERA was relevant, even though the minority judgment did address this issue.

The Court reaffirmed the importance of state accountability in upholding fundamental rights and complying with lawful administrative processes, while addressing the challenges of resource constraints and intergovernmental disputes in a sustainable manner.

Why the case matters

This case is a major development in constitutional and administrative law concerning electricity supply and the protection of residents' rights. The Constitutional Court confirmed that Eskom's decision to reduce bulk electricity supply to municipalities constitutes administrative action and is subject to review under PAJA, even though Eskom's contractual relationship is with municipalities rather than residents. The Court held that residents may rely on fundamental rights such as dignity, life, health, water, and an environment not harmful to health as prima facie rights justifying interim relief where a reduction in electricity supply causes catastrophic consequences. The judgment affirms that organs of Statecannot rely solely on contractual enforcement where this foreseeably results in severe harm to rights-holders, and it strengthens procedural protections by emphasising the duty to give notice and act fairly before decisions that materially and adversely affect rights are implemented.

5. South African Human Rights Commission v Agro Data CC & Another (39/2023) [2024] ZASCA 121; [2024] 4 All SA 66 (SCA); 2024 (6) SA 443 (SCA) (15 August 2024)[16]

The South African Human Rights Commission issued a directive to Agro Data CC to allow occupiers residing on their farm to access borehole water, which was the only source of water available to them. The owner was refusing access unless they paid, and was directing them to use river water. They owner refused to abide by the directive issued saying it was not binding, resulting in the SAHRC requesting the High Court to declare that its directives are binding. The High Court followed by the SCA both held that the SAHRC does not have coercive, binding or enforceable powers, but merely the power to make findings and recommendations. The SAHRC has appealed to the Constitutional Court, and judgment is awaited.

[16] https://www.saflii.org/za/cases/ZASCA/2024/121.html

Parties

Applicant: South African Human Rights Commission (SAHRC)

Respondents: Agro Data CC (first respondent), the owner of the farm in question, and F G Boshoff (second respondent), who controlled access to water on the farm.

Amici curiae: Afriforum NPC; Centre for Applied Legal Studies; and the Commission for Gender Equality.

Background and facts

The matter arose from a complaint lodged with the SAHRC in 2018 on behalf of elderly farm occupiers residing on a farm owned by Agro Data CC. The complaint alleged that Mr Boshoff had unilaterally restricted the occupiers' access to borehole water, their only reliable source of water, by rationing supply, demanding payment, and directing them to use river water that was unsafe for human consumption.

Following an investigation conducted under sections 184 of the Constitution and 13(3) of the South African Human Rights Commission Act 40 of 2013 (SAHRC Act), the SAHRC found that the respondents had violated the occupiers' rights to access water under sections 27(1)(b) of the Constitution and 6(2)(e) of the Extension of Security of Tenure Act 62 of 1997, and their right to dignity under section 10 of the Constitution.

The SAHRC issued directives requiring the restoration of borehole water, meaningful engagement on water management, and the disclosure of information. The respondents failed to comply. The SAHRC then approached the High Court, seeking a declaration that its directives were binding. The High Court dismissed the application, prompting the appeal to the SCA.

Legal issues before the Court

The central issue was whether section 184(2)(b) of the Constitution, read with section 13(3) of the SAHRC Act, empowers the SAHRC to issue binding directives that must be complied with unless set aside by a court.

Related to this was whether a failure to comply with SAHRC directives was unlawful and unconstitutional, and whether the SAHRC's powers were comparable to those of the Public Protector.

Court's findings and reasoning

The SCA held that the SAHRC lacks the power to issue binding directives. Interpreting section 184(2) (b) of the Constitution, the Court emphasised the wording "to take steps to secure appropriate redress", which it found to be materially different from the Public

Protector's constitutional power "to take appropriate remedial action".

The Court reasoned that the Constitution and the SAHRC Act deliberately confer investigative, reporting, facilitative and litigating powers on the SAHRC, but not adjudicative or coercive remedial powers. The SAHRC's role is to assist complainants in obtaining redress through mediation, negotiation or litigation, including by approaching a court itself, rather than to impose binding outcomes.

While rejecting the notion of a hierarchy among Chapter 9 institutions, the Court nevertheless distinguished the SAHRC's mandate from that of the Public Protector, whose binding remedial powers are expressly provided for in section 182 of the Constitution.

The Court also rejected arguments that international law required an interpretation granting the SAHRC binding powers, holding that the existing framework was consistent with international norms for national human rights institutions.

Court order

The appeal was dismissed. The order of the High Court stood, with no order as to costs. The Court confirmed that the SAHRC's directives were not binding or enforceable in themselves, although its findings and recommendations were entitled to serious consideration.

Why the case matters

South African Human Rights Commission v Agro Data CC clarifies the constitutional role and limits of the SAHRC. It confirms that, unlike the Public Protector, the SAHRC lacks binding remedial powers and must secure redress through facilitation, persuasion, or litigation. At the same time, the case emphasises the seriousness of violations of the right to access water and dignity, particularly for vulnerable farm occupiers, and affirms the SAHRC's crucial role in investigating abuses, developing the evidentiary record, and enabling access to the courts. The judgment delineates the distinct functions of Chapter 9 institutions while reaffirming that deprivation of access to water is a grave constitutional concern requiring effective remedies.

Further developments

The SAHRC appealed to the Constitutional Court against this decision, and the matter was heard in November 2025. Judgment is pending.

Table of Cases

Case	key constitutional principle	Core right-to-water issue
Mazibuko v City of Johannesburg , 2010 (3) BCLR 239 (CC)	Progressive realisation and reasonableness standard (section 27(1)(b), 27(2))	Minimum standard for water supply set and prepaid meters accepted as lawful
Mshengu v Msunduzi Municipality, [2019] JOL 45319 (KZP)	Municipal obligations to provide water and access to land for installation (section 27, ESTA)	Failure to provide water to rural farm occupiers is unconstitutional
Concerned Residents of Flag Boshielo West v Sekhukhune District Municipality and others [2020] JOL 48355 (GP)D	State accountability for enforcement of socio-economic rights	Contempt of court in failing to supply court-ordered water. Requirements of contempt of court application must show male fides
Eskom v Vaal River Development Association (Pty) Limited and others, 2023 (5) BCLR 527 (CC)	Administrative fairness, subsidiarity and respect for socio-economic rights (sections 7(2), 27, PAJA)	Electricity cuts leading to water supply failures cannot be imposed without due process being followed
SAHRC v Agro Data CC & Another (Afriforum, 2024 (6) SA 443 (SCA)	Interdependence of water with dignity and subsistence farming (sections 10, 27)	Denial of water to poor occupiers on private land not lawful, but powers of SAHRC to required compliance called into question

Current enforceable rights

The current case law confirms the following:

- Everyone is entitled to 25 litres of potable water per day, or 6 kilolitres per household per month, at no cost. The supply must be within 200 metres of their home. Water cannot be cut off for more than 7 days at a time.
- Free water must be available to the vulnerable and poor, with municipalities having an obligation to implement the national Free Basic Water Policy through policies in place.
- Local authorities are responsible for water provision, and private owners must grant them access to their properties to make water available unless they have been designated as intermediaries or Water Service Authorities under the contracts.

- Prepaid metres can be installed by local authorities for water provision and are not unconstitutional or unlawful. Individual households can have temporary stoppages of water restored by registering as indigent with their municipalities or by paying for usage above 6 kilolitres if they have run out.
- If there is a need for a sudden reduction in overall state services, the service provider is obliged, under the Promotion of Administrative Justice Act 3 of 2000, to give residents prior notice and to follow fair administrative procedure.

The right to have access to social security

> *To be held in poverty is a cursed condition. Quite apart from the physical discomfort of deprivation it reduces a human in his or her dignity. The inevitable result of being unlawfully deprived of a grant that is required for daily sustenance is the unnecessary further endurance of that condition for so long as the unlawfulness continues.*[1]

Cases in this chapter

1. Rangani v Superintendent-General, Department of Health and Welfare 1999 (4) SA 385 (T) 302
2. Bushula NJ and others v Permanent Secretary, Dept of Welfare, Eastern Cape Provincial Government and another, [2000] JOL 6580 (E) 303
3. Permanent Secretary Department of Welfare, Eastern Cape Provincial Government and Another v Ngxuza and Others (493/2000) [2001] ZASCA 85; 2001 (4) SA 1184 (SCA); 2001 (10) BCLR 1039 (A) (31 August 2001) 305
4. Mashavha v President of RSA & others [2004] JOL 12915 (CC) 306
5. Khosa and Others v Minister of Social Development and Others; Mahlaule and Another v Minister of Social Development and Others, 2004 (6) BCLR 569 (CC) 308
6. Sikutshwa v MEC for Social Development, EC Province & another, [2005] JOL 14413 (Tk) 310
7. Kate v Member of the Executive Council for the Department of Welfare, Eastern Cape (ECJ 2004/028) [2004] ZAECHC 25; [2005] 1 All SA 745 (SE); 2005 (1) SA 141 (SE) (1 September 2004) 312
8. MEC, Department of Welfare, Eastern Cape v Kate 2006 (4) SA 478 (SCA) 314
9. Njongi v Member of the Executive Council, Department of Welfare, Eastern Cape, 2008 (6) BCLR 571 (CC) 315
10. Black Sash Trust v Minister of Social Development and others (Freedom Under Law NPC as intervening party) (Corruption Watch (NPC) RF and another as amici curiae), [2017] JOL 37548A (CC) 317
11. Mahlangu and another v Minister of Labour and others (Commission for Gender Equality and another as amici curiae), [2020] JOL 48996 (CC) 319

[1] Nugent JA, MEC, Department of Welfare v Kate 2006 (4) SA 478 (SCA) para 33.

The Constitution

The Constitution states that everyone has the right to access social security, including when they are unable to support themselves and their dependents, as well as appropriate social assistance (section 27(1)(c)). The state must take reasonable legislative and other measures, within its available resources, to progressively realise each of these rights (section 27(2)).

General points

Two important terms that need to be understood are "social security" and "social assistance". The White Paper for Social Welfare (White Paper)[2] defines "social security" as "Policies that ensure that all people have adequate economic and social protection during unemployment, ill health, maternity, child rearing, widowhood, disability and old age, by means of contributory and non-contributory schemes for providing for their basic needs".[3] "Social assistance" is what we generally understand by state-funded programmes aimed at ensuring that those who are unable to support themselves and their dependents are given income. "Social assistance aims at ensuring that those who are poor at least gain access to minimum income to satisfy their basic needs".[4]

The Social Assistance Act 13 of 2004 establishes the legal framework for providing social assistance to individuals who cannot support themselves and their dependants. Its purpose is to give effect to the constitutional right of access to social security in section 27(1)(c) of the Constitution by creating a system of state-funded social grants for eligible persons. The Act regulates the types of grants available, the eligibility criteria and means tests, as well as the administration and payment of grants, mainly through SASSA. This Act replaced the Social Assistance Act of 1992 on 1 April 2006. On that date, the Social Assistance Act 13 of 2004 came into force, and the 1992 Act was repealed, with SASSA established to oversee the administration of social grants.

Currently, the Department of Social Development offers the following grants, all of which require means tests and are available to citizens, permanent residents, or refugees.

- Care dependency grant – income support for caregivers providing permanent care to children with severe mental or physical disabilities (citizens, permanent residents or refugees).
- Child support grant: income for the primary caregiver.

[2] Department of Welfare White Paper for Social Welfare (1997).
[3] Ibid, p 100.
[4] Swart M, "*Social Security*" in Stu Woolman, Michael Bishop and Jason Brickhill (eds) Constitutional Law of South Africa 2 ed, Volume 56D (Juta & Co, 2012), p 5.

- Disability grants for individuals with permanent and severe disabilities aged between 18 and 59.
- Foster care grant for foster parents (no means test eligibility required)
- Grant-in-aid for older persons, war veterans, or disabled individuals requiring full-time attendance by another person.
- Grants for older persons are available to those aged 60 or above.
- War veterans' grants are available to older or disabled persons who fought in the Second World War or Korean War (not available to refugees).

In the 2022/23 financial year, the state allocated R234.64 billion to social grants, approximately 10.7% of the budget.

Most cases concerning the right to social assistance relate to the administration and implementation of the social grant system. Mia continues and states that: "A survey of recent South African social security cases shows that very few cases involve constitutional issues (or issues) such as non-discrimination. Most of the litigation on social security involves the non-payment of social grants and the inadequate administration of social grants. They are, at heart, administrative law matters."[5]

Statistics

Coverage: In 2023, 39,4% of individuals in South Africa and 50% of households received social grants. The highest proportion of individuals receiving grants was found in Limpopo (49.1%) and Eastern Cape (48.4%), while the lowest was in Western Cape (23.9%) and Gauteng (24.9%). Households with at least one grant recipient were most common in Mpumalanga (62.3%), Eastern Cape (62.3%), and Limpopo (61.6%), and least common in Western Cape (36.3%) and Gauteng (36.6%).[6]

Grants as a source of income. Social grants are the second most common source of household income after salaries. In 2023, 50.5% of households reported salaries as a source of income, while 50.0% reported receiving social grants. For 23.0% of households nationally, grants were the primary source of income. In certain provinces, more households received grants than salaries: Eastern Cape (65.4% vs 51.2%), Free State (64.5% vs 55.1%), and Limpopo (61.4% vs 48.9%). Grants were especially important in the Eastern Cape (37.0%), Limpopo (33.2%), and Free State (33.0%).[7]

Grant receipt differed markedly by race. While 49.1% of black African-headed

[5] Ibid, p 18.
[6] Statistics South Africa General Household Survey 2023 Statistical Release P0318 (2024) 10, Figure 7.1 and Figure 7.2 available at https://www.statssa.gov.za/publications/P0318/P03182023.pdf
[7] Ibid, p 10.

households received at least one grant, the corresponding figure was 20.4% for coloured-headed households and less than 10% for Indian/Asian and white-headed households.[8]

Trends. Both household and individual receipt of social grants have risen since 2023, with a significant increase in 2021–2022 related to the SRD grant (Figure 2 7.1).[9]

Cases

Ensuring continuity of social grants

1. Rangani v Superintendent-General, Department of Health and Welfare 1999 (4) SA 385 (T)[10]

The case deals with a situation where a person's disability grant was terminated without notice nor an opportunity to make representation. This violates the Promotion of Administrative Justice Act 3 of 2000 (PAJA) and principles of natural justice, and the state was held to have acted unlawfully in failing to give notice and failing to allow Rangani to be heard as to why the grant should not be terminated.

Parties

The applicant was a person who received of a disability grant under the Social Assistance Act 59 of 1992 (the earlier version of the Social Assistance Act 13 of 2004). The respondent was the responsible state official.

Background and facts

The applicant's disability grant was terminated by the Department of Health and Welfare without prior notification or an opportunity to make representations as to why it should not be terminated.

Legal issues before the Court

The Court had to determine whether the absence of prior notification to the applicant about the termination of the grant, as well as the lack of an opportunity to make representations before the decision was made, constituted a violation of principles of natural justice and required review under the PAJA. The Court addressed the issue of the right to a fair hearing when a state entity terminates a benefit. It also considered the

[8] Ibid p 32, Table 9.1

[9] Ibid p 24, Figure 7.1

[10] Rangani v Superintendent-General, Department of Health and Welfare 1999 (4) SA 385 (T)

concept of legitimate expectations, which arise when a person reasonably anticipates a particular outcome based on past practice or representations.

Court's finding and reasoning

The Court emphasised the significance of procedural fairness in administrative decision making, especially when such decisions impact individual rights and entitlements. It ruled that a decision, such as terminating a disability grant, requires the state to follow principles of natural justice and fairness.

Court order

The Court ruled that the state's decision to cancel the grant was illegal.

Why the case matters

The case highlighted the significance of fair procedures and legitimate expectations regarding the government's benefits and entitlements.

The Eastern Cape cases

2. Bushula NJ and others v Permanent Secretary, Dept of Welfare, Eastern Cape Provincial Government and another, [2000] JOL 6580 (E)[11]

The case reaffirms that if the state is to reduce or terminate a benefit, it must follow administratively fair procedure and give the beneficiary the reason for the termination in writing, and an opportunity to have a hearing opposing the termination.

Parties

The applicants were NJ Bushula and others, all recipients of disability grants. The respondents were the Permanent Secretary of the Department of Welfare and the MEC for Welfare in the Eastern Cape Provincial Government.

Background and facts

Mr Bushula, a 50-year-old illiterate man with a severe physical disability, had been receiving a disability grant since 1991. In June 1997, he was verbally informed by a welfare clerk that his grant had been cancelled. He was not given any prior written notice or reasons for the cancellation and did not receive a hearing. The Department had commenced a process to review all disability grants but relied on general notices instead of individualised communication. The applicant argued that the cancellation was unlawful

[11] https://www.saflii.org/za/cases/ZASCA/2001/85.html

and unconstitutional.

Legal issues before the Court

The central issues were:

- Whether the cancellation of the disability grant without notice or a hearing breached the applicant's right to fair administrative action under section 33(1) of the Constitution.
- Whether the termination breached section 27(1)(c) of the Constitution, which guarantees the right to access social security.
- Whether the Department complied with Regulation 21(2) of the Social Assistance Act 59 of 1992. The provision states: "If a grant is suspended, the beneficiary shall be informed in writing of the reasons for the suspension, and shall be given an opportunity to respond or to make representations within a period of 90 days. If no response or representation is received, the grant may then be cancelled."

Court's findings and reasoning

The Court found that cancelling the grant was an administrative action affecting the applicant's rights, thus requiring compliance with both section 33(1) of the Constitution and the *audi alteram partem* rule. The Department failed to provide proper notice and did not allow the applicant a fair hearing. It also did not adhere to Regulation 21(2), which specifies suspension (not cancellation), written reasons, and notification of the right to apply for restoration within 90 days. The state's failure to comply with the regulation was deemed procedurally unfair and unlawful.

Court order

The Court declared the cancellation invalid, ordered the reinstatement of the grant with retrospective effect, and directed the respondents to pay all arrears and costs. The third applicant's attempt to revive a settled claim was dismissed.

Why the case matters

This case affirms the constitutional right of access to social security (section 27(1)(c)) and procedural fairness in administrative decisions (section 33). It emphasises that beneficiaries of social assistance cannot have grants terminated without strict adherence to lawful procedures and the right to be heard. It remains important for safeguarding the rights of vulnerable individuals within the welfare system.

3. Permanent Secretary Department of Welfare, Eastern Cape Provincial Government and Another v Ngxuza and Others (493/2000) [2001] ZASCA 85; 2001 (4) SA 1184 (SCA); 2001 (10) BCLR 1039 (A) (31 August 2001)[12]

The SCA confirmed that class actions can be used to protect the rights of large groups of vulnerable people whose social grants were unlawfully cancelled. The case highlighted that constitutional standing provisions should be interpreted generously to ensure access to justice for the poor.

Parties

The appellants were the Permanent Secretary and the MEC for Welfare in the Eastern Cape Provincial Government. The respondents were disability grant beneficiaries whose grants had been cancelled.

Background and facts

The Eastern Cape government either cancelled or suspended thousands of disability grants without informing beneficiaries, forcing recipients to reapply. Many genuinely disabled individuals were left without income. Four applicants filed a case in the High Court seeking the reinstatement of their grants and also requested permission to initiate a class action on behalf of tens of thousands of similarly affected beneficiaries across the province. The High Court allowed them to proceed with the class action and ordered the government to disclose the names of the affected beneficiaries and to publicise the proceedings.

Legal issues before the Court

The main question on appeal was whether the High Court was correct in allowing a class action on behalf of thousands of disability grant beneficiaries and whether the class had been properly defined. The government also argued that the High Court lacked jurisdiction over some class members who lived outside its territorial boundaries.

Court's findings and reasoning

The SCA held that the Constitution permits class actions and that courts must interpret standing provisions generously to enable poor and vulnerable people to vindicate their rights.

The Court found that the case was particularly suitable for a class action because the

[12] https://www.saflii.org/za/cases/ZASCA/2001/85.pdf

claimants were extremely poor, widely dispersed, and had small individual claims that would be difficult to litigate individually.

The Court rejected the government's objections to the class definition and jurisdiction and criticised the province for its obstructive approach to the litigation and for unlawfully cancelling grants without proper procedures.

Court order

The appeal was dismissed, and the High Court's order permitting the class action to proceed was upheld.

Why the case matters

The case is a crucial decision on class actions and access to justice in South Africa. It affirmed that representative litigation can be used to protect the rights of large groups of vulnerable people, especially when individuals are unable to enforce their rights independently.

4. Mashavha v President of RSA & others [2004] JOL 12915 (CC)[13]

The case concerned whether it was constitutionally valid for the social grant system to be assigned to provinces. The Court held that social assistance cannot be regulated by provincial legislation but must be regulated and coordinated by uniform norms and standards set by national government and that apply throughout the country. This will allow fairness and equality aimed in particular at addressing historical injustices.

Parties

Applicant: Alfred Mashavha

Respondents: The President of the Republic of South Africa, the Minister for Welfare and Population Development, and the Premier of the Northern Province.

Background and facts

The applicant was injured in 1995 and became unable to work. He applied for a social grant under the Social Assistance Act 59 of 1992. Although the national Minister for Welfare and Population Development was responsible for implementing the Act, this function had been delegated to the provinces. The applicant contested the assignment of powers to the provinces, arguing that the administration of social assistance was a

[13] https://www.saflii.org/za/cases/ZACC/2004/6.html

national competency and could not be delegated to provincial authorities.

Legal issues before the Court

- Whether the assignment of administrative powers under the Social Assistance Act by the President to the provinces was constitutional.
- Whether the administration of social assistance was an area of concurrent national and provincial competence under Schedule 4 of the Constitution.Whether the President had acted within his constitutional powers in assigning these responsibilities.

Court's findings and reasoning

The Constitutional Court determined that the administration of the Social Assistance Act falls under Schedule 4A of the Constitution, which pertains to concurrent national and provincial legislative powers. However, the Court found that the President had not properly followed the procedure outlined in section 126 of the interim Constitution when assigning the function. As a result, the assignment was declared invalid. The Court held that the provision of social assistance is primarily a national obligation and that it is unconstitutional for provinces to assume this role without appropriate delegation. The Court reaffirmed that social assistance must be delivered in a manner that guarantees equity and fairness throughout the country. This ruling emphasised the necessity of centralised administration to uphold the right to access social security under s 27(1)(c) of the Constitution.

Court order

The Court invalidated the assignment of powers to the provinces and ordered that the national government be responsible for administering social assistance under the Social Assistance Act. It granted declaratory relief to clarify the constitutional position.

Why the case matters

This case is a key ruling on the right to social security under section 27(1)(c) of the Constitution. It clarified the national government's duty to ensure the fair and consistent delivery of social assistance and prevented fragmentation across provinces. It also reaffirmed constitutional principles related to the separation of powers and proper delegation of administrative authority.[14]

[14] The Social Assitance Act 13 of 2004, operationalised in April 2006 created SASSA, a body that would administer the social grant system nationally moving away from provincial administration of grants.

5. Khosa and Others v Minister of Social Development and Others; Mahlaule and Another v Minister of Social Development and Others, 2004 (6) BCLR 569 (CC)[15]

This case extended the right to social assistance through grants to permanent residents as it said that section 27 states that "everyone" has the right to have access to social security not only citizens. If it was intended that this right was only available to citizens as is the right to vote (section 19), the section would have stated this. Mokgoro J distinguished the rights of permanent residents, to whom social assistance should be extended, from illegal residents, and temporary residents.

Parties

Applicants: (in both instances): Mozambican nationals (Khosa, Mahlaule, and others) who were permanent residents in South Africa.

Respondents: The Minister of Social Development, the Director-General of Social Development, and the President of the Republic of South Africa.

Background and facts

The applicants were all permanent residents of South Africa who had lawfully lived and worked in the country. Some had contributed to South African taxes and the Unemployment Insurance Fund. Despite being in similar socio-economic situations to South African citizens, they were excluded from receiving social grants, including old-age pensions and child-support grants, solely because they were not citizens.

The relevant legislation (the Social Assistance Act 59 of 1992) limited these grants to South African citizens, excluding permanent residents. The applicants argued that this was irrational and violated their constitutional rights, especially in light of their lawful and permanent residence status and their economic vulnerability.

Legal issues before the Court

The Court was required to assess whether excluding permanent residents from social grants accessible to citizens infringed upon their rights under:

- Section 27(1)(c) of the Constitution: the right of everyone to have access to social security, including appropriate social assistance when they are unable to support themselves and their dependents.
- Section 9(3): the right to equality and protection against unfair discrimination.

[15] https://www.saflii.org/za/cases/ZACC/2004/11.html

- Section 10: the right to dignity. 1(a): foundational constitutional values of human dignity, equality, and the advancement of human rights.

The main issue was whether restricting access to social assistance based on citizenship status was reasonable and justifiable under the Constitution.

Court's findings and reasoning

The Court held that section 27(1)(c) provides a right of access to social security to "everyone," a term that includes permanent residents, not just citizens. This interpretation was reinforced by the Court's earlier jurisprudence that "everyone" in the Bill of Rights generally encompasses all persons in South Africa, unless specifically limited. The Court found that excluding permanent residents from the right to social assistance was unreasonable and unjustifiable, especially considering:

- The applicants' permanent residence status.
- Their economic vulnerability.
- Their contribution to the South African economy.
- The constitutional requirement to treat all persons with dignity and equality.

The government failed to demonstrate that excluding permanent residents served a legitimate government purpose. The Court held that "No persuasive reasons were advanced for the absolute exclusion of permanent residents from the social assistance scheme" (para 60). Mokgoro J emphasised the interconnectedness of rights, noting that denial of social assistance impacted not only the right to social security but also rights to equality, dignity, and life. The Court observed: "The right to life and dignity are the most important of all human rights, and the source of all other personal rights" (para 52). The Court reaffirmed the state's positive obligation to take reasonable legislative and other measures within its available resources to progressively realise socio-economic rights, including social assistance, as mandated by section 27(2).

Court order

The Court declared that the relevant provisions of the Social Assistance Act (restricting grants to citizens) were unconstitutional and invalid.

The order was suspended for three months to allow the government time to amend the legislation to comply with the Constitution.[16]

[16] The Social Assistance Act 13 of 2004 was enacted in the same year, which does not restrict the eligibility of grants to citizens. It came into operation on 1 April 2006.

Why the case matters

This case confirmed that section 27(1)(c) of the Constitution applies to all persons lawfully in South Africa, not just citizens. It held that excluding individuals from social assistance solely based on citizenship, especially for permanent residents, is unreasonable and infringes on the rights to dignity, equality, and life. The Court determined that the state has a positive obligation to support vulnerable groups and cannot arbitrarily deny social support to those in need based on formalistic distinctions. The judgment reaffirmed that constitutional rights extend universally to everyone within the South African community, particularly those living lawfully and permanently in the country. It also re-emphasised the intersection of equality, social security, and constitutional dignity and has been frequently cited in cases regarding access to socio-economic benefits.

6. Sikutshwa v MEC for Social Development, EC Province & another, [2005] JOL 14413 (Tk)[17]

As with the Bushula and Rangani cases, this case reaffirms the principle that if a grant is to be terminated, proper notice must be given to the recipient and the right to a hearing must be given.

Parties

Applicant: Mandisa Sikutshwa.

Respondents: MEC for Social Development, Eastern Cape Province, and another.

Background and facts

Mandisa Sikutshwa, a person with a permanent disability, had been receiving a social grant from the Department of Social Development. In November 2005, she was orally informed that her grant had been cancelled. She received no written notice, no reasons, and no opportunity to be heard. This occurred during a period when the Department was conducting widespread reviews and cancellations of social grants in the Eastern Cape, affecting many grant beneficiaries. She approached the High Court seeking judicial review of the Department's decision to terminate her grant.

Legal issues before the Court

- Whether the cancellation of Sikutshwa's grant without written notice or a hearing violated her constitutional right to just administrative action (section 33 of the

[17] https://www.saflii.org/za/cases/ZAECHC/2005/18.html

Constitution). Whether the termination constituted a breach of her right to access social security under section 27(1)(c) of the Constitution.

- Whether the Department had complied with Regulation 21(2) of the Social Assistance Act 59 of 1992, which governs the suspension and cancellation of grants.

Court's findings and reasoning

The Court found that the Department's conduct amounted to administrative action and was therefore subject to the requirements of procedural fairness under the Constitution and the Promotion of Administrative Justice Act 3 of 2000. The Court held that the applicant had not been afforded a fair hearing or adequate notice, and that this contravened both Regulation 21(2) and section 33(1) of the Constitution.

The failure to adhere to these procedures rendered the cancellation unlawful. The Court observed that the Department could not rely on general or public notices when making decisions that significantly affected individual rights. Instead, it was required to follow a process that met constitutional and statutory standards for fairness.

Court order

The Court reviewed and overturned the Department's decision to cancel Sikutshwa's grant. It ordered the Department to reinstate the grant with retrospective effect and to pay all arrears.

Why the case matters

This case reaffirmed that the state has a constitutional duty to act fairly when administering social grants, and any deprivation of such rights must follow lawful procedures. It also reinforced the right to access social security under section 27(1)(c) and the right to fair administrative action under section 33. It is part of a broader series of judgments criticising the Eastern Cape Department of Social Development for systemic irregularities and unfair practices in cancelling grants without proper due process.

7. Kate v Member of the Executive Council for the Department of Welfare, Eastern Cape (ECJ 2004/028) [2004] ZAECHC 25; [2005] 1 All SA 745 (SE); 2005 (1) SA 141 (SE) (1 September 2004)

The case affirmed Kate's right to receive back pay, interest on late payments of her grant and legal costs for having to take the state to court in order to affirm her rights. Her grant application was only approved three years after it had been submitted. When payment began, she received less than the amount of back payment she was due. This was discovered in 2003 and she was still not paid all the outstanding amounts. This judgment required the state to pay the remaining amount, interest on the total outstanding amount, and costs.

Parties

Nontembiso Norah Kate (Applicant) v The Member of the Executive Council for the Department of Welfare, Eastern Cape (Respondent).

Background and facts

The applicant, a 62-year-old woman with arthritis, submitted a claim for a disability grant under the Social Assistance Act 59 of 1992 on 16 April 1996. Her application was approved over three years later, in August 1999. She initially received a back payment of R6 000, although she was actually entitled to R19 120. This underpayment was only identified in 2003 when she sought legal advice. Despite receiving an additional R13 015 in December 2003, she remained underpaid and was not awarded any interest or costs. The respondent never explained the delay, the underpayment, or the lack of response to the applicant's legal representatives. The application challenged these failures and requested back pay, interest, and costs.

Legal issues before the Court

Whether the delay in processing and approving the grant, the failure to pay the full arrears, and the failure to inform the applicant constituted unlawful administrative actions reviewable under PAJA.

Whether back pay and interest are appropriate remedies under PAJA or the Constitution.

Whether the applicant's claim was barred because of not exhausting internal remedies or for being filed outside the 180-day period.

Court's findings and reasoning

Froneman J found that the respondent failed to justify the delay or underpayment. He reviewed the development of social grant jurisprudence in the Eastern Cape, including the use of constitutional remedies to enforce rights under section 27(1)(c) of the Constitution. He reiterated the High Court's constitutional duty to provide effective remedies, emphasising that denying back pay and interest would undermine section 27(1)(c), the rule of law, and access to justice.

Court order

The Court ordered the respondent to pay the remaining arrears (R805), interest on the total outstanding amount at the legal rate, and the applicant's legal costs. Froneman J made clear that Jayiya could not be used to justify non-compliance with court orders or to ignore constitutional obligations.

Why the case matters

This case affirms the constitutional right to access social assistance under section 27(1)(c). It verifies that courts can award meaningful remedies, including back pay and interest, when administrative delays breach that right. The judgment is a significant endorsement of judicial oversight over social grant administration and the enforcement of socio-economic rights amidst systemic administrative failures.

Class actions

In Kate v The MEC, Department of Welfare, Eastern Cape, the Court highlighted the longstanding and serious issue in the Eastern Cape regarding the administration of social grants over many years.

"The failure in proper administration of social grants has led to the situation where the courts have become the primary mechanism for ensuring accountability in the public administration of social grants. Week after week the High Court in this province is confronted with many applications of the present kind" (para 5).

The matter went on appeal to the Supreme Court of Appeal

The Kate judgment became important in later social-grant litigation because it confirmed that beneficiaries whose grants were delayed or wrongly administered could recover the arrears along with interest. At that time, the Eastern Cape welfare system was plagued by serious administrative failures, leading to thousands of applicants waiting years for their grants or receiving incorrect payments.

The ruling therefore provided a vital legal basis for many similar claims brought in the High Court to compel the provincial government to pay outstanding grants and to hold the administration accountable for systemic delays in the social-grant system.

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

The SCA confirmed that beneficiaries can claim arrears and interest when the state unlawfully delays payment of social grants, recognising that social assistance offers a minimum income for those in need.

Parties

The appellant was the MEC for Welfare in the Eastern Cape. The respondent was Nontembiso Norah Kate, a disability-grant applicant.

Background and facts

Kate applied for a disability grant in 1996, but the department delayed processing the application for several years. When the grant was finally approved, she received only partial arrears. She approached the High Court seeking payment of the outstanding amount and interest.

Legal issues before the Court

Whether the provincial department was liable to pay the arrears and interest arising from the unlawful delay in approving and paying the grant.

Court's findings and reasoning

The SCA held that social grants are a statutory entitlement and that administrative failures causing payment delays cannot deny beneficiaries the funds they are entitled to. The Court acknowledged that social assistance plays a crucial role in ensuring that low-income individuals have a minimum income to cover their basic needs. Therefore, the department was liable to pay the arrears along with interest.

Court order

The MEC's appeal was dismissed, and the order demanding payment of the outstanding grant arrears and interest was upheld.

Why the case matters

The case established that beneficiaries may recover arrears and interest when the state unlawfully delays the processing or payment of social grants. It also includes an important

statement about the purpose of social assistance in alleviating poverty.

9. Njongi v Member of the Executive Council, Department of Welfare, Eastern Cape, 2008 (6) BCLR 571 (CC)[18]

This case is another where a grant was suddenly terminated without proper reasons and no opportunity to make representation. It focused on whether the applicant's claim, which was for arrear payments once the grant was terminated had prescribed or not. The Full Court (EC) held it had prescribed because it said that the administrative decision to stop the grant was an unlawful decision and from the date of the unlawful decision she had the right to claim the unpaid disability grant. And from the date that the grant stopped being paid, prescription had started to run. The Constitutional Court rejected this and held that an administrative decision remains effective in law and practice until it is formally set aside or repudiated. It is important because claims against the state rarely prescribe for this reason.

Background and facts

Mrs Njongi received a disability grant from 1989 to 1997, when the payment of the grant inexplicably stopped. The provincial department official consulted by the applicant offered no explanation for the cessation and simply advised her to reapply. In fact, she was among the thousands in the Eastern Cape who experienced this. The courts, in Ngxuza, Bushula, and Kate, had already criticised the Eastern Cape authorities for their widespread cancellations, failure to provide individual notice, and neglect of due process.

She reapplied successfully, and payments resumed in July 2000. At that time, she received a payment described as "back-pay" amounting to R1,100.00. In May 2004, she initiated proceedings in the High Court to set aside the administrative action terminating her disability grant. She subsequently claimed R15,200.00 in arrear payments for the period from November 1997 to July 2000. A further sum of R9,400.00 was paid to her after the proceedings were instituted.

Legal issues before the Court.

- Whether the prescription was in favour of the state while the unlawful administrative action terminating the disability grant remained in force.
- Whether it was lawful and constitutional for the state to invoke prescription to avoid paying arrear social grants.

[18] https://www.saflii.org/za/cases/ZACC/2008/4.html

- Whether the disability grant arrears qualified as a "debt" under the Prescription Act 68 of 1969.
- Whether the administrative action terminating the grant needed to be set aside before a claim for arrears could be enforced.

Court's findings

The Eastern Cape High Court and Full Court (the first court of appeal being the full bench of the Eastern Cape High Court) regarded the unlawful cancellation of Mrs Njongi's disability grant as automatically null ("a nullity'), and therefore stated that prescription had commenced immediately. The Constitutional Court overturned this, holding that an administrative decision **remains valid in law and practice** until it is formally set aside or disavowed. As a result, prescription had not yet begun, and Mrs Njongi's claim had not prescribed.

The Court dismissed the High Court's reasoning that unlawful administrative action is automatically a nullity. Instead, it emphasised that "Far from having been a nullity while in operation, the administrative decision... caused untold misery and suffering" (para 46).

The Court distinguished between theoretical nullity and practical effect, stating that a grant recipient must be restored to the position they would have occupied if the unlawful decision had not taken place. Until that was achieved, the debt was not due, and prescription was not accruing.

The Court was critical of the conduct of the state. Yacoob J stated that the provincial government should have reinstated all improperly cancelled social grants following the Bushula and Ngxuza judgments. It was insufficient for the government to comply only with an individual order. "The province's approach to these proceedings was contradictory, cynical, expedient and obstructionist. It conducted the case as though it were at war with its own citizens…" (para 20).

It emphasised that the government has a constitutional duty to assist and protect the courts (s 165(4)). The government should respect, implement, and generalise court decisions. In this case, these decisions were to uphold the right to social security under section 27(1)(c). The Court held that the government ought to have proactively reinstated grants to affected individuals after judgments like Bushula, without forcing them to litigate.

Court order

The Constitutional Court overturned the Full Court's decision and reinstated the High Court's order, which declared the termination of the grant invalid and ordered payment of R5,800 plus interest. Interest was to be calculated on each unpaid monthly grant

amount from November 1997 to July 2000 at 15.5% per annum, deducting the R9,400 already paid. No de bonis propriis costs order was issued, but the Court criticised the MEC's legal advisers.

Why the case matters

This judgment enforces section 27(1)(c) of the Constitution, the right of access to social security. It establishes that the State cannot rely on prescription to escape liability where an unlawful administrative act has not been set aside. It held that a debt is not "due" until such administrative action is revoked or set aside and that the government has a constitutional duty to rectify unlawful decisions proactively, especially when they affect the poor and vulnerable. Finally, it held that section 27(1)(c) rights must be implemented with respect for dignity, legality, and procedural fairness. It emphasises that socio-economic rights are justiciable and that administrative justice is vital to their realisation. It confirms that the burden cannot be shifted to grant recipients to remedy the State's unconstitutional conduct through prolonged litigation.

10. Black Sash Trust v Minister of Social Development and others (Freedom Under Law NPC as intervening party) (Corruption Watch (NPC) RF and another as amici curiae), [2017] JOL 37548A (CC)[19]

The case revolved around an emergency that developed that threatened the continuation of social grant payments from 1 April 2019. Five years earlier, SASSA contracted with Cash Paymaster Services (CPS) to administer the grant payments on its behalf. The Constitutional Court held in an earlier judgment that the tender was irregular and that the contract was invalid. Despite the invalidity, the Court held that CPS had to continue until another provider could take over. SASSA said in late 2016 that it would take over the administration of payments itself, but it soon became apparent that it could not do so. This action was heard on 15 March, two weeks before the extended CPS contract was going to end, and judgment was handed down on 17 March. The Court ordered CPS to continue for another twelve months so that grants would continue to be paid, but subject to close scrutiny.

Parties

Black Sash Trust (the Black Sash) was granted direct access to bring an application concerning the continuation of the payment of social grants. Freedom Under Law NPC was granted leave to intervene as an amicus curiae.

[19] https://www.saflii.org/za/cases/ZACC/c/8.html

Background and facts

The Constitutional Court issued an order stating that the South African Social Security Agency ("SASSA") and Cash Paymaster Services (Pty) Ltd ("CPS") had a constitutional duty to ensure the continuation of social grant payments to beneficiaries after 1 April 2017. SASSA had reassured the court of its preparedness to assume control over grant payments towards the end of 2016. However, less than a month before the current contract with CPS expired, it was revealed that SASSA was unable to manage the payment system. The Court considered this a breach of its earlier supervisory order requiring SASSA to take over payments and regarded it as a serious threat to the constitutional rights of the country's most vulnerable citizens.

In a previous case, the Constitutional Court had declared the contract between SASSA and CPS invalid. However, in this judgment, it suspended the declaration of invalidity to ensure continuous payment for a 12-month period starting from 1 April 2017. CPS was instructed to ensure the payment of social grants on the same terms and conditions as those in the current contract, which would have expired on 31 March 2017. Additionally, the Court ordered that CPS and SASSA adhere to strict auditing and accounting requirements.

Legal issues before the Court

The judgment reaffirmed the right of access to social security under section 27(1)(c) of the Constitution. Froneman J emphasised that this right is directly linked to the rights to dignity, equality, and freedom, especially for those unable to support themselves and their dependents. The Court stated: "The constitutional right to social assistance that, for many, especially children, the elderly, and the indigent, provides the bare essentials for a life of dignity, equality, and freedom is directly involved, across the land" (para 17). Social grants are often the only lifeline for the elderly, children, persons with disabilities, and the indigent. Any disruption in their payment would not only be an administrative failure but would also constitute a direct breach of their socio-economic rights, potentially leading to hunger, homelessness, and further impoverishment (para 12).

Court's findings and reasoning

The Court held that both SASSA and CPS, as organs of state or agents fulfilling public functions, have ongoing constitutional duties to ensure grant payments continue. It determined that the state's actions represented a breach of accountability, transparency, and responsiveness as mandated by sections 1(d) and 195 of the Constitution.

Court order

The threatened disruption of grants posed a constitutional crisis, and the Court used its

powers under section 172(1)(b)(ii) to impose a remedy that extended the invalid contract with CPS for twelve months, subject to strict conditions to protect beneficiaries' personal data and prevent commercial misuse of their information. The order ensured that grant payments would continue without interruption.

Why the case matters

The Court's reasoning clearly indicated that the constitutional right to food, although not explicitly mentioned, was significantly at stake. For millions of recipients, social grants are their only means of obtaining food and supporting themselves. The Court'cs intervention averted a catastrophic failure of food access and maintained a basic level of subsistence for the poor.

The judgment reinforced the role of civil society organisations, such as the Black Sash Trust and Freedom Under Law, in holding the state accountable for delivering on constitutional guarantees. It also affirmed the judiciary's role as guardian of the Constitution during times of institutional failure. This case remains one of the clearest judicial affirmations that failures in social assistance delivery implicate the right to food and other socio-economic rights. It emphasises that the integrity of the grant system is essential to protecting the dignity, survival, and equality of South Africa's most vulnerable populations.

Cross reference food

11. Mahlangu and another v Minister of Labour and others (Commission for Gender Equality and another as amici curiae), [2020] JOL 48996 (CC)[20]

Two issues arose in this case. The first was whether compensation under the Compensation for Occupational Injuries and Diseases Act 130 of 1993 (COIDA) is a form of social assistance available to employees who are injured in the workplace. The second was the fact that COIDA excluded domestic workers from its scope. The Court held that compensation under COIDA is a form of social security as envisaged in terms of section 27(1) (c) of the Constitution, and it held that to exclude domestic workers was unconstitutional and therefore the act would need to be amended to include them.

Parties

Applicants: Sylvia Bongi Mahlangu and the South African Domestic Service and Allied Workers Union (SADSAWU).

[20] https://www.saflii.org/za/cases/ZACC/2020/24.html

Respondents: Minister of Labour, Director-General of the Department of Labour, and the Acting Compensation Commissioner.

Amici Curiae: Commission for Gender Equality and the Women's Legal Centre Trust.

Background and facts

The first applicant's mother, Ms Mahlangu, worked as a domestic worker for 22 years in a private home. On 31 March 2012, she drowned in her employer's pool while carrying out her duties. Her daughter, who was financially dependent on her, approached the Department of Labour for compensation under the Compensation for COIDA. She was told that domestic workers were excluded from the Act's definition of "employee" and therefore could not claim benefits.

With the support of SADSAWU, the first applicant approached the High Court to declare section 1(xix)(v) of COIDA unconstitutional for excluding domestic workers from compensation. The High Court found the exclusion invalid and granted retrospective relief. The case then proceeded to the Constitutional Court for confirmation of that order.

Legal issues before the Court

- Whether excluding domestic workers from the definition of "employee" under COIDA infringes their constitutional rights to equality, dignity, and access to social security as protected by section 27(1)(c) of the Constitution.
- Whether COIDA benefits fall within the scope of "social security" under section 27(1)(c).
- Whether the exclusion was a reasonable and justifiable limitation of rights under section 36 of the Constitution.
- Whether the declaration of invalidity should have immediate and retrospective effect.

Court's findings

The Court held that COIDA is part of South Africa's social security system and must be interpreted within the framework of section 27(1)(c) and (2). Justice Victor emphasised that:

"Social security assistance in terms of COIDA is a subset of the right of access to social security under section 27(1)(c) of the Constitution." (para 59)

The Court found that excluding domestic workers from COIDA was unreasonable, discriminatory, and violated section 27(1)(c), as it left a vulnerable group, mainly black women, unprotected in case of injury or death at work. The Court also emphasised the

interconnectedness of rights.

“The purpose of social security is to ensure that everyone, including the most vulnerable members of our society, enjoy access to basic necessities and can live a life of dignity” (para 63).

The Court rejected the state’s claim that the exclusion was justified or due to a lack of resources, noting that there were no legitimate objectives for excluding domestic workers. The respondents conceded that the exclusion infringed section 27(1)(c) rights.

The Court confirmed that COIDA constitutes “reasonable legislative and other measures” within the meaning of section 27(2), but its exclusion of domestic workers was inconsistent with constitutional values of equality, dignity, and substantive fairness. The Court also addressed intersectional discrimination, emphasising that domestic workers face compounded disadvantages due to race, gender, and class.

Why the case matters

This case established that statutory compensation for work-related injuries and death, such as COIDA, is part of the constitutional right to social security as set out in section 27(1)(c). The judgment:

- Affirms that vulnerable workers cannot be excluded from social security protections without violating constitutional rights.
- Emphasises the significance of intersectionality in evaluating discrimination.
- Extends social security protections to domestic workers, with retrospective effect from 27 April 1994, thereby correcting decades of exclusion.

“The failure to [extend COIDA] in the face of the respondents’ admitted available resources constitutes a direct infringement of section 27(1)(c), read with section 27(2) of the Constitution” (para 66).

Table of cases

Case citation	Key Constitutional Principles	Core rights established
Rangani v Superintendent-General, Department of Health and Welfare 1999 (4) SA 385 (T)	Section 33 of the Constitution entitles everyone to just administration, which includes the right to be given notice and make	The state cannot terminate a grant without prior notification or giving the affected party an opportunity to make

Case citation	Key Constitutional Principles	Core rights established
	representation.	respresentation.
Bushula v Permanent Secretary, Department of Welfare, Eastern Cape [2000] JOL 6580 (E)	Administrative justice requires procedural fairness (section 27(1)(c) and section 33) rights.	Notice and the right to be heard before grant termination.
Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government and Another v Ngxuza and Others 2001 (4) SA 1184 (SCA)	Class actions are permissible when a class of people require access to justice due to systemic administrative failure by the state (section 27(1)(c) and section 33)	If a large group of vulnerable people have rights removed, they are entitled to use class action to assert their rights. Standing provisions must be interpreted generously to allow access to justice for the poor.
Mashavha v President of RSA & Others [2004] JOL 12915 (CC)	s 27(1)(c) requires that right to access social assistance be implemented nationally to ensure equity and fairness.	There is a the need for uniformity and fairness in administration of social grants.
Khosa v Minister of Social Development; Mahlaule v Minister of Social Development 2004 (6) BCLR 569 (CC)	Equality, dignity, non-discrimination; Universality of constitutional rights	Section 27(1)(c) extends to permanent residents who have the right to access social grants, equality, (s 9) and dignity (s10)
Sikutshwa v MEC for Social Development, Eastern Cape [2005] JOL 14413 (Tk)	Audi alteram partem; Administrative law compliance	Section 27(1)(c); section 33 – Procedural fairness in termination of grants
Kate v MEC for the Department of Welfare, Eastern Cape [2005] 1 All SA 745 (SE)	Section 27(1)(c) gives the right to social assistance and an unreasonable delay in payment of several years is unconstitutional.	Kate was not only entitled to reinstatement of her grant but to receive back pay, interests on late payments and legal costs.

Case citation	Key Constitutional Principles	Core rights established
MEC, Department of Welfare, Eastern Cape v Kate 2006 (4) SA 478 (SCA)	Section 27(1)(c) and section 33 again require just administration and long delays are not acceptable.	The right to back pay when the state unlawfully delays payment of social grant is recognised.
Njongi v MEC, Department of Welfare, Eastern Cape 2008 (6) BCLR 571 (CC)	Prescription does not begin to run in cases against state where it failed to adhere to administrative law; State duty to implement court orders	Section 27(1)(c); section 33 (just administrative action), Section 165(4) Court orders must be respected by the state
Black Sash Trust v Minister of Social Development and Others [2017] JOL 37548A (CC)	Section 27(1)(c): The right of access to social security is linked to rights to food, dignity and life.	Government accountability requires continual uninterrupted payment of grants to ensure right to dignity, equality and freedom.
Mahlangu v Minister of Labour [2020] JOL 48996 (CC)	The section 27(1)(c) right to social security includes COIDA which must not exclude domestic workers as it infringes their rights to equality and dignity.	The case affirmed the rights to equality and dignity for domestic workers and that they be included in statutory social security.

Current enforceable rights

- The state cannot revoke a grant without prior notice or giving the affected party an opportunity to make representations and a right to a hearing.
- If a large group of vulnerable people has their rights removed, they are entitled to use a class action to assert their rights. Standing provisions must be interpreted broadly to facilitate access to justice for the poor.
- Social grants are accessible to all, as the right is not limited to citizens only.
- A person may recover back pay if the state unreasonably delays payment.

- A person's claim for back pay or the reinstatement of a grant remains valid in law until it is formally dismissed. In other words, claims against the state regarding grants do not expire when payment of the grant ceases.
- The state cannot cease paying social grants, as these are connected to food, dignity, and the right to life. Therefore, the administration of grants must be effective.
- Domestic workers are protected under the Compensation for Occupational Injuries and Diseases Act 130 of 1993 (COIDA).

The rights of children

> *Every child has his or her own dignity. … And foundational to the enjoyment of the right to childhood is the promotion of the right as far as possible to live in a secure and nurturing environment free from violence, fear, want and avoidable trauma.*[1]

Cases in this chapter

1. Centre for Child Law v Director General: Department of Home Affairs and others, 2022 (4) BCLR 478 (CC) 330
2. P.P.M and Others v Minister of Home Affairs and Others (14238/21) [2024] ZAGPPHC 2; [2024] 1 All SA 847 (GP); 2024 (5) BCLR 703 (GP); 2024 (3) SA 469 (GP) (16 January 2024) 333
3. C and Others v Department of Health and Social Development, Gauteng and Others [2012] ZACC 1; 2012 (2) SA 208 (CC) 335
4. Wilsnach NO v TM and others, [2021] 1 All SA 600 (GP) 338
5. VJV and another v Minister of Social Development and another (Centre for Child Law as amicus curiae) , 2023 (10) BCLR 1250 (CC) 340
6. Equal Education and others v Minister of Basic Education and others (Children's Institute as Amicus Curiae), [2020] JOL 47754 (GP) 342
7. S v Williams and Others, 1995 (7) BCLR 861 (CC) 342
8. Christian Education South Africa v Minister of Education, 2000 (10) BCLR 1051 (CC)..... 344
9. Freedom of Religion South Africa v Minister of Justice and Constitutional Development and others (Global Initiative to End All Corporal Punishment of Children and others as amici curiae), 2019 (11) BCLR 1321 (CC) 345
10. Raduvha v Minister of Safety and Security and Another [2016] ZACC 24 347
11. M v S (Centre for Child Law Amicus Curiae), 2007 (12) BCLR 1312 (CC) 349
12. AD and DD v DW and Others The Centre for Child Law (Amicus Curiae) and The Department of Social Development (Intervening Party), 2008 (4) BCLR 359 (CC) 351
13. Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development and Others, 2009 (7) BCLR 637 (CC) 353
14. Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another [2013] ZACC 35 354
15. J v National Director of Public Prosecutions and Another [2014] ZACC 13 356

[1] S V M (Centre for Child Law as Amicus Curiae) 2008 (3) SA 232 (CC) paras 18–19.

16. AB and another v Minister of Social Development (Centre for Child Law as amicus curiae), 2017 (3) BCLR 267 (CC) 359

17. AB and other V Pridwin Preparatory School and others (CCT294/18) [2020] ZACC 12; 2020 (9) BCLR 1029 (CC) 361

18. Centre for Child Law and others v Media 24 Limited and others, 2020 (3) BCLR 245 (CC) 361

19. AV and another v DC and others (Thaldar and another as amici curiae), [2024] 3 All SA 724 (GJ) 363

20. Scalabrini Centre of Cape Town and another v Minister of Home Affairs and others (Consortium for Refugees and Migrants in South Africa as amicus curiae) , 2024 (4) BCLR 592 (CC) 365

The Constitution

Children (defined as under 18) are protected by the Constitution, just like everyone else. They have the same rights as adults where appropriate. For example, they have the right to freedom of expression, dignity, and various socio-economic rights. In addition to sharing the same rights as adults, children are safeguarded by several provisions within the Constitution. Children's rights also intersect with many other rights.

The first and most important section is section 28. Section 28(1) states that every child has the right to:

a) A name and nationality from birth

b) Family care or parental care, or to an appropriate alternative care when removed from a family environment

c) Basic nutrition, shelter, basic health care services and social services

d) Be protected from maltreatment, neglect, abuse, or degradation

e) Be protected from exploitative labour practices

f) Not to be required to perform work or provide services that are

   i. Inappropriate for a person of that child's age
   ii. Place at risk the child's wellbeing, education, physical or mental health, or spiritual, moral, or social development.

g) Not to be detained except as a measure of last resort. If detained, it must be for the shortest appropriate period of time, they must be kept separately from adults over 18 years, and treated in a manner and kept in conditions appropriate to their age

h) To have a legal practitioner assigned to them by the state at state expense in civil proceedings affecting them is a substantial injustice that would otherwise prevail

i) Not to be used in armed conflict and to be protected from armed conflict.

Section 28(2) states that a child's best interests are of paramount importance in every matter concerning the child.

This chapter deals with how the case law has dealt with the rights described in 1, 2, 3, 4 and 7 above.

Beyond the rights contained in section 28, the most important other right that children have is the right to basic education (section 29(1)).

General points

Despite constitutional and statutory protections under the Children's Act 38 of 2005 and section 28 of the Constitution, many children's lived reality remains marked by ongoing vulnerability. High levels of poverty, household instability, and hunger continue to threaten children's development and well-being. The majority of South African children live in constrained socio-economic circumstances, characterised by single-parent households, informal or overcrowded dwellings, and food insecurity. While social grants and access to basic services have helped reduce deprivation, significant gaps remain in the protection and fulfilment of children's rights, especially for those in rural and historically disadvantaged provinces.

The key questions that courts have had to decide concerning the protection of children's constitutional rights are:

- What is in a child's best interests? How must these be defined?
- How do you ensure that there are no impediments to a child acquiring a name and nationality from birth?
- What constitutes family care or parental care?
- What does the right to basic nutrition, shelter, basic health care and social services entail?
- What is maltreatment, neglect, abuse, or degradation of children?
- What are adequate conditions for child detainees?

Statistics

Stats SA's Household Survey 2023 and Marginalised Groups Indicator Report 2023

Population and living arrangements

South Africa had an estimated total population of 62 million in 2023, with approximately 21.3 million children (under 18), making up 34.4% of the population.[2] Of these, 31.5% lived with both parents, while 45.4% lived only with their mother. Notably, 19.0% lived with neither biological parent. Orphanhood remains a concern as 12.3% of children had lost one or both parents.[3] Grandparent-headed households, where children live with grandparents and not parents, made up 4.2% of all households. This was most common

[2] Statistics South Africa, General Household Survey 2023 pp ix, 6 -67 and Marginalised Groups Indicator Report 2023, Table 1.1.4 available at https://www.statssa.gov.za/publications/P0318/P03182023.pdf and https://www.statssa.gov.za/publications/03-19-05/03-19-052023.pdf

[3] General Household Survey 2023 p ix and Figures 3.6 and 3.7 p 7.

in the Eastern Cape (7.1%) and Limpopo (6.6%).[4] In 2023, 0.4% of children were reported to be living in households headed by another child, with the highest concentrations in Eastern Cape (0.7%) and KwaZulu-Natal (0.6%).[5] The number of female-headed households was 42.3%.[6]

Housing and services

Most children live in formal dwellings (83.5%), while 12.2% reside in informal dwellings.[7]

Food security and hunger

In 2023, food insecurity remained a serious issue. Approximately 17.2% of households reported inadequate or severely inadequate access to food. The prevalence was highest in Eastern Cape (27.0%), North West (26.8%), and Northern Cape (23.9%) (87). Among children, 12.4% lived in households where individuals experienced hunger due to insufficient food, and 10.7% in households where children themselves went hungry.[8] 20.1% of children lived in households that ran out of money to buy food in the past 12 months. In provinces such as the Eastern Cape and North West, over a quarter of children were affected. These experiences of food insufficiency disproportionately affect rural and informal areas.[9] (Marginalised p 38).

The South African Human Rights Commission's Eastern Cape inquiry into child malnutrition highlighted alarming levels of child hunger in the province. Evidence before the inquiry showed that 1087 children presented with severe acute malnutrition between April 2021 and March 2022, and 116 children died as a result. The inquiry further noted the persistence of chronic undernutrition among children in South Africa, with national data indicating that around one quarter of young children are stunted as a result of inadequate nutrition.[10]

Health care

In terms of access to health services, only 12.9% of children in South Africa had access to medical aid in 2023, reflecting the limited reach of private health coverage among children. The vast majority relied on the public health system: 76.8% of children used public clinics as their main healthcare facility, while only 17.2% accessed private hospitals, clinics, or doctors. These figures highlight the central role of the public health system in

[4] Ibid Figure 3.5 p 6.
[5] Marginalised Groups Indicator Report 2023 p 6 of Children chapter.
[6] General Household Survey 2023 p ix.
[7] Ibid p x.
[8] Ibid Figure 17.2 p 63 -64.
[9] Marginalised Groups Indicator Report p 38.
[10] South African Human Rights Commission, Eastern Cape Provincial Inquiry into Child Malnutrition and the Right to Food (2022) para 6.13.

providing healthcare for children in South Africa.[11]

Rights and protection

The state's child support grant programme is a central social protection system for children. In 2023, approximately 13.3 million children received the Child Support Grant, and nationally, about 69.2% of children benefited from some form of social grant support.[12]

Cases

Right of every child to a name and nationality from birth (section 28(1)(a))

1. Centre for Child Law v Director General: Department of Home Affairs and others, 2022 (4) BCLR 478 (CC)[13]

The case invalidated a regulation under the Births and Deaths Registration Act 51 of 1992 that required both parents to be present when registering a child, and required both parents to possess valid documentation. The law only required the mother to register the child and the Court held that this regulation interfered with the child's rights to identity, dignity and access to essential services and the father's rights.

Parties

The applicant was the Centre for Child Law, a public interest law clinic. The respondents included the Director-General of the Department of Home Affairs and other government officials. The matter arose from the circumstances of Mr Naki, a South African citizen, and Ms Ndovya, a foreign national from the Democratic Republic of Congo, whose child's birth could not be registered.

Background and facts

Mr Naki and Ms Ndovya met in the Democratic Republic of Congo while Mr Naki was stationed there as a member of the South African Defence Force. They married according to local customary practices, but the marriage was not formally registered and was not recognised by South African authorities. Two children were born in the DRC and a third child was born in South Africa after Ms Ndovya entered the country on a visitor's visa that later expired.

[11] Marginalised Groups Indicator Report 2023, p 20.

[12] Ibid p 20.

[13] https://www.saflii.org/za/cases/ZACC/2021/31.html

When the parents attempted to register the birth of their South African-born child, the Department of Home Affairs refused because the mother did not have a valid visa or permit. The case exposed broader problems in the Births and Deaths Registration Act. In particular, section 10 of the Act regulated the registration of children "born out of wedlock" and required the mother's presence or consent before an unmarried father could register the birth under his surname.

The parents approached the High Court. The Centre for Child Law intervened and challenged the constitutionality of sections 9 and 10 of the Act and certain regulations that made birth registration difficult where the mother was absent or undocumented.

Legal issues before the Court

The Constitutional Court had to determine:

- Whether section 10 of the Births and Deaths Registration Act unfairly discriminated against unmarried fathers by preventing them from registering the birth of their children under their surname without the mother's consent.
- Whether the provision also violated the rights of children born to unmarried parents.
- Whether the section could be interpreted constitutionally, or whether it had to be declared invalid.
- What remedy would be appropriate if the provision was unconstitutional.

Court's findings and reasoning

- The majority of the Court held that section 10 was unconstitutional. The provision differentiated between married fathers and unmarried fathers and required the mother's consent before an unmarried father could give his surname to a child. This differentiation amounted to unfair discrimination on the grounds of marital status, sex and gender.
- The Court held that the provision also violated the dignity of unmarried fathers by implying that they were less worthy of recognition as parents. It reinforced outdated stereotypes that mothers are the primary caregivers and fathers play a secondary role.
- The Court further found that the provision harmed children born outside marriage. By maintaining a separate registration system for children "born out of wedlock", the law perpetuated stigma and discrimination against those children. This was inconsistent with the constitutional rights to equality, dignity and the principle that a child's best interests are paramount.
- The Court concluded that there was no legitimate governmental purpose justifying the differential treatment between married and unmarried fathers. Because the

defect lay in the structure of section 10 itself, the appropriate remedy was to remove the provision entirely rather than attempt to reparir it by reading words into it.

A dissent by Mogoeng CJ (with Mathopo AJ concurring) held that the differentiation could be justified because the law sought to protect children from potential abuse or misidentification of fathers. The dissent also argued that the provisions could be interpreted in a constitutionally compliant manner rather than struck down.

Court order

The Court confirmed the declaration of invalidity made by the High Court. It ordered that:

- Section 10 of the Births and Deaths Registration Act is unconstitutional and invalid in its entirety and must be severed from the Act.
- The phrase in section 9(2) stating that the provision is "subject to the provisions of section 10" is also severed.
- The declaration of invalidity takes effect from the date of the Constitutional Court's order.
- The state must pay the costs of the Centre for Child Law.

Why the case matters

This judgment removes a discriminatory distinction between married and unmarried fathers in the registration of children's births. It affirms that both parents have equal recognition in the birth registration process and that children should not suffer legal disadvantages because their parents are not married. The decision also reinforces the constitutional principles of equality, dignity and the paramountcy of the best interests of the child.

Cross reference migrants

2. P.P.M and Others v Minister of Home Affairs and Others (14238/21) [2024] ZAGPPHC 2; [2024] 1 All SA 847 (GP); 2024 (5) BCLR 703 (GP); 2024 (3) SA 469 (GP) (16 January 2024)[14]

Children were being blocked from their right to an identity and, concomitantly access to services such as healthcare and education owing to DHA blocking identity documents of their mothers. The Court held that the DHA practice of blocking identities on the basis of suspicion of unlawful residence was unconstitutional. A lawful, fair and reasoned administrative process should be followed.

Parties

The first applicant was P[…] P[…] M[…], a permanent resident whose identity number had been blocked by the Department of Home Affairs. The second and third applicants were Lawyers for Human Rights and LegalWise South Africa (RF) (Pty) Ltd, acting in the public interest and on behalf of affected clients. The respondents were the Minister of Home Affairs and the Director-General of the Department of Home Affairs. The Children's Institute participated as amicus curiae to present evidence on the impact of ID blocking on children.

Background and facts

The Department of Home Affairs developed a practice of placing "markers" on identity numbers suspected to be fraudulent or duplicated. Once a marker was placed, the identity number was automatically blocked. This prevented the holder from accessing services requiring an ID, including banking, education, healthcare, and government services.

The Children's Institute intervened because the blocking of a parent's ID—especially that of a mother—often has serious consequences for children. When a mother's ID is blocked, children may be unable to have their births registered, obtain birth certificates, or later acquire South African identity documents. This can place children at risk of statelessness and prevent them from accessing social grants and other services.

Legal issues before the Court

The Court had to determine whether the practice of blocking identity numbers was lawful and whether it complied with the constitutional right to just administrative action. In relation to children, the Court also had to consider whether the practice unjustifiably harmed children by indirectly depriving them of documentation, citizenship rights, and

[14] https://www.saflii.org/za/cases/ZAGPPHC/2024/2.html

access to social and legal protections.

Court's findings and reasoning

The Court held that the ID blocking practice was unlawful and unconstitutional, as it violated the right to administrative justice under section 33 of the Constitution and the Promotion of Administrative Justice Act 3 of 2000 (PAJA). The judgment stressed that the Identification Act 68 of 1997, Births and Deaths Registration Act 51 of 1992, and Immigration Act 13 of 2002 are interlinked and cannot be used in isolation to block IDs. Any such action must follow a lawful, fair, and reasoned administrative process.

The Court recognised that the blocking of a parent's identity number can have serious and far-reaching consequences for children. If a mother's ID is blocked, it may prevent the registration of a child's birth or the issuing of identity documents to the child, which can in turn, limit access to education, healthcare, and social assistance.

The Court accepted the Children's Institute's submissions that children are particularly vulnerable in this situation because they depend on their parents' documentation to establish their own legal identity and citizenship status. Measures aimed at addressing identity fraud must therefore take into account the impact on children and must avoid unnecessarily prejudicing them.

Although the state has a legitimate interest in protecting the integrity of the national population register, the Court held that blocking identity numbers without notice, a hearing, or reasons violated the right to procedurally fair administrative action. The practice therefore, unlawfully infringed the rights of affected individuals and indirectly harmed their children.

Court order

The Court held that the Department of Home Affairs acted unlawfully in blocking identity numbers without following a fair administrative process. The Department must implement procedures that provide notice, an opportunity to be heard, reasons for decisions, and a mechanism to challenge ID blocking, while ensuring that measures taken do not unjustifiably harm children.

Why the case matters

The judgment highlights that administrative practices affecting identity documentation can have profound consequences for children. By recognising the link between parental documentation and children's legal identity, citizenship, and access to services, the case reinforces the need for administrative processes that protect children from the indirect effects of state action taken against their parents.

Cross reference migrants

Right of every child to parental care (section 28(1)(b))

3. C and Others v Department of Health and Social Development, Gauteng and Others [2012] ZACC 1; 2012 (2) SA 208 (CC)[15]

A child was taken from their parents' care, and the parents challenged the removal. The Children's Act 38 of 2005 allowed such removals, requiring judicial review within 90 days. The Court amended the Children's Act to stipulate that judicial review must now occur within 48 hours.

Parties

The applicants were C (a father), M (a mother), and the Centre for Child Law acting in the public interest. The respondents included the Department of Health and Social Development in Gauteng, the City of Tshwane, several child care facilities, and the Ministers of Police and Social Development.

Background and facts

Social workers and municipal officials carried out an operation in Pretoria targeting adults begging with children. During this operation, several children were taken from their parents and placed in temporary safe care without court orders.

The parents contested the removals and also challenged the constitutionality of sections 151 and 152 of the Children's Act. These provisions permit the state to remove children from their family environment either by court order (section 151) or in emergencies without a court order (section 152).

However, the Act did not require the removal to be automatically reviewed by a court soon after it occurred. Instead, the statutory scheme allowed a social worker up to 90 days to investigate before the matter came before a children's court.

Legal issues before the Court

The Constitutional Court had to decide:

- Whether sections 151 and 152 of the Children's Act were unconstitutional because they did not provide for automatic judicial review after a child was removed from parental care.

[15] https://www.saflii.org/za/cases/ZACC/2012/1.html

- What remedy should be granted if the provisions were unconstitutional?

Court's findings and reasoning

The Court confirmed the High Court's finding that the legislation was unconstitutional.

The removal of a child from a family is a serious intrusion into:

- The child's right to family or parental care (section 28(1)(b) of the Constitution).
- The principle that the best interests of the child are paramount (section 28(2)).
- The right of parents and children to access a court (section 34).

Although the state must have the power to remove children who are in danger, the legislation failed to include a crucial safeguard: judicial oversight soon after the removal.

Without automatic review, children could remain separated from their families for long periods without a court determining whether the removal was justified. The Court held that such removals must be subject to prompt judicial scrutiny in order to protect children and their families.

Court order

The Court confirmed that sections of the Children's Act are unconstitutional to the extent that they fail to provide for automatic judicial review of a child's removal from parental care.

To cure the defect, the Court ordered a reading-in remedy.

Reading-in to sections 151 and 152 (new subsection (d))

Both section 151(7) and section 152 must be read as if they include the following additional subsection:

"(d) within 48 hours, place the matter before the Children's Court having jurisdiction for a review of the removal and continued placement of the child, give notice of the date and time of the review to the child's parent, guardian or caregiver, and cause the child to be present at the review proceedings where practicable."

This is the core safeguard: automatic court review within 48 hours.

Reading-in to section 152(3)(b)

Section 152(3)(b) must be read as including the following additional wording:

"without delay but within 24 hours refer the matter to a designated social worker to place

the matter before the children's court for review as contemplated in section 152(2)(d) and for investigation contemplated in section 155(2)."

This ensures that the social worker must promptly take the case to court for review.

Deletion in section 155(2)

The words:

"Before the child is brought before the children's court" must be deleted from section 155(2).

This prevents the section from implying that the child can only appear in court after the 90-day investigation, which would undermine the requirement for immediate review.

Overall effect of the reading-ins

Together, these changes ensure that:

- A child removed from parental care must be brought before the children's court within 48 hours.
- The parents must be notified.
- The child should attend the hearing, where possible.
- The review occurs before the long 90-day investigation process.

This created a mandatory judicial safeguard against arbitrary removals.[16]

Why the case matters

The judgment established an important procedural safeguard in child protection law. It ensures that whenever the state removes a child from their family, a children's court must quickly review the removal.

This protects:

- The child's right to family care.
- The constitutional principle that the child's best interests are paramount.
- The rights of parents and children to be heard before a court.

The case, therefore, strengthens judicial oversight of state interventions in family life and

[16] These amendments were introduced into the Children's Act in 2016 by Act 18 of 2016 and it now complies with this judgment.

ensures that emergency removals are promptly scrutinised by a court.

4. Wilsnach NO v TM and others, [2021] 1 All SA 600 (GP)[17]

The case looked at what it takes to be considered a true parent of a child and held that the person who devotes their time and energy into looking after a child is the real parent. The father of a child with cerebral palsy never played a role in the child's life from when the child was six months, and it was the grandmother that played a full parental role looking after the disabled child who passed away at the age of five. The Court awarded the estate of R21m less what had been spent on medical costs, to the grandmother and mother of the child. The award had been made by the state as damages. In doing so, the Court defined what it is to be a parent, concluding that blood ties may not be sufficient. A true parent is "the person who cares for, maintains, acts as a guardian, protects against neglect and abuse and provides the love and guidance for the child to thrive and achieve their full potential" (para 64).

Parties

*Applicant***:** Wilsnach NO (in his capacity as a trustee)

Respondents: TM (the first respondent) and other unnamed respondents

Background and facts

M was a minor child born on 23 January 2013 with cerebral palsy. He passed away on 28 April 2018 at the age of five. The parents never married nor did they cohabit. The father was not present at the child's birth, nor did he assume any responsibilities or contribute in any manner to raising M. He last saw the child when M was six months old. The mother lived with her mother during the child's life, but suffered from depression, was unemployed and did not take proper care of M. Her mother, the child's grandmother, played the primary role caring for the child, who was in full-time employment. M's mother sometimes went away for days, leaving M unattended. The situation was so untenable that M's grandmother had to give up her job in order to look after M.

An amount of R21m was awarded to M for damages caused by the negligence of staff of the Gauteng Health Department that led to his cerebral palsy, on 12 May 2017. It was paid into a trust for M's benefit. At the time of his death, a year after the award was made, cash funds of approximately R15m were in his intestate estate, being what was left after costs and payments were made before his death.

In October 2017, prior to M's death, M's grandmother applied to have the rights of M's

[17] https://www.saflii.org/za/cases/ZAGPPHC/2020/756.html

primary care, be the sole guardian and have her daughter's rights to be guardian terminated. She applied to have her daughter's rights of contact with the child restricted and the father's rights as guardian terminatedThe Family Advocate investigated the situation and recommended that the M's mother and grandmother be granted full parental responsibilities and rights in regard to M, that they both be given guardianship and that M was to live with his grandmother. The Gauteng High Court confirmed the Family Advocates' recommendations in its order made on 26 April 2018. The order terminated the father's rights and responsibilities.

The applicant in the case is the executor who seeks clarity from the Court as to how the estate should devolve.

Legal issues before the Court

The Court had to decide if M's father and mother could inherit in terms of the Intestate Succession Act 81 of 1987, as they were both the biological parents of the child. It also had to decide if M's grandmother could be deemed to be a parent to inherit in terms of the Intestate Succession Act.

The issue was whether the Intestate Succession Act required the parent to be a biological parent in the legal sense or a person who conducted themselves as a parent "in the tenor and spirit of the relationship the law contemplates should exist between parent and child." Para 38

Court's findings and reasoning

The Court held that the role and place of biology is limited. "…the primary focus being the relationship that exists between the child and the parent (or the person who discharges that role" (para 42).

The Court held that the father had chosen to have nothing to do with his child, largely because of the child's disability. It held that "he did not become a parent... in the sense described in the Constitution and the Children's Act".

It found that interpreting the Intestate Succession Act to be limited to biological or natural parents would be untenable. To do so would "offend the entire constitutional scheme and the values it is founded upon and would ultimately not be in the best interests of the child" (para 66).

M's grandmother was the primary and substantial caregiver and dominant parental figure, and acquired parental responsibilities and rights, guardianship, as well as primary residence rights.

"When a person has done all and more that is implicit in and required of being a parent,

their right to dignity must demand that we refer to them as such" (para 80).

Court order

The biological father that left the child shortly after its birth could not come and claim to be heir after the child had died in terms of the Intestate Succession Act. The Court held that the biological father did not meet the requirements of parenthood. The mother who had only played a significant role in the first two years of the child's life was recognised as a parent, and the grandmother who played the most important role was declared to be a parent for the purpose of inheriting in terms of the Intestate Succession Act. The mother and grandmother were to inherit in equal shares.

Why the case matters

Parenthood was defined not in terms of biological factors, but in terms of the relationship between the child and the person to whom they are entrusted. If that person loves them, cares for them, ensures they are safe and fed, and plays a significant and active role in their life, they will be considered to be a parent in terms of the law.

5. VJV and another v Minister of Social Development and another (Centre for Child Law as amicus curiae) , 2023 (10) BCLR 1250 (CC)[18]

The case looked at the best interests of the child, which were impaired by section 40 of the Children's Act 38 of 2005 that only recognised "spouses" or "husbands" as potential parents and not permanent life partners. In this case two women chose to have a baby via in vitero fertilisation and one carried the embryos (they were twins). The applicant, VJV, (who was her partner and in a long term permanent relationship with her) was denied the right to be given parental rights and appealed. The Court required the state to amend the Children's Act and recognise permanent life partners as this was in the best interests of the child.

Parties

The applicants were two women in a permanent same-sex life partnership. The respondents were the Minister of Social Development and the Minister of Justice and Constitutional Development. The Centre for Child Law participated as amicus curiae.

Background and facts

The applicants chose to have children through in vitro fertilisation using the first applicant's gamete and a donor. The second applicant carried the pregnancy and gave

[18] https://www.saflii.org/za/cases/ZACC/2023/21.html

birth to twins. Under section 40 of the Children's Act, parental rights were assigned only to the birth mother because the provision recognised such rights only for "spouses" or "husbands." This left the first applicant, despite being a genetic parent, without automatic parental status.

Legal issues before the Court

The central issue was whether section 40 of the Children's Act unlawfully discriminated by excluding permanent life partners from automatic parental recognition and whether this exclusion infringed constitutional rights, particularly the best interests of the child under section 28 of the Constitution.

Court's findings and reasoning

The Court held that the provision unfairly discriminated on the grounds of marital status and indirectly on sexual orientation by limiting recognition to married couples. This discrimination undermined the dignity of the applicants and, crucially, compromised the best interests of their children. The Court held that "A child's best interests are of paramount importance in every matter concerning the child."[19] Children born in such circumstances were deprived of the automatic care, guardianship, and support of both parents, leaving them legally and socially vulnerable. Section 40 of the Children's Act was found to conflict with section 28(2) of the Constitution, which protects the best interests of the child. The Court stressed that the best interests of the child principle required recognition of both applicants as parents, as this was essential to their security, stability, and equal treatment before the law. By excluding the legal recognition of a second parent who had consented to and planned a birth, the section creates two classes of children: those with married parents and those with unmarried ones. These children are left with only one legal parent at birth, and if the parents want to rectify the position, they would need to pursue adoption or other legal processes after birth.

Court order

The Court confirmed the High Court's declaration that section 40 of the Children's Act was unconstitutional. It ordered that the words "or permanent life partner" be read into the provision so that both members of a permanent life partnership would automatically acquire parental rights and responsibilities in cases of artificial fertilisation. The order was retrospective to 1 July 2007, with safeguards for past cases, and suspended for 24 months to allow Parliament to amend the legislation.

Why the case matters

The judgment firmly established that the best interests of the child must prevail over

[19] Cited at paras 1,2,11, 28, 34, 36, 39, 41, 48, 53, 60, 71, and 78.

formalistic distinctions based on marital status. It recognised that children are entitled to legal recognition and protection of their family relationships regardless of whether their parents are married, thereby advancing equality, dignity, and the paramountcy of children's rights in South African law.

Right of every child to basic nutrition shelter, basic health care and social services (section 28(1)(c))

6. Equal Education and others v Minister of Basic Education and others (Children's Institute as Amicus Curiae), [2020] JOL 47754 (GP)[20]

Eight provinces sought declaratory orders from the Minister of Basic Education and the MEC's of Education in the provinces to ensure that the National School Nutrition Programme, which provided a daily meal for learners, was continued, whether the learners were studying at school or at home, as a result of Covid-19. The Court granted the relief.

Cross reference food, social services

Right of every child to be protected from maltreatment, neglect, abuse or degradation (section 28(1)(d))

7. S v Williams and Others, 1995 (7) BCLR 861 (CC)[21]

The case ruled that juvenile whipping was unconstitutional. Langa J said: "The courts in this country have acknowledged the international consensus against corporal punishment and, in a sense, associated themselves with it in many judgments which have criticised, sometimes in the strongest terms, the infliction of corporal punishment" (para 50)

Parties

The applicants were six juvenile offenders who had been sentenced by magistrates to receive strokes with a cane under section 294 of the Criminal Procedure Act 51 of 1977. The matter reached the Constitutional Court on review from the Cape Provincial Division, which questioned the constitutionality of juvenile whipping.

Background and facts

Several juveniles had been convicted of criminal offences and sentenced to "moderate

[20] https://www.saflii.org/za/cases/ZAGPPHC/2020/306.html

[21] https://www.saflii.org/za/cases/ZACC/1995/6.html

correction" by way of whipping. Section 294 of the Criminal Procedure Act authorised courts to impose juvenile whipping as a sentencing option. The Cape Provincial Division referred the matter to the Constitutional Court to determine whether this punishment was compatible with the Constitution, particularly the rights to dignity and freedom from cruel, inhuman or degrading punishment.

Legal issues before the Court

The Court had to determine:

- Whether juvenile whipping authorised by section 294 of the Criminal Procedure Act 51 of 1977 violated the constitutional rights to dignity and freedom from cruel, inhuman or degrading punishment.
- Whether such a limitation could be justified under the constitutional limitation clause.

Court's findings and reasoning

The Court emphasised that the Constitution places a very high value on human dignity and the protection of individuals from cruel, inhuman or degrading punishment. Corporal punishment involves the deliberate infliction of physical pain by the state and therefore raises serious constitutional concerns.

The Court held that judicial corporal punishment treats the offender as an object rather than a person deserving of dignity and respect. It is an institutionalised form of violence authorised by the state.

The Court also rejected the argument that whipping was justified because it was a convenient or quick punishment, or because it might deter crime. Deterrence alone could not justify punishment that violates fundamental rights.

Importantly, the Court stressed that children are particularly vulnerable and that the state must protect their dignity and development. Subjecting juveniles to corporal punishment undermines these constitutional values.

The Court concluded that juvenile whipping is cruel, inhuman and degrading punishment and cannot be justified in a constitutional democracy.

Court order

The Court declared section 294 of the Criminal Procedure Act 51 of 1977, as well as the words "or a whipping" in section 290(2) of the Act, unconstitutional and invalid. It ordered that no sentences imposed under those provisions could be carried out.

Why the case matters

S v Williams was one of the early Constitutional Court decisions establishing that punishment imposed by the state must respect human dignity and constitutional values. The case abolished judicial corporal punishment for juveniles in South Africa and confirmed that children, as vulnerable members of society, are entitled to strong constitutional protection against degrading treatment.

8. Christian Education South Africa v Minister of Education, 2000 (10) BCLR 1051 (CC)[22]

The case concerned the right of independent schools that have parental or guardian consent to impose corporal punishment on children. Christian Education South Africa is an NGO that promoted corporal punishment on the basis that it is an integral part of the value system of Christian belief. The Court rejected this argument and upheld section 10 of the South African Schools Act 84 of 1996, which prohibits corporal punishment at all schools. Corporal punishment violates section 12 of the Constitution and thus cannot be protected.

Section 10 of the South African Schools Act prohibits the administration of corporal punishment at schools. The applicant, Christian Education South Africa, an NGO, opposed this restriction at independent schools where parents or guardians have consent in writing for corporal punishment to be administered. The applicant argued that this restriction offended against constitutional religious and cultural rights (section 15(1), 29(3), 30 and 31(1) of the Constitution. The applicant argued that corporal punishment formed part of the Christian belief system of its member parents and was an integral part of the religious beliefs and cultural values of such parents.

The respondent, the Minister of Education, argued that corporal punishment infringes a scholar's right to dignity under section 10 of the Constitution and their rights under section 28(1)(d) of the Constitution, being their rights to be protected from maltreatment, neglect, abuse or degradation. It also violated section 12 of the Constitution to freedom and security of person which includes the right to be free of all forms of violence from either public or private sources. The Court upheld the S v Williams judgment referred to above.

The Court upheld section 10 of the South African Schools Act, and dismissed the appeal of Christian Education.

[22] https://www.saflii.org/za/cases/ZACC/2000/11.html

9. Freedom of Religion South Africa v Minister of Justice and Constitutional Development and others (Global Initiative to End All Corporal Punishment of Children and others as amici curiae), 2019 (11) BCLR 1321 (CC)[23]

The case was an appeal brought by an NGO promoting religious freedom against a judgment in the High Court that found a parent's common law right to exert physical punishment against his child for watching pornography was unconstitutional. It violated the child's dignity (section 10), it failed to protect the child from violence (section 12(1)(c) and it was not in the child's best interests (section 28 (2)). It rejected an earlier common law defence that parents who punished their children using physical violence used to bring. This defence was called reasonable and moderate parental chastisement. This defence can no longer be brought, and inflicting violence upon children is now not defensible in terms of the Constitution.

Parties

The applicant in the case was Freedom of Religion South Africa (FoRSA), a civil society organisation advocating for religious freedom. The respondents included the Minister of Justice and Constitutional Development, the Minister of Social Development, the National Director of Public Prosecutions, YG (a father convicted of assaulting his son), and several public interest organisations such as the Children's Institute, Sonke Gender Justice, and the Quaker Peace Centre. Additional amici curiae included the Global Initiative to End All Corporal Punishment of Children and the Dullah Omar Institute.

Background and facts

The case arose from the conviction of a father, YG, for assaulting his 13-year-old son after finding him watching pornography. The father claimed that he had merely spanked his son in a moderate and reasonable manner, in accordance with his religious beliefs and parental responsibilities. The trial and appeal courts rejected this defence, concluding that the chastisement had exceeded reasonable bounds. The High Court, of its own accord, raised the question of whether the common law defence of reasonable and moderate parental chastisement was constitutionally valid and held that it was inconsistent with the Constitution. FoRSA, which had participated in the High Court proceedings as amicus curiae, sought leave to intervene in the Constitutional Court and appeal the High Court's declaration of constitutional invalidity.

Legal issues before the Court

The Court also had to decide whether the common law defence of reasonable and

[23] https://www.saflii.org/za/cases/ZACC/2019/34.html

moderate parental chastisement was consistent with the Constitution. This allows parents to have the right to discipline their children as long as the discipline is reasonable and moderate. The broader question was whether such discipline infringes children's rights to dignity, to be free from violence, and to have their best interests treated as paramount.

The Court considered various constitutional provisions, most centrally section 10 (right to dignity), section 12(1)(c) (right to be free from all forms of violence from public or private sources), and section 28(2) (the principle that a child's best interests are of paramount importance in every matter concerning the child).

Court's findings and reasoning

The Court reaffirmed that assault involves the unlawful application of force to another person, and that the common law had historically excused parental corporal punishment under the defence of reasonable and moderate chastisement. The question before the Court was whether this exception remained constitutionally justifiable. The Court explained that constitutional rights are not absolute and must be balanced, but that the rights of children to dignity and protection from violence are entitled to heightened protection, particularly given their vulnerability. It recognised the value of parental care and religious freedom, but emphasised that these must be exercised in ways that do not unjustifiably infringe the rights of children.

The Court held that even moderate and reasonable corporal punishment constituted a form of violence and, thus, implicated section 12(1)(c) of the Constitution. It further found that such chastisement infringed the child's dignity under section 10. The Court accepted that some parents view corporal punishment as an expression of love and a religious obligation, but stressed that the best interests of the child were paramount. It concluded that the infringement of children's rights could not be justified under section 36[24]. The Court noted the availability of less restrictive means of achieving discipline, including non-violent parenting strategies. While recognising the sincerity of religious and cultural convictions, the Court held that they could not justify conduct that violated the fundamental rights of children.

Court order

It declared the common law defence of reasonable and moderate parental chastisement to be inconsistent with sections 10 and 12(1)(c) of the Constitution.

Why the case matters

The decision confirms that all corporal punishment of children by parents constitutes

[24] Section 36 allows constitutional rights to be limited in certain circumstances.

criminal assault under South African law. It definitively abolishes the defence of reasonable and moderate chastisement, closing the gap that had previously allowed parents to justify the use of force against children. The judgment affirms that the rights of children to dignity, bodily integrity, and protection from violence take precedence over parental claims to religious or cultural practices involving corporal punishment. It also reinforces the Court's commitment to interpreting the Constitution in a manner that upholds the best interests of the child and sets a clear precedent for future cases involving similar conflicts between parental rights and children's constitutional protections.

Right of every child, when detained, to be kept separately from detained persons over the age of 18 and to be treated in a manner that accounts for the child's age (section 28(1)(g))

10. Raduvha v Minister of Safety and Security and Another [2016] ZACC 24[25]

The case concerned the arrest of a 15 year old minor child and his detention overnight with adult prisoners, and the failure of the police to notify his parents of his arrest or his whereabouts. The minor was only released after court intervention. The child's father sought a declaratory order stating that the arrest and detention violated the Constitution, and damages. The Court confirmed this.

Parties

The applicant, Raduvha, was the father of a minor child who had been detained by police without notifying the parents or bringing the child promptly before a court. The respondents included the Minister of Safety and Security and other officials involved in the arrest and detention.

Background and facts

The minor child, aged 15, was arrested by the South African Police Service and detained overnight without any parental notification or prompt appearance before a magistrate. The child was held with adult detainees and released only after court intervention. The father sought a declaratory order that the arrest and detention violated the Constitution, and he claimed damages for the infringement of the child's rights and for emotional trauma.

Legal issues before the Court

The key issue was whether the arrest and detention of a minor child without informing the parents, and without bringing the child before a court within 48 hours, violated

[25] https://www.saflii.org/za/cases/ZACC/2016/24.html

sections 28(1)(g) and 28(2) of the Constitution. The Court also considered whether damages were appropriate.

Section 28(1)(g) provides that every child has the right not to be detained except as a measure of last resort, and when detained, to be kept separately from adults and treated in a manner appropriate to their age. Section 28(2) provides that a child's best interests are of paramount importance in every matter concerning the child. The Court also applied the Child Justice Act 75 of 2008.

Detention of children must be used sparingly and accompanied by strict safeguards. The best interests of the child are a binding constitutional standard, and law enforcement officers must ensure that children are treated in accordance with their developmental needs and vulnerability.

Court's reasoning and findings

The Court found that the child's rights under both section 28(1)(g) and section 28(2) were violated. The police failed to notify the father and placed the child in conditions inappropriate for a minor. The Court stated: "The best interests of the child are not just a general guideline but a constitutionally mandated standard" (para 39). It held that the detention was unjustified, unlawful, and constitutionally deficient.

Court order

The Court declared the detention unlawful and unconstitutional. It awarded damages of R120,000 to the father for breach of the child's rights and resulting emotional distress. Costs were awarded against the respondents.

Why the case matters

The judgment underscores that children's constitutional rights apply fully within the criminal justice system. It affirms that state actors must treat children with special care and that section 28 protections cannot be disregarded during arrest and detention. The case sets a precedent for holding law enforcement accountable for procedural and substantive violations of children's rights.

The best interests of the child (section 28(2))

11. M v S (Centre for Child Law Amicus Curiae), 2007 (12) BCLR 1312 (CC)[26]

The case established a test for evaluating what is in the best interests of the child in terms of section 28(2) of the Constitution. The mother of three children appealed against her sentence of incarceration, as such imprisonment would run counter to the best interests of the children. The Court held in her favour and her sentence was replaced by a sentence that did not result in incarceration.

Parties

The applicant, M, was the mother of three young children. The case was brought to the Constitutional Court to appeal against the High Court and SCA decisions that dismissed her challenge to the sentence of imprisonment. The Centre for Child Law acted as amicus curiae, making submissions on how the incarceration of primary caregivers can negatively affect the rights and interests of their children and that such imprisonment can run counter to the best interests of the child as set out in section 28(2) of the Constitution.

Background and facts

M was a single mother convicted of fraud and sentenced to a custodial sentence without sufficient consideration of the impact on her minor children. At the time of sentencing, her children were aged 16, 12, and 8. The courts below acknowledged the presence of children but did not assess the effect of imprisonment on them. The applicant argued that this omission violated her children's constitutional rights, specifically their right to have their best interests considered paramount.

Legal issues before the Court

The central question was whether, and to what extent, sentencing courts must consider the best interests of children when their primary caregiver faces imprisonment. The case also raised broader constitutional questions about how children's rights under section 28(2) of the Constitution should influence sentencing decisions. The Court relied heavily on section 28(2) of the Constitution, which provides that 'a child's best interests are of paramount importance in every matter concerning the child. It also considered international instruments such as the United Nations Convention on the Rights of the Child.

[26] https://www.derebus.org.za/wp-content/uploads/2021/05/S-v-M-Centre-for-Child-Law-as-Amicus-Curiae-2008-3-SA-232-CC.pdf

Court's findings and reasoning

The Court found that the sentencing court failed to adequately consider the interests of M's children. It held that courts must not only note the existence of children but also inquire into how a sentence will affect them. Sachs J observed: "Every child has his or her own dignity. If a child is to be constitutionally imagined as an individual with a distinctive personality, and not merely as a miniature adult waiting to reach maturity, he or she cannot be treated as a mere extension of his or her parents" (para 18). He added: "The fact that the paramountcy of the best interests of the child is constitutionally protected does not mean that it is the sole or decisive factor when the interests of other parties are implicated. It means that it must be accorded due consideration" (para 42).

Further, he said: "Individually and collectively all children have the right to express themselves as independent social beings, to have their own laughter as well as sorrow, to play, imagine and explore in their own way, to themselves get to understand their bodies, minds and emotions, and above all to learn as they grow how they should conduct themselves and make choices in the wide social and moral world of adulthood. And foundational to the enjoyment of the right to childhood is the promotion of the right as far as possible to live in a secure and nurturing environment free from violence, fear, want and avoidable trauma" (para 19). He added that the law must create conditions to protect children from abuse and maximise opportunities for them to lead productive and happy lives (para 20).

Court order

The Court set aside the custodial sentence and replaced it with a sentence that did not require direct imprisonment. It held that the sentencing court failed to uphold the constitutional obligation to treat the best interests of the child as paramount.

Why the case matters

This case marked a constitutional turning point in recognising that children's rights are directly implicated when their caregiver is sentenced. It established that sentencing courts must actively investigate and weigh the interests of children before imposing custodial sentences. It clarified that the best interests of the child require more than token consideration. They must be given serious and independent weight and may be decisive in determining a suitable sentence.

12. AD and DD v DW and Others The Centre for Child Law (Amicus Curiae) and The Department of Social Development (Intervening Party), 2008 (4) BCLR 359 (CC)[27]

An Irish couple adopted a child with assistance from DW and took the child out of the country to Ireland. However, they did not follow proper adoption procedures and were unable to obtain recognition as the child's adoptive parent. They applied to court to obtain recognition. The Court held that adoption must comply with the Children's Act 38 of 2005 and that simply removing children across the border without such compliance amounts to child trafficking. Children have to be protected from this and safeguards in place must be adhered to.

Parties

The applicants, AD and DD, were an Irish couple who took a child from South Africa and applied for guardianship. They sought legal recognition or validation of the child's placement with them. This was despite the removal of the child to Ireland, which did not comply with legal inter-country adoptions. DW facilitated the informal and unlawful arrangement and along with the Department of Social Development, was the respondent in the case. The Centre for Child Law participated as amicus curiae.

Background and facts

The case concerned a child removed from South Africa by a woman (DW) and taken to Ireland without following proper adoption procedures. The biological mother's consent was obtained under misrepresented circumstances, and there was no compliance with statutory safeguards, including the Children's Act 38 of 2005. The applicants, AD and DD, later sought recognition as the child's adoptive parents in Ireland, raising significant concerns of child trafficking.

Legal issues before the Court

The Court had to decide whether the removal of the child constituted unlawful child trafficking under the Children's Act and whether the purported adoption process adhered to legal and constitutional requirements. It emphasised that trafficking is not limited to exploitative or commercial ends, but also includes improper removal of a child across borders in violation of legal safeguards. "This case is not merely about adoption. It is about trafficking under the guise of adoption." (para 53). The Court condemned the conduct of DW and the applicants, AD and DD, saying that bypassing statutory procedures placed the child at serious risk.

[27] https://www.saflii.org/za/cases/ZACC/2007/27.html

"The removal of the child from the Republic without complying with the provisions of the Children's Act, in particular section 249 to 264 , was unlawful and constituted trafficking in terms of that act" (para 70).

The central constitutional issue was the protection of children from trafficking and ensuring that their best interests are upheld in cross-border adoption scenarios.

The Court relied on the Constitution, particularly section 28(1)(d), which grants every child the right to be protected from maltreatment, neglect, abuse, or degradation, and section 28(2), which holds that the best interests of the child are paramount in every matter concerning the child.

"The best interests of the child are not served by informal arrangements that remove the child from the jurisdiction of this Court without oversight or accountability" (para 61).

The judgment explicitly links trafficking with both constitutional and international law violations: "South Africa's obligations under the Hague Convention and the Constitution require that every inter-country adoption be processed through central authorities to prevent child laundering and trafficking" (para 59).

Court's findings and reasoning

Children are not commodities and cannot be transferred outside South Africa without compliance with statutory and constitutional protections. Private arrangements that result in the movement of children across borders for adoption circumvent legal processes and amount to trafficking. The best interests principle requires strict adherence to laws that ensure transparent, ethical, and accountable procedures.

The Court found that the removal of the child to Ireland was unlawful and constituted child trafficking under the Children's Act. It held that the purported adoption violated both domestic and international law and failed to consider the child's best interests as constitutionally required. The Court was particularly critical of attempts to privatise adoption outside the oversight of competent authorities.

Court order

The Court declared the removal of the child unlawful and in violation of anti-trafficking provisions. It ordered that the child be returned to South Africa and placed under the care of child protection authorities. While the Court was empathetic to the emotional consequences of this order for the child and the Irish couple, it prioritised the need for legal certainty, child protection and the constitutional imperative to prevent child trafficking. It held that failing to return the child would effectively legitimise unlawful removal and undermine South Africa's child protection framework.

It also directed the Department of Social Development to ensure that any future adoption proceedings are conducted in line with the Children's Act and constitutional norms.

Why the case matters

The judgment reinforces the constitutional and statutory protections against child trafficking and improper inter-country adoptions. It underscores that the best interests of the child must guide all cross-border custodial decisions and that unauthorised removals are unconstitutional. This case sets a precedent for state accountability and international cooperation in preventing child trafficking.

13. Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development and Others, 2009 (7) BCLR 637 (CC)[28]

The case involved the constitutionality of provisions concerning the appointment of intermediaries, the holding of proceedings in camera (closed court), and the testifying of child victims in open court. The Court affirmed that child victims must be protected from undue stress when testifying in court and that courts must ensure safeguards like intermediaries in sexual offences involving children.

Parties

Two issues had to be decided upon in this case. The first was whether section 170A (1) of the Criminal Law Procedure Act 51 of 1977 (CPA), which gives judicial officers a discretion as to whether to appoint intermediaries to assist child witnesses in criminal proceedings, was constitutional or not. The second was about section 153(3) and 153(5) of the CPA, which protects children accused of crimes by requiring that the proceedings always be held in camera. Whereas this same protection was not applicable to children who were complainants in criminal proceedings. The Court held that there should be a discretion since each case is different.

This case held that in all criminal matters where a child is called upon to be a witness, the judicial officer must enquire if an intermediary should be appointed, "with due regard to the principle that the child's best interests are of paramount importance in criminal proceedings concerning a sexual offence against a child" to shield a child witness or child complainant from the anguish and stress that might be required of them to recount incidents of abuse, violation, rape, assault or deprivation. (para 128)

The Court held that a child giving evidence in criminal proceedings must be treated with dignity and compassion, and their best interests are of paramount importance. The main

[28] https://www.saflii.org/za/cases/ZACC/2009/8.html

finding was that the court should not have discretion as to whether to appoint an intermediary (section 170A (1) of the CPA is discretionary).

The section allowed a child to be based away from the court, in a separate space, and the intermediary present to enable the child's testimony to be heard in a safe environment free from stress, and enabling the child to be shielded from the accused. Stress of being in a court, which is by its nature not child-friendly, can cause a child to refuse to speak at all. The child may be so terrified and confused that they are silenced. Cross examination by either the accused (if they have no attorney) or an attorney can make matters even worse where the child might be forced to recount details of the crime in minute detail, which can be both intimidating and bewildering. The child may have had to repeat what happened to them to a whole host of people. (paras 93 –

Why the case matters

Asserts rights of child to have an intermediary present when the child is a witness for the state in criminal proceedings, particularly cases of sexual and physical violence.

Cross reference gender

14. Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another [2013] ZACC 35[29]

The Constitutional Court held that provisions of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (SORMA) that criminalised consensual sexual conduct between adolescents (aged 12–15) were unconstitutional because they infringed children's rights to dignity, privacy and their best interests. The Court found that exposing adolescents to criminal prosecution for developmentally normal sexual behaviour was harmful and not a justifiable limitation of rights, and it suspended the declaration of invalidity to allow Parliament to amend the law.

Parties

The applicants were The Teddy Bear Clinic for Abused Children and RAPCAN (Resources Aimed at the Prevention of Child Abuse and Neglect), both organisations working to protect children from abuse. The respondents were the Minister of Justice and Constitutional Development and the National Director of Public Prosecutions. Several organisations participated as amici curiae, including the Women's Legal Centre Trust and the Tshwaranang Legal Advocacy Centre.

[29] https://www.saflii.org/za/cases/ZACC/2013/35.html

Background and facts

Sections 15 and 16 of SORMA criminalised consensual sexual conduct between children aged 12–15 (referred to as adolescents in the judgment). The provisions meant that if two adolescents engaged in consensual sexual acts such as kissing, touching, or sexual intercourse, both could be prosecuted for statutory rape or statutory sexual assault. The Act also required such offences to be reported and could result in children being placed on the National Register for Sex Offenders.[30] The applicants challenged these provisions in the High Court, arguing that criminalising consensual sexual exploration between adolescents violated several constitutional rights. The High Court declared the provisions unconstitutional, and the matter came to the Constitutional Court for confirmation.

Legal issues before the Court

The Constitutional Court had to decide:

- Whether the criminalisation of consensual sexual conduct between adolescents infringed constitutional rights, including dignity, privacy, bodily and psychological integrity, and the best interests of the child.
- If rights were infringed, whether the limitation could be justified under section 36 of the Constitution.
- What remedy would be appropriate if the provisions were unconstitutional.

Court's findings and reasoning

The Court held that criminalising consensual sexual activity between adolescents violated several constitutional rights.

- First, it infringed the right to dignity because criminalisation stigmatised adolescents for engaging in developmentally normal behaviour and exposed them to shame and social disgrace.
- Second, it violated the right to privacy because the law allowed the state to intrude into the most intimate aspects of adolescents' personal relationships and sexual development.
- Third, the provisions were inconsistent with section 28(2) of the Constitution, which requires that a child's best interests be of paramount importance. The Court accepted expert evidence that adolescent sexual exploration is often part of normal development and that criminalisation discourages young people from seeking guidance from parents, teachers, or counsellors. Instead of protecting children, the

[30] Created by section 42 of SORMA.

provisions could drive sexual behaviour underground and expose adolescents to greater risks.

The court also rejected the argument that prosecutorial discretion or diversion procedures under the Child Justice Act sufficiently mitigated the harm. Even the possibility of investigation, arrest, and prosecution was damaging to children's rights.

Although the purpose of protecting children from premature sexual activity was legitimate, the Court found that criminal sanctions against adolescents were not rationally connected to achieving that goal and were therefore not a justifiable limitation of rights.

Court order

The Court confirmed the High Court's declaration that sections of the SORMA were unconstitutional insofar as they criminalised consensual sexual conduct between adolescents. The Court suspended the declaration of invalidity for 18 months to allow Parliament to amend the legislation. During that period the Court ordered a moratorium on investigations and prosecutions of adolescents for consensual sexual conduct under the impugned provisions.

Why the case matters

The judgment is a significant children's rights decision. It affirms that adolescents are constitutional rights-bearers with dignity and privacy interests in their developing sexuality. The Court emphasised that the criminal law should not be used to regulate developmentally normal sexual behaviour between young people and that the best interests of the child must guide legislation affecting children. The case also influenced later amendments to the SORMA introducing "close-in-age" exceptions for consensual sexual activity between adolescents.

15. J v National Director of Public Prosecutions and Another [2014] ZACC 13[31]

The Court held that section 50(2)(a) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (SORMA) was unconstitutional insofar as it required the automatic placement of child offenders on the National Register for Sex Offenders. The Court held that automatic registration violated the best interests of the child because courts had no discretion to consider the individual circumstances and prospects of rehabilitation of the child offender.

[31] https://www.saflii.org/za/cases/ZACC/2014/13.pdf

Parties

The applicant was J, who had been convicted of sexual offences committed when he was 14 years old. The respondents were the National Director of Public Prosecutions and the Minister of Justice and Constitutional Development.

Amici curiae included Childline South Africa, the Teddy Bear Clinic for Abused Children and the National Institute for Crime Prevention and the Reintegration of Offenders.

Background and facts

J was convicted in the Regional Court of raping three young boys aged six and seven and assault with intent to cause grievous bodily harm against a girl. He was 14 years old when the offences were committed. He pleaded guilty and was sentenced to five years' compulsory residence in a Child and Youth Care Centre followed by three years' imprisonment.

In addition to the sentence, the court made an order in terms of section 50(2) of SORMA requiring that his details be entered on the National Register for Sex Offenders.

The matter came before the Western Cape High Court on automatic review under the Child Justice Act 75 of 2008. The High Court raised the question whether section 50(2), which required courts to place offenders on the Register automatically, was constitutional, particularly in relation to child offenders.

Legal issues before the Court

The Constitutional Court had to determine:

- Whether section 50(2)(a) of SORMA was unconstitutional insofar as it required courts automatically to place the particulars of child offenders on the National Register for Sex Offenders.
- Whether this infringed the constitutional principle that a child's best interests are of paramount importance (section 28(2) of the Constitution.
- What remedy would be appropriate if the provision was unconstitutional.

Court's findings and reasoning

The Court held that section 50(2)(a) was unconstitutional insofar as it applied to child offenders because it required courts automatically to place them on the Register without any discretion.

The Court emphasised several principles relating to children in the criminal justice system:

First, the Constitution requires that the law treat children differently from adults because they are developmentally vulnerable and capable of reform.

Second, the best interests of the child require an individualised approach to child offenders.

Courts must consider the particular child's circumstances, maturity and prospects for rehabilitation.

Third, children must be given an opportunity to be heard and to make representations in proceedings affecting them.

Section 50(2)(a) undermined these principles because it required automatic registration after conviction, without allowing a court to consider whether registration was appropriate in the individual case.

The Court recognised that the purpose of the National Register for Sex Offenders – protecting children and persons with mental disabilities from sexual abuse – was important and legitimate. However, automatic registration of child offenders was not proportionate because it did not allow courts to determine whether the child posed a real risk to others.

The Court held that less restrictive means were available, such as allowing courts a discretion to decide whether registration was necessary after considering the circumstances of the child offender.

Court order

The Court declared section 50(2)(a) of SORMA unconstitutional to the extent that it required the automatic registration of child offenders on the National Register for Sex Offenders.[32]

The Court also ordered the state to provide information on children whose names had already been placed on the Register so that they could obtain legal assistance if necessary.

Why the case matters

The case confirms that the best interests of the child require an individualised and flexible approach to child offenders in the criminal justice system. The Court emphasised that children are capable of reform and should not automatically be subjected to lifelong

[32] Section 50(2)(a) is still in SORMA but because of this judgment it cannot operate automatically for children. There must always be an individualised assessment of the child offender, because an automatic inclusion in the register would violate the best interests of the child.

consequences such as placement on the National Register for Sex Offenders.

The judgment also reinforced the constitutional principle that legislation affecting children must allow courts to consider the specific circumstances of each child.

16. AB and another v Minister of Social Development (Centre for Child Law as amicus curiae), 2017 (3) BCLR 267 (CC)[33]

The case clarified the law of surrogacy and held that a child born by means of a surrogacy agreement must have a genetic relationship with one parent. In this case, a woman who was both unable to fall pregnant or donate her eggs, and had no male partner to donate sperm, was not entitled, in terms of the section 294 of the Children's Act 38 of 2005 to enter a surrogacy agreement with the woman who was to carry her baby.

Parties

The first applicant, AB, was an adult woman unable to conceive or carry a child. The second applicant, the Surrogacy Advisory Group, is a voluntary association providing medico-legal advice and support on surrogacy. The respondent was the Minister of Social Development, responsible for administering the Children's Act. The Centre for Child Law was admitted as amicus curiae.

Background and facts

AB had undergone 18 unsuccessful in vitro fertilisation (IVF) cycles between 2001 and 2011. She was permanently infertile both in terms of conception (unable to contribute her own gametes) and pregnancy (unable to carry a child to term). She sought to enter into a surrogacy agreement using both donor sperm and donor ova. However, section 294 of the Children's Act required that at least one commissioning parent contribute a gamete. This prevented her, as a single person unable to provide gametes, from proceeding. AB and the Surrogacy Advisory Group challenged the constitutionality of section 294, arguing it violated rights to equality, dignity, reproductive autonomy, privacy and access to health care.

Legal issues before the Court

The Court had to decide whether section 294 of the Children's Act was unconstitutional. The key questions were whether the genetic link requirement:

- Infringed rights to dignity, equality, reproductive autonomy, privacy, and access to reproductive health care.

[33] https://collections.concourt.org.za/handle/20.500.12144/3819

- Unjustifiably limited the constitutional value of freedom and the right to make decisions concerning reproduction under section 12(2)(a) of the Constitution.
- Whether it was rationally connected to protecting the best interests of children, particularly their right to know their genetic origins.

Court's findings and reasoning

Two judgments emerged.

The majority (Nkabinde J, with Mogoeng CJ and others concurring) upheld section 294. They reasoned that the right to make reproductive decisions did not extend to creating a child with no genetic link to a commissioning parent. The provision was rationally connected to the legitimate purpose of protecting children's best interests, including their right to know their genetic origins and preventing the commercialisation of surrogacy. The majority concluded that any limitation of rights was reasonable and justifiable.[34]

Court order

The Constitutional Court declined to confirm the High Court's declaration of invalidity. Section 294 of the Children's Act remained in force. The respondent's appeal was upheld, though the Court ordered the Minister to pay the applicants' costs, including costs of two counsel.

Why the case matters

This case addressed the constitutional limits of reproductive autonomy in South Africa. It confirmed the statutory requirement that at least one commissioning parent must contribute a gamete in surrogacy arrangements. While the minority emphasised dignity, equality and reproductive choice, the majority prioritised the best interests of children and the importance of a genetic link. The judgment illustrates the tension between adults' rights to reproductive autonomy and the state's duty to protect children's rights under the Constitution.

[34] The minority (Khampepe J, with Cameron J, Froneman J and Madlanga J concurring) held that section 294 violated section 12(2)(a), which protects the right to make decisions concerning reproduction. Preventing persons who are both conception and pregnancy infertile from accessing surrogacy arrangements limited their reproductive decision-making and harmed psychological integrity. The minority found that the limitation was not justified under section 36. They stressed that autonomy, dignity and equality supported the invalidation of section 294.

17. AB and other V Pridwin Preparatory School and others (CCT294/18) [2020] ZACC 12; 2020 (9) BCLR 1029 (CC)[35]

The judgment of Khampepe J in the case is important in relation to the rights of the child to be heard in matters that affect them. She quotes the United Nations Convention on the Rights of the Child, the African Charter on the Rights and Welfare of the Child and the Children's Act 38 of 2005. The Convention at Article 12 states that a child who is capable of forming their own view has the right to express them in matters affecting their interests (para 238).

Children should be given the opportunity to be heard in judicial and administrative proceedings that affect them, one of which is their education, including suspensions and expulsions (para 238). The judgment quotes section 10 of the Children's Act, which states that children should be involved in the decisions affecting their lives by expressing their views and participating in these decisions (para 243).

Cross reference education

18. Centre for Child Law and others v Media 24 Limited and others, 2020 (3) BCLR 245 (CC)[36]

This case extended the ambit of section 154(3) of the Criminal Procedure Act 51 of 1977, which provides that the identity of children accused of crimes or who are witnesses at criminal proceedings cannot be published in any manner. There was an omission in the section, in that it did not include victims of crime. The Court gave Parliament 24 months to correct the defects in section 154(3) by adding the protection of anonymity to child victims of crime. The Court further required a new section to be added, section 154(3A), that stated that the anonymity protection should continue after a child reached the age of 18 unless they consented to the publication of their identity or a court decided that such publicity could occur.

Parties

The applicants were the Centre for Child Law, KL (a child victim), Childline South Africa, NICRO, and Media Monitoring Africa Trust. The respondents included major media companies (Media 24 Ltd, Independent Newspapers (Pty) Ltd, and Times Media Group Ltd), along with the Minister of Justice and Correctional Services and the National Director

[35] https://www.saflii.org/za/cases/ZACC/2020/12.html

[36] https://collections.concourt.org.za/bitstream/handle/20.500.12144/36583/Full%20judgment%20Official%20version%204%20December%202019.pdf?sequence=38&isAllowed=y

of Public Prosecutions.

Background and facts

The case arose after the widely publicised discovery of a girl (known as "KL") who had been kidnapped as a baby and raised under a different identity. When criminal proceedings were initiated against the alleged kidnapper, KL faced intense media scrutiny. Section 154(3) of the Criminal Procedure Act 51 of 1977 prohibited the publication of identifying information about children accused and witnesses, but it did not explicitly protect child victims. KL and the Centre for Child Law approached the courts seeking protection against disclosing her identity and challenging the constitutionality of the provision.

Legal issues before the Court

The Constitutional Court considered two main issues:

- Whether section 154(3) of the Criminal Procedure Act is unconstitutional because it fails to safeguard the identity of child victims in criminal proceedings.
- Whether the protection of children's anonymity should persist after they turn 18.

Court's findings and reasoning

The Court held that section 154(3) created an irrational distinction by protecting child accused and witnesses but not child victims. This differentiation violated the right to equality and undermined children's rights to dignity, privacy, and the constitutional principle that the best interests of the child are paramount. The Court found that protecting children's identities did not significantly limit media freedom, because the media could still report on cases without identifying the child. The Court further held that the absence of ongoing protection after a child turns 18 could harm children and undermine their dignity and rehabilitation, and therefore protection should continue unless the person consents to disclosure or a court permits it.

Court order

The Court confirmed that section 154(3) of the Criminal Procedure Act is unconstitutional in so far as it does not protect child victims and does not offer ongoing protection after they turn 18. The declaration of invalidity was suspended for 24 months to allow Parliament to amend the law. In the meantime, the Court ordered a reading-in so that the prohibition on publication applies to the child accused, witnesses, and victims, and remains in place after they reach adulthood unless they consent or a court orders disclosure.

Why the case matters

This judgment greatly enhanced the protection of children involved in criminal proceedings. It acknowledged that public identification of child victims can cause lasting psychological harm and breach their dignity and privacy. The decision also clarified that the constitutional principle that the best interests of the child are paramount may require anonymity protection to continue into adulthood.

19. AV and another v DC and others (Thaldar and another as amici curiae), [2024] 3 All SA 724 (GJ)

The Court clarified the law on gamete donors, and held that they do not hold parental rights in terms of the Children's Act 38 of 2005. In this case, however, because DC, the sperm donor, had played a significant role in the child's life, he was accorded certain limited rights of contract and certain responsibilities.

Parties

AV and NZ, a same-sex couple, conceived a child through artificial insemination. DC, the sperm donor, sought to be recognised as a co-parent.

Background and facts

The child, Z, was born in 2019. Although DC's role was disputed, he was involved in her early life. When he demanded full parental rights and withheld consent for Z's international travel, conflict arose.

Legal issues before the CCourt

The issue was whether DC, legally a gamete donor excluded from parenthood by section 40 of the Children's Act, could nonetheless be accorded parental or contact rights, and how this should be reconciled with the constitutional principle that a child's best interests are paramount.

Court's findings and reasoning

The Court held that DC was not a legal parent under the Act, but section 28(2) of the Constitution required Z's best interests to be the guiding principle. It found that excluding DC altogether would harm Z by depriving her of a potentially beneficial relationship and aspect of her identity. While his behaviour had been flawed, he had shown genuine commitment. The child's rights to stability, identity, and emotional welfare required that her ties to him not be severed.

Court order

Z was declared the legal child of AV and NZ, who hold full parental rights and responsibilities. DC was confirmed as a gamete donor but granted limited contact and ordered to contribute to maintenance and medical aid. AV was released from needing his consent for temporary international travel with Z.

Why the case matters

Although involving relatively privileged parties, the case reinforces the principle that in all disputes concerning children, their constitutional rights and best interests must prevail over adult conflicts. It highlights the judiciary's continuing role as upper guardian of children, ensuring that their identity, security, and relationships are protected above the preferences of parents or donors.

In situations where children are born of surrogate mothers, their best interests are protected by the requirement that the conception is effected by the use of the gametes of both commissioning parents, or if not possible, at least one.

The purpose of having the option of surrogacy is for parents unable to have children naturally to have the option of entering an agreement with someone else to bear their child. If there is no genetic link to the child to be born, surrogacy could become a system where "designer children" could be created, instead of adoption being followed where a genetic link is not possible. The only purpose of having the option of surrogacy.

The Children's Act disqualifies gamete donors from parental rights unless statutory exceptions or valid agreements apply (section 41(3)). In this case, the gamete donor DC applied for parental rights and responsibilities, arguing that he had played a part in the child Z's life, contributed financially and that there was a co-parenting agreement between him and the birth mother and her permanent life partner, even though not in writing. He argued that it was in the child's best interests that he be given these rights.

The Court did not give DC full parental rights, nor did it agree that a co-parenting agreement existed. It did not agree that the definition of "parent" in the Children's Act, which excludes a person "who is biologically related to a child by reason only of being a gamete donor for the purposes of artificial fertilisation" was unconstitutional. However, because the court is enjoined to consider the child's best interests, and because DC had indicated a genuine involvement in the child, the Court found that DC was entitled to limited rights of contact and care under section 23 of the Children's Act. The Court declined to remove DC's name from Z's birth certificate as requested by AV and NZ, finding that having DC's identity on her birth certificate would be in Z's interest. The Court held that it gave Z the right at a later stage to know and have a relationship with her father should she choose, which was in Z's best interests. The Court recognised both AV

and NZ who were in a permanent life partnership as parents within the meaning of parent in the Children's Act.

20. Scalabrini Centre of Cape Town and another v Minister of Home Affairs and others (Consortium for Refugees and Migrants in South Africa as amicus curiae) , 2024 (4) BCLR 592 (CC)[37]

The Scalabrini Centre challenged the constitutionality of sections 22(12) and 22(13) of the Refugees Act 130 of 1998 and the Refugee Regulations giving effect to those provisions (particularly regulation 9) which provided that an asylum seeker's application would be deemed abandoned if their permit was not reviewed within one month of expiry. These two subsections were inserted into the Act and brought into operation on 1 January 2020. The Court held that the provisions unfairly disadvantaged children who are a vulnerable group. The Court agreed, and held that the provision must be amended to ensure that the children's in the asylum system's constitutional rights must be protected.

Parties

The applicants were the Scalabrini Centre of Cape Town and the Consortium for Refugees and Migrants in South Africa (CoRMSA). The respondents included the Minister of Home Affairs and other government officials responsible for administering asylum processes.

Background and facts

The case concerned 22(12) of the Refugees Act, which provided that an asylum seeker's application would be deemed abandoned if their permit was not renewed within one month of expiry. The applicants argued that this short timeline disproportionately affected vulnerable groups, including children.

Legal issues before the Court

The main issue was whether the abandonment provision unjustifiably limited the rights of the child under section 28(2) of the Constitution, by failing to consider individual circumstances such as a child's vulnerability.

Court's findings and reasoning

The Court examined constitutional rights including the right to dignity, just administrative action, and the best interests of the child. It found that rigid application of the rule failed

[37] https://www.saflii.org/za/cases/ZACC/2023/45.html

to meet constitutional standards, particularly in matters affecting children.

The best interests of the child must be the paramount consideration in all matters concerning children. Children's rights are not dependent on legal status and must be protected even within immigration processes. The Court held that the challenged provisions were overly rigid and did not permit discretion for late renewals based on valid reasons, including children's best interests. This was unconstitutional and procedurally irrational.

Court order

The Court declared the relevant provisions unconstitutional and suspended the declaration for 24 months. It read in interim relief to allow good cause, including children's interests, to justify late renewals.

Why the case matters

The case affirms that children in the asylum system are entitled to constitutional protection. It ensures that no child is arbitrarily excluded from legal status due to administrative rigidity, reinforcing the paramountcy of children's rights in immigration law.

Cross reference to migrants

Table of cases[38]

Case citation	Key constitutional principles	Core rights established
Name and nationality from birth (section 28(1)(a)		
Centre for Child Law v Director General: Department of Home Affairs and Others, 2022 (4) BCLR 478 (CC)	Every child has the right to a name, nationality, and legal identity from birth (s 28(1)(a) and 28(2)).	Right to birth registration and nationality for children of foreign parents cannot be denied if both parents are not present with valid documentation.
P.P.M and Others v Minister of Home Affairs and Others (14238/21) [2024] ZAGPPHC 2; [2024] 1 All SA 847 (GP); 2024 (5)	Every child has the right to a name, nationality, and legal identity from birth (s 28(1)(a) and 28(2).	The practice of blocking identities carried out by the Department of Home Affairs , on the basis of suspicion of unlawful

[38] The table categorises the cases under headings based on the Constitution. But there is overlap and all the cases essentially fall under section 28(2) which says that a child's best interests are of paramount importance in every matter concerning the child.

Case citation	Key constitutional principles	Core rights established
BCLR 703 (GP); 2024 (3) SA 469 (GP) (16 January 2024)		residence was unconstitutional.
Right of every child to parental care (section 28(1)(b)		
C and Others v Department of Health and Social Development, Gauteng and Others, [2012} ZACC 1; 2012(2) SA 208 (CC)	Right to family care paramount (s 28(1)(b) and 28(2). Section 155 of Children's Act is unconstitutional.	Removal of children from parents without court oversight unconstitutional.
Wilsnach NO v TM and Others, [2021] 1 All SA 600 (GP)	What constitutes true parenting defined as person who cares for, maintains, acts as a guardian, protects against neglect and abuse and provides love and guidance to a child (s 28(1)(b) and 28(2).	A parent that plays no role in a child's life cannot claim parental rights, particularly monetary ones.
VJV and another v Minister of Social Development and another (Centre for Child Law as amicus curiae) , 2023 (10) BCLR 1250 (CC	A child has a right to parental care from both parents, even if they are not married and are not heterosexual (s 28(1)(b) and 28(2).	Exclusion of permanent life partners from automatic parental rights unconstitutional.
Right of every child to basic nutrition, shelter, basic health care and social services (section 28(1)(c)		
Equal Education and others v Minister of Basic Education and others, [2020] JOL 47754 (GP)	Not to be deprived of a daily meal in a child's best interests (s 28 (1)(c), s 28 (2) and 29(a)).	Right of learners to daily meal provided for by the National School Nutrition Programme whether they attended school or studied at home during COVID-19.
Right of every child to be protected from maltreatment, neglect, abuse or degradation (section 28(1)(d)		
S v Williams and Others 1995 (7) BCLR 861 (CC)	Right to dignity, protection from harm and maltreatment, and access to child-sensitive justice (s 28(1)(d).	Abolition of judicial corporal punishment for children
Christian Education SA v Minister of Education 2000 (1) BCLR 1051 (CC)	Right to be protected from abuse (s 28(1)(d)) and s 28(2)).	Use of corporal punishment in independent schools

Case citation	Key constitutional principles	Core rights established
Freedom of Religion SA v Minister of Justice and Constitutional Development and Others 2019 (11) BCLR 1321 (CC)	Corporal punishment, even by a parent violates a child's dignity (s10), fails to protect the child from violence (s 12(1)(c) and is not in the child's best interests (s 28(2)).	Corporal punishment in the home declared unconstitutional.
Right of every child, when detained, to be kept separately from detained persons over the age of 18 and to be treated in a manner that accounts for the child's age (section 28(1)(g)		
Raduvha v Minister of Safety and Security and Another Constitutional Court, 2016	Right to liberty, due process, and prioritisation of child's best interests – Section 28(1)(g) and (2)	The arrest and overnight detention of a 15-year-old requires that a child's best interests be given paramount importance and that detention be used only as a measure of last resort.
Best interests of the child (section 28(2)		
M v S, 2007 (12) 2007 (12) BCLR 1312 (CC)	Child's best interests must be considered separately from the caregiver (s 28(2)).	Cannot sentence a primary caregiver without considering impact on children in losing their caregiver/parent.
AD and DD v DW and Others The Centre for Child Law, 2008 (4) BCLR 359 (CC)	Children are protected by the Children's Act in adoption proceedings. They cannot be removed across borders (s 28(2))	A child cannot be taken across a border. That constitutes inter-country trafficking under the guise of adoption.
Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development and Others 2009 (7) BCLR 637 (CC)	Right to child-sensitive processes and expedited justice (s 28(2)).	Child victims must be protected in court and intermediaries must be provided in sexual offences involving children.
Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another [2013] ZACC 35	Criminalising sexual conduct between adolescents (aged 12-15) infringes children's rights, and it is not in their best interest that sexual conduct of this kind is criminalised (s 28(2)).	The Court declared the section of SORMA criminalising sexual conduct between adolescents unconstitutional.

Case citation	Key constitutional principles	Core rights established
J v National Director of Public Prosecutions and Another [2014] ZACC 13	The details of a minor convicted of a sexual offence cannot be automatically placed on the National Register of Sex Offenders (s 28(2)).	The circumstances of each case must be considered by the courts before place a child's name on the register.
AB and Another v Minister of Social Development 2017 (3) BCLR 267 (CC)	The law of surrogacy requires the baby born to a surrogate must have a genetic relationship with one parent. The alternative is adoption (s 28(2)).	The law of surrogacy clarified and distinguished from adoption.
AB and other V Pridwin Preparatory School and others (CCT294/18) [2020] ZACC 12; 2020 (9) BCLR 1029 (CC	The Children's Act, at section 10 provides that children have a right to participate in any matter affecting them, depending on age, maturity and stage of development, which is their best interests.	The right to participate is fundamentally in the best interests of the child.
Centre for Child Law and Others v Media 24 Limited and Others, 2020 (3) BCLR 245 (CC)	Children's dignity and privacy is important in criminal proceedings. The identity of victims of crime need to be protected (s 10 and 28(2)).	Protection of anonymity for children in legal proceedings extended to victims.
AV and Another v DC and Others [2024] 3 All SA 724 (CJ)	Future child's potential best interests must guide decisions and gamete donor not automatically given parental rights and responsibilities (s 28(1)(b) and s 28(2).	Gamete donors in surrogacy arrangements do not hold parental rights and responsibilities.
Scalabrini Centre of Cape Town and Another v Minister of Home Affairs and Others 2024 (4) BCLR 592 (CC)	Sections of regulations under the Refugees Act 130 of 1998 were held to be unconstitutional and unfair to children's best interests (s 28(c) and 28(2)).	The need for asylum seekers to renew permits within one month of expiry was held to be unfair to children.

Current enforceable rights

The following rights have now been firmly established by the courts.

- All children have the right to a name and nationality from birth. This applies not only to South African citizens and those with permanent residence, but also to refugees, asylum seekers, and children of migrants who are here illegally.
- Children have a right to family or parental care. The definition of parents is not limited to married heterosexual couples but also includes individuals in long-term life partnerships, those in civil unions, LGBTQI+ people, and any other person who assumes a parental role as established in case law, even if not biologically related to the child.
- Neither a surrogate mother who carries a child nor a gamete donor is regarded as a parent with parental rights.
- If a child is to be removed from their family, court oversight must be required before such removal, and the child (if sufficiently mature) and parents must participate in the judicial process.
- A true parent may not necessarily be the biological mother or father. It could be someone like a grandparent who cares for, maintains, acts as a guardian, protects the child from neglect or abuse, and provides love and guidance.
- Children at school are entitled to a daily meal. This should not be arbitrarily taken away.
- Corporal punishment is neither allowed nor lawful in schools, as judicial punishment, or in the home.
- Children, when detained, must be kept separate from adults and housed in their own facilities.
- Child witnesses, especially those giving evidence in criminal cases and sexual offences, should be provided with an intermediary.
- Children who are victims of crimes should receive the same protections as children who are accused of crimes or child witnesses when it comes to in camera court proceedings. In other words, proceedings where the victim is a crime should be held in camera.
- Compliance with section 28(1)(g) requires that a child should not be detained, and if a child is detained, their parents or guardian must be informed of the detention.
- When a court sentences a parent or person with parental responsibilities who has minor children to care for, the court should consider the best interests of the child. Sentencing must take the children's interests into account.

- Adoption that does not follow the procedures outlined in the Children's Act is illegal. No child can be taken out of the country to live with parents who claim to have adopted the child informally, as this could lead to child trafficking.
- A child has the right to be heard, subject to their age, maturity and stage of development.
- Sexual interactions between teenagers should not be criminalised.
- The details of a minor convicted of a sexual offence should not automatically be recorded on the National Register of Sex Offenders; however, each case must be examined by the court, which is responsible for making a decision.

The right to education

> *Education is both a human right in itself and an indispensable means of realising other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalised adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities.*[1]

Cases in this chapter

1. Governing Body of the Juma Musjid Primary School and Others v Essay NO and Others (Centre for Child Law and Another as Amici Curiae), 2011 (8) BCLR 761 (CC) 378
2. Madzodzo and Others v Minister of Basic Education and Others [2014] ZAECMHC 5 380
3. Tripartite Steering Committee and Others v Minister of Basic Education and Others [2015] ZAECHC 67 381
4. Linkside and Others v Minister of Basic Education and Others (3844/2013) [2015] ZAECGHC 36 383
5. Minister of Basic Education and others v Basic Education for All and others, [2016] 1 All SA 369 (SCA) 385
6. Komape and Others v Minister of Basic Education and Others (Limpopo High Court, Polokwane) Case No. 1416/2015 387
7. R K and Others v Minister of Basic Education and Others (754/2018; 1051/2018) [2019] ZASCA 192; [2020] 1 All SA 651 (SCA); 2020 (2) SA 347 (SCA) (18 December 2019) 387
8. Equal Education and others v Minister of Basic Education and others (Children's Institute as Amicus Curiae), [2020] JOL 47754 (GP) 389
9. D.A v Governing Body, Settlers High School and Others [2002] 4 All SA 294 (C) 391
10. Minister of Education v Pillay [2007] ZACC 21 393
11. Head of Department, Department of Education, Free State Province v Welkom High School and Another; Head of Department of Education, Free State Province v Harmony High School and Another [2013] ZACC 25 395
12. AB and another v Pridwin Preparatory School and others, 2020 (9) BCLR 1029 (CC) 397
13. Centre for Child Law and others v Minister of Basic Education and others (Section 27 and another as amici curiae), [2020] 1 All SA 711 (ECG) 399

[1] ICESCR Committee General Comment 13 (21st Session, 1999) —The Right to Education (art 13)‖ UN Doc E/C.12/1999/10 at para 1, available at https://www.refworld.org/legal/general/cescr/1999/37937

14. Head of Department, Mpumalanga Department of Education & Another v Hoërskool Ermelo & Another [2009] ZACC 32 (Constitutional Court) 402

15. MEC for Education in Gauteng Province and Others v Governing Body of Rivonia Primary School and Others (CCT 135/12) [2013] ZACC 34; 2013 (6) SA 582 (CC);2013 (12) BCLE 1365 (CC) (3 October 2013) 404

16. Head of Department, Department of Education, Free State Province v Welkom High School and Another; Head of Department of Education, Free State Province v Harmony High School and Another [2013] ZACC 25 408

The Constitution

The Constitution provides that everyone has the right to a basic education, including adult basic education, and the right to further education, which the state, through reasonable measures, must progressively make available and accessible (section 29(1)(a) and (b).

Furthermore, everyone has the right to receive education in the official language of their choice in public educational institutions where this is reasonably practicable. To realise this right, the state must consider all reasonable educational alternatives, including single-medium institutions, taking into account:

- Equity
- Practicability
- The need to redress the results of past racially discriminatory laws and practices. (section 29(2)

Everyone has the right to establish and maintain, at their own expense, independent educational institutions that do not:

- Discriminate on the basis of race
- Are registered with the state, and
- Maintain standards that are not inferior to standards at comparable public educational institutions.(Section 29 (3).

General points

This section focuses in the main, but not exclusively on section 29(1) of the Constitution in terms of which everyone has the right to a basic education.

- The South African Schools Act 84 of 1996 operationalises section 29 of the Constitution. First, it makes it compulsory for every child aged 7 or older to attend school. Children must remain at school until the last day of the year in which they turn 15 or until they complete Grade 9. The Act states that no learner may be refused admission to a public school on the grounds of race, ethnicity, gender, religion, disability, language or the learner's inability to pay school fees (case law has extended this to include cases where there is no birth certificate or documentation).
- Section 10 of the South African Schools Act explicitly prohibits corporal punishment.

- The case law has clarified what the right to basic education entails. Most importantly, it has been established that the right to basic education, as distinct from other socio-economic rights in the Constitution, is "immediately realisable."[2]
- A series of cases concerning school infrastructure have been heard over the years, resulting in the state publishing comprehensive minimum uniform norms and standards for public school infrastructure. These cover power supply, water supply and sanitation; building materials; perimeter fencing; special access for children with physical disabilities; the location of new schools; classroom size; laboratories; libraries; sport and recreation facilities; connectivity; and certain design norms. [3]
- A number of cases have addressed textbook provision, but no national framework has yet been established, setting out minimum standards for textbook provision. Section 5A of the South African Schools Act requires the Minister to prescribe minimum uniform norms and standards for the provision of learning and teaching support material. To date, the Basic Education Laws Amendment Act, 2024, has provided for centralised textbook procurement and deals with supply chains under national oversight. Some provinces have issued circulars on textbooks. For example, KwaZulu-Natal circular 146 of 2024 outlines textbook retrieval and distribution processes. In the Eastern Cape, circular 06 of 2024 deals with the procurement of workbooks and textbooks. There are no consolidated, enforceable national regulations dedicated to textbook provision, despite the Minister of Basic Education v Basic Education for All, discussed below.
- There is very little case law on the quality of education provided, for example, in relation to teacher standards, teacher absenteeism, low marks, maths and science pass rates, etc. This might be an area of further litigation.

Statistics[4]

Learners at school. In 2023, there were approximately 15,4 million learners at school (86,8%), and virtually all children (97,3%) had attended school by the age of 15. Approximately two-thirds of learners (63,6%) were still in school by the age of 18, which is usually when learners leave school having completed grade 12. Some people over 18 remained at school, with 18,3% of twenty-year-olds still attending. Only 3,1% of people aged 20 or older do not have any education, and those with a grade 12 qualification

[2] Governing Body of the Juma Musjid Primary School & Others v Essay N.O. & Others [2011] ZACC 13 (see later summary)

[3] South African Schools Act, 1996 (Act No. 84 of 1986), Regulations Relating to Minimum Uniform Norms and Standards for Public School Infrastructure, Government Gazette No. 50876, 27 June 2024, available at https://www.gov.za/sites/default/files/gcis_document/202406/50876gon4994.pdf

[4] Stats SA, *General Household Survey (GHS)*, Statistical Release P0318 available at https://www.statssa.gov.za/publications/P0318/P03182023.pdf

increased from 30,5% to 50,8%.[5]

Dropping out. Among learners who dropped out before age 18, the primary reasons cited were poor academic performance (29.1%), lack of financial resources (19.5%), and family obligations (7.2%). Girls were disproportionately affected by family responsibilities, with 14.1% citing this reason, compared with only 0.1% of boys. [6]

No-fee schools. In 2023, 66.1% of learners attended no-fee schools, although there is provincial variation, with 87.3% in Limpopo and 51.0% in the Western Cape.[7]

Travelling to school. Almost two-thirds (65,1%) of learners walk to school. Another 13,2% are transported to school by vehicles rented by parents, while 9,3% are transported by private vehicles. Although 4,9% use public buses, 1,3% use buses or minibus taxis provided by the school. Walking was most common in the Free State (77,6%), Limpopo (75,6%) and Mpumalanga (74,8%), and least common in the Western Cape (51,7%). Almost one-fifth (23,4%) of learners in the Western Cape and 16,6% of learners in Gauteng were transported to school by private vehicles, compared with only 3,3% in Limpopo. The use of vehicles hired by parents was highest in Gauteng (16,7%) and KwaZulu-Natal (15,9%).[8]

Feeding schemes. More than three-quarters (76,7%) of learners attending public schools benefitted from school feeding schemes in 2023, compared with 63,1% in 2009. Over 80% of learners in the Eastern Cape, Northern Cape, KwaZulu-Natal, Mpumalanga and Limpopo benefitted from school nutrition programmes at public schools. Learners in Limpopo (89,4%) and the Eastern Cape (88,1%) benefitted most from these programmes, while only 54,4% of learners in the Western Cape and 61,2% of learners in Gauteng benefitted from them. [9]

Corporal punishment. Although case law and legislation have prohibited it, corporal punishment persists in some schools. Prevalence has declined since 2009, though it remains a concern. Nationally, the percentage of learners who experienced corporal punishment at school decreased from 16,6% in 2009 to 6,3% in 2023. Corporal punishment was most prevalent among learners in KwaZulu-Natal (17,3%) and the Eastern Cape (11,9%). By comparison, only 0,5% of learners in Gauteng and 0,3% of learners in the Western Cape were reportedly subjected to this form of punishment in 2023.[10]

[5] Stats SA, GHS p ix
[6] Stats SA, *GHS* p ix
[7] Stats SA, *GHS* p ix
[8] Stats SA, *GHS* Figure 4.6 p 13
[9] Stats SA, *GHS* Figure 4.7 p 14
[10] Stats SA, GHS Figure 4.8 p 14

Educational attainment has steadily improved over the past two decades. By 2023, 50.8% of South Africans aged 20 years and older had at least completed Grade 12, up from 30.5% in 2002. The proportion with no formal education declined from 11.4% to just 3.1% (Figure 4.5, p. 17). Functional illiteracy fell, with only 3,2% of people aged 20- 39 being functionally illiterate. As many as 34,4% of individuals over 60 are functionally illiterate. [11]

Early Childhood Development (ECD). 33.6% of children aged 0–4 attended ECD facilities such as day-care centres, crèches, playgroups, nursery schools, or pre-primary schools. Access to these services was highest in Gauteng (40.6%) and the Western Cape (39.4%), while over 54% of children stayed at home with parents or guardians. Nationally, almost two-thirds (61,1%) of children aged 0–4 stayed at home with a parent or guardian, or with another adult. This figure was most pronounced in KwaZulu-Natal (72,8%) and the Northern Cape (69,2%).[12]

Infrastructure. The SAHRC released a 2025 report on the state of school infrastructure in the Eastern Cape. It found that there was still enormous room for improvement and urged the DBE to adhere to the Minimum Norms and Standards for School Infrastructure on an urgent basis. In particular, it raised concerns that traditional pit toilets were still being used in 427 schools. It added that Ventilated Improved Pit (VIP) latrines, intended to be an improvement, "frequently fail to meet the safety and usability needs of younger learners due to poor design and implementation …. This report makes it clear that the continued use of both traditional pit toilets and unsafe VIP latrines constitutes an ongoing breach of learners' rights to safety, dignity, and education. The violations are preventable, well-documented, and unacceptable in a society committed to upholding human rights". [13]

[11] Stats SA, GHS Figures 4.10 and 4.12 pp 16 – 18

[12] Stats SA, GHS pp 8 - 9

[13] South African Human Rights Commission, Investigative Report: Systemic Failures in School Sanitation Infrastructure in the Eastern Cape p 20, available at https://sahrc.org.za/home/21/files/EC%20INVESTIGATIVE%20REPORT%20ON%20SANITATION%20IN%20THE%20EC%20FEB%202025.pdf

Cases

Right to basic education is an immediate right

1. Governing Body of the Juma Musjid Primary School and Others v Essay NO and Others (Centre for Child Law and Another as Amici Curiae), 2011 (8) BCLR 761 (CC)[14]

This case affirmed that the right to basic education is not dependent on the state's available resources and is not progressively realisable. It is an immediate right that every child has, and the state is obliged to do everything in its power to ensure it is provided. In this case, the state school was evicted from land owned by a private owner, but its eviction was postponed while the MEC found an alternative place or school to accommodate the children so that their schooling was not interrupted. The case also placed an obligation on private entities to respect the right to basic education.

Parties

The appellants were the Governing Body and the principal of a public school operating on private property owned by the Juma Musjid Trust. The respondents included the trust, which sought eviction, and the MEC for Education in KwaZulu-Natal, who had failed to enter into an agreement under section 14(1) of the South African Schools Act 84 of 1996. Section 14(1) provides: "If public schools are provided on private property, the Member of the Executive Council must, in terms of an agreement with the owner of the property, ensure the continued provision of education and the performance of the functions of the school".

Background and facts

The Juma Musjid Trust owned land in Durban on which the Juma Musjid Primary School operated as a public school. The Trust permitted the school to use its property, but no formal agreement was concluded with the Department of Education, as required by section 14(1) of the Schools Act. After negotiations broke down and the Department failed to take responsibility for services and maintenance, the Trust sought an eviction order. The High Court granted the eviction, raising concerns about potential disruption to learners' education.

Legal issues before the Court

Whether the eviction infringed the learners' constitutional right to basic education under section 29(1)(a) of the Constitution and whether the state had fulfilled its positive

[14] https://www.saflii.org/za/cases/ZACC/2011/13.html

obligations to protect that right.

Court's findings and reasoning

The Court emphasised that the right to basic education is immediately realisable and unqualified. Section 8(2) of the Constitution imposes a duty on private parties not to infringe constitutional rights. Section 14 of the Schools Act requires formal agreements between private property owners and education authorities to ensure learners' continued access to education.

The Court found that the MEC had failed in its obligations by not securing a section 14 agreement with the Trust. It acknowledged that the Trust had not acted unreasonably, but stressed that the learners' right to education could not be disregarded. At para 37, the Court stated: "Unlike some of the other socio-economic rights, this right (to basic education) is immediately realisable. There is no internal limitation requiring that the right be progressively realised within 'available resources' subject to 'reasonable legislative measures'."

The Court added: "Basic education is an important socio-economic right directed, among other things, at promoting and developing a child's personality, talents and mental and physical abilities to his or her fullest potential (para 42)." It also held that socio-economic rights, such as the right to basic education, must be protected against improper invasion.

Court order

The Court confirmed the eviction order but postponed it to allow the MEC time to make alternative arrangements. It found that while the Trust was entitled to regain possession, the learners' right to education must be respected during the transition.

Why the case matters

This case reaffirmed that the right to basic education is immediately enforceable. It underscored the state's obligation to proactively protect this right and clarified private parties' duty not to impair its enjoyment. The Court balanced competing rights to property and education, elevating learners' constitutional priority of access to schooling.

Right to minimum standards required to learn

2. Madzodzo and Others v Minister of Basic Education and Others [2014] ZAECMHC 5[15]

This case was brought by a group of people acting on behalf of learners in the Eastern Cape against the Minister of Basic Education and the MEC for Education. It required the state to provide desks and chairs for learners, many of whom were attending under-resourced schools with severe shortages of basic school furniture. Many learners were being forced to sit on the floor. The Court ordered the government to provide furniture in schools with shortages and did not accept its rationale for not providing it on the basis of lack of funding.

Parties

Applicants: Madzodzo and others, acting on behalf of learners at various schools in the Eastern Cape.

Respondents: Minister of Basic Education, Member of the Executive Council (MEC) for Education in the Eastern Cape, and relevant national and provincial education officials.

Background and facts

Many public schools in the Eastern Cape were severely under-resourced, particularly in furniture. Thousands of learners attended classes without desks or chairs, and in some cases were forced to sit on the floor. Despite repeated promises and court orders to address the shortage, the Eastern Cape Department of Education and the national government had failed to provide adequate furniture. This systemic failure led the applicants to return to Court to enforce learners' constitutional rights.

Legal issues before the Court

Section 29(1)(a) of the Constitution guarantees the right to basic education, which is immediately realisable and not subject to progressive realisation. This includes essential inputs such as infrastructure, educators, and school furniture. Section 195(1) sets out principles of public administration, including transparency, accountability, and responsiveness. Section 237 requires all constitutional obligations to be performed diligently and without delay.

[15] https://www.saflii.org/za/cases/ZAECMHC/2014/5.html

Court's findings and reasoning

Revelas J reaffirmed that the right to basic education includes the provision of school furniture and that the state had failed to meet this obligation. The Court rejected the respondents' arguments that delays were due to logistical or budgetary constraints, finding that these did not justify continued violations of learners' rights. The Court was particularly critical of the Department's failure to comply with earlier court orders, characterising its conduct as a breach of both constitutional and administrative duties. The Court reinforced the principle that courts can enforce socio-economic rights through structural remedies.

Court order

The Court ordered the Department of Basic Education to provide adequate furniture to all schools in the Eastern Cape where shortages were found, in accordance with a verified audit. It set timeframes for compliance and directed the Department to report on progress. The judgment reinforced the Court's supervisory role in enforcing socio-economic rights.

Why the case matters

Madzodzo established that basic education includes the provision of school furniture and that budgetary or logistical excuses cannot justify a failure to fulfil constitutional obligations. It affirmed that section 29(1)(a) is enforceable through direct and structural orders. The case illustrates the judiciary's role in holding government accountable for systemic violations and affirms that socio-economic rights have practical content that must be respected in daily practice.

3. Tripartite Steering Committee and Others v Minister of Basic Education and Others [2015] ZAECHC 67[16]

This case was brought by three schools in the Eastern Cape against the Minister of Education and the MEC for Education in the province, seeking the provision of transport to school for disadvantaged scholars who lived far from school. The Court held that the right to basic education cannot be realised if a scholar cannot get to school owing to a lack of transport, disadvantage, and living too far away to walk.

[16] https://www.saflii.org/za/cases/ZAECGHC/2015/67.html

Parties

Applicants: Tripartite Steering Committee, comprising three schools in the Eastern Cape acting on behalf of their learners and governing bodies, together with Masivuyiswe Secondary School.

Respondents: Minister of Basic Education, Member of the Executive Council (MEC) for Education in the Eastern Cape, and the Eastern Cape Department of Basic Education.

Background and facts

Learners in rural Eastern Cape communities were forced to walk long distances, often more than 10 kilometres, sometimes in dangerous conditions, to attend school. Although the Eastern Cape Department of Education had a policy on scholar transport, it failed to implement it consistently. The applicant schools either received no transport or had their applications for assistance refused without justification. This lack of transport severely affected learners' access to education.

Legal issues before the Court

Section 29(1)(a) of the Constitution guarantees the right to basic education. This right is immediately realisable and not subject to progressive realisation. Essential components of the right include the conditions necessary to access education, such as safe and reliable transport for learners who live far from school. A rigid application of a 5 or 10 kilometre distance rule, without consideration of contextual factors such as terrain, safety, and learner vulnerability, is inconsistent with the Constitution.

Court's findings and reasoning

Plasket J held that the right to basic education encompasses more than the provision of schools and teachers. It includes the means to access schooling. The failure to provide scholar transport to learners who live far from school and cannot afford private transport amounted to a violation of their right to education. The Court criticised the inflexible application of the 5 kilometre threshold and the Department's failure to consider learners' actual needs. It found that the Department had a constitutional obligation to provide transport where it is essential for learners to access school.

Court order

The Court held that the state has a constitutional obligation to provide scholar transport where scholars demonstrate genuine need (distance and inability to afford transport). In such cases, transport to school is necessary for learners to access basic education. It reviewed and set aside the provincial department's refusals to provide transport, ordering the decisions to be reconsidered in line with the Constitution. The department

was directed to provide transport to qualifying learners and to report on its progress in developing a revised transport policy.

Why the case matters

The case:

- Firmly establishes that scholar transport is a constitutional component of basic education when access is otherwise impossible.
- It reinforces the concept of minimum core obligations under section 29, requiring active measures to ensure actual *access* to schooling, not merely theoretical availability.
- It mandates that policies be interpreted in light of constitutional needs-based flexibility, advancing learners' rights over administrative rigidity.
- It strengthens jurisprudence on education as an immediately realisable socio-economic right, with implications for related fields such as health, nutrition, and infrastructure.

4. Linkside and Others v Minister of Basic Education and Others (3844/2013) [2015] ZAECGHC 36[17]

The case, brought by 90 schools in the Eastern Cape, concerned the state's obligation to guarantee the right to basic education, as required by section 29(1)(a), which is an immediately realisable right. Under educational policies, the state is obliged to provide schools with the full complement of teaching and non-teaching staff. If the state fails, the courts are empowered to issue structural interdicts to enforce compliance with socio-economic rights. In this case, the Court ordered the state to appoint and pay the teachers whose posts had been approved and to reimburse schools that had used their own funds to pay teacher salaries. It also issued a structural interdict requiring the Department to report regularly to the Court on its compliance.

Parties

Applicants: Linkside and 90 school governing bodies acting on behalf of Eastern Cape public schools and their learners.

Respondents: Minister of Basic Education, MEC for Education in the Eastern Cape, and relevant provincial and national education authorities.

[17] https://www.saflii.org/za/cases/ZAECGHC/2015/36.html

Background and facts

The applicants sought relief for the state's failure to appoint and pay teachers at public schools in the Eastern Cape, despite those posts being funded and approved. Schools either employed teachers privately and were not reimbursed, or operated without sufficient teaching staff. This affected both learning outcomes and the right to education. The crisis had persisted for several years, with the Department failing to implement court orders issued in previous litigation (e.g., Centre for Child Law cases).

Legal issues before the Court

Section 29(1)(a) of the Constitution guarantees the right to basic education, which is immediately realisable. The state is obliged to ensure that public schools have the full complement of teachers as approved in their post provisioning norms. Sections 195 and 237 of the Constitution further require effective public administration and the diligent fulfilment of constitutional obligations. Courts are empowered to issue supervisory and structural interdicts to enforce compliance with socio-economic rights.

Court's findings and reasoning

Revelas J found that the Department of Education had persistently failed to comply with its constitutional and statutory duties to appoint and pay educators. The failure to fill posts that were both approved and funded violated learners' right to basic education. The Court rejected the Department's attempts to excuse non-compliance on the grounds of bureaucratic delays or administrative confusion. It held that the right to basic education includes the availability of teachers in sufficient numbers. The judgment reaffirmed that previous court orders must be implemented in full and that courts are justified in granting structural relief to compel compliance.

Court order

The Court ordered the state to appoint and pay the teachers whose posts had been approved and to reimburse schools that had used their own funds to pay teacher salaries. It issued a structural interdict requiring the Department to report regularly to the Court on its compliance with the order. The judgment reinforced the Court's role in monitoring the implementation of socio-economic rights.

Why the case matters

Linkside advanced the jurisprudence on the right to basic education by clarifying that a sufficient number of appointed and paid teachers is an essential component of that right. It confirmed that learners are entitled to a functioning education system that includes staffing and support. The case affirmed that budgetary or administrative failures cannot be used as a defence for non-compliance with constitutional duties and strengthened the authority of courts to use structural interdicts as an enforcement tool.

5. Minister of Basic Education and others v Basic Education for All and others, [2016] 1 All SA 369 (SCA)[18]

This case affirms that the right to basic education is an immediate right, incomplete if learners are not provided with textbooks. The right to basic education under section 29(1)(a) of the Constitution includes the right of each learner to receive a textbook per subject before the school year begins. In the Limpopo High Court, the Court held that the state must provide textbooks to all school learners before the term began at the start of the year. The state appealed the decision and lost its appeal in the SCA.

Parties

The appellants were the Minister of Basic Education, the Director-General of Basic Education, the MEC for Education in Limpopo, the Acting Head of the Limpopo Department of Education, and the Head of the intervention team established under section 100 of the Constitution. The respondents were Basic Education For All (BEFA), the school governing bodies of 22 schools in Limpopo, and the South African Human Rights Commission (SAHRC).

Background and facts

Between 2012 and 2014, the Department of Basic Education (DBE) failed to provide a textbook for each subject to every learner in Limpopo before the start of each academic year. Despite a clear national policy requiring one textbook per learner per subject, this obligation was not met. Earlier High Court orders directed textbook delivery, but compliance remained partial. BEFA initiated further proceedings in 2014 due to ongoing shortages, particularly affecting poor, rural, black learners attending no-fee schools.

Legal issues before the Court

The Court had to decide whether the right to basic education under section 29(1)(a) of the Constitution includes the right of each learner to receive a textbook per subject

[18] https://www.saflii.org/za/cases/ZASCA/2015/198.html

before the school year begins. It also had to consider whether the DBE's failure to do so constituted a violation of the rights to basic education, equality, and dignity, and whether non-compliance could be excused by logistical and budgetary constraints or the principle of separation of powers. The Court also considered whether the DBE had failed to comply with previous court orders.

Section 29(1)(a) of the Constitution guarantees the right to basic education, which is immediately realisable and not subject to progressive realisation. The Court referred to case law, including Juma Musjid, which confirmed the immediacy of the right, and Hoërskool Ermelo, which recognised education's role in addressing historical inequality. The Court also considered section 3 of the National Education Policy Act and the South African Schools Act 84 of 1996, which require equal access to education and the adequate provision of educational materials.

Court's findings and reasoning

The Court held that textbooks are essential to the realisation of the right to basic education. The DBE had adopted a policy to provide each learner with a textbook and must be held to that standard. The Court rejected the DBE's excuses, including logistical failures, incorrect data from schools, budgetary constraints, and alleged interference with executive functions. It found that the DBE's failure amounted to a violation of the rights to education, equality, and dignity, particularly affecting already disadvantaged learners.

Court order

The appeal was dismissed, and the cross-appeal was upheld. The Court held that section 29(1)(a) entitles every learner in Limpopo to be provided with every prescribed textbook before the commencement of the year. It found that the DBE and the Limpopo Department of Education had violated this right in 2014 and failed to comply with earlier court orders.

Why the case matters

This case reaffirmed that the right to basic education is immediately enforceable and includes the timely provision of textbooks. It confirmed that the government's failure to meet its own standards constitutes a violation of constitutional rights. The judgment strengthened the justiciability of socio-economic rights and affirmed that courts can enforce these rights against the state, even in the face of administrative or financial excuses. It also recognised the role of civil society organisations in holding the government accountable on behalf of marginalised communities.

6. Komape and Others v Minister of Basic Education and Others (Limpopo High Court, Polokwane) Case No. 1416/2015[19]

7. R K and Others v Minister of Basic Education and Others (754/2018; 1051/2018) [2019] ZASCA 192; [2020] 1 All SA 651 (SCA); 2020 (2) SA 347 (SCA) (18 December 2019)[20]

These two cases were brought by the Komape family after five-year-old Michael Komape died after falling into a dilapidated pit latrine at his primary school in Limpopo. The High Court ordered certain damages payments to the family, which the SCA confirmed and extended. In addition, the High Court issued a structural interdict requiring the Minister of Basic Education and the MEC for Education in Limpopo to provide sufficient toilets at each school in the province. They requested plans and programmes for this and set time lines.

Parties

Applicants: Rosina, Maloti, Mokibelo Lydia, and Lucas Khomotso Komape (Michael's family)

Respondents: Minister of Basic Education; MEC for Education, Limpopo; Principal of Mahlodumela Primary School; School Governing Body.

Background and facts

Five-year-old Michael Komape died after falling into a dilapidated pit toilet at his rural school in Limpopo. The toilets were known to be dangerous and unmaintained. His body remained in the pit for hours. Prior warnings and engagements about poor sanitation had been ignored by education authorities. The applicants also sought a declaratory order on constitutional breaches.

Legal issues before the Court

The state has positive constitutional obligations to ensure children's rights under sections 10 (dignity), 11 (life), 28(1)(d) (protection from maltreatment, neglect, abuse or degradation), and 29(1)(a) (basic education) of the Constitution. The Constitution imposes a duty to "respect, protect, promote and fulfil" these rights.

[19] https://www.saflii.org/za/cases/ZALMPPHC/2018/18.html

[20] https://www.saflii.org/za/cases/ZASCA/2019/192.html

Court's findings and reasoning

The Court held that the state breached its constitutional obligations by failing to ensure safe and dignified sanitation, particularly given prior notice of unsafe facilities.

Court order

Awarded damages to the family for emotional trauma and medical treatment, but dismissed the claim for grief and the declaratory relief.

Issued a structural interdict, ordering the Minister and the MEC to:

- Install sufficient safe, hygienic, and dignified toilets at all rural Limpopo schools that still use pit latrines.
- File affidavits identifying affected schools and timelines for sanitation upgrades.
- Provide detailed implementation plans, with expert input, and periodic progress reports.

Why the case matters

These were among the first cases to expose the state's failure to ensure safe infrastructure in rural schools as a violation of children's constitutional rights. They placed the issue of pit toilets on the national agenda and highlighted that state inaction in school sanitation can lead to loss of life and a breach of dignity. The structural interdict compelled long-term remedial action across Limpopo schools, making the case a cornerstone of education infrastructure accountability. The SCA reaffirmed that children's constitutional rights to dignity, safety, and education are enforceable against the state (ss 10, 28, 29). The state has a duty to take reasonable steps to protect learners from harm. Structural interdicts may be used to enforce these rights when systemic failures are identified.

Cross reference children

8. Equal Education and others v Minister of Basic Education and others (Children's Institute as Amicus Curiae), [2020] JOL 47754 (GP)[21]

Although brought during the COVID-19 pandemic, this case reiterated the importance of the National School Nutrition Programme, a feeding scheme at public schools, in making the right to education real and meaningful. The scheme enables poor and disadvantaged children, in particular, to enjoy their right to basic education, and recognises that the child's dignity and equality, and access to basic nutrition, are severely impaired if this scheme is stopped.

Parties

Applicants: Equal Education, Section 27 and the Equal Education Law Centre, representing the interests of schools and their learners in relation to the provision of the National School Nutrition Programme (NSNP) in Limpopo and the Eastern Cape.

Respondents: Minister of Basic Education, Director-General of the Department of Basic Education, MECs for Education in Limpopo and the Eastern Cape, and the HODs of Education in Limpopo and the Eastern Cape. The Children's Institute, a child rights research and advocacy centre at UCT, was admitted as an amicus curiae.

Background and facts

The case arose during the COVID-19 pandemic and challenged the decision by the national and provincial departments of basic education to suspend the National School Nutrition Programme (NSNP) during school closures and their subsequent failure to resume it when schools reopened on a full-time basis.

Legal issues before the Court

The Court had to determine whether the Minister of Basic Education and the provincial MECs were under a constitutional and statutory duty to provide a daily meal to all qualifying learners under the National School Nutrition Programme (NSNP), including those not physically attending school during the COVID-19 phased reopening.

It had to decide whether section 29(1)(a) (the right to basic education), read together with section 28(1)(c) (every child's right to basic nutrition) and section 27(1)(b) (access to sufficient food), imposed an obligation to continue providing school meals once schools reopened, even if only partially reopened.

The Court was required to determine whether the suspension or phased-in rollout of the

[21] https://www.saflii.org/za/cases/ZAGPPHC/2020/306.html

NSNP infringed learners' constitutional rights and constituted an impermissible retrogressive measure.

A further issue was whether children's right to basic nutrition is immediately realisable and not subject to progressive realisation, and whether any limitation could be justified under section 36.

The Court also had to assess whether, on the evidence, the respondents had in fact rolled out the NSNP as undertaken from 8 June 2020.

Finally, the Court had to decide what relief was just and equitable: whether declaratory relief was warranted and whether a supervisory (structural) interdict was necessary to secure compliance.

Court's findings and reasoning

The Court held that the Minister of Basic Education and the provincial MECs were under a constitutional and statutory duty to ensure that the NSNP provided a daily meal to all qualifying learners, including those not physically attending school during the COVID-19 phased reopening. The Court rejected the argument that the provision of meals was merely incidental to the right to education. It found that basic nutrition is inextricably linked to the effective enjoyment of the right to basic education under section 29(1)(a) and is reinforced by section 28(1)(c), which guarantees every child the right to basic nutrition.

The Court emphasised the immediacy of children's rights, stating:

"The children's right in s28 of the Constitution are not subject to internal limitation such as the availability of resources or progressive realization. These rights are unqualified and immediate, with the only limitation under s36 of the Constitution." (para 54)

It further held that once the state had established and implemented the NSNP as a mechanism to fulfil these rights, it could not withdraw or limit that protection without compelling justification.

The Court stated: "The Minister and MECs cannot take away the pre-existing right to basic nutrition, including at least one meal a day during school terms. Any deliberate retrogressive measure needs to be fully justified…" (para 46)

On the facts, the Court found that the respondents had failed to roll out the NSNP to all qualifying learners from 8 June 2020, as publicly undertaken. No adequate justification had been provided for this failure.

The phased-in approach constituted an unjustified limitation and an impermissible

retrogressive step, particularly given that millions of vulnerable children depended on the programme for daily nutrition.

Given the scale of the rights infringement and the state's inconsistent implementation, the Court concluded that declaratory relief and a supervisory interdict were necessary to ensure effective compliance.

Court order

The Court ordered that the NSNP be resumed for all qualifying learners and imposed a supervisory interdict, requiring the reporting of implementation plans within five days and every fifteen days thereafter.

Why the case matters

The case affirmed the right to basic education but linked it to other rights, notably the right to equality (section 9), on the basis that black, working-class and rural learners are disproportionately reliant on the NSNP. Section 29(1)(c), which affirms the right of children to basic nutrition, although not central to the judgment, was also affirmed, as was section 28(2), which affirms the best interests of the child.

Cross reference children and food

Rights of learners to learn

9. D.A v Governing Body, Settlers High School and Others [2002] 4 All SA 294 (C)[22]

The court considered the right of a learner to wear dreadlocks to school after she became an adherent of the Rastafarian religion. The judgment found that the school's holding the learner of serious misconduct for wearing dreadlocks was a blatant absurdity. The judgment stressed that the South African Schools Act guidelines for codes of conduct mention the need to establish a culture of tolerance and peace at schools, done in the context of the democratic values of human dignity, equality and freedom (para 14). Dignity and freedom of expression are mentioned as rights to be upheld.

Parties

The applicant was D.A., a fifteen-year-old Grade 10 learner at Settlers High School in Bellville. The first respondent was the Governing Body of Settlers High School. The second respondent was the Head of the Western Cape Education Department, and the third

[22] https://www.saflii.org/za/cases/ZAWCHC/2002/4.html?utm_source=chatgpt.com

respondent was the Member of the Executive Council for Education in the Western Cape.

Background and facts

D.A. embraced the Rastafarian religion in December 1999. As part of her religious convictions, she grew dreadlocks and wore a black cap to cover her hair at school.

The school's headmaster regarded this as a breach of the school's code of conduct and as a defiance of authority. She was charged with "serious misconduct" and suspended for five days following a disciplinary hearing. Although she later left the school, the disciplinary finding remained on her school record, prompting her to request a review.

Legal issues before the Court

The Court had to determine:

- Whether the applicant's conduct (wearing dreadlocks and a cap for religious reasons) was prohibited by the school's code of conduct.
- Whether such conduct could constitute "serious misconduct" under the applicable provincial regulations.
- Whether the governing body properly applied its mind to constitutional values, including dignity, freedom of expression, and religious and cultural rights.
- Court's Findings and Reasoning

The Court held that the code of conduct did not expressly prohibit dreadlocks or headgear. The governing body failed to interpret and apply its own rules properly. Even if the conduct had breached the code, it could not amount to "serious misconduct" within the meaning of the regulations, which contemplated grave behaviour such as criminal offences, assault, theft, or similarly serious conduct. Wearing dreadlocks and a cap for religious reasons could not reasonably be categorised as disgraceful or improper behaviour of that gravity.

The Court emphasised that school discipline must be interpreted and applied in light of constitutional values, including dignity, tolerance, reconciliation, and freedom of expression, which extends to clothing and hairstyles. The governing body, therefore, failed to consider the meaning of "serious misconduct," rendering its decision reviewable.

Court order

The Court set aside:

- The decision finding the applicant guilty of serious misconduct
- The five-day suspension.

Why the case matters

This case is an early judgment on religious expression in public schools.

It confirms that:

- School codes must be interpreted in accordance with constitutional values.
- Religious and cultural expression in dress and hairstyle is protected.
- Minor disciplinary breaches cannot be inflated into "serious misconduct".

It laid the groundwork that was later developed more fully by the Constitutional Court in Pillay, which concerned reasonable accommodation and diversity in public schooling.

Cross reference freedom of expression

10. Minister of Education v Pillay [2007] ZACC 21[23]

First heard in the Equality Court this case concerned the right of a learner to wear a nose ring for cultural or religious reasons. The school disallowed this based on the uniform code that outlawed nose rights. On appeal to the High Court found the prohibition of the nose ring to be discriminatory. The school appealed to the Constitutional Court which found that the school had discriminated against the learner in disallowing the nose ring. It said if there is a uniform code in a school, it should be drawn up in consultation with as wide a number of participants as possible to reflect post-apartheid diversity in schools, there should be clear rules regarding when exemptions will be given and clear procedures in place for learners wishing to apply for exemption to follow.

Parties

The applicants were the MEC for Education in KwaZulu-Natal, the School Liaison Officer for the KwaZulu-Natal Education Department, the principal of Durban Girls' High School (DGHS), and the chairperson of the school's governing body. The respondent was Ms Navaneethum Pillay, acting on behalf of her minor daughter, Sunali Pillay, a learner at DGHS. The Governing Body Foundation, the Natal Tamil Vedic Society Trust, and the Freedom of Expression Institute were admitted as amici curiae.

Background and facts

Sunali Pillay, a Hindu learner of South Indian Tamil heritage, wore a small gold nose stud as part of a long-standing family and cultural tradition marking her coming of age. The

[23] https://www.saflii.org/za/cases/ZACC/2007/21.html

school's Code of Conduct prohibited all jewellery except specified earrings and a wristwatch. Sunali was instructed to remove the nose stud.

Her mother requested an exemption on religious and cultural grounds. The governing body refused. When disciplinary proceedings were threatened, Ms Pillay approached the Equality Court, arguing that the refusal constituted unfair discrimination under the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

The Equality Court held that although discrimination had been established, it was not unfair. The High Court overturned that decision, finding that the refusal to allow the nose stud amounted to unfair discrimination. The matter came before the Constitutional Court.

Legal issues before the Court

The Court had to determine:

- Whether the school's Code of Conduct, together with the refusal to grant an exemption, amounted to discrimination on the grounds of religion and/or culture under the Equality Act.
- If so, whether that discrimination was unfair.
- Whether voluntary (as opposed to mandatory) religious or cultural practices enjoy constitutional protection.
- What role reasonable accommodation plays in the school context.

Court's findings and reasoning

The Court (per Langa CJ) held that, read together with the refusal to grant an exemption, the Code discriminated against Sunali on the grounds of religion and culture. The Code was neutral on its face, but had a disparate impact on learners whose sincere religious or cultural practices conflicted with it. Importantly, the Court rejected the argument that only mandatory religious or cultural practices deserve protection. Voluntary practices may be central to dignity and identity and are equally protected.

The Court emphasised the concept of reasonable accommodation. Where a rule designed to promote discipline and uniformity marginalises minority practices, schools must take positive steps to accommodate diversity unless doing so would impose undue hardship.

In this case, the school failed to provide a structured exemption procedure and did not meaningfully accommodate Sunali's cultural and religious expression. The discrimination was therefore unfair.

Court order

The Constitutional Court dismissed the appeal and confirmed that the school's refusal to allow Sunali to wear a nose stud amounted to unfair discrimination.

It ordered the governing body, after consultation with learners, parents and educators, to amend its Code of Conduct to provide for the reasonable accommodation of religious and cultural deviations and to establish a clear exemption procedure.

Why the case matters

Pillay is a key judgment on equality, dignity, and cultural and religious diversity in public schools.

It establishes that:

- Public schools must reasonably accommodate diverse religious and cultural practices.
- Protection extends to voluntary practices central to identity.
- Formal equality (treating everyone the same) may entrench disadvantage; substantive equality may require differentiated treatment.
- Codes of conduct must include fair and transparent procedures for exemptions.

Cross reference children and freedom of expression

11. Head of Department, Department of Education, Free State Province v Welkom High School and Another; Head of Department of Education, Free State Province v Harmony High School and Another [2013] ZACC 25[24]

Two issues were aired in this judgment. One was the role of the School Governing Board (SGB) vis a vis the state. The other was whether the two schools' pregnancy policies were constitutionally compliant or not. On the pregnancy policies of the two schools that excluded learners, the Court held, these infringed the rights of women learners to human dignity (s 10), freedom and security of person (s 12) and privacy (s 14). A blanket policy disallowing pregnant learners from attending school is also discriminatory.

The sections of the judgment on the denial of pregnant learners the right to schooling held the following:

Discrimination on a prohibited ground

[24] https://www.saflii.org/za/cases/ZACC/2013/25.html

Justice Khampepe held that the pregnancy policies unfairly discriminated on a prohibited ground closely related to sex and gender. Pregnancy discrimination is presumptively unfair under section 9(3) of the Constitution. The impact falls exclusively on female learners, making it inherently a form of gender discrimination.

Denial of the right to basic education

The policies fundamentally deprived learners of their right to a basic education. Forcing a learner to leave school could result in serious educational setbacks and undermine her future prospects. Section 29(1)(a) guarantees an immediately realisable right; exclusion on the basis of pregnancy unjustifiably limited that right.

Violation of dignity, privacy and bodily integrity

The policies required learners to disclose their pregnancies and created an atmosphere of surveillance and stigma. The Court held that treating pregnancy as serious misconduct framed it as shameful rather than as a private health matter. Justice Khampepe explained that forcing a young woman to disclose her pregnancy and encouraging monitoring by others to treat pregnancy as an offence to be policed rather than a condition warranting support. Such policies humiliate learners, infringing their right to dignity (section 10).

They also violate privacy (section 14), as pregnancy is intensely personal information, and bodily and psychological integrity (section 12(2)), including reproductive autonomy and control over one's body.

Best interests of the child

The policies contravened section 28(2). A rigid, blanket exclusion failed to allow individualised assessments of each learner's circumstances. There was no scope to consider health, academic progress, support systems, or the stage of pregnancy — factors that might show that continued schooling, with appropriate accommodation, was in the learner's best interests.

See summary of judgment under cases involving SGBs to see SGB issues covered in the judgment.

Cross reference children

12. AB and another v Pridwin Preparatory School and others, 2020 (9) BCLR 1029 (CC)[25]

The parents of two minor children contested the expulsion of their children from Pridwin, a private independent school, on the grounds that it was carried out without affording them the right to a hearing or to contest the expulsion. Furthermore, it deprived the children of their constitutional right to basic education and was not in their best interests (section 28). The Court upheld the appeal, finding that the school's expulsion of the children unfairly prejudiced them by depriving them of their right to basic education, which was not in their best interests.

Parties

A*pplicants:* AB and another, the parents of two minor children, DB and EB, who had been enrolled at Pridwin Preparatory School.

Respondents: Pridwin Preparatory School, an independent boys' preparatory school in Johannesburg; Mr Selwyn Marx, the headmaster; the School Board of Pridwin; the MEC for Education, Gauteng; and the Independent Schools Association of South Africa (ISASA). The Centre for Child Law and Equal Education were admitted as amici curiae.

Background and facts

The applicants were the parents of two minor boys enrolled at Pridwin Preparatory School, an elite independent school in Johannesburg. Admission was governed by a written parent contract, which included clause 9.3, allowing the school to cancel the contract "at any time, for any reason" with one term's written notice.

Over several years, the children's father repeatedly clashed with school staff, particularly over sporting decisions and team selection. His conduct included confrontations with coaches and umpires, aggressive behaviour at matches, and strained interactions with the headmaster. Following a further altercation during soccer trials in June 2016, the school invoked clause 9.3 and terminated the parent contracts, giving six months' notice.[26]

The parents challenged the cancellation, arguing that the decision was unconstitutional because it was made without affording them a hearing on the children's best interests and because it infringed the children's right to basic education.

[25] https://www.saflii.org/za/cases/ZACC/2020/12.html

[26] Clause 9.3 was a provision in the parent contract concluded between the parents and the school when their children were enrolled.

Legal issues before the Court

The Court had to determine:

- Whether an independent school has constitutional obligations under sections 28(2) and 29(1)(a) of the Constitution.
- Whether the school's cancellation of the parent contracts without a hearing violated the children's best interests and their right to basic education.
- Whether the enforcement of clause 9.3 without fair procedure was constitutionally permissible.

Court's findings and reasoning

The majority held that although independent schools do not have a positive duty to provide education, once they provide basic education, they assume at least a negative constitutional duty not to impair learners' existing enjoyment of that right.

Section 28(2) (best interests of the child) applies to independent schools and has a procedural dimension. Before terminating a contract with serious consequences for children, the school was required to afford the parents a fair opportunity to be heard on whether the cancellation was in the children's best interests.

The Court held that the school's failure to provide such a hearing rendered the termination decision unconstitutional. Private contractual autonomy must yield where enforcement would unjustifiably limit children's constitutional rights. The Constitution applies horizontally in appropriate circumstances (section 8(2)).

Court order

The Court:

- Granted leave to appeal.
- Upheld the appeal.
- Set aside the order of the SCA.
- Declared the school's decision to cancel the parent contracts invalid and set it aside.

The Court did not invalidate clause 9.3 itself, but held that its enforcement must comply with the constitutional requirements of substantive and procedural fairness.

Why the case matters

This case is significant because it clarifies that independent schools are not constitutional

"enclaves" immune from the Bill of Rights. Even in private contractual settings, children's rights to basic education and to have their best interests treated as paramount remain protected.

The judgment establishes that once a private school provides basic education, it incurs at least a negative duty not to unjustifiably interfere with learners' existing access to that education. It also confirms that section 28(2) has procedural force: decisions that materially affect children must be made after fair consideration of their best interests.

The case, therefore, marks an important development in the horizontal application of constitutional rights and limits the extent to which private contractual clauses may be enforced when children's fundamental rights are at stake.

13. Centre for Child Law and others v Minister of Basic Education and others (Section 27 and another as amici curiae), [2020] 1 All SA 711 (ECG)[27]

Children who did not have valid identity or passport numbers were to be excluded from schools according to an Eastern Cape directive. This was contested by the Centre of Child Law and others. The Court held that excluding undocumented children from school was both a violation of their right to a basic education and was not in their best interests. It struck down the directive.

Parties

The applicants were the Centre for Child Law and Phakamisa High School, later joined by 37 undocumented learners as further applicants. The respondents were the Minister of Basic Education, the Eastern Cape Department of Education and related provincial officials. The Minister and the Superintendent-General of Home Affairs were joined as fourth and fifth respondents. The South African Human Rights Commission and Section 27 were admitted as amici curiae.

Background and facts

In 2016, the Eastern Cape Department of Education issued Circular 06 of 2016, requiring schools to capture the valid identity or passport numbers of all learners in the SASAMS system. Funding — including norms and standards allocations, post provisioning, and National School Nutrition Programme transfers — would be based only on learners with valid identity numbers. Learners without valid documentation would not be funded and would ultimately be removed from enrolment.

The policy affected "undocumented children", including South African children unable to

[27] https://www.saflii.org/za/cases/ZAECGHC/2019/126.html

obtain birth certificates and foreign children without legal immigration status. Many of these learners came from vulnerable backgrounds and, for reasons beyond their control, were unable to secure the required documents.

Although later circulars purported to accommodate such learners conditionally, the policy still imposed time limits within which documentation had to be produced, failing which exclusion followed.

The applicants challenged the policy and related provisions of the Admission Policy and Immigration Act.

Legal issues before the Court

The Court had to determine a number of issues, including those affecting children, set out here:

- Whether clauses 15 and 21 of the Admission Policy were unconstitutional.
- Whether sections 39 and 42 of the Immigration Act prohibited schools from educating undocumented children.
- Whether denying or conditionally limiting access to public education on the basis of documentation status violated sections 29(1)(a), 28(2), 9, and 10 of the Constitution.

Court's findings and reasoning

Right to Basic Education

Section 29(1)(a) guarantees the right to basic education to "everyone" without qualification. The right is immediately realisable and not subject to progressive realisation. Denying access on the basis of a lack of documentation impermissibly limited that right.

Best interests of the child

Section 28(2) applies to all children within South Africa's jurisdiction, regardless of citizenship or immigration status. Excluding children from school on the basis of their immigration status failed to treat their best interests as paramount.

Dignity and equality

The policy undermined children's dignity by penalising them for circumstances beyond their control and treating them as lesser members of society. Documentation status was treated as analogous to listed grounds under section 9(3); the differentiation unfairly discriminated against vulnerable children.

Immigration Act interpretation

The Court interpreted sections 39 and 42 of the Immigration Act in a manner consistent with the Constitution. Properly construed, they did not prohibit the provision of basic education to undocumented children. Legislation must be interpreted through the prism of the Bill of Rights and international law obligations.

Section 36

The limitation was not imposed by a law of general application and could not be justified under section 36. The Admission Policy was also ultra vires the Schools Act and the National Education Policy Act.

The Court therefore concluded that clauses 15 and 21 of the Admission Policy were unconstitutional.

Court order

The Court:

- Condonation was granted for the delay.
- Declared clauses 15 and 21 of the Admission Policy unconstitutional and invalid.
- Set aside Circular 06 of 2016 to the extent that it limited learners' access to education on the basis of documentation status.
- Declared that no learner may be excluded from a public school on the basis that he or she lacks an identity number, a passport, or a permit.
- Directed respondents to ensure continued funding and admission of undocumented learners.

Why the case matters

This judgment confirms that the right to basic education belongs to every child within South Africa's borders, irrespective of documentation or immigration status.

The Court affirmed that children cannot be punished for their parents' failures or circumstances. It also reinforced that section 29(1)(a) is an unqualified, immediately realisable right and that section 28(2) requires children's best interests to be paramount in all matters.

The judgment also clarified that immigration control cannot be pursued at the expense of children's fundamental rights and confirmed the constitutional obligation to interpret legislation consistently with the Bill of Rights and international law.

Cross reference migrants and children

Powers of School Governing Bodies

14. Head of Department, Mpumalanga Department of Education & Another v Hoërskool Ermelo & Another [2009] ZACC 32 (Constitutional Court)[28]

A school cannot use a language policy to exclude learners who are unable to find places in other schools. In this case, Hoërskool Ermelo, an Afrikaans-medium public high school, refused to give over 100 English-speaking learners who need to be accommodated, places. The learner had failed to find placements elsewhere owing to overcrowding. The Department of Education requested the SGB of the school to shift to parallel-medium instruction. It confirmed that governing bodies must act in line with the Constitution and cannot use language policy to exclude learners.

Parties

Applicants: The Head of Department, Mpumalanga Department of Education, and the Minister for Education.

Respondents: Hoërskool Ermelo and the School Governing Body of Hoërskool Ermelo.

Amicus curiae: The Federation of Governing Bodies for South African Schools (FEDSAS)

Background and facts

Hoërskool Ermelo, an Afrikaans-medium public high school, was governed by an elected School Governing Body (SGB). The Mpumalanga Department of Education (DoE) requested that the SGB adopt parallel-medium instruction (Afrikaans and English) to accommodate local English-speaking learners due to overcrowding elsewhere. The SGB refused. Over 100 English-speaking Grade 8 learners could not secure placements elsewhere. The DoE, asserting that the SGB had acted unreasonably, revoked the SGB's powers under section 22 of the South African Schools Act 84 of 1996 and appointed an interim committee under section 25 to adopt a parallel-medium policy. The SGB challenged the Head of Department's (HoD) decision in the High Court and succeeded. The Department appealed to the Constitutional Court.

Legal issues before the Court

- Whether the HoD had the power under section 22 of the South African Schools Act to revoke the SGB's function of determining the school's language policy, and, if so,

[28] https://www.saflii.org/za/cases/ZACC/2009/32.html

whether that power was exercised on reasonable and procedurally fairgrounds (including prior notice, reasons, and an opportunity to respond).

- Whether the HoD could lawfully invoke section 25 of the Act to appoint an interim committee to perform that function on the basis that the SGB had failed to fulfil its duties.
- If section 25 applied, whether the appointment of the interim committee and its adoption of a parallel-medium language policy were lawful and procedurally fair.
- How sections 22 and 25 of the Schools Act should be interpreted in light of section 29(2) of the Constitution, which guarantees the right to receive education in the official language of one's choice where this is reasonably practicable.
- What just and equitable remedy was appropriate?

Court's findings and reasoning

The Court held that the HoD acted unlawfully in withdrawing the School Governing Body's (SGB's) power to determine the language policy and in appointing an interim committee. Section 25 of the South African Schools Act may be invoked only where a governing body has failed to perform its functions. On the facts, the SGB was functioning and had an existing language policy; it had not "ceased to perform" its duties. The HoD therefore, misused section 25.

Because the appointment of the interim committee was unlawful, its adoption of a parallel-medium language policy had no legal effect. The Court further held that the HoD failed to comply with the procedural safeguards required by section 22. Section 22 provides that before the HoD can withdraw a function of an SGB, it must give prior notice, reasons and an opportunity to respond.

At the same time, the Court emphasised that SGB powers are not absolute. Language policy must comply with section 29(2) of the Constitution and be exercised reasonably, equitably and in a manner that addresses past discrimination. Public schools are public resources and must respond to broader constitutional obligations.

The appeal was dismissed, the HoD's decisions were set aside, and the SGB was directed to review its language policy in a manner compliant with the Constitution.

Court order

The Court ordered that enrolled English learners continue instruction in English until matriculation. The SGB was directed to review its language policy in accordance with constitutional obligations and the Schools Act, particularly section 6(2). Reporting obligations were imposed on both the SGB and the Department within one month on

progress and future classroom planning.

"Pending the outcome of the process for the adoption of a language policy by the governing body, the learners who have already been admitted to Hoërskool Ermelo to receive education in the English medium shall be permitted to continue receiving such education until they have completed their schooling at the school". (para 97) The Court said that the governing body of Hoërskool Ermelo should review its language policy in accordance with the norms and standards and having due regard to the needs of the community, the constitutional values of equality, dignity, and the constitutional obligation to make education accessible.

Why the case matters

The case confirmed that governing bodies must act in accordance with the Constitution and cannot use language policy to exclude learners. It underscored the importance of section 29 of the Constitution in promoting access to education and set clear limits on when provincial departments can override governing bodies. It also marked the Court's use of structural relief to enforce compliance with constitutional and statutory obligations. While the judgment does not explicitly state that the English-speaking children were poor and Black, the racial and socio-economic implications were evident and central to the dispute. The case reflects how Afrikaans-language schools, often well-resourced, were being challenged to transform and open access to Black learners, many of whom preferred or required English-medium education. The Court's ruling pushed back against the use of language policy as a barrier to integration and equitable access.

15. MEC for Education in Gauteng Province and Others v Governing Body of Rivonia Primary School and Others (CCT 135/12) [2013] ZACC 34; 2013 (6) SA 582 (CC);2013 (12) BCLE 1365 (CC) (3 October 2013)[29]

This court held that the state has a duty to provide all children with basic education in terms of section 29(1)(a) of the Constitution. In any particular province, until all children are placed in schools, School Governing Bodies (SGBs) cannot refuse admission to students if they are unable to be accommodated. Schools are prohibited from declaring they have reached their maximum capacity before the provincial admission process is finalised. The Head of Department is empowered to override the SGB on this issue. However, when the HOD overrides an SGB it must do so in a lawful manner, that is, both procedurally and administratively fair and accords with tenets of cooperative governance.

[29] https://www.saflii.org/za/cases/ZACC/2013/34.html

Parties

The applicants were the MEC for Education in Gauteng Province, the Head of Department (HOD) of the Gauteng Department of Education, and the District Director for Johannesburg East D9. The first and second respondents were the Governing Body of Rivonia Primary School and the school itself. The third and fourth respondents were the parents of the learner whose admission was in dispute, and the fifth respondent was the principal of the school. Equal Education and the Centre for Child Law were admitted jointly as the first and second amici curiae, and the Suid Afrikaans Onderwysersunie was admitted as the third amicus curiae.

Background and facts

Rivonia Primary is a public school in a historically privileged area of Johannesburg. In 2010, a Grade 1 learner who lived within the school's feeder area was refused admission for 2011 because the school had reached its stated Grade 1 capacity of 120 learners under its admission policy.

The learner was placed on a waiting list. Her mother complained to the Department and lodged an appeal with the MEC. Due to administrative failures, the appeal was considered only in February 2011, after the school year had already begun.

Based on the school's "tenth-day statistics", which showed 124 learners in Grade 1 (across five classes), the HOD concluded that the school had capacity to admit one more learner. Acting in accordance with provincial regulations, he overturned the refusal and instructed that the learner be admitted.

The principal refused. The Department then withdrew her admission function and placed the learner in a Grade 1 classroom. The school approached the High Court for relief, arguing that the governing body had sole power to determine admission policy and capacity.

The High Court dismissed the school's challenge (except in relation to the withdrawal of the principal's function). The SCA upheld the school's appeal, holding that the HOD could not act contrary to the school's admissions policy. The Department then appealed to the Constitutional Court.

Legal issues before the Court

The Constitutional Court identified three main issues:

- Whether the Gauteng HOD had decision-making authority regarding the admission of learners to public schools.

- If so, whether the HOD could depart from the SGB's admission policy (including its capacity determination).
- If so, whether the HOD's decision to admit the learner was lawful, reasonable and made in a procedurally fair manner.

Court's findings and reasoning

Powers over admissions and capacity

The Court held that although an SGB determines a school's admission policy (including capacity), that power is not absolute. The Schools Act creates a three-tier partnership between national government, provincial government, and SGBs. While governing bodies determine policy, the implementation of admissions ultimately lies within the authority of the HOD, and provincial regulations expressly empower the HOD to confirm or set aside a principal's refusal.

The SCA therefore erred in holding that the HOD could act only "strictly in accordance with" the school's admission policy. Admission policies are not immutable law; they must be applied flexibly and cannot rigidly bind the HOD.

Procedural fairness

However, the Court held that the HOD's exercise of power was procedurally unfair. The decision was taken after the school year had already begun, relying on tenth-day statistics that the school had not had an opportunity to address. The earlier consultations (September–November 2010) were insufficient, as they predated the HOD's actual decision and were based on different information.

Given the timing and changed circumstances, fairness required that the school be given an opportunity to make representations before the learner was forcibly placed. This did not happen.

Cooperative governance and systemic capacity

The Court emphasised that disputes over capacity must be resolved through cooperation and good-faith engagement. Both the Department and the SGB failed to prioritise the child's best interests and the broader constitutional objective of equitable access to education.

The Schools Act envisages partnership, not unilateral action or rigid institutional posturing.

Court order

The Constitutional Court granted leave to appeal.

It held that:

- The HOD had the power to admit the learner and was not strictly bound by the school's capacity determination.
- However, the HOD's decision was procedurally unfair.

The Court set aside the SCA's reasoning insofar as it denied the HOD's power, but found that the manner in which the power was exercised was unlawful because of procedural unfairness. (The specific practical consequences were shaped by the fact that the learner had already been placed.)

Why the case matters

This case clarifies that SGBs do not have the final say on admissions and capacity. Provincial education authorities retain ultimate responsibility for ensuring that every child has access to basic education under section 29(1)(a) of the Constitution.

At the same time, the case strongly affirms:

- The rule of law holds that departments must use lawful processes and cannot act heavy-handedly.
- Procedural fairness is important, and even when the state acts to realise socio-economic rights, it must act fairly.
- Cooperative governance requires that disputes over capacity must be resolved through partnership, engagement, and a shared focus on children's best interests.

Rivonia sits alongside Ermelo and Welkom as a key Constitutional Court judgment that defines the balance of power between SGBs and provincial education departments in the post-apartheid education system.

16. Head of Department, Department of Education, Free State Province v Welkom High School and Another; Head of Department of Education, Free State Province v Harmony High School and Another [2013] ZACC 25[30]

Two issues were considered by the Court. One was the role of the SGB vis a vis the state. The other was whether the schools' pregnancy policies were constitutionally compliant or not. On the powers of SGBs, the majority judgment confirmed that SGBs are empowered by the South African Schools Act 84 of 1996 to formulate policies on learner pregnancies. They have governance functions, one of which is to adopt codes of conduct for learners. However, Khampepe, in her broad analysis of the constitutional and legislative framework, also reiterated that SGB policies must accord with the Constitution and the Schools Act. Their policies cannot transgress constitutional rights.

See the above discussion on the pregnancy policy.

Parties

Head of Department, Department of Education, Free State Province v Welkom High School (First Respondent), Governing Body of Welkom High School (Second Respondent), Harmony High School (Third Respondent), Governing Body of Harmony High School (Fourth Respondent) and Equal Education and Centre for Child Law (as amici curiae)

Background and facts

In 2008 and 2009, the SGBs of Welkom High School and Harmony High School each adopted learner pregnancy policies that required pregnant learners to take mandatory leave from school. In 2010, two learners, one at each school, were required to leave under these policies, despite having continued their schooling during their pregnancies and intending to write final examinations. Their families sought help from the Free State Department of Education.

In response, the Head of Department (HOD) instructed the principals of both schools to allow the learners to return immediately and to assist them in catching up. The SGBs refused, asserting that the HOD had no legal authority to override policies duly adopted by the schools. Despite initial resistance, the learners were eventually allowed to return, but the governing bodies approached the High Court to interdict the HOD from interfering with their policies.

[30] https://www.saflii.org/za/cases/ZACC/2013/25.html

Orders of Courts

The Free State High Court held that the HOD had no authority to instruct principals to disregard SGB policies and declared the learners' exclusions valid. The HOD was interdicted from acting contrary to the pregnancy policies, but the Court allowed the learners to remain at school until they had completed their schooling. The SCA confirmed the ruling of the High Court. The HOD appealed to the Constitutional Court, which dismissed the appeal. It ordered the schools and the HOD to engage meaningfully in line with constitutional rights and required the schools to submit their revised policies to the Court.

Court's finding and reasoning

The issue relating to the SGB concerned the limits of power between SGBs and the provincial Department of Education. Specifically, the case asked whether a provincial Head of Department (HOD) could lawfully instruct a school principal to ignore a policy adopted by the SGB, in this case, a learner pregnancy policy that required pregnant learners to leave school and take extended leave. The Constitutional Court held that while SGBs are empowered by the South African Schools Act to adopt policies and codes of conduct for learners, as part of their governance functions, they must do so in line with constitutional rights. However, even if an HOD believes that a school's policy is unconstitutional, they may not unilaterally override it. The Schools Act sets out specific procedures the HOD must follow, such as withdrawing functions under section 22 or approaching a court. The HOD's failure to use these lawful mechanisms and their attempt to bypass the SGB's authority by direct instruction was found to be unlawful and in breach of the principle of legality.

Court order

The Court granted leave to appeal but dismissed the appeal, holding that the HOD had acted unlawfully by instructing the school principals to ignore the governing bodies' pregnancy policies. It confirmed the interdict restraining the HOD from directing principals to act contrary to those policies. However, the Court ordered the governing bodies of Welkom and Harmony High Schools to review their pregnancy policies in light of the judgment, to engage meaningfully with the HOD in doing so, and to file affidavits and copies of the revised policies with the Court.

Why the case matters

In relation to SGBs the case clarifies how a HOD can intervene. They must follow procedures laid down in the Schools Act and regulations in order for interference to be lawful. And on the other hand, SGBs can create policies and codes of conduct for learners, but these must be constitutionally compliant.

Cross reference gender and children

Table of cases

Case citation	Key constitutional principles	Core rights established
Right to basic education is an immediate right		
Governing Body of the Juma Musjid Primary School & Others v Essay N.O. & Others [2011] ZACC 13	Right to basic education is immediately realisable (s 29(1)(a)) and enforceable against both the state and private parties if they limit access. Section 8(2) of the Constitution imposes a duty on private parties not to infringe constitutional rights.	Basic education must be immediately available to all children.
Right to minimum standards required to learn		
Madzodzo & Others v Minister of Basic Education [2014] EC High Court	Section 29(1)(a): Education includes infrastructure and basic furniture.	Right to a functional classroom environment is central to the right to basic education and there is a state duty to provide desks and furniture.
Tripartite Steering Committee and Others v Minister of Basic Education and Others [2015] ZAECHC 67	Sections 29 and 28: Right to basic education includes learner transport; cooperation between departments required to ensure transport is organised.	Constitutional entitlement to scholar transport in rural areas to ensure access.
Linkside and Others v Minister of Basic Education and Others (3844/2013) [2015] ZAECGHC 36	Section 29(1)(a) of the Constitution is made meaningless unless teachers and support staff are appointed and posts are filled.	The right to a basic education includes a right to sufficient numbers of teachers and support staff to enable education to be delivered.
Minister of Basic Education and others v Basic Education for All and others, [2016] 1 All SA 369 (SCA)	The right to basic education under section 29(1)(a) of the Constitution includes the right of each learner to receive a textbook per subject before the school year begins.	Text books are essential to the right to basic education.

Case citation	Key constitutional principles	Core rights established
Komape and Others v Minister of Basic Education and Others (Limpopo High Court, Polokwane) Case No. 1416/2015 and Komape and Others v Minister of Basic Education and Others [2019] JOL 46462 (SCA)	A High Court or the SCA can issue a structural interdit to hold government to account when children's constitutional rights to dignity, safety and education are violated.	The state in Limpopo was required to provide sufficient toilets at each school in the province and provide plans and programmes for delivery.
Equal Education and others v Minister of Basic Education and others (Children's Institute as Amicus Curiae), [2020] JOL 47754 (GP)	Feeding schemes are essential to learners' right to basic education.	Right to basic nutrition as integral to right to basic education.
Rights of learners to learn		
D.A v Governing Body, Settlers High School and Others [2002] 4 All SA 294 (C)	Religious expression in schools protected under s 15 and s 9 of the Constitution.	Learners' right to religious expression upheld; disciplinary actions must respect constitutional rights.
Minister of Education v Pillay [2007] ZACC 21	There must be a reasonable accommodation of religious and cultural practices in schools.	Non-discrimination based on belief and culture at school.
Head of Department, Department of Education, Free State Province v Welkom High School and Another; Head of Department of Education, Free State Province v Harmony High School and Another [2013] ZACC 25	A pregnant learner's right to basic education is infringed if they are forced to leave school.	Female pregnant learners have the right to human dignity, to security and control over their body (s 12(2)(b)), to privacy and not to be discriminated against on the basis of their pregnancies.
AB and another v Pridwin Preparatory School and others, 2020 (9) BCLR 1029 (CC)	Constitutional rights must be protected, so removing or diminishing an existing right is a violation of the constitution.	The right for a child not to be removed from a school without a fair and thorough hearing.

Case citation	Key constitutional principles	Core rights established
Centre for Child Law and others v Minister of Basic Education and others (Section 27 and another as amici curiae) [2020] 1 All SA 711 (ECG)	Undocumented children have the same right to education under s 29(1)(a)	Right to education of undocumented migrant children
Powers of School Governing Bodies		
Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another [2009] ZACC 32	State's power to regulate public education includes ensuring equitable access; school governing bodies do not have unfettered authority over language policy.	Right to education; right to equality; state's obligation to ensure access and transformation in public schools.
MEC for Education in Gauteng Province and Others v Governing Body of Rivonia Primary School and Others (CCT 135/12) [2013] ZACC 34; 2013 (6) SA 582 (CC);2013 (12) BCLE 1365 (CC) (3 October 2013)	An SGB cannot exclude a learner unilaterally in situations where not all learners in a province have access to basic education.	The right of the learner to be admitted was enforced, curtailing the power of the SGB to stipulate admission policies.
Head of Department, Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another [2013] ZACC 25	Balance between school governing body autonomy and the Department's oversight; learners' best interests. Section 29(1), 28(2), school governance under the Schools Act; procedural fairness and cooperative governance.	Right to education and best interests of the child. Affirmed SGB's authority to adopt learner pregnancy policies; required cooperative and constitutional consultation between schools and the state.

Current enforceable rights

- The right to basic education is immediately realisable for everyone and is not dependent on the state's ability to progressively make it available.
- The right to basic education includes access to basic infrastructure and resources, including:
    - Desks and chairs.
    - Transport for disadvantaged scholars who live far from school.

    - Teachers. If posts remain unfilled and there are shortages of teachers, learning is compromised.
    - Textbooks are essential for the right to basic education to be realised.
    - Adequate toilets are required so that children can safely perform their ablutions while at school.
- School feeding schemes are required for poor and disadvantaged children so that they can learn.
- Learners have certain rights, including:
    - In public schools, to follow their religious and cultural practices, including wearing garments that represent their religions or cultures.
    - To remain in school while pregnant and to be excluded is discriminatory and violates section 9(3)
    - If they are in private schools, they should not have their right to basic education removed unfairly.
    - To be admitted with or without identity documents and a passport. Undocumented minors have the same right to learn as everyone in the country.

SGBs

- SGBs cannot use the language policy to unfairly exclude learners who are unable to secure places at other schools, but provincial heads of departments must exercise their powers in relation to SGBs lawfully.
- Schools cannot refuse admission to students on the basis of having reached maximum capacity before the provincial admission process is finalised. Provincial heads of departments must override SGBs lawfully in accordance with the Schools Act.
- SGBs are empowered by the Schools Act to formulate policies on learner pregnancies, but their policies must comply with the Constitution and cannot override constitutional rights, such as the right to privacy, dignity and the right to basic education.

Refugee, asylum seeker and undocumented migrant rights

> *Refugees are unquestionably a vulnerable group in our society and their plight calls for compassion. … They have been forced to flee their homes as a result of persecution, human rights violations and conflict. Very often they, or those close to them, have been victims of violence on the basis of very personal attributes such as ethnicity or religion. Added to these experiences is the further trauma associated with displacement to a foreign country.*[1]

Cases in this chapter

1. Lawyers for Human Rights and Another v Minister of Home Affairs and Another [2004] ZACC 12 421
2. Minister of Home Affairs and Others v Watchenuka and Others (010/2003) [2003] ZASCA 142; [2004] 1 All SA 21 (SCA); 2004 (2) BCLR 120 (SCA); 2004 (4) SA 326 (SCA) (28 November 2003) 424
3. Kiliko and Others v Minister of Home Affairs and Others 2006 (4) SA 114 (C) 426
4. Union of Refugee Women and Others v Director: Private Security Industry Regulatory Authority and Others 2007 (4) SA 395 (CC); 2007 (4) BCLR 339 (CC) 428
5. Jeebhai v Minister of Home Affairs (139/2008) [2009] ZASCA 35 (31 March 2009) 430
6. Somali Association of South Africa v Limpopo Department of Economic Development, Environment and Tourism (48/2014) ZASCA 143 (26 September 2014) 433
7. Scalabrini Centre v Minister of Home Affairs 2016 (4) SA 125 (SCA) – Supreme Court of Appeal 436
8. Gavrić v Refugee Status Determination Officer, Cape Town and Others [2018] ZACC 38 439
9. Ruta v Minister of Home Affairs [2018] ZACC 52 442
10. Saidi and Others v Minister of Home Affairs and Others [2018] ZACC 9 444
11. Centre for Child Law and others v Minister of Basic Education and others (Section 27 and another as amici curiae) [2020] 1 All SA 711 (ECG) 446
12. P[…] P[…] M[…] and Others v Minister of Home Affairs and Others, Gauteng Division, Pretoria, Case No 14238/21 (16 January 2024) 446
13. Scalabrini Centre of Cape Town and Others v Minister of Home Affairs and Others [2024] ZACC 3 448

[1] Kondile AJ, Union of Refugee Women and Others v Director, Private Security Industry Regulatory Authority and Others (CCT 39/06) [2006] ZACC 23; 2007 (4) BCLR 339 (CC) ; (2007) 28 ILJ 537 (CC); 2007 (4) SA 395 (CC) (12 December 2006), para 28.

14. Kopanang Africa against Xenophobia and others v Operation Dudula and Others (2023-044685) [2025] ZAGPJHC (4 November 2025) (Gauteng Division, Johannesburg, Adams J) 451

The Constitution

The rights of migrants[2] are not protected by a specific clause in the Constitution, but by a wide range of sections that apply equally to South African citizens. The Constitution protects the fundamental rights of **"everyone"** in South Africa unless a right is expressly limited to **citizens.** As a result, refugees, asylum seekers and undocumented migrants are entitled to a broad range of constitutional protections. The sections below outline the rights most frequently invoked in legal disputes involving non-nationals.

Human dignity and equality (ss 9–10):

All non-nationals are entitled to equality before the law and protection from unfair discrimination, including on grounds of nationality or origin. Their inherent dignity must be respected and protected in all interactions with the state, including immigration control, asylum processing and access to basic services.

Life, freedom and security of the person (ss 11–12):

These provisions protect migrants from arbitrary detention, violence, intimidation and cruel or inhuman treatment. They apply directly to immigration detention centres, border policing and deportation procedures.

Children's rights (s 28):

Migrant, asylum-seeking and undocumented children have the same rights as all other children, including the right to family care, basic education and protection from abuse or neglect. Their best interests remain paramount in all decisions affecting them, including detention and deportation.

Arrest, detention and fair trial rights (s 35):

These rights apply equally to non-national detainees. Individuals must be informed of the reasons for their detention, brought before a court within 48 hours, and given access to legal advice and the ability to challenge the lawfulness of their detention or deportation.

Administrative justice and access to courts (ss 33–34):

Asylum and immigration decisions must be lawful, reasonable and procedurally fair. Refugees and migrants are entitled to written reasons for adverse decisions, and they have the right to challenge unlawful or unfair conduct, particularly by state officials who administer the legislation that deals with refugees, in the courts.

[2] The word "migrant" is used descriptively to refer to people who move across borders (or sometimes within borders) for a range of reasons. For example, work, family, study or survival.

Socio-economic rights (ss 26–27, 29):

Many socio-economic rights apply to "everyone". The right of access to housing (s 26) includes protection against arbitrary eviction and an entitlement to emergency shelter in appropriate circumstances. Section 27 provides access to health care, food and water for all persons within South Africa, while emergency medical treatment (s 27(3)) is guaranteed without qualification.Children's right to basic education under s 29 applies irrespective of their or their parents' documentation status.

Freedom of religion, expression, assembly and association (ss 15–18):

These rights apply to everyone, enabling migrants and refugees to participate in community life, organise collectively, express their views, and to practise their faith freely.

Freedom of movement and residence (ss 21):

Some aspects of freedom of movement and residence are reserved for citizens, but migrants are protected from unlawful restrictions beyond those authorised by immigration legislation.

International law and interpretation (s 39):

Courts must consider international law when interpreting rights. This is central to refugee matters, as South Africa is bound by the 1951 Refugee Convention and the 1969 OAU Refugee Convention, which strengthen constitutional protections.

General limitations (s 36):

Any limitation of migrants' constitutional rights must be reasonable and justifiable in an open and democratic society. Immigration status alone does not justify disproportionate or abusive restrictions.

General points

South Africa's legal framework for people displaced across borders is primarily based on the Refugees Act 130 of 1998, as amended, together with the Immigration Act 13 of 2002, the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE), and South Africa's international obligations.

The Refugees Act establishes the asylum system and incorporates the 1951 UN Refugee Convention and the 1969 OAU Refugee Convention into domestic law. It provides asylum seekers with temporary legal status while their claims are processed, protects recognised

refugees from refoulement,[3] and grants refugees the right to work, study and access basic services.

Amendments to the Act in recent years[4] have tightened the regime for asylum seekers and removed or restricted certain rights previously available. These amendments include stricter conditions on work and study rights for asylum seekers, heightened reporting requirements, narrower grounds for renewing asylum permits, and expanded powers to withdraw or cancel refugee status. They have also introduced more onerous procedural barriers, which have been widely criticised for undermining the accessibility and fairness of the asylum system. A few cases discussed in this chapter have contested some of these.

The Immigration Act regulates entry, visas, documentation, detention and deportation. Although it prohibits unlawful entry and residence, asylum seekers whose claims are pending are generally protected from deportation. Immigration detention, arrest and deportation must comply with the law, including the provision of proper notice and review mechanisms.

The PIE Act applies equally to refugees, asylum seekers and undocumented migrants. It prohibits summary eviction and requires courts to ensure that any eviction is just and equitable.

International law plays a significant role in interpreting South Africa's refugee and immigration framework. By acceding to the Refugee Convention, the OAU Refugee Convention, and core human rights treaties, South Africa has binding obligations to prevent refoulement, ensure humane treatment, and protect access to essential services for displaced people. South African courts have repeatedly affirmed that, despite a more restrictive statutory regime, refugees, asylum seekers and undocumented migrants remain entitled to fair procedures, humane treatment and essential safeguards, and cannot be denied protection solely on the basis of their immigration status.

This chapter focuses on jurisprudence that affirmatively advances the constitutional and statutory rights of refugees, asylum seekers and undocumented migrants. Cases that primarily concern sector-specific entitlements (such as housing, health care, work and social assistance) are dealt with elsewhere, and cases that duplicate findings in other cases or are peripheral have been omitted for clarity and coherence.

3 Refoulement is the unlawful return of a person to a country where they face a real risk of persecution, torture, or serious harm.

4 The Refugees Amendment Act 11 of 2017 was signed into law 14 December 2017 and its provisions came into force on 1 January 2020. New regulations under the Act were published on 27 December 2019, effective from 1 January 2020.

Statistics[5]

Migrant population. South Africa currently hosts between 2.4 and 2.8 million foreign-born people, representing 3.9% to 4.8% of the total population, according to Census 2021 and estimates from the United Nations Department of Economic and Social Affairs (UNDESA). Migration into the country is dominated by regional mobility from the Southern African Development Community (SADC), with 65% of migrants originating from African countries, primarily Zimbabwe, Mozambique and Lesotho. The migrant population is predominantly young and economically active. The largest age group is 25 to 34 years, and the mean age of migrants is 35.7 years, reflecting strong labour-driven migration.

Education and employment. Employment trends indicate that migrants are increasingly absorbed into the South African labour market. Their share of total employment rose from 6.0% in 2012 to 8.9% in 2022, with the majority employed in the services sector, including retail, hospitality, domestic work and security. Education data show a similar upward trend. The number of immigrant learners in basic education grew from 26 992 in 2018 to 76 805 in 2023,

Asylum seekers. South Africa has historically managed one of the world's largest asylum systems. The number of asylum seekers has fluctuated dramatically over the past two decades, largely driven by regional instability and policy shifts. The asylum system recorded 15 139 asylum seekers in 2000, rising sharply during the Zimbabwean economic and political crisis to 309 794 in 2009. A further surge occurred in 2014, when the number of asylum seekers reached 463 909, the highest figure recorded in South Africa's asylum history. By 2022, the number had declined to 84 316. The system remains characterised by very large backlogs and slow processing. The principal countries of origin for asylum seekers in recent years have been Ethiopia, the Democratic Republic of the Congo and Somalia.

Refugees. The refugee population has been similarly volatile. In 2000, South Africa hosted 15 058 recognised refugees. This number rose steadily over the next decade, reaching 43 542 in 2008 and peaking at 121 635 in 2015. Refugee numbers have since declined, falling to approximately 76 729 in 2022. Access to the asylum and refugee system has been further constrained by administrative decisions. Three major refugee reception offices, in Cape Town, Johannesburg and Port Elizabeth, were closed, leaving only Musina, Pretoria and Durban, which has made it significantly more difficult for asylum seekers and

[5] The sources of information in this section are: Migration Profile Report for South Africa, A Country Profile 2023, StatsSA; A Hirsh, South Africa Country Study: Migration Trends, Policy, Implementation, and Outcomes, Migration Governance Reform Program, 3rd Migra Report, January 2024. Available at https://www.statssa.gov.za/publications/03-09-17/03-09-172023.pdf and https://nsi.org.za/wp-content/uploads/2024/01/South-Africa-Country-Study-%E2%80%93-Migration-trends-02-12-2023-V5.pdf

refugees to maintain lawful status or renew documentation.

Statelessness. Estimates of the number of stateless persons are unavailable, but there is a growing risk of statelessness, especially for children of migrants who face barriers to birth registration, documentation and nationality determination. Statelessness is most prevalent among children born in South Africa to undocumented foreign parents and among families from Zimbabwe, Malawi and Mozambique who struggle to navigate an increasingly restrictive and complex documentation regime.

Illegal migrants. A major limitation in South African migration statistics is the absence of reliable data on irregular or "illegal" migrants. The Census does not collect information on legal status, and Department of Home Affairs records do not capture visa expiries, overstays, or unauthorised entry. As a result, irregular migration cannot be meaningfully quantified. Available indicators offer only partial insight. Deportations peaked at 312 284 in 2007, revealing historical spikes in enforcement, but deportation numbers do not reflect the actual scale of undocumented migration. Similarly, crime and correctional statistics challenge public perceptions: between 2017 and 2021, immigrants made up only 1.7% to 2.6% of inmates in South African prisons.

ZEPs. Special permit regimes remain a significant feature of South Africa's migration landscape. Between 2009 and 2019, approximately 336 000 Zimbabweans received special exemption permits, and roughly 178 000 still hold Zimbabwe Exemption Permits (ZEPs) in 2023. Lesotho nationals have undergone a similar process through the Lesotho Special Permit and, later, the Lesotho Exemption Permit, introduced in 2019. These permits constitute one of the largest regularisation programmes ever implemented in the region.

Migrant labour. Labour migration from neighbouring countries continues to be shaped by historical mine-labour systems. Foreign mineworkers once constituted more than 70% of the labour force, though in more recent years they now represent around a quarter of mine employment.

The statistics from both reports portray a migration system marked by scale, complexity and uneven management capacity. South Africa remains a major regional destination for migrants, asylum seekers and refugees. Although the country has made progress in certain indicators, such as employment among immigrants, access to education and housing, it continues to face significant challenges in asylum processing, documentation, border management and data availability.

Category	Key Statistics
Immigrants in South Africa	2.4 - 2.8 million foreign-born people (3.9%–4.8% of population) 65% from Africa (mainly Zimbabwe, Mozambique, Lesotho) Predominantly aged 25–34; mean age 35.7
Asylum Seekers	84,316 in 2022
Refugees	Around 76,729 refugees in 2022
Stateless Persons	No official figures available.

Cases

1. Lawyers for Human Rights and Another v Minister of Home Affairs and Another [2004] ZACC 12[6]

This case challenged section 34 of the Immigration Act, which permitted the detention of undocumented foreign nationals for up to 30 days, extendable to 90 days, without automatic judicial oversight. The Constitutional Court held that detention beyond 48 hours without a warrant or court supervision was unconstitutional, and read in safeguards requiring judicial oversight to authorise and review continued detention. The judgment affirmed that immigration control must comply with constitutional guarantees of liberty and the rule of law, even in respect of non-citizens.

Parties

The applicants were Lawyers for Human Rights and an individual immigration detainee affected by the impugned provisions, while the respondents were the Minister of Home Affairs and the Director-General of the Department of Home Affairs.

Background and facts

This case concerns the immigration detention regime under the Immigration Act 13 of 2002, specifically section 34, which regulates the arrest, detention, and deportation of illegal foreigners. Ann Eveleth was detained without trial under section 34(8), which applies to people detained on ships at ports of entry.

[6] https://www.saflii.org/za/cases/ZACC/2004/12.html?utm

Lawyers for Human Rights challenged the constitutionality of sections 34(2)[7] and 34(8) on the grounds that these provisions permitted arbitrary detention without adequate judicial safeguards.

Contested provisions:

Section 34(1): Allows the detention of suspected illegal foreigners, requires a court order for detention longer than 30 days, and ensures notification and appeal rights.[8]

Section 34 (1)(d): Allows immigration officers to arrest and detain undocumented foreigners without a warrant.

Section 34(2): Requires that persons arrested under section 34(1) be brought before a court within 48 hours, but this safeguard did not extend to detainees on board ships.

Section 34(8): Allowed the detention of foreign nationals on ships at ports of entry pending deportation or refusal of entry. It contained no safeguards, no time limits, and no requirement for judicial oversight, creating a substantial risk of arbitrary detention.

Legal issues before the Court

- Whether foreign nationals physically present in South Africa but not formally admitted enjoy constitutional rights, including sections 12 (freedom and security of the person) and 35(2) (rights of detained persons).
- Whether the lack of judicial oversight under section 34(8) renders the detention regime unconstitutional.
- Whether the 48-hour safeguard in section 34(2) must apply to detainees on board ships.

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[7] 34 (2): If an illegal foreigner is arrested in terms of subsection (1), the immigration officer must, within 48 hours, bring that person before a court, which shall confirm the lawfulness of the detention for purposes of deportation or order the release of that person.

8 34 (1): Without the need for a warrant, an immigration officer may arrest an illegal foreigner or cause him or her to be arrested, and shall, irrespective of whether such foreigner is arrested, deport him or her and may, pending his or her deportation, detain him or her; provided that—
(a) the foreigner concerned—
(i) shall be notified in writing of the decision to deport him or her and of his or her right to appeal such decision; and
(ii) may at any time request assistance from the Department in contacting his or her consulate;
(b) the foreigner may not be held in detention for longer than 30 calendar days without a warrant of a court which on good and reasonable grounds may extend such detention for an adequate period not exceeding 90 calendar days;
(c) the foreigner shall be held in detention in compliance with minimum prescribed standards protecting his or her dignity and relevant human rights; and
(d) the foreigner shall be deported as soon as is reasonably possible at any time before the expiry of the period of detention.

- Whether Lawyers for Human Rights had public interest standing under section 38.

Court's findings and reasoning

The Court confirmed that Lawyers for Human Rights had public interest standing because immigration detainees are vulnerable and often unable to vindicate their own rights. The Court held that constitutional rights, including those in sections 12 and 35(2), apply to all persons within South Africa's territorial boundaries, including those on board ships in South African waters. The Court found that detention under section 34(8) must be based on reasonable suspicion and cannot be arbitrary. The absence of judicial oversight for detentions exceeding 30 days was unconstitutional. Section 34(8) was thus invalid to the extent that it omitted the safeguards contained in section 34(1)(d).

The Court held that the 48-hour requirement in section 34(2) need not apply to detainees on ships because they are not formally admitted and their physical presence on a ship may prevent compliance, but their section 35(2) rights still apply.

Court order

The Court upheld the appeal in part and declared section 34(8) unconstitutional for failing to provide judicial oversight of detention beyond 30 days. It ordered a reading-in to require that detention for more than 30 days be confirmed by a court, with a possible extension of up to 90 additional days on reasonable grounds. Each party was ordered to pay its own costs.

Why the case matters

The judgment confirms that constitutional rights apply to all people in South Africa, regardless of immigration status or formal entry. It reinforces protections against arbitrary detention, ensures judicial oversight of immigration detention, strengthens detainees' rights under section 35(2), and affirms the importance of public interest standing for vulnerable groups.

2. Minister of Home Affairs and Others v Watchenuka and Others (010/2003) [2003] ZASCA 142; [2004] 1 All SA 21 (SCA); 2004 (2) BCLR 120 (SCA); 2004 (4) SA 326 (SCA) (28 November 2003)[9]

Ms Watchenuka, a Zimbabwean national who came to South Africa with her adult disabled son, challenged the blanket prohibition on work and study in her asylum seeker permit. She needed to work to support herself and her son. The Court held that there should not be a general prohibition, and that such decisions should be made by the Standing Committee for Refugee Affairs on an individualised basis. To deprive asylum seekers and refugees of the right to work and/or study was to deprive them of their constitutional right to dignity.

Parties

Appellants: The Minister of Home Affairs; the Director-General of the Department of Home Affairs; and the Chairperson of the Standing Committee for Refugee Affairs.

Respondents: Muriel Millie Watchenuka, an asylum seeker, supported by the Cape Town Refugee Centre.

Background and facts

Ms Watchenuka, a Zimbabwean national, entered South Africa with her adult disabled son and applied for asylum under the Refugees Act 130 of 1998. Pending the determination of her application, she was issued with an asylum seeker permit under section 22(1) of the Act.

The permit incorporated a standard condition, derived from the Refugee Regulations, prohibiting asylum seekers from working or studying. Ms Watchenuka, a trained pharmacy technician whose resources were exhausted, sought permission to work to support herself and her son, and to allow her son to study. She challenged the legality and constitutionality of the blanket prohibition on employment and study imposed on asylum seekers.

The High Court declared the prohibition unlawful and unconstitutional. The Minister appealed to the SCA.

Legal issues before the Court

Whether the Minister had statutory authority under the Refugees Act to impose a blanket

[9] https://www.saflii.org/za/cases/ZASCA/2003/142.html?utm_

prohibition on work and study by regulation. Whether the power to determine conditions relating to work and study was vested in the Minister or in the Standing Committee for Refugee Affairs. Whether a general prohibition on work and study for asylum seekers unjustifiably infringed constitutional rights, particularly dignity and the right to education.

Court's findings and reasoning

The Court held that the Minister acted ultra vires in imposing a general prohibition on employment and study. Properly interpreted, the Refugees Act vests the power to determine conditions relating to work and study in the Standing Committee for Refugee Affairs, not in the Minister. The regulatory prohibition was therefore unlawful and was correctly set aside.

The Court further held that a blanket policy prohibiting work and study was inconsistent with the Constitution. Human dignity applies to citizens and non-citizens alike. While asylum seekers do not have an automatic right to work or study, a general prohibition that takes no account of individual circumstances is unreasonable and unjustifiable.

The Court emphasised that where asylum seekers have no alternative means of support and receive no state assistance, denial of work may result in humiliation and degradation that are incompatible with dignity. Similarly, an inflexible prohibition on study unjustifiably limits dignity and the right to education, particularly for vulnerable persons.

The Court stressed that decisions about work and study must be made on an individualised basis, either case by case or through constitutionally compliant guidelines, rather than through blanket exclusions.

Court order

The appeal was partially upheld. The High Court order directly authorising work and study was set aside. In its place, the Court ordered that the Standing Committee for Refugee Affairs must consider and determine whether the respondents should be permitted to work and study pending the finalisation of their asylum application, and must endorse appropriate conditions on the asylum seeker permit.

Why the case matters

Watchenuka is a foundational authority on the rights of asylum seekers in South Africa. It establishes dignity as a central constitutional constraint on restrictions affecting survival and education, confirms that blanket prohibitions on work and study are unlawful, and requires individualised, humane decision-making. The case laid the groundwork for later jurisprudence that extends dignity-based protection to livelihoods, including self-employment, and remains a cornerstone of refugee rights law.

3. Kiliko and Others v Minister of Home Affairs and Others 2006 (4) SA 114 (C)[10]

Kiliko and other Congolese nationals were struggling to get their asylum applications processed because the Cape Town Refugee Reception Office had a policy that they only processed 20 new applications per day. This was resulting in some people not being able to acquire asylum seeker permits, thus remaining vulnerable to arrest, detention and deportation. The Court held that it was unlawful to restrict applications in this way as refugees have the same rights to dignity and freedom as everyone else. It issued a structural interdict requiring the Department to report on staffing and administration and indicate that it was putting in place systems to manage the numbers of applications.

Parties

Applicants: Kiliko and other Congolese nationals seeking asylum.

Respondents: The Minister of Home Affairs and the Department of Home Affairs.

Background and facts

The applicants were citizens of the Democratic Republic of Congo who entered South Africa to seek asylum. To remain lawfully in the country pending the determination of their claims, they were required to apply in person for asylum seeker permits under section 22 of the Refugees Act 130 of 1998.

At the Cape Town Refugee Reception Office, the Department of Home Affairs adopted a policy of processing only 20 new asylum applications per day. As a result, asylum seekers were routinely turned away despite waiting for long periods. Until they were issued with an asylum seeker permit, they remained vulnerable to arrest, detention and deportation under the Immigration Act.

The applicants approached the High Court in their own interests, in the interests of asylum seekers as a class, and in the public interest, challenging the lawfulness of this practice.

Legal issues before the Court

- Whether the Department's limitation on the number of asylum applications processed per day was authorised by the Refugees Act.

[10] https://www.saflii.org/za/cases/ZAWCHC/2008/124.html

- Whether this practice infringed the constitutional rights of asylum seekers, particularly their dignity and the freedom and security of the person.
- Whether administrative incapacity and resource constraints could justify restrictions on access to the asylum system.

Court's findings and reasoning

The Court held that foreigners are entitled to all constitutional rights except those expressly reserved for citizens. Asylum seekers therefore enjoy protection of dignity and personal liberty.

The practice of limiting applications to 20 per day was not authorised by the Refugees Act and stemmed from administrative incapacity rather than lawful discretion. By obstructing access to asylum seeker permits, the practice exposed individuals to arrest, detention and destitution, directly infringing their dignity and freedom and security of the person.

The Court rejected reliance on administrative convenience or lack of resources, holding that the state has a constitutional and statutory obligation to establish reasonably adequate systems for receiving and processing asylum applications expeditiously.

Court order

The Court declared the respondents' conduct unlawful and unconstitutional. It granted a structural interdict requiring the Department to report on staffing, processing capacity, backlogs, and remedial measures, and postponed the matter for further supervision. The respondents were ordered to pay costs.

Why the case matters

Kiliko is a foundational judgment on access to the asylum system. It holds that systemic administrative failure can itself constitute a constitutional violation and that the state must organise its asylum machinery to protect dignity and liberty. The case is an early and influential example of the use of structural relief to address ongoing rights violations affecting asylum seekers.

4. Union of Refugee Women and Others v Direcor: Private Security Industry Refulatory Authority and Others 2007 (4) SA 395 (CC); 2007 (4) BCLR 330 (CC)[11]

The Court held that restricting registration as private security providers to citizens and permanent residents did not amount to unfair discrimination against refugees. The limitation was justified by the need to ensure trustworthiness in a sensitive security industry, although refugees could still seek exemption under section 23(6) of the Private Security Industry Regulation Act 56 of 2001.

Parties

The applicants were the Union of Refugee Women and several individual refugees living in South Africa. The respondents were the Director of the Private Security Industry Regulatory Authority (PSIRA), the Chairperson of the PSIRA Appeal Committee, the Chairperson of the PSIRA Council, and the Minister of Safety and Security.

Background and facts

The Private Security Industry Regulation Act 56 of 2001 required anyone wishing to work as a security service provider to be registered. Section 23(1)(a) limited registration to South African citizens or permanent residents. Several refugees applied to be registered as security guards but were refused or had their registration withdrawn because they were neither citizens nor permanent residents. They challenged the decisions and argued that the provision unfairly discriminated against refugees and violated their constitutional rights to equality, dignity and freedom to work.

Legal issues before the Court

The Constitutional Court had to determine:

- Whether section 23(1)(a) of the Private Security Industry Regulation Act 56 of 2001, which restricted registration as a security service provider to citizens and permanent residents, violated the equality rights of refugees.
- Whether the decisions refusing or withdrawing the applicants' registrations constituted administrative action reviewable under the Promotion of Administrative Justice Act 3 of 2000.
- Whether refugees could rely on section 23(6) of the Act, which allowed the authority to grant exemptions on "good cause shown".

[11] https://www.saflii.org/za/cases/ZACC/2006/23.html

Court's findings and reasoning

The Court acknowledged that refugees are a particularly vulnerable group who have often fled persecution and violence and therefore deserve compassion and protection. It recognised that foreign nationals inside South Africa generally enjoy the rights in the Bill of Rights except where the Constitution limits rights to citizens.

However, the Court held that the differentiation between citizens/permanent residents and other foreigners was rationally connected to the purpose of regulating the private security industry, which involves public safety and trust. Because security guards may carry weapons and have access to private premises, the state was entitled to impose stricter requirements to ensure that entrants to the industry could be properly vetted.

The Court therefore found that the limitation on refugees working in this particular industry did not amount to unfair discrimination. Refugees remained free to seek employment in other fields, and they could still apply for exemption under section 23(6) of the Act if they could show good cause.

The Court also held that the refusal to register applicants constituted administrative action under the Promotion of Administrative Justice Act 3 of 2000 (PAJA). The regulatory authority therefore had a duty to provide fair procedures and adequate information about how refugees could apply for exemptions.

Court order

The Constitutional Court dismissed the challenge to the constitutionality of section 23(1)(a). However, it ordered that the refugee applicants be given an opportunity to apply for exemption under section 23(6) and directed the authority to provide proper information to applicants about how such exemption applications should be made. The respondents were also ordered to pay the applicants' costs.

Why the case matters

The case is important for refugee rights because it affirms that refugees are a vulnerable group entitled to constitutional protection and administrative fairness. At the same time, the Court held that the state may legitimately regulate certain sensitive industries, such as private security, even if this limits refugees' employment opportunities. The judgment therefore clarifies the balance between the constitutional rights of refugees and the state's regulatory powers in areas affecting public safety.

5. Jeebhai v Minister of Home Affairs (139/2008) [2009] ZASCA 35 (31 March 2009)[12]

The case concerned Mr Rashid, a Pakistani national who was arrested, detained and deported under section 34 of the Immigration Act. Attorneys contested this as unlawful and as having infringed his constitutional rights to freedom and dignity and protection from unlawful arrest, detention and deportation. The Court held that his arrest was lawful, but his detention and deportation were not. It reaffirmed that immigration practice that bypass judicial oversight are unlawful. It affirms the rights of migrants to be treated with dignity and the importance of adherence to the rule of law in immigration and migrant cases.

Parties

Applicants: Ismail Ebrahim Jeebhai; Yasmin Naidoo; Zehir Omar (attorneys cited due to contempt findings in the court below).

Respondents: The Minister of Home Affairs; a senior immigration officer in the Department of Home Affairs.

Background and facts

Mr Khalid Mahmood Rashid, a Pakistani national, was arrested at a private residence by the immigration office, also accompanied by members of the South African Police Service. He was unable to produce a valid permit and admitted entering South Africa unlawfully and obtaining fraudulent documentation.

Mr Rashid was detained at a police station and subsequently served with a notice of deportation under section 34 of the Immigration Act 13 of 2002. Within days, he was removed from South Africa and handed over to Pakistani officials. His deportation took place without notice to his family or legal representatives and without the procedural safeguards required by the Immigration Act and its Regulations.

Because Mr Rashid was unable to instruct lawyers or to depose to affidavits, Mr Jeebhai instituted proceedings on his behalf to challenge the lawfulness of his arrest, detention and deportation. The litigation became procedurally complex, involving multiple applications and counter-applications, including allegations of contempt of court against the applicants.

The High Court dismissed the challenge to the deportation and convicted the applicants of contempt. Leave to appeal to the SCA was granted.

[12] https://www.saflii.org/za/cases/ZASCA/2009/35.html

Legal issues before the Court

The SCA was required to determine:

- Whether Mr Rashid's arrest under section 34(1) of the Immigration Act was lawful.
- Whether his detention and deportation complied with the procedural requirements of the Immigration Act and the Regulations.
- Whether section 8 of the Immigration Act (internal review procedures) had to be exhausted before arrest and detention for deportation.
- Whether the deportation constituted an unlawful "disguised extradition".
- Whether the state's conduct constituted an "enforced disappearance".
- Whether the contempt findings against the applicants were lawful.

Court's findings and reasoning

The Court drew a clear and principled distinction between arrest, detention and deportation, emphasising that each stage is governed by distinct statutory requirements.

Arrest

The Court held that Mr Rashid's arrest was lawful. As an "illegal foreigner" within the meaning of the Immigration Act, he could lawfully be arrested without a warrant under section 34(1) for the purpose of deportation. The Court rejected a line of High Court authority suggesting that section 8 review procedures must be exhausted before arrest, holding that such an interpretation would render section 34 ineffective and undermine immigration enforcement.

Detention and deportation

Although the arrest was lawful, the Court held that the subsequent detention and deportation were unlawful. The Immigration Act and Regulations impose strict procedural safeguards when a person's liberty is restricted. These include detention under a warrant, proper notification of rights, and removal through lawful procedures and at designated ports of entry.

According to the respondents' account, Mr Rashid was detained without a warrant, removed from detention, and deported without the required authorisation. The Court stressed that any deprivation of liberty is presumptively unlawful and that the burden rests on the state to justify it. That burden had not been discharged.The Court reaffirmed that immigration control does not permit the informal or expedient deprivation of liberty. Even where a person has entered unlawfully, the state must strictly comply with statutory safeguards.

Disguised extradition and enforced disappearance

The Court rejected the argument that the deportation constituted a disguised extradition. The evidence relied upon was inadmissible hearsay and insufficient to establish that the removal was at the request of a foreign government or to circumvent extradition safeguards. Similarly, the Court held that the facts did not meet the threshold for "enforced disappearance" as a crime against humanity. Such a finding would require proof of conduct forming part of a widespread or systematic attack on a civilian population, which was not established.

Contempt of court

The Court found that the applicants had been wrongly convicted of contempt. The order relied upon had been amended to permit the use of the relevant documents in other proceedings, and there was no wilful disobedience of a court order. The contempt convictions and sentences were therefore set aside.

Court order

The appeal was upheld.

The Court set aside the High Court's order and replaced it with an order declaring that Mr Rashid's detention and deportation were unlawful. The counter-application for contempt was dismissed, and the respondents were ordered to pay the applicants' costs.

Why the case matters

Jeebhai is a leading authority on the limits of state power in immigration enforcement and on the application of the principle of legality to detention and deportation. It establishes that while the state may lawfully arrest undocumented migrants, detention and removal must strictly comply with statutory safeguards.

The judgment decisively rejects informal or expedient immigration practices that bypass warrants, notice requirements, or judicial oversight. It affirms that unlawful detention cannot be justified by administrative convenience or migration control objectives.

Jeebhai also plays a critical jurisprudential role in later refugee and asylum-seeker cases. Its insistence on strict legality in detention underpins subsequent decisions such as Arse and Ruta, which further constrain the use of the Immigration

Act where the Refugees Act applies. Together, these cases reinforce the principle that liberty, dignity and the rule of law apply fully in the migration context.

6. Somali Association of South Africa v Limpopo Department of Economic Development, Environment and Tourism (48/2014) ZASCA 143 (26 September 2014)[13]

The state in Limpopo closed down approximately 600 small businesses and spaza shops operated by Somalian and Ethiopian nationals, many of whom were asylum seekers or refugees. The SCA held such closures to be unlawful saying that while section 22 of the Constitution states that every citizen has the right to choose their trade, occupation or profession freely it does not exclude or prohibit refugees or asylum seekers from exercising a similar right. To prevent refugees and asylum seekers from operating their businesses and making a livelihood would deprive them of their dignity and jeopardise their survival.

Parties

Applicants: Somali Association of South Africa and others, including individual asylum seekers and refugees.

Respondents: Limpopo Department of Economic Development, Environment and Tourism and others.

Background and facts

The case arose from a law-enforcement initiative in Limpopo Province known as "Operation Hardstick". Under this operation, the South African Police Service and municipal officials shut down spaza shops and small businesses operated by Somali and Ethiopian nationals, many of whom were asylum seekers or recognised refugees lawfully present in South Africa.

Approximately 600 businesses were closed. Traders were arrested, stock and equipment were confiscated, and business premises were sealed. Officials repeatedly asserted that foreign nationals were not permitted to operate businesses, that permits had to be in the trader's own name, and that asylum seeker or refugee permits did not entitle holders to trade or conduct business.

The affected traders included asylum seekers holding section 22 permits under the Refugees Act and recognised refugees holding section 24 permits. Some held business licences or municipal trading consent; others had unsuccessfully applied for or renewed licences but were refused on the basis of nationality.

[13] https://www.saflii.org/za/cases/ZASCA/2014/143.html

The applicants approached the High Court seeking declaratory relief confirming their right to trade and challenging the lawfulness of the business closures. The High Court dismissed the application, holding that the constitutional right to choose a trade, occupation or profession under section 22 is reserved for citizens. The applicants appealed to the SCA.

Supreme Court of Appeal

Legal issues before the Court

The SCA was required to determine:

- Whether asylum seekers and refugees lawfully present in South Africa are entitled to apply for and renew business or trading licences under applicable legislation.
- Whether South African law imposes a blanket prohibition on self-employment by asylum seekers and refugees.
- Whether the closure of businesses operated by lawfully present asylum seekers and refugees was lawful.
- How the right to dignity, read in conjunction with international refugee law, informs access to livelihoods for asylum seekers and refugees.
- Whether the reasoning in Watchenuka applies to self-employment as well as to wage employment.

Court's findings and reasoning

The Court rejected the High Court's conclusion that section 22 of the Constitution barred asylum seekers and refugees from self-employment. Section 22 confers on citizens the right to freely choose a trade, occupation or profession, but it does not prohibit non-citizens from working or trading, nor does it create a general exclusion from economic activity.

Turning to the Refugees Act, the Court held that section 27(f), which entitles refugees to "seek employment", is not confined to wage labour. There is no textual or purposive basis for excluding self-employment from that entitlement.

The Court found no statutory provision in the applicable business licensing legislation that excluded foreign nationals from applying for licences or trading consent. Requirements to provide an identification number did not operate as a citizenship requirement, as asylum seekers and refugees hold official permits with identifying numbers.

The Court emphasised the particular vulnerability of asylum seekers and refugees. South Africa provides no general system of social assistance to support them while their status is being determined. In this context, denying access to self-employment, where it is the

only realistic means of survival, would result in destitution and humiliation, thereby engaging the constitutional right to dignity.

Crucially, the Court held that the dignity-based reasoning in Watchenuka is not limited to wage-earning employment. Where the denial of economic activity threatens survival and dignity, constitutional protection is triggered, regardless of the form that work takes. There is no principled basis for protecting dignity in employment while denying it in self-employment.

The Court was also critical of the conduct of state officials. The closures and confiscations were carried out without lawful authority and were based on incorrect assumptions about the rights of asylum seekers and refugees. Such conduct amounted to unlawful, discriminatory and xenophobic enforcement.

Court order

The appeal was upheld. The High Court's order was set aside and replaced with an order declaring that asylum seekers and refugees are entitled to:

- Apply for and renew business or trading licences in accordance with applicable legislation.
- Apply for and renew municipal consent to operate spaza shops and similar businesses.

The closure of businesses operated by asylum seekers and refugees lawfully present in South Africa was declared unlawful and invalid. The respondents were ordered to pay costs, including the costs of two counsel.

Why the case matters

The Somali Association is a landmark judgment on the economic rights of asylum seekers and refugees in South Africa. It affirms that there is no blanket prohibition on self-employment by non-citizens and that licensing regimes must be applied without discrimination on the basis of nationality.

The case extends the dignity-based reasoning developed in Watchenuka from wage labour to encompass all forms of livelihood necessary for survival. It recognises that, in the absence of state support, access to self-employment may be essential to preserving dignity and avoiding destitution.

The judgment also serves as a strong judicial rebuke of unlawful and xenophobic enforcement practices by state authorities, reinforcing that migration control objectives cannot override constitutional protections and the rule of law.

7. Scalabrini Centre v Minister of Home Affairs 2016 (4) SA 125 (SCA) – Supreme Court of Appeal[14]

The Cape Town Refugee Reception Office was closed down in 2012 and the applicants challenged the closure, arguing that asylum seekers and refugees were forced to travel to Durban, Musina, or Pretoria to submit their applications. This was arduous, expensive and unnecessarily burdensome. The Court held that the closure undermined the protective elements of the Refugees Act and that access and protection are key elements of our refugee and asylum seekers system. The respondents were ordered to reopen the office in Cape Town.

Parties

Applicants: Scalabrini Centre, Cape Town; the Trustees of the Scalabrini Centre, Cape Town; Somali Association of South Africa; and several individual asylum seekers.

Respondents: The Minister of Home Affairs; the Director-General of the Department of Home Affairs; the Chief Director: Asylum Seeker Management; the Standing Committee for Refugee Affairs; and the Minister of Public Works.

Background and facts

This case concerned the decision of the Director-General of the Department of Home Affairs to close the Cape Town Refugee Reception Office (CTRRO) to new asylum applicants and to cease operating it as a fully functional refugee reception office.

The CTRRO had been operating since 2000 and served asylum seekers residing in the Western Cape. Over time, the Office had been relocated several times due to zoning disputes and nuisance litigation brought by neighbouring businesses. In 2012, following further litigation and difficulties in securing suitable premises, the Department announced that the CTRRO would close permanently. From June 2012, it ceased accepting new asylum applications, although limited services for existing asylum seekers continued on a transitional basis.

As a result of the closure, asylum seekers in Cape Town were required to travel to refugee reception offices in Musina, Pretoria or Durban to lodge new asylum applications or transfer their files. This imposed significant financial, logistical and practical burdens on asylum seekers, many of whom lacked the means to travel long distances or to remain near the northern border.

[14] https://www.saflii.org/za/cases/ZASCA/2017/126.html

The closure decision was challenged in earlier litigation. In 2013, the SCA held that the Director-General's failure to consult with interested organisations rendered an earlier closure decision procedurally irrational and unlawful, but characterised the decision as executive action rather than administrative action reviewable under PAJA. The Court granted leave to apply for further relief if a new decision was not taken.

Following consultations, the Director-General again decided, in January 2014, to permanently close the CTRRO. This second decision was the subject of the present appeal, after the High Court dismissed the applicants' challenge.

Legal issues before the Court

The SCA was required to determine:

- Whether the Director-General's decision to close the CTRRO was lawful and rational under the principle of legality.
- Whether the Director-General properly exercised the power conferred by section 8(1) of the Refugees Act 130 of 1998.
- Whether relevant considerations were taken into account and irrelevant considerations were excluded.
- Whether the decision undermined the purpose of the Refugees Act, particularly access to asylum procedures.
- Whether the High Court erred in dismissing the application for review.

Court's findings and reasoning

The Court reaffirmed that although the decision to close a refugee reception office constitutes executive action and is therefore not reviewable under PAJA, it remains subject to the principle of legality. This requires that the decision be lawful, rationally connected to its purpose, and made in accordance with the empowering provision.

Interpreting section 8(1) of the Refugees Act, the Court emphasised that the Director-General's discretion to establish refugee reception offices must be exercised "for the purposes of the Act". Those purposes include giving effect to international refugee law, providing for the reception of asylum seekers, and regulating access to refugee status.

The Court found that the Director-General failed to consider the impact of the closure on asylum seekers residing in the Western Cape. Requiring asylum seekers to travel to distant offices in other provinces significantly impeded access to the asylum system and undermined the Act's protective purpose. The Court rejected the notion that asylum seekers could reasonably be expected to relocate to border areas or major cities far from where they lived in order to seek protection.

The Court also criticised the Department's reliance on administrative convenience, resource constraints, and nuisance litigation as justification for closure. While acknowledging the practical difficulties faced by the Department, the Court held that these considerations could not override statutory obligations to ensure meaningful access to asylum procedures.

Importantly, the Court found that the Director-General took into account irrelevant considerations, including the assumption that most asylum seekers using the CTRRO were "economic migrants", and failed to properly weigh expert submissions and objections raised during the consultation process. Notably, none of the refugee-rights organisations consulted supported the closure of the CTRRO.

The Court concluded that the decision was not rationally connected to the purpose of the Refugees Act and was therefore unlawful under the principle of legality.

Court order

The appeal was upheld with costs, including the costs of two counsel. The High Court's order was set aside and replaced with an order declaring the Director-General's decision to close the Cape Town Refugee Reception Office unlawful and invalid. The respondents were directed to reopen and maintain a fully functional refugee reception office in or around the Cape Town metropolitan area by a specified date. The Director-General was required to report regularly to the applicants on the steps taken to comply with the order. Leave was granted to apply for further relief if necessary.

Why the case matters

This judgment is a leading authority on access to asylum procedures and the application of the principle of legality to executive decisions in the migration context. It confirms that while the executive has discretion to determine the location and number of refugee reception offices, that discretion must be exercised in a manner consistent with the purpose of the Refugees Act and South Africa's international obligations.

The case affirms that practical access to asylum procedures is a core component of refugee protection. Administrative efficiency, cost considerations, or local opposition cannot justify decisions that effectively deny asylum seekers the right to lodge claims. The case is also significant for clarifying that executive action affecting asylum seekers, although not reviewable under PAJA, remains subject to constitutional scrutiny for rationality and legality. It laid important groundwork for later jurisprudence emphasising access, protection and the centrality of the asylum system, including subsequent Constitutional Court cases dealing with non-refoulement and procedural barriers to asylum.

Note: The respondents applied to the Constitutional Court for leave to appeal, which was dismissed. A reception centre is now operational in the Cape Town metropolitan area, although it opened only in 2023, a decade after the litigation was initially instituted.

8. Gavrić v Refugee Status Determination Officer, Cape Town and Others [2018] ZACC 38[15]

Gavrić had committed various crimes in his home country, Serbia. The Serbian government sought to extradite him and he appealed for refugee status using section 4(1)(b) of the Refugees Act as his basis. He argued he should not be refused refugee status because his crimes were of a political nature. His argument was rejected by the High Court and the Constitutional Court also rejected it, and held that he could not be given refugee status as he had committed crimes and was excluded by section 4(1)(b). However the Court held that he could not be sent back to a situation where his life, and fundamental rights would be endangered as South Africa is committed to non-refoulement.[16]

Parties

Applicant: Dobrosav Gavrić

Respondents: Refugee Status Determination Officer, Cape Town; Minister of Home Affairs; Director-General of the Department of Home Affairs; Minister of Justice and Constitutional Development; Director-General of Justice and Constitutional Development; Director of Public Prosecutions, Western Cape

Amicus curiae: People Against Suppression, Suffering, Oppression and Poverty (PASSOP)

Background and facts

Mr Gavrić is a Serbian national who was convicted in Serbia for the assassination of Željko "Arkan" Ražnatović and two bodyguards. He was sentenced to a lengthy term of imprisonment following criminal proceedings in Serbia.

In 2007, Gavrić entered South Africa by means of a false identity. His true identity was revealed in 2011 after he was involved in a shooting incident. Serbia subsequently requested his extradition. In January 2012, Gavrić applied for asylum in South Africa under the Refugees Act 130 of 1998. He claimed that if returned to Serbia, he faced a real

[15] https://www.saflii.org/za/cases/ZACC/2018/38.html

[16] Section 2 of the Refugees Act says that a person may not be expelled or returned to a country where they may be persecuted or their life, physical safety or freedom would be threatened because of external aggression, occupation, foreign domination or events seriously disturbing public order in that country.

risk of being killed by supporters of Arkan.

The Refugee Status Determination Officer (RSDO) rejected his asylum application not by disputing his fear of harm but by excluding him from refugee status under section 4(1)(b) of the Act. That section excludes a person from refugee status where there is reason to believe they have committed a serious non-political crime outside South Africa.

Gavrić challenged the exclusion decision in the High Court and later sought to appeal to the SCA, arguing that section 4(1)(b) was unconstitutional and that the decision violated his fundamental rights. After those challenges failed, he approached the Constitutional Court.

Legal issues before the Court

The Constitutional Court was required to decide:

- Whether section 4(1)(b) of the Refugees Act is unconstitutional because it limits rights such as life, dignity, equality, and the freedom and security of the person.
- Whether an asylum seeker must first be found to qualify as a refugee under section 3 before being excluded under section 4.
- Whether a decision to exclude an asylum seeker under section 4 is subject to internal appeal under the Refugees Act.
- Whether the RSDO's decision was lawful, reasonable, and procedurally fair.
- Whether the applicant should be declared a refugee.

Court's findings and reasoning

The Court held that Mr Gavrić was not entitled to refugee status because section 4(1)(b) of the Refugees Act provides that a person does not qualify for refugee status if there are serious reasons to believe they have committed a non-political crime that would be punishable by imprisonment if committed in South Africa. The Court found that this requirement was clearly met, given Mr Gavrić's conviction and lengthy prison sentence in Serbia for multiple murders. Once these facts were established, the decision-maker had no discretion to grant refugee status.

The Court rejected the argument that the authorities were required to decide first whether Mr Gavrić qualified for refugee protection under section 3[17] of the Act before deciding whether section 4(1)(b) applied. It held that where the facts justifying

[17] Section 3 defines the positive grounds on which a person may be recognised as a refugee such as them having a well-founded fear of being persecuted or having to seek refugee from war and having to leave their home.

disqualification are clear from the outset, it is permissible to decide the matter on that basis alone, without first determining whether the person would otherwise qualify as a refugee.

The Court also dismissed the constitutional challenge to section 4(1)(b). It held that the provision serves a legitimate and important purpose, namely to ensure that refugee protection is not granted to persons who have committed serious crimes and to prevent refugee status from being used to avoid criminal accountability. The Court emphasised that international refugee law expressly permits states to deny refugee status to persons who have committed serious non-political crimes.

At the same time, the Court made clear that refusing refugee status does not automatically mean a person may be deported or extradited. Section 4(1)(b) must be read together with section 2 of the Act, which prohibits South Africa from returning any person to a country where they face a real risk of persecution, death, torture, or cruel, inhuman, or degrading treatment. Any future decision to extradite or remove Mr Gavrić would therefore require a separate assessment at that stage, in compliance with section 2 and the Constitution.

Court order

Gavrić had appealed against the High Court's judgment dismissing his challenge to the refusal of refugee status.[18] Although the Constitutional Court agreed with the High Court that Mr Gavrić should not be granted refugee status, it set aside the High Court's order and the administrative decision, and substituted its own decision on clearer constitutional and statutory grounds. It held that Mr Dobrosav Gavrić does not qualify for refugee status under section 4(1)(b) of the Refugees Act 130 of 1998. The Court did not order his deportation, holding that any decision on extradition or removal must be taken by the executive in accordance with section 2 of the Act and the Constitution.

Why the case matters

This judgment is a leading authority on the relationship between refugee law and constitutional rights in South Africa. It confirms that exclusion from refugee status is constitutionally permissible, but only if it operates alongside robust protections against refoulement. The case makes clear that denying refugee status does not authorise the state to expose any person to death, torture, or inhuman treatment. It also strengthens procedural fairness by confirming appeal rights for excluded asylum seekers. In doing so, the Court ensures that refugee law operates within, rather than outside, the

[18] Gavrić had appealed to the SCA who refused leave to appeal so the matter went directly to the Constitutional Court.

Constitution's commitment to human dignity, accountability, and the rule of law.

9. Ruta v Minister of Home Affairs [2018] ZACC 52[19]

Mr Ruta entered South Africa irregularly and was arrested 15 months later for road traffic offences and was found with false permits. The Department of Home Affairs treated him as an illegal foreigner under the Immigration Act and sought to deport him. The High Court interdicted the deportation and said the delay did not disqualify him from applying for asylum and traffic offences in South Africa did not disqualify him. The SCA reversed this decision and he appealed to the Constitutional Court. By then, he had applied for asylum, so the matter was moot. But the Constitutional Court held that a delay in starting to apply for asylum does not negate the application, and traffic offences in South Africa do not fall under the basis of exclusion found in section 4(1)(b) of the Refugees Act.[20] It also warned against using the Immigration Act to deal with matters that fall squarely under the Refugees Act.

Parties

Applicant: Alex Ruta, a Rwandan national

Respondent: Minister of Home Affairs

Background and facts

Mr Ruta entered South Africa irregularly in December 2014. Approximately 15 months later, he was arrested for road traffic offences and found to be in possession of false permits. While detained, he expressed an intention to apply for asylum, claiming that he faced persecution and a risk to his life if returned to Rwanda.

The Department of Home Affairs treated him as an "illegal foreigner" under the Immigration Act and initiated deportation proceedings, arguing that his delay in seeking asylum meant he was barred from accessing the asylum system.

The High Court interdicted his deportation and held that the delay did not disqualify him from applying for asylum and that his South African criminal convictions did not trigger the exclusion clause in section 4(1)(b) of the Refugees Act.

On appeal, the SCA reversed this decision by a majority, holding that asylum seekers must apply within a reasonable time and that Mr Ruta's delay meant he had to be dealt with

19 https://www.saflii.org/za/cases/ZACC/2018/52.html

20 This section allows for exclusion if a person has committed non political crimes in their home country.

under the Immigration Act.

By the time the matter reached the Constitutional Court, Mr Ruta had been released and had applied for asylum. Although his individual case was technically moot, the legal issues remained live and of general public importance.

Legal issues before the Court

- Whether a person who entered South Africa unlawfully and delayed applying for asylum is barred from accessing the asylum process.
- Whether an "illegal foreigner" who expresses an intention to apply for asylum must be dealt with under the Refugees Act rather than the Immigration Act.
- Whether section 4(1)(b) of the Refugees Act excludes from refugee status persons who have committed crimes within South Africa.
- Whether the SCA acted inconsistently with its own binding precedent in refugee law.
- Whether leave to appeal should be granted despite mootness.

Court's findings and reasoning

The Court granted leave to appeal, finding that the matter raised issues of significant public importance affecting large numbers of asylum seekers and the administration of refugee law.

The Court reaffirmed that the Refugees Act, read in light of section 2 (the non-refoulement provision), prevails over the Immigration Act where a person expresses an intention to apply for asylum. Once such an intention is expressed, deportation and removal are prohibited until the asylum process, including appeals, has been lawfully completed.

Delay in applying for asylum does not disqualify a person from accessing the asylum system. The Court emphasised that only the grounds listed in section 24(3) of the Refugees Act permit the refusal of an asylum application, and that the merits of an application, including credibility, delay, or abuse of process, may be assessed only by a Refugee Status Determination Officer.

The Court confirmed that section 4(1)(b) of the Refugees Act applies only to crimes committed outside South Africa. Mr Ruta's local traffic offences therefore did not exclude him from refugee protection.

Critically, the Court held that the SCA majority had breached the principle of stare decisis by departing from its settled jurisprudence in Abdi, Arse, Bula and Ersumo without

explaining why those decisions were wrong. [21] This undermined legal certainty and the rule of law.

The Court grounded its interpretation firmly in constitutional values of dignity, freedom and life, and in South Africa's international law obligations, particularly the principle of non-refoulement.

Court order

The appeal was upheld with costs, including the costs of two counsel. The order of the SCA was set aside and replaced with an order dismissing the appeal with costs.

Why the case matters

Ruta is a key judgment on the relationship between the Refugees Act and the Immigration Act. It confirms that delay, unlawful entry, or immigration status cannot be used to deny access to the asylum process.

The judgment reaffirms that only Refugee Status Determination Officers may assess the merits of asylum claims, restoring fidelity to established refugee-law jurisprudence and preventing executive overreach.

Ruta also strongly affirms the constitutional and international law principle of non-refoulement, making clear that protection against return to danger applies from the moment an intention to seek asylum is expressed, not only after formal recognition as a refugee.

Finally, the case is significant for its robust defence of stare decisis, legal certainty, and judicial accountability in a context where liberty, dignity, and life are directly at stake.

10. Saidi and Others v Minister of Home Affairs and Others [2018] ZACC 9[22]

The applicants had instituted review proceedings under PAJA after their applications for asylum were rejected and all internal appeals had been exhausted. Refugee Reception Officers would not extend their permits pending the review, a practice that had been implemented in the past. The Constitutional Court held that permits had to be extended pending reviews since failure to extend them could lead to refoulement.

[21] In Abdi, Arse, Bula and Ersumo, the Supreme Court of Appeal had consistently held that delay in seeking asylum, unlawful entry, or doubts about credibility do not bar access to the asylum process, and that only a Refugee Status Determination Officer may assess the merits of an asylum application under section 24(3) of the Refugees Act.

[22] https://www.saflii.org/za/cases/ZACC/2018/9.html

Parties

Applicants: Cishahayo Saidi and 28 other asylum seekers.

Respondents: Minister of Home Affairs; Director-General, Department of Home Affairs; Manager of the Cape Town Refugee Facility.

Background and facts

The applicants were asylum seekers whose applications had been refused and whose internal appeals had been exhausted. They instituted judicial review proceedings under the Promotion of Administrative Justice Act 3 of 2000 (PAJA). A long-standing practice of extending asylum seeker permits pending review was abruptly discontinued, exposing the applicants to arrest, detention and deportation while their court challenges were pending.

Legal issues before the Court

Whether Refugee Reception Officers have the power to extend asylum seeker permits pending judicial review. Whether such extensions are discretionary or mandatory. How sections 22 and 21(4) of the Refugees Act must be interpreted in light of the principle of non-refoulement.

Court's findings and reasoning

The Constitutional Court held that Refugee Reception Officers have both the power and the obligation to extend asylum seeker permits while judicial review proceedings are pending.

The phrase "pending the outcome of an application" includes the final outcome of judicial review, not merely internal administrative processes.

The Court held that any interpretation that exposed asylum seekers to detention or deportation while a review was pending would violate the principle of non-refoulement and undermine access to the courts. Administrative convenience could not justify such a risk.

Court order

The Court held that Refugee Reception Officers are obliged to issue or extend asylum seeker permits pending the finalisation of judicial review proceedings and ordered the respondents to pay costs.

Why the case matters

Saidi is the Constitutional Court's statement on protecting asylum seekers during judicial

review. Building directly on the principles articulated in Arse, it ensures that access to the courts is meaningful and that asylum seekers are not exposed to refoulement, detention, or destitution while the lawfulness of refusal decisions is being tested. Administrative convenience cannot justify exposing asylum seekers to detention or deportation while the legality of refusal decisions is under review.

11. Centre for Child Law and others v Minister of Basic Education and others (Section 27 and another as amici curiae) [2020] 1 All SA 711 (ECG) [23]

See Education chapter. The case affirms that the right to basic education applies to all children, and cannot be conditional on the child having documentation. The Court held that education is a basic right regardless of nationality or documentation.

Cross reference education

12. P[…] P[…] M[…] and Others v Minister of Home Affairs and Others, Gauteng Division, Pretoria, Case No 14238/21 (16 January 2024)

The case challenged Home Affairs' practice of "blocking" identity numbers without prior notice or proper investigation. Blocking prevented affected persons from accessing services and participating in everyday civic and economic life. The Court held that this constituted unlawful and procedurally unfair administrative action under the Promotion of Administrative Justice Act 3 of 2000 (PAJA). It found that decisions affecting identity and citizenship must follow fair process and cannot be arbitrary.

Parties

The first applicant was P[…] P[…] M[…], a permanent resident of South Africa whose identity number had been blocked by the Department of Home Affairs. The second and third applicants were Lawyers for Human Rights and LegalWise South Africa (RF) (Pty) Ltd, acting in the public interest and on behalf of affected clients. The respondents were the Minister of Home Affairs and the Director-General of the Department of Home Affairs. The Children's Institute participated as amicus curiae.

Background and facts

The Department of Home Affairs developed a practice of placing "markers" on identity numbers suspected to be fraudulent or duplicated. When a marker was placed, the identity number was automatically blocked, preventing the holder from accessing

[23] https://www.saflii.org/za/cases/ZAECGHC/2019/126.html

services such as banking, travel, education, healthcare, voting, and social benefits. Many individuals discovered their IDs were blocked only when they attempted to use them. The applicants challenged this practice after Ms M[…]'s ID was blocked while Home Affairs investigated suspected identity fraud linked to a duplicate ID number.

Legal issues before the Court

The court had to determine:

- Whether the practice of placing markers and blocking identity numbers was lawful and authorised by legislation.
- Whether blocking IDs without notice or a hearing violated the right to procedurally fair administrative action under section 33 of the Constitution and the Promotion of Administrative Justice Act 3 of 2000.
- What just and equitable remedy should be granted for people whose IDs had been blocked.

Court's findings and reasoning

The Court held that blocking an identity number has severe consequences because it prevents individuals from functioning in society and accessing basic rights and services. While the state has a legitimate interest in protecting the integrity of the national population register and preventing identity fraud, any interference with rights must be authorised by law and comply with procedural fairness.

The Court found that the relevant legislation (including the Identification Act 68 of 1997 and the Births and Deaths Registration Act 51 of 1992) allows the state to seize or cancel identity documents in certain circumstances. However, the law does not authorise the blocking of identity numbers merely on suspicion during the investigative phase. Blocking IDs without notifying the affected person, giving them an opportunity to respond, or providing reasons constituted unlawful and procedurally unfair administrative action under PAJA.

Court order

The Court held that the Department of Home Affairs acted unlawfully in blocking identity numbers without following a fair administrative process. The Court ordered relief designed to address the situation of affected individuals while allowing the Department to develop procedures consistent with constitutional and administrative-law requirements.

Why the case matters

The case confirms that the Department of Home Affairs cannot block identity numbers without lawful authority and procedural fairness. It emphasises that administrative measures taken to protect the national population register must comply with the Constitution and PAJA. The judgment highlights the severe impact that ID blocking has on citizenship, dignity, and access to essential services, and underscores the need for transparent procedures before such drastic measures are taken.

Cross reference children

13. Scalabrini Centre of Cape Town and Others v Minister of Home Affairs and Others [2024] ZACC 3[24]

In 2020, the state brought into force two amendments to the Refugees Act. These were sections 22(12) and (13), which stated that if an asylum seeker failed to renew their section 22 asylum seeker visa within one month of its expiry, their asylum application would be deemed "abandoned". The Constitutional Court confirmed the High Court order that these sections were unconstitutional. In particular, they undermined South Africa's commitment to non-refoulement.

Parties

Applicants: Scalabrini Centre of Cape Town and the Trustees of the Scalabrini Centre of Cape Town, acting in their own interest and in the public interest, including on behalf of asylum seekers unable to litigate in their own name.

Respondents: The Minister of Home Affairs; the Director-General of the Department of Home Affairs; the Chairperson of the Standing Committee for Refugee Affairs; and related officials.

Background and facts

This case concerned a constitutional challenge to sections 22(12) and 22(13) of the Refugees Act 130 of 1998, as amended by the Refugees Amendment Act 11 of 2017 and brought into force on 1 January 2020.

The impugned provisions provided that if an asylum seeker failed to renew their section 22 asylum seeker visa within one month of its expiry, their asylum application would be deemed "abandoned". Once the Standing Committee for Refugee Affairs endorsed the application as abandoned, the asylum seeker was barred from reapplying for asylum and

[24] https://www.saflii.org/za/cases/ZACC/2023/45.html

had to be dealt with as an “illegal foreigner” under the Immigration Act, exposing them to arrest, detention and deportation.

Although limited discretion existed to condone late renewal for reasons such as hospitalisation or institutionalisation, the effect of the scheme was that asylum seekers who failed to renew on time for reasons linked to poverty, distance, administrative barriers, or dysfunction at Refugee Reception Offices lost all protection under the refugee system.

Scalabrini challenged the constitutionality of these provisions in two stages. In Part A, the High Court granted interim relief, interdicting their implementation. In Part B, the High Court declared sections 22(12) and (13) unconstitutional and invalid. Because the order struck down primary legislation, it required confirmation by the Constitutional Court.

By the time the matter reached the Constitutional Court, the respondents had conceded in the High Court that the impugned provisions were inconsistent with constitutional rights. The Constitutional Court was therefore required to determine whether the declaration of invalidity was correct and, if so, whether it should be confirmed.

Legal issues before the Court

The Constitutional Court was required to determine:

- Whether sections 22(12) and (13) of the Refugees Act infringed constitutional rights, particularly the right to non-refoulement.
- Whether deeming asylum applications abandoned on the basis of procedural non-renewal was rationally connected to a legitimate governmental purpose.
- Whether the infringement of rights could be justified under section 36 of the Constitution.
- Whether the High Court’s declaration of constitutional invalidity should be upheld.

Court’s findings and reasoning

The Court began by reaffirming the centrality of the principle of non-refoulement in South African law. Section 2 of the Refugees Act gives domestic effect to South Africa’s international obligations and provides that no person may be returned to a country where they face persecution, threats to life or freedom, or serious harm.

This protection applies irrespective of a person’s formal immigration status and operates as a substantive guarantee, not merely a procedural one.

The Court held that the impugned provisions directly undermined non-refoulement. By treating a failure to renew a visa as abandonment of an asylum claim, the provisions

permitted deportation without any consideration of the merits of the asylum claim or the risk of return. As a result, persons with valid refugee claims could be removed solely because of procedural non-compliance.

The Court rejected the respondents' argument that the provisions were intended to address backlogs in the asylum system, finding the premise of that justification flawed. The evidence showed that backlogs arose primarily from systemic failures within the Department of Home Affairs, including inadequate staffing, dysfunctional Refugee Reception Offices, and delays at the appeal stage. Non-attendance or late renewal by asylum seekers was not a meaningful cause of the backlog.

The Court further held that the provisions were irrational. Declaring asylum claims abandoned did not meaningfully reduce the asylum system's workload, as abandoned claims still required administrative processing and enforcement through immigration mechanisms. The provisions therefore bore no rational connection to their stated purpose.

Turning to justification, the Court found that the limitation imposed by sections 22(12) and (13) was severe and absolute. Once an application was deemed abandoned, the asylum seeker was permanently excluded from the refugee system, regardless of the strength of their claim or the dangers they faced. The discretionary condonation mechanism was narrow and failed to reflect the lived realities of asylum seekers, including poverty, distance, language barriers and systemic administrative dysfunction.

The Court identified multiple less restrictive means to address administrative concerns, including extending visa validity periods, allowing renewals at any Refugee Reception Office, strengthening administrative capacity, and using existing mechanisms to manage inactive files. The existence of these alternatives rendered the impugned provisions unjustifiable under section 36.

Court order

The Constitutional Court confirmed the High Court's declaration that sections 22(12) and 22(13) of the Refugees Act are unconstitutional and invalid. The declaration of invalidity took immediate effect, and no suspension of the declaration was ordered. The respondents were ordered to pay the applicants' costs, including the costs of two counsel.

Why the case matters

Scalabrini affirms the primacy of non-refoulement in South African constitutional law. It makes clear that refugee protection cannot be extinguished by procedural mechanisms that bypass substantive risk assessment. The case decisively rejects administrative default as a basis for exclusion from the asylum system and confirms that systemic state

failures cannot be shifted onto asylum seekers. It reinforces that asylum procedures must be designed and implemented in a manner that is realistic, humane and constitutionally compliant.

The judgment also clarifies that efficiency and backlog reduction cannot justify measures that expose vulnerable persons to refoulement. In doing so, it strengthens the line of authority, emphasising access to asylum procedures and protection pending determination, and stands as the Constitutional Court's most authoritative statement on abandonment, documentation and the limits of procedural exclusion in refugee law.

14. Kopanang Africa against Xenophobia and others v Operation Dudula and Others (2023-044685) [2025] ZAGPJHC (4 November 2025) (Gauteng Division, Johannesburg, Adams J)[25]

The case affirmed that xenophobic action is unlawful and a grave violation of the rights of foreigners. Operation Dudula was interdicted from intimidating, harassing, and assaulting foreign nationals; engaging in hate speech; interfering with access to healthcare facilities and schools by foreign nationals; and from other similar conduct. It was also interdicted from wearing uniforms suggestive of police or military authority. Only immigration officers or police have the power to demand identity documents.

Parties

Applicants: Kopanang Africa Against Xenophobia; South African Informal Traders Forum; Inner City Federation; Abahlali Basemjondolo Movement SA.

Respondents: Operation Dudula; the Government of the Republic of South Africa; key Ministers (Police; Home Affairs; Justice; Health; Basic Education); SAPS; and two Operation Dudula office-bearers (Zandile Dabula and Dan Radebe).

The SAHRC participated; amici included SECTION27, the International Commission of Jurists, Media Monitoring Africa, and the UN Special Rapporteur on Human Rights Defenders.

Background and facts

This was a special-motion application for interdictory and declaratory relief arising from Operation Dudula's anti-migrant "raids" and campaigns, and the alleged impact on foreign nationals' safety, livelihoods, schooling and access to healthcare. The matter was heard on 10 and 11 June 2025, and judgment was delivered on 4 November 2025.

[25] https://www.saflii.org/za/cases/ZAGPJHC/2025/1102.html

Operation Dudula did not oppose the main relief (save that certain state respondents opposed the "uniform/military apparel" relief), and the Court addressed both (a) relief restraining Operation Dudula's conduct and (b) relief clarifying the lawful scope of section 41 of the Immigration Act 13 of 2002 and compelling the implementation of the National Action Plan to Combat Racism, Racial Discrimination, Xenophobia and Related Intolerance (NAP).

Legal issues before the Court

The Court had to decide, in essence:

- Whether final interdictory relief should be granted restraining Operation Dudula and its office-bearers from unlawful conduct (including intimidation, harassment, assault; hate speech; interference with healthcare access and schooling; unlawful evictions; interference with trading and employment; and incitement).
- Whether only immigration officers or police officers may demand identity documents under section 41, and whether private persons (including Operation Dudula) may do so.
- Whether section 41 should be declared unconstitutional or interpreted restrictively (public/private spaces; reasonable suspicion; safeguards for children).
- Whether the state should be ordered to implement the NAP (including early warning/rapid response mechanisms and disaggregated data).
- Whether the South African Police Services (SAPS)/Department of Home Affairs supported or colluded with Operation Dudula, and whether SAPS breached its constitutional duties by failing to investigate and enforce the law (relief sought and partly refused).

Court's findings and reasoning

Relief against Operation Dudula

The Court granted wide final interdicts restraining Operation Dudula and named office-bearers from specified unlawful conduct (including intimidation, harassment, and assault of persons identified as foreign nationals;

hate speech; interference with access to healthcare; interference with schools; unlawful evictions; interference with trading and employment; and incitement).

Section 41 of the Immigration Act (identity demands and safeguards)

The Court held that only an immigration officer or a police officer has the power under section 41 to demand identification documents; private persons have no such power

unless authorised by law.

Instead of striking down section 41, the Court adopted a restrictive interpretation: it authorises warrantless "search"/enquiry only in public spaces (not in private places such as homes and places of work/study/business), requires reasonable suspicion that a person is unlawfully in South Africa, and must be applied with safeguards to protect children's interests.

Uniform/military apparel relief (refused)

The Court found that private persons and groups are not entitled to assume the powers or appearance of state authority, and that wearing such uniforms contributed to the unlawful taking of the law into their own hands and increased the risk of harassment and violence against foreign nationals and others. Accordingly, the Court interdicted Operation Dudula and prohibited its leaders from engaging in conduct that included wearing uniforms or paraphernalia suggestive of police or military authority in the course of demanding identification or enforcing immigration rules, reinforcing that only authorised officers under section 41 of the Immigration Act may lawfully demand identity documents in public spaces and that private vigilantism is unlawful.

State obligations: implementation of the NAP (granted)

The Court held that the government must take reasonable steps to implement the NAP, including establishing an early warning/rapid response mechanism and collating and publishing disaggregated data on xenophobic hate speech and hate crimes (including prosecution and conviction data).

In motivating the need for implementation, the judgment records the NAP's adoption and the applicants' complaint, made years later, that critical elements had not been implemented (including early warning/rapid response and data systems).

Collusion/SAPS breach allegations (refused in part)

The Court did not accept the applicants' claim that SAPS and DHA supported or colluded with Operation Dudula, and it refused the interdictory/declaratory relief sought on that basis. It also refused the declarator that SAPS breached its constitutional duties to combat and investigate crime and to uphold and enforce the law (as reflected in the judgment summary).

Court order

The key orders were:

- Declaration: only immigration officers or police officers may demand identity documents under section 41; private persons may not.
- Interdict: Operation Dudula and the named office-bearers interdicted from demanding passports/ID from private persons.
- Interdicts restraining Operation Dudula and named office-bearers from intimidation/harassment/assault; hate speech; interference with healthcare access; interference with schools; unlawful evictions; interference with trading/employment; and incitement.
- Direction: Operation Dudula must communicate the order to its office-bearers and members.
- Mandamus: Government directed to take reasonable steps to implement the NAP, including early warning/rapid response and disaggregated data publication.

Why the case matters

First, it is a significant High Court intervention against organised xenophobic vigilantism, granting detailed final interdicts to prevent intimidation, hate speech, unlawful evictions, and interference with access to healthcare, schooling, and livelihoods.

Second, it clarifies section 41 of the Immigration Act in a rights-protective way: identity demands are confined to immigration and police officials; exercised in public spaces; grounded in reasonable suspicion; and consistent with safeguards for children.

Third, it moves beyond condemnation to remedy by compelling concrete steps to implement the state's own NAP, particularly early warning and rapid response capacity, and reliable public data on xenophobic hate speech and hate crimes.

Table of cases

Case citation	Key constitutional principles	Core rights established
Lawyers for Human Rights and Another v Minister of Home Affairs and Another [2004] ZACC 12	The Bill of Rights and protections it grants apply to all people. The arrest, detention and deportation of illegal foreigners cannot take place without judicial	Constitutional detention safeguards apply to non-nationals physically present in South Africa (including at ports); immigration detention requires judicial

Case citation	Key constitutional principles	Core rights established
	oversight and adherence to the rule of law.	oversight for extended detention
Minister of Home Affairs and Others v Watchenuka and Others 2004 (4) SA 326 (SCA)	While section 22 of the Constitution gives all citizens the right to choose their trade, occupation or profession freely, it does not entail a prohibition on foreign nationals working and studying here.	It is unlawful for the Department of Home Affairs to impose a blanket prohibition on work and study by asylum seekers and refugees. These must be assessed on a case by case basis by the Standing Committee for Refugee Affairs.
Kiliko and Others v Minister of Home Affairs and Others 2006 (4) SA 114 (C)	Asylum seekers and refugees have the same rights to dignity and freedom as everyone else.	State must provide meaningful access to the asylum system and documentation; systemic administrative barriers violate constitutional rights.
Union of Refugee Women and Others v Director: Private Security Industry Regulatory Authority and Others 2007 (4) SA 395 (CC); 2007 (4) BCLR 339 (CC)	Section 22 of the Constitution limits the right to choose a trade, occupation or profession freely, to citizens.	It was not unconstitutional for the security industry to disallow refugees from working in the industry, because high levels of trust required.
Jeebhai v Minister of Home Affairs (139/2008) [2009] ZASCA 35 (31 March 2009)	The Immigration Act requires due process. A person cannot be arrested, detained and deported without judicial oversight and migrants must be treated with dignity. Their freedom cannot arbitrarily be denied.	The Court affirmed the rights of migrants to be treated with dignity. While arresting someone might be lawful, to detain and deport them without procedural safeguards is unlawful and unconstitutional. It also is a form of refoulement.
Somali Association of South Africa v Limpopo Department of Economic Development, Environment and Tourism (48/2014)	The section 22 right to work in our Constitution is not a bar on migrants being extended the right to choose their trade, occupation or	Asylum seekers and refugees may not be excluded from trading/self-employment without lawful basis; discriminatory closures

Case citation	Key constitutional principles	Core rights established
ZASCA 143 (26 September 2014)	profession.	and confiscations are unlawful.
Scalabrini Centre v Minister of Home Affairs 2016 (4) SA 125 (SCA)	It is not acceptable to make the process of applying for asylum unnecessarily burdensome as this violates the rights to dignity and administrative justice.	Decisions closing or limiting refugee reception offices must be lawful and rational; state must ensure practical access to the asylum system.
Gavrić v Refugee Status Determination Officer, Cape Town and Others [2018] ZACC 38	While a person who has committed a non-political crime in another country may be refused asylum, they may not be arbitrarily deported as we are committed to non-refoulement and procedural fairness. Constitutional rights apply to all persons.	Even where excluded from refugee status, a person retains constitutional protection against refoulement to serious harm; exclusion decisions must be procedurally reviewable/appealable.
Ruta v Minister of Home Affairs [2018] ZACC 52	The Immigration Act should not be used when the Refugees Act applies, and the principle of non-refoulement remains central.	Delay or unlawful entry does not bar access to asylum; once intention to seek asylum is expressed, deportation must be stayed pending lawful completion of the asylum process.
Saidi and Others v Minister of Home Affairs and Others [2018] ZACC 9	Procedural safeguards must be followed and an asylum seeker is protected during judicial review proceedings.	Asylum seeker permits must be issued/extended pending judicial review to prevent detention/deportation while legality is tested.
Centre for Child Law and Others v Minister of Basic Education and Others (Section 27 and Another as amici curiae) [2020] 1 All SA 711 (ECG)	The best interests of the child are protected under section 28 and everyone has a right to basic education (section 29). This applies to all children.	Undocumented children may not be excluded from public schooling due to lack of documentation; access to basic education must be protected.
P[…] P[…] M[…] and	Constitutional right to	Blocking IDs unlawful if

Case citation	Key constitutional principles	Core rights established
Others v Minister of Home Affairs and Others, Gauteng Division, Pretoria, Case No 14238/21 (16 January 2024)	just administrative action (section 33) is violated if a state department makes changes that drastically affect people's lives without giving them an opportunity to respond or provide reasons.	based merely on a suspicion of fraud. Administrative action must comply with PAJA.
Scalabrini Centre of Cape Town and Others v Minister of Home Affairs and Others [2024] ZACC 3	Rights to due process and administrative fairness cannot be arbitrarily taken away.	The requirement that renewal of an asylum seeker permit is deemed abandoned if not renewed within one month of expiry is unconstitutional.
Kopanang Africa against Xenophobia and Others v Operation Dudula and Others (2023-044685) [2025] ZAGPJHC 1102 (4 November 2025)	Foreign nationals must be protected against the vigilantism of xenophobic groups. The rule of law must be asserted and the dignity and protection of migrant rights is central to the South African democracy.	Interdictory relief restraining xenophobic vigilantism; protects migrants' access to clinics and schools and guards against unlawful evictions/intimidation; clarifies section 41 document demands are for officials, not private actors.

Socio-economic rights of migrants

Case citation	Key constitutional principles	Core rights established
Treatment Action Campaign and Others v Facility Manager, Yeoville Clinic and Others (2025-181893) [2025] ZAGPJHC 1256 (4 December 2025)	Section 27 gives everyone equal rights to health care, food, water and social security.	Migrants are entitled to access primary health care services at public clinics regardless of nationality or documentation.
Section 27 and Others v Member of the Executive Council for Health,	Section 27; reasonableness; equality	Orders protecting access to free public health services for specified

Case citation	Key constitutional principles	Core rights established
Gauteng and Others (19304/22) (Gauteng High Court)		groups irrespective of nationality or documentation status
Kopanang Africa Against Xenophobia and Others v Operation Dudula and Others (2023-044685) [2025] ZAGPJHC 1102 (4 November 2025)	Basic rights of foreign nationals cannot be interfered with.	Interdictory relief protecting migrants' access to clinics, schools and housing against harassment, intimidation and vigilantism.
Khosa and Others v Minister of Social Development and Others; Mahlaule and Another v Minister of Social Development and Others (CCT12/03) [2004] ZACC 11	The right to social assistance ectends to everyone no matter what their nationality.	Permanent residents may not be excluded from social assistance without justification; social security linked to dignity.
Government of the Republic of South Africa and Others v Grootboom and Others (CCT11/00) [2000] ZACC 19	The right to be protected against eviction extends to evdryone.	Housing programmes must provide for emergency relief for people in crisis, regardless of national status.
Port Elizabeth Municipality v Various Occupiers (CCT53/03) [2004] ZACC 7	Section 26 balances the rights of property owners with those of occupiers not matter wht their nationality.	Evictions must be just and equitable, taking into account the circumstances of all occupiers, including vulnerable non-citizens.
Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others (CCT24/07) [2008] ZACC 1	Meaningful engagement; dignity; participatory governance.	Municipalities must engage meaningfully with occupiers before eviction, including inner-city residents regardless of nationality.
City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another (CCT37/11) [2011] ZACC 33	Section 26 requires municipal duties; protection against homelessness.	Municipalities must provide temporary accommodation where eviction would result in homelessness, even in private eviction cases and where foreign nationals are involved.

Case citation	Key constitutional principles	Core rights established
Centre for Child Law and Others v Minister of Basic Education and Others [2020] 1 All SA 711 (ECG)	Sections 28 and 29; best interests of the child; equality,	Undocumented children are entitled to access basic education on the same basis as citizens.
Centre for Child Law v Director-General: Department of Home Affairs and Others (CCT101/20) [2021] ZACC 31	Children's rights; dignity; administrative justice.	Barriers to birth registration for children of undocumented parents are unconstitutional.

Current enforceable rights

- **Constitutional protection for all persons.** Refugees, asylum seekers and undocumented migrants are protected by the Bill of Rights, except where rights are expressly limited to citizens.
- **Protection against arbitrary arrest, detention and violence.** Any deprivation of liberty in the migration context is presumptively unlawful and must strictly comply with statutory and constitutional safeguards.
- **Judicial oversight of immigration detention.** Detention beyond the initial statutory period requires court authorisation; detention without time limits or judicial oversight is unconstitutional.
- **Lawful arrest, detention and deportation procedures.** Arrest, detention and deportation are distinct processes, each requiring compliance with statutory safeguards, including warrants, notice of rights and procedural fairness.
- **Non-refoulement.** No person may be returned to a country where they face persecution, threats to life or freedom, torture, or cruel, inhuman or degrading treatment, regardless of immigration status.
- **Access to the asylum system.** The state must maintain accessible and functional asylum procedures; administrative incapacity, delay or convenience cannot justify barriers to access.
- **Protection is provided once the intention to seek asylum is expressed.** Once an intention to seek asylum is expressed, deportation is prohibited until the asylum process, including appeals and judicial review, is finalised.
- **Procedurally fair asylum and status decisions** Asylum, exclusion and status-related decisions must be lawful, reasonable and procedurally fair, with reasons provided and access to internal review or appeal mechanisms.

- **Dignity, survival and livelihood.** Measures that deprive asylum seekers or refugees of the means of survival engage the right to dignity and require individualised justification, including in relation to work, study and self-employment.
- **Equality and protection from xenophobia.** Discriminatory or xenophobic law enforcement, harassment, collective punishment, or private vigilantism is unlawful and interdictable.
- **Access to the courts and protection of vulnerable groups.** Migrants and asylum seekers are entitled to access the courts and to effective remedies, and children enjoy full constitutional protection, irrespective of nationality or documentation, including the paramountcy of their best interests.
- **Socio-economic rights.** Almost all rights set out are available to "everyone" which includes refugees, asylum seekers and undocumented migrants. The exceptions are:
    a) Section 19(3) that restricts political rights to vote and stand for office to citizens.
    b) Section 20 which states that no citizen may be deprived of citizenship.
    c) Section 21(3) that gives citizens the right to enter, remain in and reside anywhere in the Republic and to have a passport.
    d) Section 22 which gives every citizen the right to choose their trade, occupation or profession freely.
    e) Section 15(5) which provides that the state must take steps, within its available resources to foster conditions which enable citizens access to land on an equitable basis.

The remaining socio-economic rights are available to everyone. These includes the right to be equal before the law, dignity, life, privacy, freedom of religion and expression, freedom of association and movement, fair labour practices, a clean and health environment, housing, health care, food, water, social security a basic education, just administration and access to the courts. The rights of every child are guaranteed.

Gender

> *Women in this country are entitled to the protection of their rights. They have a legitimate claim to walk peacefully on the streets, to enjoy their shopping and their entertainment, to go and come from work, and to enjoy the peace and tranquillity of their homes without the fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives.*[1]

Cases in this chapter

1. S v Jackson (35/97) [1998] ZASCA 13; 1998 (4) BCLR 424 (SCA) ; [1998] 2 All SA 267 (A); 1998 (2) SA 984 (SCA); 1998 (1) SACR 470 (SCA) (20 March 1998)) 467
2. Director of Public Prosecutions, Western Cape v Prins and Others (369/12) [2012] ZASCA 106; 2012 (2) SACR 183 (SCA); 2012 (10) BCLR 1049 (SCA); [2012] 3 All SA 245 (SCA) (15 June 2012) 469
3. Embrace Project NPC and others v Minister of Justice and Correctional Services and others [2024] JOL 66923 (GP) 469
4. Lategan and Another v Director of Public Prosecutions, Western Cape and Another (314/2022) [2024] ZASCA 74; 2024 (2) SACR 227 (SCA) (10 May 2024) 470
5. Director of Public Prosecutions, Eastern Cape, Makhanda v Coko [2024] ZASCA 59; 2024 (2) SACR 113 (SCA) 471
6. Carmichele v Minister of Safety and Security 2001 (4) SA 938 (CC) 473
7. AK v Minister of Police (CCT 94/20) [2022] ZACC 14; 2022 (11) BCLR 1307 (CC); 2023 (1) SACR 113 (CC); 2023 (2) SA 321 (CC) (5 April 2022) 475
8. Levenstein and Others v Estate of the Late Sidney Lewis Frankel and Others CCT 170/17 477
9. Tshabalala and another v S and a related matter (Commission for Gender Equality and another as amici curiae) 2020 (3) BCLR 307 (CC) 479
10. Mahlangu and Another v Minister of Labour and Others [2020] ZACC 24; 2020 (6) SA 494 (CC) 481
11. Piliso v Old Mutual Life Assurance Company (SA) Limited and Others (C32/2005) [2006] ZALC 107 (5 December 2006) and Media 24 Ltd and Another v Grobler 2005 (6) SA 328 (SCA) at 349 E-F 484
12. Gaga v Anglo Platinum Ltd and Others (JA 44/10) [2011] ZALAC 29; [2012] 3 BLLR 285 (LAC); (2012) 33 ILJ 329 (LAC) (20 October 2011) 486

[1] Mohamed, CJ in S v Chapman [1997] ZASCA 45; 1997 (3) SA, para 4

13. Simmers v Campbell Scientific Africa (Pty) Ltd. and Others (C751/2013) [2014] ZALCCT 34; [2014] 8 BLLR 815 (LC); (2014) 35 ILJ 2866 (LC) (9 May 2014) 488
14. Moboea/Avbob Mutual Assurance Society 2010 (5) BALR 524 (CCMA) 489
15. Motsamai v Everite Building Products (Pty) Ltd (JA21/08) [2010] ZALAC 11; [2011] 2 BLLR 144 (LAC) 490
16. Rustenburg Platinum Mines Limited v UASA obo Pietersen and Others (JR641/2016) [2018] ZALCJHB 72; (2018) 39 ILJ 1330 (LC) (27 February 2018) 492
17. Venter v The State (A611/11) (2018) ZAGPPHC 615 (9 March 2018) 493
18. Liberty Group Limited v Masango [2017] ZALAC 107 493
19. S v Baloyi and Others (CCT29/99) [1999] ZACC 19; 2000 (1) BCLR 86 ; 2000 (2) SA 425 (CC) 494
20. Kula v S (CAB 02/2023) [2023] ZANWHC 35; 2023 (2) SACR 52 (NWM); [2023] 3 All SA 218 (NWM) (4 April 2023) 496
21. Tabatha v S (Bail Appeal) (CA&R 04/25) [2025] ZAECMHC 21 (27 March 2025) 498
22. S v Campher 1987 (1) SA 940 (A) 499
23. S v Engelbrecht 2005 (2) SACR 41 (W) 500
24. Bhe and Others v Magistrate, Khayelitsha and Others 2005 (1) SA 580 (CC) 502
25. Gumede v President of the Republic of South Africa 2009 (3) SA 152 (CC) 503
26. Women's Legal Centre Trust v President of the Republic of South Africa and Others [2022] ZACC 23; 2023 (1) BCLR 80 (CC) 505
27. Bwanya v Master of the High Court, Cape Town and Others [2021] ZACC 51 507
28. S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae) CCT31/01 [2002] ZACC 22; 2002 (6) SA 642; 2002 (11) BCLR 1117 (9 October 2002) 510
29. Kylie v Commission for Conciliation, Mediation and Arbitration CA10/08 (2010) 7 BLLR 705 (LAC) 512

The Constitution

The Constitution protects women through a set of interconnected rights that address both direct harm and the structural conditions perpetuating gender inequality.

Equality (section 9) guarantees substantive equality and prohibits unfair discrimination on grounds including sex, gender, pregnancy, and marital status. It requires the law to take account of women's lived realities, historical disadvantage, and intersecting forms of discrimination.

Human dignity (section 10) affirms women's inherent worth and autonomy. Violence, sexual harassment, and exclusion from legal protection are recognised as profound violations of human dignity.

Freedom and security of the person (section 12) provides direct protection against gender-based violence, including the right to be free from all forms of violence and the right to bodily and psychological integrity.

The right to life (section 11) reinforces the State's obligation to protect women from serious and lethal harm, particularly where violence is foreseeable.

Access to the courts and to just administrative action (sections 34 and 33) ensures that women can seek protection, challenge discrimination, and hold the State accountable for failures in policing, prosecution, and service delivery.

Socio-economic rights (sections 26 and 27) are also critical, as poverty, housing insecurity, and a lack of healthcare often heighten women's vulnerability to violence and exploitation.

Together, these rights require the State not only to refrain from violating women's rights but also to take positive steps to prevent harm, provide protection, and ensure effective remedies.

General points

The legislation environment is supportive and includes:

- Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2017 (SORMA)
- Domestic Violence Act 116 of 1998
- Protection from Harassment Act 17 of 2011

- Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace, Government Gazette, 18 March 2022
- Employment Equity Act 55 of 1998
- Labour Relations Act 66 of 1995
- Promotion of Equality and Prevention of Unfair Discrimination Act Act 4 of 2000

The policy environment is supportive and includes:

- National Crime Prevention Strategy 1996
- White Paper on Safety and Security 1998
- National Victim Empowerment Programme 1999
- Thuthuzela Care Centres (there are 66 nationally)
- Victim Empowerment Services in the SAPS
- SAPS National Instruction 3/2008 on Sexual Offences 2008
- National Prosecuting Framework Management of Sexual Offence Matters 2012
- National Strategic Plan on Gender Based Violence and Femicide 2020

Despite these developments in law and policy, gender-based violence and discrimination against women, LGBTIQ+ and disabled people continue to plague the country.

This chapter examines the law on gender-based violence and gender inequality through a constitutional and rights-based lens, drawing on key judicial decisions to show how South African law has responded to the violence, discrimination, and structural inequality experienced by women and other vulnerable groups. It proceeds from the premise that gender-based violence is not an isolated or private phenomenon but a systemic violation of fundamental rights, deeply rooted in patriarchy, inequality, and historical marginalisation. The chapter, therefore situates case law within its broader social and constitutional context, including the State's positive obligations to prevent violence, protect victims, and provide effective remedies.

The chapter is organised thematically, beginning with rape and sexual offences, the State's duty to prevent violence, the police's vicarious liability, prescription in sexual violence cases, and the application of doctrines such as common purpose.

A separate section examines intersectionality, illustrating how courts have recognised that gender-based harm is often shaped by overlapping forms of disadvantage, including race, class, and social position.

Workplace sexual harassment is covered, setting out the principles governing employers' vicarious liability, what constitutes sexual harassment, the importance of policies and victim-centred procedures, and the legal approach to delayed reporting. The chapter also addresses domestic violence more broadly, including standards of proof under the Domestic Violence Act, and concludes with a focused examination of women who kill abusive partners, highlighting both the advances and the limits of criminal law doctrine in responding to prolonged abuse.

In addition to violence in its direct forms, the chapter examines how gender inequality is produced and reinforced through family law and social status, particularly through the law's treatment of marriage and intimate relationships. It considers cases involving customary and other marriages, the constitutional consequences of unequal marital regimes, and the recognition (or non-recognition) of life partnerships, showing how women's vulnerability may be heightened by exclusion from legal protection relating to property, inheritance, maintenance, and family security. In this way, the chapter links gender-based violence to broader structural questions about women's legal and social positioning within relationships and households.

Taken together, the chapter aims to provide a coherent account of the current law and to expose gaps, tensions, and areas where further legal development is likely or necessary.

Statistics

A recent report on gender-based violence, entitled "The First South African National Gender-Based Violence Study, 2020", was published by the HSRC in 2022. Below is a brief summary of the findings. [2]

The report presents the most comprehensive data to date on the scope, drivers, and consequences of GBV in South Africa. It confirms what many communities have long experienced: that GBV is a widespread, systemic, and deeply normalised violation of human rights.[3]

It highlights the constitutional implications of GBV, showing how it undermines the rights to life, dignity, freedom from violence, bodily and psychological integrity, and security of the person, and sets out the extent and nature of these violations.

[2] See at: https://hsrc.ac.za/wp-content/uploads/2024/12/FULL-REPORT-THE-FIRST-SOUTH-AFRICAN-NATIONAL-GENDER-BASED-VIOLENCE-STUDY-2022-10.12.24-SPREAD.pdf

[3] The research is based on interviews with 5 233 women and 4337 men using Statistics SA Master Sample Frame which is weighted to reflect the national population of South Africa which allows its statistics to be generalised to the entire adult female population of South Africa.

Right to Life (Section 11)

The right to life is gravely threatened by South Africa's high rates of femicide and life-threatening intimate partner violence (IPV). Femicide rates in South Africa are five times the global average. 7.3% of women report having been choked, strangled, or suffocated by a partner, acts that carry a high risk of death.

Right to Human Dignity (Section 10)

Gender-based violence erodes women's dignity through humiliation, psychological abuse, and coercion. The report finds that 43.8% of women experienced emotional abuse at some point in their lives. Many reported feelings of shame, powerlessness, and social isolation after abuse. When such degradation is widespread and normalised, it signals a systematic devaluation of women's dignity in society.

Right to be Free from Violence (Section 12(1)(c))

The Constitution protects everyone from violence "from either public or private sources". However, GBV remains pervasive, with 25.6% of women experiencing physical IPV, 20.1% experiencing sexual IPV, and 21.6% experiencing non-partner sexual violence. It was also reported that 15.3% of men admitted to forcing a partner to have sex and 6.6% of men admitted to raping a non-partner. Alarmingly, 55.5% of men and 39.4% of women agreed that a man has a right to sex with his wife or girlfriend even if she refuses, indicating widespread social acceptance of sexual violence within intimate relationships.

Right to Bodily and Psychological Integrity (Section 12(2))

Women's bodily autonomy is routinely violated, with 15.9% reporting being forced to have sex by a partner and 11.3% experiencing reproductive coercion, such as being denied contraception or being forced into pregnancy. In addition to physical harm, the psychological impacts, including depression, anxiety, PTSD, and suicidal ideation, indicate clear violations of psychological integrity.

Right to Security of the Person

Women across the country report living in fear, with over 40% saying they changed their behaviour or restricted their movements because of fear of violence. Only 48.7% of women who experienced GBV sought help, often deterred by shame, fear of retaliation, or disbelief from authorities.

The report estimates that **approximately 10 million women aged 18 and over** have experienced **at least one form of GBV**.

GBV Prevalence – Insights from Figure 1 (p33)

The study's Figure 1 provides lifetime prevalence rates for different forms of GBV among women.

Type of Violence	Numbers
Lifetime sexual violence	43.8% or 7 310 389 women
Lifetime physical violence	9,8% or 2 150 342 women
Lifetime physical and/or sexual violence	35,5% or 7 847 438
IPV – emotional abuse (lifetime)	25,1%
IPV – economic abuse (lifetime)	13,1%
IPV – psychological abuse (lifetime)	57,6%

The report identifies the drivers of GBV as structural. For example, they are rooted in patriarchal norms, gender inequality, and the structural vulnerability of certain groups, such as Black women, who are both impoverished and racially discriminated against, and who are also subject to patriarchal violence, substance abuse, childhood trauma, social acceptance of violence, and state inaction.

Cases

Sexual offences

1. **S v Jackson (35/97) [1998] ZASCA 13; 1998 (4) BCLR 424 (SCA) ; [1998] 2 All SA 267 (A); 1998 (2) SA 984 (SCA); 1998 (1) SACR 470 (SCA) (20 March 1998))[4]**

The case did away with the "cautionary rule" which was a rule used by courts to be cautious about testimony of complainants in sexual offence cases [5]

Parties

Appellant: Rodney Jackson

Respondent: The State

Background and facts

The appellant, a policeman, was convicted of attempted rape of a 17-year-old complainant. The trial court accepted the complainant's version of forced sexual assault

[4] https://www.saflii.org/za/cases/ZASCA/1998/13.pdf

[5] Section 60 of SORMA provides that the court may not treat evidence of a complainant in criminal proceedings involving a sexual offence with caution. This was not in a statute at the time of the case.

and rejected the appellant's claim of consensual conduct. The conviction was upheld on appeal and came before the SCA.

Legal issues before the Court

The central evidential issue was whether the trial court misdirected itself by failing properly to apply the cautionary rule traditionally applicable to complainants in sexual offence cases.

Court's findings and reasoning

The SCA undertook a fundamental reconsideration of the cautionary rule, which required courts to treat the evidence of complainants in sexual cases with special caution because of an alleged "inherent danger" of false accusation.

The Court held that:

- The rule was based on outdated and discriminatory assumptions, rooted in the notion that women are particularly prone to fabricate allegations of rape.
- There was no empirical foundation for treating complainants in sexual cases as inherently unreliable.
- The rule unjustly stereotyped complainants and risked increasing the State's burden of proof beyond the ordinary standard.

The Court concluded that there is no general cautionary rule in sexual offence cases. The ordinary criminal standard applies: the State must prove guilt beyond reasonable doubt. A cautionary approach is justified only where there is an evidential basis for doubting a particular witness's reliability, not merely because the charge is sexual in nature.

Court order

The appeal was dismissed.

Why the case matters

S v Jackson abolished the automatic cautionary rule in sexual offence cases in South African law. It marked a decisive shift away from gendered evidentiary presumptions and affirmed that complainants in sexual cases are to be assessed under ordinary credibility principles, consistent with constitutional commitments to equality and dignity.

2. Director of Public Prosecutions, Western Cape v Prins and Others (369/12) [2012] ZASCA 106; 2012 (2) SACR 183 (SCA); 2012 (10) BCLR 1049 (SCA); [2012] 3 All SA 245 (SCA) (15 June 2012)[6]

The Court held that because Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (SORMA) did not specify penalties, it did not mean that a court could not impose penalties. After the case SORMA was amended to specifically provide for the court's power to impose penalties.

The Court held that the absence of an expressly prescribed penalty in SORMA did not invalidate the offences created under the Act, nor render charge sheets defective. The Court rejected the High Court's conclusion that, because the Act did not specify penalties for certain offences (including sexual assault under s 5(1)), it failed to create valid criminal offences in light of the *maxim nulla poena sine lege* and the principle of legality. Wallis JA held that s 276(1) of the Criminal Procedure Act 51 of 1977 constitutes a general empowering provision authorising courts to impose sentences in all cases, whether common law or statutory, where no specific penalty is otherwise prescribed. Accordingly, the Court found that there was a lawful basis for sentencing persons convicted under the Act, upheld the appeal, and reinstated the prosecution.[7]

3. Embrace Project NPC and others v Minister of Justice and Correctional Services and others [2024] JOL 66923 (GP)[8]

This case considered various arguments on what constitutes "consent" in sexual offences cases.

This case questioned the way "consent" is used as a defence by the accused in rape cases. The High Court declared SORMA unconstitutional and referred the matter to the Constitutional Court for confirmation. Judgment is awaited. There are a number of legal disputes and differences of interpretation in the matter, which makes a summary at this stage difficult to include in the compilation.[9]

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[6] https://www.saflii.org/za/cases/ZASCA/2012/106.html

[7] In June 2012, SORMA was amended and a new section 56A was inserted that expressly provides that the imposition of penalties for sexual offences in the Act is left to the discretion of the courts. It provides that the court shall, if the court or another court has convicted a person of a sexual offence and a penalty is not prescribed in the Act, impose an appropriate sentence.

[8] This is the High Court link - https://www.saflii.org/za/cases/ZAGPPHC/2024/961.html.

[9] The Constitutional Court citation is **Embrace Project NPC and Others v Minister of Justice and Correctional Services and Others (CCT314/24; 48656/22)** available at https://collections.concourt.org.za/handle/20.500.12144/38628?utm_source=chatgpt.com

4. Lategan and Another v Director of Public Prosecutions, Western Cape and Another (314/2022) [2024] ZASCA 74; 2024 (2) SACR 227 (SCA) (10 May 2024)[10]

The court held that procedural provisions of SORMA applied retroactively and that the applicant's appeal, which argued that courts cannot convict for offences that did not exist at the time of commission, failed.

Parties

Stephanus Petrus Lategan and Johannes Retief Lategan (appellants) v Director of Public Prosecutions, Western Cape and the Regional Magistrate, Wynberg (respondents).

Background and facts

The appellants were charged in 2018 with common law sexual offences allegedly committed between 1974 and 1979, before the commencement of the SORMA. The State sought to rely on sections 58, 59 and 60 of the Act (relating to evidentiary rules). The regional court ordered that those sections be removed from the charge sheet. The DPP successfully reviewed that decision in the High Court.

Legal issues before the Court

Whether sections 58, 59 and 60 of the Act apply to prosecutions instituted after the Act's commencement, where the offences were committed before it came into force; and whether review (rather than appeal) was the correct procedural route.

Court's findings and reasoning

The SCA held that sections 58–60 are procedural provisions relating to evidence and do not affect substantive rights. Although there is a presumption against retrospectivity, it applies primarily to substantive rights. These provisions operate prospectively and attach procedural consequences to future trials, even where the conduct occurred before the Act. No vested rights of the appellants were infringed.

The High Court correctly entertained the matter by way of review, as the magistrate had committed a material misdirection of law.

[10] https://www.saflii.org/za/cases/ZASCA/2024/74.html

Court order

The appeal was dismissed with costs, including the costs of two.

Why the case matters

The judgment clarifies that the evidentiary provisions in SORMA apply to post-2007 prosecutions of pre-2007 common-law sexual offences. It clearly distinguishes between substantive retrospectivity (generally impermissible) and procedural retrospectivity (permissible) and confirms the limited scope of section 69's transitional protection.

5. Director of Public Prosecutions, Eastern Cape, Makhanda v Coko [2024] ZASCA 59; 2024 (2) SACR 113 (SCA)[11]

This was an appeal against a rape acquittal in the High Court. The Court found that Coko was in guilty of rape, having engaged in penetrative sex with the complainant despite the victim consistently telling him she did not want to have sex involving vaginal penetration. She consented to foreplay and oral sex, but that consent did not extend to full intercourse. Coko knew she did not consent to this and that she was a virgin, yet he continued regardless.

Parties

The appellant was the Director of Public Prosecutions for the Eastern Cape, Makhanda. The respondent was Loyiso Coko. The Women's Legal Centre Trust, the Initiative for Strategic Litigation in Africa, and the Commission for Gender Equality were admitted as amici curiae.

Background and facts

The matter arose from the prosecution of Mr Coko for raping TS, a 21-year-old university student with whom he had recently begun a relationship. TS had consistently told him that she was a virgin and was not ready to engage in penile-vaginal intercourse. On 1 July 2018, she visited his apartment. After kissing, he removed her pyjamas following reassurances that no intercourse would take place. He performed oral sex, then penetrated her vaginally despite her saying "stop" and "you're hurting me," while crying and attempting to push him off. He continued despite her protests.

The Regional Court convicted Coko, finding beyond reasonable doubt that TS had not

[11] https://www.saflii.org/za/cases/ZASCA/2024/59.html

consented and that his evidence was false. He was sentenced to seven years' imprisonment. The High Court overturned the conviction, holding that TS had tacitly consented and that the magistrate had misdirected himself by failing to recognise this. It found that her failure to resist throughout the encounter amounted to participation.

Legal issues before the Court

The SCA had to decide whether the High Court had erred in overturning the conviction; whether the State could invoke section 311 of the Criminal Procedure Act 51 of 1977 to appeal against the acquittal; the proper interpretation of "consent" in section 3 of SORMA; and whether the mens rea requirement (intention) was satisfied.

Court's findings and reasoning

The SCA reaffirmed that consent under section 1(2) of SORMA is a voluntary and conscious agreement to a specific act of penetration. Consent to kissing or oral sex does not equate to consent to vaginal penetration. It further stressed that consent, once given, can be withdrawn at any time, and that continuation thereafter constitutes rape.

The Court rejected the High Court's approach that passivity or failure to resist amounted to tacit consent. It emphasised that mere submission, acquiescence, or lack of resistance is not consent. The SCA found that Coko knew TS had not consented: he knew she was a virgin, knew penetrative intercourse was not planned, heard her objections, and admitted continuing regardless. At the very least, he acted with dolus eventualis (recklessness as to her lack of consent).

The SCA also criticised the High Court for improperly interfering with the trial court's factual findings, contrary to the principles limiting appellate interference with factual determinations.

Court order

The SCA upheld the state's appeal, reinstated the Regional Court's conviction, and set aside the High Court's acquittal. The case was remitted to the High Court to determine whether the seven-year sentence imposed by the Regional Court was appropriate. The respondent was directed to prosecute the sentence appeal within 20 days or to report to prison to serve the sentence.

Why the case matters

Survivor-centred interpretations of sexual consent are confirmed. It clarifies that consent must relate to each specific sexual act, cannot be inferred from passivity, and may be withdrawn at any time. The judgment also holds that courts must resist stereotypes and rape myths, and that appellate courts should defer to trial courts on factual findings

unless clear error is shown. It strengthens protections for survivors of sexual assault by closing interpretative gaps that allowed claims of "tacit consent" to excuse rape.

State duty/police liability in SGBV

6. Carmichele v Minister of Safety and Security 2001 (4) SA 938 (CC)[12]

The case held that the police and prosecutorial authorities have a constitutional obligation to ensure the safety of individuals, particularly women, from gender-based violence. In this case, the police and prosecutors failed to detain a person known to pose a danger to women while he was in custody awaiting trial. After his release on bail, he seriously assaulted Carmichele, who successfully sued the state.

Parties

Alix Jean Carmichele (Applicant) and Minister of Safety and Security (First Respondent) Minister of Justice and Constitutional Development (Second Respondent)

Background and facts

In August 1995, the applicant, Ms Carmichele, was brutally attacked by Francois Coetzee at a friend's house in Noetzie. Coetzee had previously been convicted of sexual assault and was awaiting trial for the attempted rape and assault of another woman, E.T.

Despite this, the police and prosecutors failed to oppose his release on bail or to present the relevant prior convictions to the Court. After his release, Coetzee attacked Carmichele.

Ms Carmichele sued the Ministers of Safety and Security and of Justice and Constitutional Development in the High Court for damages, alleging that the police and prosecutors had negligently failed in their legal duty to protect her. The High Court and the SCA dismissed her claim, granting the respondents absolution from the instance on the ground that no legal duty had been owed to her.

Legal issues before the Court

The Court considered the following issues:

- Whether the police and prosecutors owed a legal duty to protect the applicant from harm.

[12] https://www.saflii.org/za/cases/ZACC/2001/22.html

- Whether such a duty, if it existed, had been negligently breached.
- Whether the common law should be developed in line with the Constitution to recognise such a duty.

Court's findings and reasoning

The Court held that the lower courts had erred by failing to consider the constitutional obligation to develop the common law in light of the Bill of Rights, particularly the rights to life, dignity, and the security of the person (sections 7–12 of the Constitution).

The Court found that courts have a duty under section 39(2) of the Constitution to promote the spirit, purport and objects of the Bill of Rights when developing the common law. The SCA applied a pre-constitutional understanding of delictual wrongfulness and failed to assess the state's constitutional obligations to protect individuals, particularly women, from gender-based violence.

The Court emphasised that police and prosecutors are among the primary agents of the state tasked with discharging these obligations. It held that public officials do not enjoy immunity from delictual liability merely because they are exercising public functions. The failure to consider Coetzee's prior convictions and the risk he posed may have amounted to a breach of constitutional obligations to protect the applicant.

Court order

The Constitutional Court set aside the SCA's order and remitted the matter to the High Court for reconsideration. It held that the applicant should have been allowed to proceed with her case, as a court, properly applying its mind, might find that the police and prosecutors owed her a legal duty.

Why the case matters

Carmichele affirms the constitutional obligation of courts to develop the common law in line with the Bill of Rights. It also establishes that state actors, including the police and prosecutors, can be held delictually liable for failing to protect individuals from foreseeable harm, particularly in cases involving gender-based violence.

7. AK v Minister of Police (CCT 94/20) [2022] ZACC 14; 2022 (11) BCLR 1307 (CC); 2023 (1) SACR 113 (CC); 2023 (2) SA 321 (CC) (5 April 2022)[13]

This case affirmed that the police have a duty to both respond adequately and investigate thoroughly cases of gender based violence. It went so far as to require the police to even adopt a higher standard of diligence when cases involved gender based violence.

Parties

The applicant was AK, a rape survivor. The respondent was the Minister of Police, sued vicariously for the negligent conduct of SAPS officers. The Commission for Gender Equality and the Centre for Applied Legal Studies were admitted as amici curiae.

Background and facts

On the night of 9 December 2010, AK was abducted in Port Elizabeth, held overnight, and repeatedly raped for about 15 hours until the following morning, when she managed to escape. Her vehicle was located by SAPS shortly after her abduction. First responders failed to conduct a basic foot search immediately after arriving at the scene and called off the search prematurely. Later, a dog handler omitted a key section of the beach and dunes from his search plan, and a helicopter search was not directed to illuminate the area that had not been searched (area "F" to "G"). In addition, the subsequent investigation was marked by significant omissions, most notably the failure to secure and promptly view critical CCTV footage and the failure to collect evidence.

AK instituted a delictual claim against the Minister of Police. The High Court held the Minister 40% liable for AK's proven damages, based on negligent omissions by SAPS during both the search and the investigation. The SCA overturned that decision, finding no wrongful or negligent conduct that justified liability. AK appealed to the Constitutional Court.

Legal issues before the Court

The Constitutional Court was asked to determine:

- Whether omissions by SAPS in the search and subsequent investigation were wrongful and negligent, thereby attracting delictual liability.
- Whether those omissions caused AK's psychiatric harm, applying the principles of factual and legal causation.

[13] https://www.saflii.org/za/cases/ZACC/2022/14.html

- Whether CALS's evidence under rule 31, relating to victim-centred policing and secondary victimisation, should be admitted.
- Whether the Biowatch principle should apply to costs.

Court's findings and reasoning

The majority judgment (Tlaletsi AJ, with Khampepe J, Madlanga J, Majiedt J, Mhlantla J and Theron J concurring) found that the police had acted negligently by failing to conduct a prompt foot search when AK's vehicle was discovered, by omitting part of the search area, and by failing to ensure the helicopter properly illuminated the relevant dunes. These omissions were wrongful because they fell short of the duty of reasonable policing in the context of a violent crime. The subsequent investigation was "riddled with material flaws", including the negligent failure to secure and view CCTV footage. In the context of gender-based violence, this was sufficiently serious to found liability.

On causation, the Court applied the flexible but-for test in Lee v Minister of Correctional Services. Although it could not be said with certainty that AK's harm would have been avoided, earlier discovery and a competent investigation would have materially reduced her trauma. This was sufficient for both factual and legal causation.

The Court admitted CALS's evidence, finding it relevant, uncontested, and illuminating the real dangers of secondary victimisation and the need for victim-centred policing.

Concurring judgment (Theron J):

Theron J agreed with the outcome but emphasised that not every investigative omission will found liability. In her view, liability for investigative negligence should be reserved for egregious failures that foreseeably aggravate survivors' trauma. She stressed that liability in this case remained vicarious and did not create inconsistent duties for SAPS. The unexplained failure to view critical CCTV footage constituted such an egregious investigative omission.

Court order

The Court granted condonation and leave to appeal, admitted CALS's evidence, and upheld AK's appeal. The SCA's order was set aside and replaced with an order dismissing the Minister's appeal. The effect was to reinstate the High Court's finding that the Minister was liable. The High Court had held the Minister 40% liable for AK's damages**,** and the Constitutional Court confirmed that this apportionment was "unassailable" (para 112). The Minister was ordered to pay AK's costs in the SCA and the Constitutional Court, including the costs of two counsel.

Why the case matters

The judgment confirms that SAPS can incur delictual liability for negligent omissions in both search and investigation. It adopts a victim-centred perspective, recognising that secondary victimisation is relevant to the wrongfulness inquiry and that negligent investigative failures can aggravate trauma. It raises the bar for gender-based violence cases, requiring the police to meet higher standards of response. Finally, the case reaffirms that GBV survivors who litigate against the state should not be discouraged by adverse costs orders, thereby encouraging constitutional accountability.

Prescription in sexual offences cases

8. Levenstein and Others v Estate of the Late Sidney Lewis Frankel and Others CCT 170/17[14]

The case rejected the current legal situation that held that sexual crimes other than rape and compelled rape prescribed after 20 years. It required the law to be changed to remove prescription from all types of sexual offences.

Parties

The applicants were Nicole Levenstein and seven others, who alleged that they had been sexually assaulted as children by Sidney Lewis Frankel. The first respondent was the Estate of the late Mr Frankel, substituted after his death in 2017. The second respondent was the Minister of Justice and Correctional Services. The third respondent was the Director of Public Prosecutions, Gauteng. The Women's Legal Centre Trust, the Teddy Bear Clinic, and Lawyers for Human Rights participated as amici curiae.

Background and facts

Between 1970 and 1989, when the applicants were aged 6 to 15, Mr Frankel allegedly sexually assaulted them. They claimed to have suffered lasting trauma. Section 18 of the Criminal Procedure Act 51 of 1977 imposed a 20-year time bar on the prosecution of sexual offences other than rape or compelled rape. By the time the applicants sought to pursue criminal charges, the Director of Public Prosecutions refused to prosecute because the alleged offences had prescribed. The applicants challenged the constitutionality of section 18 in the High Court, which declared it invalid on the ground that the distinction between rape and other sexual offences was irrational and infringed rights to dignity, equality, freedom from violence, and access to courts. That declaration required

[14] https://www.saflii.org/za/cases/ZACC/2018/16.html

confirmation by the Constitutional Court.

Legal issues before the Court

The Constitutional Court had to decide:

- Whether section 18 of the Criminal Procedure Act was inconsistent with the Constitution by barring prosecution for sexual offences other than rape or compelled rape after 20 years.
- Whether the declaration of invalidity should be suspended to allow Parliament to amend the law, and, if so, whether an interim "reading-in" should apply.
- Whether the declaration should operate retrospectively.

Court's findings and reasoning

The Court unanimously held that section 18 was unconstitutional. It found that all sexual offences inflict serious harm and trauma, often resulting in delayed disclosure. The arbitrary distinction between rape or compelled rape and other sexual offences lacked a rational basis and undermined the state's constitutional duties to respect dignity, equality, freedom from violence, and bodily integrity. The Court noted that international obligations also required equal treatment of all survivors of sexual violence. It stressed that prescription penalises survivors for delayed disclosure, even where the delay stems from the nature of the abuse. The Court held that survivors of all sexual offences face similar barriers to reporting, and thus the differentiation in section 18 was irrational and arbitrary.

Court order

The Court confirmed the High Court's declaration of invalidity. It ordered that:

- Section 18 was unconstitutional to the extent that it imposed a 20-year limit on the prosecution of sexual offences other than rape or compelled rape.
- The declaration was suspended for 24 months to allow Parliament to enact remedial legislation. In the meantime, section 18 must be read as including "all other sexual offences whether in terms of common law or statute".
- If Parliament failed to act, the reading-in would become final.
- The order of invalidity took effect retrospectively on 27 April 1994.
- The Estate's appeal against the High Court's costs order was dismissed.
- The Minister of Justice was ordered to pay the costs of the confirmation proceedings.

Why the case matters

This case abolished the 20-year prescription period for all sexual offences, recognising that all forms of sexual abuse and violence can have equally traumatic consequences. The decision affirmed that distinctions between penetrative and non-penetrative sexual offences are irrational and perpetuate harmful, outdated views. It advanced the rights to equality, dignity, bodily integrity, freedom from violence, and access to justice for survivors of sexual offences. The ruling also aligned South Africa with its international human rights obligations and reinforced the principle that effective remedies must be provided for serious rights violations.

Common purpose in sexual offences

9. Tshabalala and another v S and a related matter (Commission for Gender Equality and another as amici curiae) 2020 (3) BCLR 307 (CC)[15]

This case confirms that the doctrine of common purpose is applicable to the crime of rape. A group of young men went on a rampage of violence that included looting, assault and the rape of eight women. Tshabalala and Ntuli were convicted of rape by the High Court through the doctrine of common purpose. The Constitutional Court confirmed that rape can fall under the doctrine.

Parties

The applicants were Jabulane Alpheus Tshabalala and Annanius Ntuli, who had been convicted of rape, housebreaking, robbery and related offences. The respondents were the State, represented by the Director of Public Prosecutions. The Commission for Gender Equality and the Centre for Applied Legal Studies were admitted as amici curiae.

Background and facts

On 20 September 1998, a group of young men, including the applicants, went on a violent rampage in Tembisa township. They invaded nine households, looted them, assaulted occupants, stabbed one person, and raped eight women, including a 14-year-old girl and a pregnant woman. Some rapes were multiple, and others took place while others guarded outside.

The High Court found that the group acted as a cohesive unit and that the rapes were part of a pre-arranged plan. The applicants were convicted on several counts of rape,

[15] https://www.saflii.org/za/cases/ZACC/2019/48.html?utm_

seven of which relied on the doctrine of common purpose, and were sentenced to life imprisonment.

The litigation history was lengthy. The High Court rejected the argument that, by its nature, rape could not attract liability under the common purpose doctrine. A co-accused, Phetoe, successfully appealed to the SCA, which overturned his rape convictions on the ground that the State had not proved active participation. Spurred by this, Tshabalala and Ntuli sought leave to appeal to the Constitutional Court, raising the question of whether rape could be committed by common purpose.

Legal issues before the Court

The Constitutional Court had to determine:

- Whether the doctrine of common purpose applies to the common-law offence of rape.
- Whether convictions based on common purpose could stand when an accused had not personally penetrated the complainant.
- The impact of prior conflicting decisions of the High Courts and the SCA on the issue.
- How the interpretation of rape and common purpose should align with constitutional values and international obligations.

Court's findings and reasoning

Three concurring judgments were delivered.

The main judgment (Mathopo AJ) held that the "instrumentality argument" – that rape can be committed only with one's own body – was flawed, discriminatory, and contrary to constitutional principles of equality and dignity. It emphasised that rape is not merely about penetration but about domination, power, and violence. Liability under the common purpose doctrine arises where individuals actively associate with the crime, whether by intimidation, guarding, or encouragement. The applicants were part of a coordinated plan to commit rape, robbery, and assault and could not escape liability by arguing that they did not personally penetrate the victims.

The concurring judgment (Khampepe J) emphasised the systemic and structural nature of rape in South Africa, framing it as an expression of male dominance and gender inequality. She stressed that excluding rape from the reach of common purpose would entrench patriarchal norms and rape culture.

The third concurring judgment (Victor AJ) highlighted feminist legal theory and international law obligations under CEDAW and the Maputo Protocol. She noted that

patriarchal gender norms had historically obstructed rape convictions and that recognising common purpose liability in rape cases was necessary to protect women's dignity and equality.

The Court also drew parallels with other consequence crimes, such as murder, where common purpose liability does not require proof of causation by each participant. It rejected the notion that rape is unique in excluding common purpose liability.

Court order

The Constitutional Court granted condonation and leave to appeal but dismissed the appeals of Tshabalala and Ntuli. It held that the doctrine of common purpose applies to the common-law crime of rape. The High Court's convictions and sentences were upheld. No order as to costs was made.

Why the case matters

This judgment resolved uncertainty in South African law by confirming that rape can be committed through the doctrine of common purpose. It rejected the outdated "instrumentality" approach, which had shielded perpetrators in group rapes who did not themselves penetrate victims. The case affirmed that rape is about power, violence, and degradation, not merely about penetration. It strengthened constitutional protections of dignity, equality, and bodily integrity, and aligned domestic law with international obligations to combat gender-based violence. The decision was a decisive step towards dismantling patriarchal norms embedded in rape law and ensuring accountability for collective sexual violence.

Intersectionality

10. Mahlangu and Another v Minister of Labour and Others [2020] ZACC 24; 2020 (6) SA 494 (C)[16]

This case draws attention to the need to address the intersectionality of women's experiences. "The violence that many women experience is often shaped by the other dimensions of their identifies, such as race and class" (para 92).

Parties

Applicants: Sylvia Bongi Mahlangu; South African Domestic Service and Allied Workers Union

[16] https://www.saflii.org/za/cases/ZACC/2020/24.html

Respondents: Minister of Labour and others

Amici curiae: Commission for Gender Equality; Women's Legal Centre Trust

Background and facts

Ms Mahlangu was a domestic worker employed in a private household. She drowned in her employer's swimming pool while performing her duties. Her daughter, who was financially dependent on her, was denied compensation under the Compensation for Occupational Injuries and Diseases Act 130 of 1993 (COIDA) because domestic workers were expressly excluded from the definition of "employee".

The applicants challenged the constitutionality of this exclusion, arguing that it entrenched systemic disadvantage affecting domestic workers, who are overwhelmingly Black women.

Legal issues before the Court

The key issue concerning intersectionality was whether the exclusion of domestic workers from COIDA constituted unfair discrimination when assessed through the lens of intersecting grounds of disadvantage, including race, gender, sex, class, and social origin.

Court's findings and reasoning

The Constitutional Court expressly adopted an intersectional approach to its equality analysis. It held that discrimination against domestic workers could not be properly understood through a single-axis lens. Domestic workers experience compounded and overlapping forms of disadvantage arising from the intersection of race, gender, sex, class, and historical marginalisation.

The Court recognised that domestic workers, predominantly Black women, occupy a uniquely vulnerable position created by apartheid's racial hierarchy, patriarchy, and economic exploitation. Their exclusion from COIDA therefore constituted indirect discrimination on listed grounds, with the intersection of those grounds aggravating the harm and rendering the discrimination presumptively unfair.

Importantly, the Court affirmed that intersectionality is not foreign to South African constitutional jurisprudence and that section 9 of the Constitution anticipates multiple, converging grounds of discrimination. An intersectional framework was described as essential to achieving substantive equality and the transformative purpose of the Constitution, as it exposes how seemingly neutral laws entrench systemic and gendered poverty.

Court order

The Court confirmed the declaration of the constitutional invalidity of section 1(xix)(v) of COIDA, with immediate and retrospective effect from 27 April 1994, thereby extending compensation protection to domestic workers.

Why the case matters

Mahlangu is the clearest and most authoritative Constitutional Court judgment on intersectionality. It entrenches intersectional analysis as a constitutional method for assessing discrimination and group disadvantage. The judgment affirms that equality jurisprudence must address layered and cumulative oppression rather than isolated categories.

The case is especially significant for women's rights, as it centres Black women's lived experiences and recognises that the law can perpetuate gendered and racialised poverty unless structural disadvantage is directly addressed.

Sexual harassment (workplace)

The Employment Equity Act 55 of 1998 (EEA) provides at section 60 that:

- If it is alleged that an employee, while at work, contravened a provision of this Act or engaged in conduct that would constitute unfair discrimination, the alleged conduct must be immediately brought to the employer's attention.
- The employer must consult all relevant parties and take the necessary steps to eliminate the alleged conduct and comply with the provisions of this Act.
- If the employer fails to take the necessary steps referred to in subsection (2), and it is proved that the employee has contravened the relevant provision, the employer must be deemed also to have contravened that provision.
- Despite subsection (3), an employer is not liable for an employee's conduct if the employer proves that it did all that was reasonably practicable to ensure that the employee would not act in contravention of this Act.

11. Piliso v Old Mutual Life Assurance Company (SA) Limited and Others (C32/2005) [2006] ZALC 107 (5 December 2006) and Media 24 Ltd and Another v Grobler 2005 (6) SA 328 (SCA) at 349 E-F[17]

While Piliso did not win her case which aimed at holding her employer vicariously liable for not protecting her against sexual harassment, the judgment illustrates what the duty of care of an employer entails and what is required to successful hold an employer vicariously liable under the Employment Equity Act, section 60.

Parties

Applicant: Sipokazi Piliso

Respondents: Respondent: Old Mutual Life Assurance Company (SA) Ltd and others

Background and facts

Ms Piliso, an administrator in Old Mutual's Document Management Systems (DMS) department, discovered two offensive and sexually harassing notes written on photographs of herself, placed at her workstation, one in Afrikaans and one in English. Another female employee also found a similar note. Ms Piliso felt shocked, unsafe, and humiliated. She reported the matter to her managers, including Mr Van der Berg, but alleged that the company failed to respond adequately.

Legal issues before the Court

The case raised three alternative claims:

- A statutory claim under section 60 of the EEA, arguing that the employer was vicariously liable for failing to take steps to prevent sexual harassment.
- A delictual claim under the common law, alleging breach of the duty to provide a safe working environment.
- A claim for constitutional damages for breach of her dignity, equality, and freedom from violence, arising from the employer's failure to provide support and protection after the incident.

Court's findings and reasoning

The Court held that:

[17] https://www.saflii.org/za/cases/ZALC/2006/107.html

- Under section 60 of the EEA, an employer can be held vicariously liable only if it is proved that an employee committed the act of harm against a fellow employee. Ms Piliso failed to prove that the perpetrator of the sexual harassment was an employee. Although she reported the incident and felt the company responded inadequately, this was insufficient to trigger the deeming provision in section 60(3).
- On the delictual claim, although the employer has a common law duty to ensure a safe workplace, Ms Piliso again failed to establish that an employee was the perpetrator. The evidence suggested that access to the DMS area where she worked was not restricted to employees alone, and anyone could have entered and committed the act.
- On the constitutional damages claim, the Court referred to *Fose v Minister of Safety and Security* and held that such relief may be available only where no statutory or common law remedies exist. Since remedies were available under the EEA and at common law (though unsuccessful), constitutional damages could not be awarded.
- The Court accepted that the psychological impact on the applicant was severe, as confirmed by expert evidence, particularly due to the employer's lack of support. However, it held that failure to respond empathetically or proactively did not create liability without proof of the perpetrator's identity.

Court order

The applicant's claims under section 60 of the EEA, in delict, and for constitutional damages were all dismissed. No damages or compensation were awarded.

Why the case matters

This case clarified that, to succeed in a claim under section 60 of the EEA, an applicant must prove that the sexual harassment was perpetrated by an identifiable co-employee. In relation to the delictual claim for damages, the employee would have the onus of proving that the perpetrator was a fellow employee and that the perpetrator was acting within the scope of their employment. While acknowledging the severe harm suffered by the victim and the employer's inadequate response, the Court ultimately held that legal liability cannot arise from generalised allegations or the employer's poor handling of the aftermath unless the necessary jurisdictional facts are established.

12. Gaga v Anglo Platinum Ltd and Others (JA 44/10) [2011] ZALAC 29; [2012] 3 BLLR 285 (LAC); (2012) 33 ILJ 329 (LAC) (20 October 2011)[18]

The Court held that sexual harassment in the workplace is unwelcome conduct of a sexual nature. It includes suggestive remarks, direct propositions, or persistent pressure for sexual favours, especially when repeated despite being declined. The test focuses on the effect on the recipient's dignity and comfort, not the harasser's intent or whether the victim was visibly offended at the time. Crucially, harassment by a superior abusing their authority over a subordinate remains misconduct even if the subordinate appears ambivalent

Parties

Appellant: Mzi Gaga, former Group Human Resources Manager at Anglo Platinum Ltd

First Respondent: Anglo Platinum Ltd.

Second Respondent: Commission for Conciliation, Mediation and Arbitration (CCMA).

Third Respondent: Commissioner N Mbelengwa of the CCMA.

Background and facts

Gaga was employed from 1 May 2005 and dismissed on 18 July 2008 for sexually harassing his personal assistant, Esme Makosholo. The company's Sexual Harassment Policy prohibited unwelcome conduct of a sexual nature, including suggestive remarks, direct propositions, and persistent requests despite refusal.

The complainant alleged that over two years, Gaga made repeated sexual propositions, including suggestive comments, invitations to hotels for sex, and crude expressions such as the Zulu phrase "ngiyakugalela". She rejected these advances, at times firmly (including by SMS asking him to stop), though she also handled some remarks with humour or apparent ambivalence, as he was her boss and she was unsure how best to respond.

She lodged a complaint only after an exit interview prompted by the Head of HR, Ms Mogaki, who was aware of previous sexual harassment allegations against Gaga.

The CCMA commissioner found that although some comments caused discomfort, the complainant was not truly offended. He therefore concluded that the dismissal was substantively unfair and ordered reinstatement and back pay. Anglo appealed to the

[18] https://www.saflii.org/za/cases/ZALAC/2011/29.html

Labour Appeal Court.

Legal issues before the Court

- Whether the commissioner erred by focusing narrowly on whether the complainant was "offended" rather than on whether the conduct met the policy and the Code's definition of sexual harassment.
- Whether the commissioner failed to determine, on a balance of probabilities, which version was true.
- Whether repeated unwelcome conduct of a sexual nature suffices to constitute sexual harassment under the policy, even if not all elements are proved.
- Whether the exclusion of similar fact evidence (prior allegations of sexual harassment) constituted a reviewable irregularity.
- Whether dismissal was an appropriate sanction.

Court's findings and reasoning

The Labour Appeal Court (Murphy AJA) upheld the Labour Court's decision to set aside the CCMA award. Key findings:

- The commissioner adopted a too narrow definition, wrongly requiring cumulative proof of all elements of the policy, even though the definition is disjunctive: repeated unwelcome conduct of a sexual nature is sufficient.
- The complainant's credible evidence, corroborated in part by Ms Mogaki, established that Gaga repeatedly made unwelcome sexual propositions despite refusals. Her occasional warmth or joking responses did not negate the unwelcome nature of the conduct, particularly given the power imbalance.
- It is not necessary for the complainant to be "offended" for conduct to qualify as harassment; unwelcome and persistent conduct is sufficient.
- The commissioner failed to fully assess credibility and ignored material evidence, including the SMS asking Gaga to stop.
- Similar fact evidence of prior allegations could have been admissible to show a pattern and knowledge of the rules, and its exclusion was a reviewable irregularity, though not decisive in this case, given the other evidence.
- Given Gaga's senior role, responsibility for "people development", and abuse of authority, dismissal was an appropriate sanction despite the absence of proven psychological harm.

Court order

- Appeal dismissed, and Gaga's dismissal from Anglo was not unfair but was confirmed.
- The Labour Court's order substituting for the CCMA award stands: dismissal was substantively fair.

Why the case matters

The case:

- Clarifies that under workplace sexual harassment policies and the Code of Good Practice, repeated unwelcome conduct of a sexual nature suffices; there is no requirement to prove all listed elements or that the victim was subjectively "offended".
- Highlights that apparent ambivalence or cordial relations do not preclude harassment, particularly where power dynamics are at play.
- Emphasises the duty of senior managers to uphold workplace dignity; sexual harassment by a superior is inherently serious and often justifies dismissal.
- Confirms that excluding relevant similar fact evidence can constitute a reviewable irregularity.
- Affirms that the focus in harassment cases should be on the effect on the recipient, not the harasser's intent, and that the power imbalance must be considered when assessing a complainant's responses.

13. Simmers v Campbell Scientific Africa (Pty) Ltd. and Others (C751/2013) [2014] ZALCCT 34; [2014] 8 BLLR 815 (LC); (2014) 35 ILJ 2866 (LC) (9 May 2014)[19]

Even one instance of an unwelcome sexual advance by an employee to another is a dismissible offence.

An unwelcome advance, even once, constitutes sexual harassment and is a dismissible offence. The Labour Court overturned the CCMA's ruling, which found Simmers guilty of sexual harassment and dismissed him. The facts were that Simmers was away with a service provider and made advances towards her, which she rejected. The Labour Court found his dismissal to be unfair and reinstated him. On appeal to the Labour Appeal Court, it was held that the Labour Court had erred in finding that the behaviour was not sexual harassment but simply "crude and inappropriate" and in treating the conduct as an unreciprocated sexual advance. An unwelcome sexual advance, even once, removes the

[19] https://www.saflii.org/za/cases/ZALCCT/2014/34.html

employee's right to enjoy substantive equality in the workplace.

"Ms M, and other women such as her, are assured of their entitlement to engage constructively and on an equal basis in the workplace without unwarranted interference upon their dignity and integrity. This is the protection which our Constitution affords". [20]

The Court held that it was incorrect to believe that this behaviour did not impair the dignity of the complainant because she was not an employee but an outside service provider. The respondent argued that there was no disparity in power. However, the Appeal Court found that the behaviour was unwelcome and that the respondent, 25 years older than the women, indicated a very real power differential in his favour, due to his age and gender.

14. Moboea/Avbob Mutual Assurance Society 2010 (5) BALR 524 (CCMA)[21]

The case reiterated the need for employers to have a policy to deal with sexual harassment in place as well as clear procedures that a victim can follow.

The Court held that employers should develop clear procedures to address sexual harassment. These procedures should resolve problems in a sensitive, efficient and effective manner. The Court further stated that employers should issue a policy statement that sets out three things:

- That employees, job applicants, and other people who have dealings with the business have the right to be treated fairly.
- That sexual harassment in the workplace is neither permitted nor condoned.
- That people who have been subjected to sexual harassment or are being subjected to it in the workplace have the right to lodge a grievance about it.

Further, drawing on the Code22, the Court held that management has a positive duty to implement the policy and take disciplinary action against employees who do not comply with it. The sexual harassment policy should also set out the procedure employees are to follow. It must state that complaints will be dealt with expeditiously, sensitively and confidentially, and that employees will be protected against victimisation, retaliation for

[20] Simmers case, para 33

[21] Ivan Israelstam, 'Employers Should Not Ignore Sexual Harassment at the Workplace' (Labour Law Advice, 20 April 2020) https://www.labourlawadvice.co.za/articles/employers-should-not-ignore-sexual-harassment-at-the-workplace/

22 Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace, Government Gazette, 18 March 2022

lodging grievances, and false accusations.

Finally, it held that policies on sexual harassment should be communicated to all employees.[23]

15. Motsamai v Everite Building Products (Pty) Ltd (JA21/08) [2010] ZALAC 11; [2011] 2 BLLR 144 (LAC)[24]

The case makes it clear that an employer cannot deal with a complaint of sexual harassment without taking into consideration the views of the complainant. If a complainant does not want to participate in mediation or any other form of conciliation this must be respected. A victim centred approach must be followed, and in general mediation and conciliation are not appropriate mechanisms for dealing with sexual harassment. Full disciplinaries are more appropriate, particularly if this is what the complainant requests. In essence the employer cannot foist procedures on the complainant, but must consult victim.

Parties

Appellant: Themba Prince Motsamai

Respondent: Everite Building Products (Pty) Ltd

Background and facts

Two female employees accused the appellant, Motsamai, their supervisor, of inappropriate conduct constituting sexual harassment. The incidents included:

- Showing pornographic material at work and making sexual remarks about colleagues.
- Showing female condoms and making sexually suggestive remarks.
- Hugging and touching a complainant's private parts without consent.

Motsamai was charged, found guilty at a disciplinary hearing, and dismissed. His internal appeal was unsuccessful, and he referred an unfair dismissal dispute to the CCMA.

Legal issues before the Court

The central issues were:

[23] Moboea case, paras 25, 26, 27, 28 and 29

[24] https://www.saflii.org/za/cases/ZALAC/2010/23.html?utm_source=chatgpt.com

- Whether the dismissal was substantively and procedurally fair.
- Whether the employer was required, under its disciplinary code, to attempt mediation or conciliation before taking disciplinary action.
- Whether the reinstatement (ordered by the CCMA) was an appropriate remedy.

Court's findings and reasoning

The Labour Appeal Court upheld the Labour Court's decision to set aside the CCMA's reinstatement award and confirmed that the dismissal was substantively and procedurally fair.

The Court underscored the seriousness of workplace sexual harassment, describing it as a "violation of dignity, integrity, and self-worth, of the employee harassed" (para 20). It held that this was particularly serious when perpetrated by a supervisor. It must be viewed from the victim's perspective, and the victim's *reasonable perception* is the guiding standard (para 20).

The complainant must determine the procedure. Importantly, the Court held that the complainant (the victim of sexual harassment) has the right to determine the appropriate resolution process. While an employer's disciplinary code may provide for mediation or conciliation, this is not mandatory.

"Unless the victim agrees to any other form of resolution of a complaint of sexual harassment, the employer should hold a disciplinary hearing (para 20)."

In this case, Msibi (the complainant) explicitly requested a formal disciplinary process. The Court held that it would have been improper for the employer to pursue mediation rather than a formal disciplinary process.

Mediation not appropriate in sexual harassment cases. The Court was clear that forcing mediation or conciliation in such cases could *compound the harm* already done:

"To force conciliation or mediation between the perpetrator and the victim further compounds the wrong (para 20)."

Therefore, mediation is appropriate only if the complainant consents to it; otherwise, the employer must proceed with disciplinary action.

The sanction must be reasonable and justified. The CCMA's order that the employee be re-employed (rather than reinstated) on new terms and be subjected to weekly counselling was found to be "curious", unreasonable, and not grounded in evidence. The Labour Appeal Court confirmed that dismissal was the only reasonable sanction, particularly given the appellant's lack of remorse and the repeated nature of the

misconduct (paras 17-18).

Court order

- The appeal was dismissed.
- The Labour Court's ruling was upheld, finding the dismissal both procedurally and substantively fair.
- The CCMA award was set aside and replaced with an order confirming the dismissal was fair.
- No costs order was made on appeal.

Why the case matters

This case is an authority on:

- The rights of complainants in sexual harassment matters to decide whether a formal or informal procedure should be followed.
- The inappropriateness of forced mediation or conciliation in serious cases of sexual misconduct.
- The proper application of disciplinary procedures and the use of proportional sanctions for workplace sexual harassment.

It strengthens the principle that employers must take allegations seriously, respond appropriately, and respect the agency and wishes of complainants when determining procedures.

Delay in reporting

16. Rustenburg Platinum Mines Limited v UASA obo Pietersen and Others (JR641/2016) [2018] ZALCJHB 72; (2018) 39 ILJ 1330 (LC) (27 February 2018)[25]

The case sets out the many reasons why victims frequently delay reporting sexual harassment and gender based violence.

The Court said that one must look deeply and objectively into why incidents of sexual harassment are not immediately reported. There may be many reasons. For instance, the complainant may be 'frozen' and disbelieving, and therefore in a state of paralysis, accompanied by guilt, confusion, shame, helplessness or outright terror. Many may fear

[25] https://www.saflii.org/za/cases/ZALCJHB/2018/72.html

a backlash, losing their job or being victimised. Other fears include causing upset in the workplace and the worry that their allegations may not be believed. They might fear negative labelling, feel pity for the harasser for whatever reason, hope the ordeal will go away and that it is a one-off incident, or fear publicity and having to be cross-examined (para 51).

17. Venter v The State (A611/11) (2018) ZAGPPHC 615 (9 March 2018)[26]

The case confirms that late reporting does not negatively reflect on the validity or veracity of the complaint.

The Court confirmed that late reporting should not be taken as reflecting negatively on the complainant. In this case, there was late reporting and date errors, but the Court held that the victim D never wavered on what offences were committed, only on exactly when they were committed. The Court stated that not reporting an incident promptly does not render the complainant's version improbable (para 54).

18. Liberty Group Limited v Masango [2017] ZALAC 107[27]

Late reporting does not negate a claim against an employer. Section 60(1) says the alleged conduct must "immediately" be brought to the attention of the employer, but the Court held that one should not interpret this too formalistically and a delay should not invalidate the complaint.

The appellant argued that Masango had not reported the harassment "immediately" as required by section 60(1) of the EEA. The Court rejected a narrow or overly technical interpretation. It held that "immediately" must be given a sensible meaning consistent with the EEA's purpose. A limited delay between the incidents and the report did not invalidate the complaint.

"Although the appellant contends that the conduct was not reported immediately, as required by s 60(1), … I am satisfied that the requirement that conduct be reported 'immediately' must be given a sensible meaning … which ensures an interpretation that does not lead to a *glaring absurdity*, even where the interpretation given may involve a departure from the plain meaning of the words used (para 51)."

The Court recognised the difficulty employees face in disclosing harassment by a senior.

[26] https://www.saflii.org/za/cases/ZAGPPHC/2018/615.html

[27] https://www.saflii.org/za/cases/ZALAC/2017/19.html

Masango's report to Mr Haines was therefore sufficient to trigger the employer's obligations, even though it was not made immediately.

Domestic violence

19. S v Baloyi and Others (CCT29/99) [1999] ZACC 19; 2000 (1) BCLR 86 ; 2000 (2) SA 425 (CC)[28]

Sachs J explained that if someone is accused of breaking a domestic violence interdict, it is still the state's job to prove guilt beyond a reasonable doubt. The accused does not have to prove their innocence, because that would unfairly undermine the right to be presumed innocent.

Parties

The case was between the State and Godfrey Baloyi, an army officer, with the Minister of Justice and the Commission for Gender Equality intervening as amici curiae.

Background and facts

Baloyi's wife laid a charge of assault against him and obtained an interdict under the Prevention of Family Violence Act 133 of 1993 (a precursor to the Domestic Violence Act). The magistrate also issued a suspended warrant of arrest. Baloyi allegedly assaulted her again and threatened to kill her. She reported this, and Baloyi was arrested and brought before a magistrate for breaching the interdict. The magistrate, applying the balance of probabilities, convicted him and sentenced him to twelve months' imprisonment (six suspended).

On appeal, the Transvaal High Court found that section 3(5) of the Act imposed a reverse onus inconsistent with the constitutional right to be presumed innocent, declared it invalid, and referred the order to the Constitutional Court for confirmation.

Legal issues before the Court

The key issue before the Court was whether section 3(5) of the Prevention of Family Violence Act 133 of 1993 created a reverse onus by importing section 170 of the Criminal Procedure Act 51 of 1977. Section 170 expressly places the burden on an accused to prove that their failure was not due to their fault ("unless the accused satisfies the court…"). The High Court applied this provision to domestic violence cases, holding that accused persons had to prove they had not wilfully breached an interdict, thereby placing the

[28] https://www.saflii.org/za/cases/ZACC/1999/19.html

onus on the accused to prove their innocence.

The Court had to decide:

- Whether a person accused of breaching a domestic violence interdict is “an accused person” entitled to the protection of section 35(3)(h) of the Constitution.
- Whether section 3(5) of the Prevention of Family Violence Act imposed a reverse onus on the accused, thereby conflicting with the presumption of innocence.
- If so, whether such a limitation could be justified under section 36 of the Constitution.

Court’s findings and reasoning

Sachs J said that people accused of breaching a domestic violence interdict remain “accused persons” under the Constitution. This means they have the right to be presumed innocent until the state proves their guilt beyond a reasonable doubt. He rejected the High Court’s view that the law places a “reverse onus” on the accused to prove their innocence. Instead, he explained that the law should be read to protect both the victim’s safety and the accused’s right to a fair trial. The state must prove the breach; the accused are not required to disprove it, and the burden of proof remains with the state.

Court order

The Court declined to confirm the High Court’s declaration of invalidity. It held that, properly construed, section 3(5) did not impose a reverse onus and was therefore not unconstitutional. The matter was remitted to the High Court to proceed in accordance with this interpretation.

Why the case matters

The Court had to address two important but competing constitutional duties. On the one hand, it stressed that the state has a clear responsibility to protect victims of domestic violence, which Sachs J described as “systemic, pervasive and overwhelmingly gender-specific” (para 12) and a form of patriarchal domination. He emphasised that section 12(1)(c) of the Constitution, read with section 7(2), obliges the state to protect people against private as well as public violence, and that this duty is reinforced by South Africa’s commitments under international instruments such as the Convention on the Elimination of All Forms of Discrimination against Women, the African Charter and the Declaration on the Elimination of Violence Against Women. At the same time, the Court affirmed that every accused person is entitled to a fair trial, and in particular to the presumption of innocence in section 35(3)(h). The Court therefore interpreted section 3(5) of the Prevention of Family Violence Act in a way that allowed the state to take domestic

violence seriously as a constitutional and human rights issue, while still ensuring that the burden of proof remains on the state and the presumption of innocence of accused persons is not undermined.[29]

20. Kula v S (CAB 02/2023) [2023] ZANWHC 35; 2023 (2) SACR 52 (NWM); [2023] 3 All SA 218 (NWM) (4 April 2023)[30]

Amendments made to the Criminal Procedure Act in 2022 create a bail change that deals specifically with the conditions under which bail should be granted in case involving domestic relationships. It held that the accused bail must only be given if the interests of justice require it, and the onus is on the accused to prove this.

Parties

Appellant: Sibusiso Macdonald Kula

Respondent: The State

Background and facts

The appellant was charged with murder read with section 51(1) of the Criminal Law Amendment Act 105 of 1997. The deceased was his wife. They were in a domestic relationship and there had previously been a protection order under the Domestic Violence Act 116 of 1998.

The Magistrate refused bail and treated the matter as a Schedule 6 bail application, which required the appellant to prove "exceptional circumstances". The appellant appealed.

Legal issues before the Court

The central issue was which bail regime applied.

After the 2021 amendments to the Criminal Procedure Act 51 of 1977, there are four bail categories:

- Schedule 6 (section 60(11)(a)) – the accused must prove exceptional circumstances.

29 The Domestic Violence Act 116 of 1998 which has replaced the Prevention of Family Violence Act prosecutes breaches of protection orders as criminal offences. The state bears the burden of proof beyond a reasonable doubt to show that a valid protection order existed, that the accused was aware of it, and that the accused intentionally breached its terms. Unlike the Prevention of Family Violence Act, there is no reverse onus on the accused to show they did not breach the order.

30 https://www.saflii.org/za/cases/ZANWHC/2023/35.html

- Schedule 5 (section 60(11)(b)) – the accused must show that the interests of justice permit release.
- Section 60(11)(c) – a new category for offences committed against a person in a domestic relationship where the accused must show, on a balance of probabilities, that the interests of justice permit their release (not exceptional circumstances).
- Ordinary bail for less serious offences.

The question was whether this case properly fell under Schedule 6, or under Schedule 5, section 60(11)(c).[31]

Court's findings and reasoning

The Court held that the Magistrate misdirected herself by treating the matter as Schedule 6 without properly establishing that Schedule 6applied (for example, by clearly identifying premeditation).

Because the alleged offence was committed against the appellant's wife, within a domestic relationship, the case fell under section 60(11)(c). Under section 60(11)(c), the appellant did not have to prove exceptional circumstances. He only had to show that the interests of justice permitted his release. The Magistrate therefore applied the wrong and stricter bail test.

The Court also emphasised that, in principle, the safety of the complainant and the public is always central in bail applications, and bail must be refused if there is a real likelihood that the accused will endanger any person if released.

Court order

The appeal was upheld. The High Court set aside the refusal of bail and granted bail subject to strict conditions, including reporting requirements, travel restrictions, surrender of passports, and no contact with witnesses.

Why the case matters

The case clarifies that, after the 2022 amendments, offences committed within a domestic relationship fall under section 60(11)(c), not automatically under Schedule 6. It confirms that correctly identifying the bail regime is crucial because it determines the burden placed on the accused. Applying the wrong regime is a material misdirection that justifies appellate intervention.

[31] Schedule 6 offences includes serious offences that are premeditated, and include murder, rape and robbery with aggravating circumstances. Schedule 5 includes unpremeditated murder, rape that doesn't fall into Schedule 6 and robbery. They are less serious.

21. Tabatha v S (Bail Appeal) (CA&R 04/25) [2025] ZAECMHC 21 (27 March 2025)[32]

The case is about bail conditions for the accused in domestic violence cases. It clarifies that these are more stringent than in other crimes in line with amendments made to the Criminal Procedure Act 51 of 1977 in 2022.

Parties

Appellant: Zilindile Tabatha

Respondent: The State

Background and facts

The appellant was charged with attempted murder for allegedly shooting his wife multiple times, together with unlawful possession of a firearm and ammunition. He had a pending robbery charge.

The matter was treated as a domestic-related offence under Schedule 5 of the Criminal Procedure Act 51 of 1977. Bail was refused by the magistrate. Although the complainant filed a statement indicating that she wished to withdraw the case, and the investigating officer did not oppose bail, the state opposed the application and intended to proceed with prosecution.

Legal issues before the Court

Whether the magistrate was wrong to refuse bail in a domestic violence matter, particularly where the complainant sought to withdraw the charge.

Court's findings and reasoning

The Court emphasised the stricter bail framework applicable to domestic-related offences following the 2022 amendments to the Criminal Procedure Act 51 of 1977. Under s 60(11)(b), the accused bears the onus of proving on a balance of probabilities that the interests of justice permit their release.

The Court held that:

- The complainant's wish to withdraw the case does not automatically entitle an accused to bail. In domestic violence cases, withdrawal statements may stem from fear, pressure or economic dependence.

[32] https://www.saflii.org/za/cases/ZAECMHC/2025/21.html

- Prosecution is a constitutional function of the state and is not controlled by the complainant.
- The Court must independently assess the interests of justice, including the safety of the complainant and the integrity of the criminal justice system.
- The case confirms that police bail is not permitted in domestic violence matters.

Given the seriousness of the allegations and the pending violent charge, the appellant failed to discharge the onus.

Court order

The appeal against the refusal of bail was dismissed.

Why the case matters

The judgment confirms that domestic violence cases fall within a heightened bail regime. It clarifies that a complainant's withdrawal does not determine bail and reinforces the court's duty to prioritise victim safety and the broader interests of justice.

Women who kill abusive partners

22. S v Campher 1987 (1) SA 940 (A)[33]

Self-defence can only succeed as a defence to murder if the threat posed to a victim is imminent and because the threat is imminent the person under attack commits murder. A woman subject to years of abuse who kills her partner is not subject to imminent attack and cannot use self-defence to escape conviction.

Parties
Appellant: Ms Campher, wife of the deceased.

Respondent: The State

Background and facts

The appellant had suffered years of physical and emotional abuse at the hands of her husband. On the day in question, after an altercation, she shot him dead. Her defence was that she acted in self-defence because she believed her life was under constant threat. The trial court convicted her of murder, finding that the husband was not engaged in an immediate attack when she fired the fatal shot. She appealed.

[33] https://www.saflii.org/za/cases/ZASCA/1986/149.html

Court's findings and reasoning

Self-defence requires an imminent attack or a threat of unlawful violence.

- The test is objective: whether a reasonable person in the circumstances would have considered lethal force necessary.
- Emotional strain or cumulative provocation, in the absence of mental illness, does not preclude liability.

The Court held that the threat posed by the deceased was not imminent at the time of the shooting. The Court accepted that the appellant had endured long-term abuse and was emotionally overwhelmed but reiterated that South African law requires a present attack before the defence of private defence can succeed. The Court was not prepared to recognise "battered woman syndrome" as negating criminal responsibility.

Court order

The conviction for murder was confirmed, with recognition of extenuating circumstances.

Why the case matters

Campher is among the earliest South African cases to raise the plight of abused women who kill. It demonstrates the rigidity of the imminence requirement, which disadvantages those whose perception of threat is shaped by years of abuse. The judgment reveals the judiciary's reluctance at that time to adapt common-law doctrines to the realities of domestic violence.

23. S v Engelbrecht 2005 (2) SACR 41 (W)[34]

Even though Engelbrecht suffered years of abuse and violence, the killing of her husband was considered to be murder not self-defence. She was not under imminent attack as her husband was asleep when she killed him. Nevertheless the judgment recognised abuse and battered woman syndrome as mitigating factors in sentencing.

Parties

The State v Engelbrecht

Background and facts

Ms Engelbrecht killed her husband after many years of severe domestic abuse, marked by physical violence, intimidation, psychological domination, and coercive control. The

[34] https://www.saflii.org/za/cases/ZAWCHC/2005/11.html

evidence revealed a sustained pattern of abuse that left her in constant fear for her life and made it impossible to escape the relationship. At the time of the killing, the deceased was asleep. Ms Engelbrecht relied on self-defence, contending that the cumulative abuse created an ongoing and ever-present threat to her safety, which had to be assessed contextually rather than as an isolated incident.

Court's findings and reasoning

The judgment, delivered by Satchwell J, accepted extensive expert evidence on battered woman syndrome and the dynamics of abusive relationships. The Court recognised that domestic violence is not a series of discrete events but a continuous pattern of domination and control. It acknowledged that women subjected to sustained abuse may reasonably perceive lethal danger even in the absence of an immediate physical attack, and cautioned against abstract, gender-neutral standards of reasonableness that ignore lived realities.

In this respect, the Court advanced the law by giving serious judicial recognition to the gendered nature of domestic violence, validating expert evidence on coercive control, and situating criminal responsibility within constitutional values such as dignity, equality, and freedom from violence. The judgment marked a move towards a more contextual and substantive assessment of the conduct of women who kill abusive partners.

However, the Court ultimately held that the requirements of private defence were not satisfied under existing doctrine. In particular, Satchwell J concluded that the element of imminence was absent because the deceased was asleep at the time of the killing. The Court regarded itself as constrained by orthodox principles of private defence and declined to extend the doctrine to accommodate cumulative abuse in the absence of an imminent unlawful attack.

Court order

Ms Engelbrecht was convicted of murder. At sentencing, the Court gave significant weight to the prolonged abuse and her diminished moral blameworthiness, imposing a 10-year prison term, of which 5 years were suspended.

Why the case matters

Engelbrecht advances South African criminal law by centring women's lived experiences of domestic violence and exposing the limitations of traditional self-defence doctrine when applied to abusive relationships. At the same time, it illustrates the limits of judicial development of the common law, showing how abused women may remain criminally liable despite the profound impact of sustained violence on their actions.

Marriage

24. Bhe and Others v Magistrate, Khayelitsha and Others 2005 (1) SA 580 (CC)[35]

This is judgment recognises that customary law marriages must have the same protection under the Constitution as civil marriage and are not to be treated as inferior or less formal. The bonds and relationships, as well as the reciprocal duties of support under such marriages. are equal to and as strong as those under all other recognised marriages.

Parties

The applicants were Bhe and Others, including the mothers and minor children of deceased men who had lived under customary law. The respondents were the Mawere, Khayelitsha, the Master of the High Court, and the Minister of Justice and Constitutional Development.

Background and facts

The case arose from disputes over intestate succession where the deceased had lived under customary law, including relationships recognised as customary marriages. The application exposed the legal marginalisation of women and children in customary families, particularly where customary marriages were treated as inferior or invisible within the formal legal system. The applicants challenged the exclusion of spouses and children in customary marriages from inheritance under rules rooted in male primogeniture and colonial legislation.

Legal issues before the Court

As relevant to customary marriage, the Court had to consider whether customary law family relationships, including customary marriages, were entitled to full recognition and protection under the Constitution, and whether laws that effectively treated such marriages as inferior or denied spouses legal recognition were constitutionally permissible.

Court's findings and reasoning

The Constitutional Court affirmed that customary law is a valid and integral part of South African law, enjoying equal status with common law under the Constitution. In doing so, it recognised customary marriages as legally valid family relationships deserving dignity

[35] https://www.saflii.org/za/cases/ZACC/2004/17.html

and legal protection. The Court rejected approaches that treated customary marriages as informal or lesser forms of marriage, emphasising that they give rise to genuine family bonds, reciprocal duties of support, and legally cognisable interests. It held that the historical failure to recognise women in customary marriages as spouses with enforceable rights was inconsistent with constitutional values of equality and dignity. The Court further explained that discriminatory rules excluding women in customary marriages were not an inherent feature of living customary law, but the product of colonial and apartheid-era distortions.

Court order

The Court declared the impugned rules and legislation unconstitutional and ordered interim relief, ensuring that spouses and children in customary marriages were recognised as heirs under the general law of intestate succession pending legislative reform.

Why the case matters

Although primarily a succession case, Bhe recognises customary marriages as constitutionally valid and equal to other family forms. It affirms that spouses in customary marriages are entitled to full legal recognition, dignity, and protection, and that customary marriage cannot be treated as inferior to civil marriage. The judgment laid important groundwork for later cases and legislation that explicitly regulate and protect customary marriages.

25. Gumede v President of the Republic of South Africa 2009 (3) SA 152 (CC)[36]

Marriages concluded prior to the passing of the Customary Marriages Act of 1998 are not to be treated any differently from civil or customary marriages entered into after that date.

Parties

The applicant was Mrs Gumede, a woman married to her husband under customary law. The respondents were the President of the Republic of South Africa and the Minister of Justice and Constitutional Development.

Background and facts

Mrs Gumede was married to her husband in a customary marriage entered into before

[36] https://www.saflii.org/za/cases/ZACC/2008/23.html

the Recognition of Customary Marriages Act 120 of 1998 came into force. Their marriage later broke down, and she challenged the legal consequences of the marriage, particularly the proprietary regime that applied to customary marriages concluded before the Act came into force. Under the Act, such marriages were treated differently from both civil marriages and customary marriages concluded after the Act, leaving women married under customary law before 1998 without equal proprietary rights.

Legal issues before the Court

The Constitutional Court had to decide whether sections of the Recognition of Customary Marriages Act that distinguished between customary marriages concluded before and after the Act were consistent with the Constitution. In particular, the Court considered whether the exclusion of spouses in pre-Act customary marriages from equal proprietary protection violated the rights to equality and dignity.

Court's findings and reasoning

The Court held that the differential treatment of women in customary marriages concluded before the Act unfairly discriminated on the grounds of gender and marital status. It found that the impugned provisions entrenched the historical vulnerability of women in customary marriages and failed to respect their equal worth and dignity. The Court reaffirmed that customary marriages are fully recognised marriages under South African law and that spouses in such marriages are entitled to equal protection and the benefit of the law. It rejected arguments that altering the proprietary consequences of customary marriages would undermine customary law, holding instead that living customary law is dynamic and must evolve in line with constitutional values.

Court order

The Court declared the relevant provisions of the Recognition of Customary Marriages Act unconstitutional and invalid to the extent that they failed to afford women in pre-Act customary marriages equal proprietary rights. The declaration of invalidity was made retrospective, and the Court ordered that such marriages be treated as marriages in community of property unless the spouses had agreed otherwise.

Why the case matters

Gumede recognises customary marriages and the equality of spouses within them. It confirms that customary marriages are not inferior to civil marriages and that women married under customary law are entitled to full legal recognition, dignity, and equality. The judgment was crucial in dismantling gender discrimination in customary marriage law and in aligning customary law with the Constitution.

26. Women's Legal Centre Trust v President of the Republic of South Africa and Others [2022] ZACC 23; 2023 (1) BCLR 80 (CC)[37]

This judgment recognises Muslim marriages to be of equal status to all other marriages and held that the non-recognition of these marriages was discriminatory and unconstitutional.

Parties

The applicant was the Women's Legal Centre (WLC), acting in the public interest. The respondents were the President of the Republic of South Africa, the Minister of Justice and Constitutional Development, the Minister of Home Affairs, the Speaker of the National Assembly, the Chairperson of the National Council of Provinces, the South African Human Rights Commission (SAHRC), and the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities. The Commission for Gender Equality (CGE) was admitted as an intervening party, and the Muslim Assembly Cape (MAC) and the United Ulama Council of South Africa (UUCSA) were admitted as amici curiae.

Background and facts

The case arose from the long-standing non-recognition of Muslim marriages in South Africa and the harmful consequences for Muslim women and children. Three matters were consolidated in the High Court.

- The WLC matter, seeking a declaration that the state had failed to protect rights under sections 9, 10, 15, 28, 31 and 34 of the Constitution by failing to enact legislation recognising Muslim marriages.
- The Faro matter concerned a widow in a Muslim marriage who was excluded from inheritance because of a disputed talaq (Islamic divorce).
- The Esau matter concerned a wife seeking protection of pension interests during divorce proceedings. The High Court held that the state was constitutionally obliged, under section 7(2) of the Constitution, to enact legislation recognising Muslim marriages. The state appealed. The SCA upheld the unconstitutionality of the Marriage Act 25 of 1961 and the Divorce Act 70 of 1979 for failing to recognise Muslim marriages but declined to hold that section 7(2) imposed a duty to legislate.

[37] https://www.saflii.org/za/cases/ZACC/2022/23.html

- It suspended the declarations of invalidity for 24 months and provided interim relief, allowing Muslim marriages to be dissolved under the Divorce Act pending reform.

Legal issues before the Court

- Whether the Marriage Act and the Divorce Act's failure to recognise Muslim marriages violated constitutional rights to equality, dignity, access to the courts, and the best interests of children.
- Whether the state was obliged under section 7(2) of the Constitution to enact legislation specifically recognising Muslim marriages.
- Whether the order of constitutional invalidity should apply retrospectively to all Muslim marriages concluded since 27 April 1994.

Court's findings and reasoning

The Court confirmed the SCA's finding that the Marriage Act and the Divorce Act unjustifiably discriminated against Muslim women and children, thereby infringing sections 9, 10, 28 and 34 of the Constitution. It held that:

- The exclusion of Muslim marriages was discriminatory on grounds of religion, marital status, and gender, impairing dignity and depriving children of the protections afforded to those born of civil or customary marriages.
- There was no justification for continuing the non-recognition.
- The common-law definition of marriage, to the extent that it excluded Muslim marriages, was unconstitutional.

On section 7(2), the Court held that while the state must take reasonable and effective measures to fulfil constitutional rights, it had already legislated, albeit inadequately, through the Marriage and Divorce Acts. Ordering standalone legislation under section 7(2) would bypass the principle of subsidiarity. The proper course was to challenge the existing legislation rather than compel Parliament to legislate anew.

On retrospectivity, the Court held that relief would extend to all unions validly concluded under Sharia law and subsisting when the WLCT instituted proceedings, as well as to those dissolved but still subject to ongoing legal proceedings at the time of the order. This ensured that women who initiated the litigation but whose marriages had ended before judgment would not be excluded.

Court order

- Confirmed that the Marriage Act 25 of 1961 and the Divorce Act 70 of 1979 were unconstitutional for failing to recognise Muslim marriages and regulate their consequences.
- Suspended declarations of invalidity for 24 months to allow the President, Cabinet and Parliament to remedy defects by amending or enacting legislation.
- Ordered interim relief: Muslim marriages subsisting (or dissolved but pending litigation) could be dissolved under the Divorce Act, with its provisions applied (including section 7(3) on asset redistribution).
- Declared the common-law definition of marriage unconstitutional to the extent that it excluded Muslim marriages.

Why the case matters

This case is a landmark in advancing equality and dignity for Muslim women and children in South Africa. It remedies decades of systemic exclusion by recognising Muslim marriages within the constitutional framework. The judgment emphasises that religious and cultural diversity must be respected, but not at the expense of women's rights. It also clarifies the scope of section 7(2), affirming that while the state must act reasonably to protect rights, litigants cannot bypass existing legislation by relying directly on the Constitution. The case is significant for its practical relief, ensuring interim protection, and for advancing gender and religious equality in marriage law.

Recognition of life partnerships

27. Bwanya v Master of the High Court, Cape Town and Others [2021] ZACC 51[38]

The case recognises the legitimacy of long term life partnerships in a context where co-habitation outside marriage is common, and consists of all the hallmarks and attributes of marriage. The Intestate Succession Act and the Maintenance of Surviving Spouses Act were both held to be unconstitutional in their failure to recognise partners of long term life partnerships as eligible for benefits that would flow to spouses. Parliament was required to repair these defects.

[38] https://www.saflii.org/za/cases/ZACC/2021/51.html

Parties

Applicant: Jane Bwanya

Respondents: Master of the High Court, Cape Town; Executor of the deceased estate; Minister of Justice and Correctional Services; and others

Amici curiae: Women's Legal Centre Trust; Commission for Gender Equality

Background and facts

Ms Bwanya and the deceased, Mr Anthony Ruch, were in a permanent heterosexual life partnership that bore all the hallmarks of a marriage. They lived together, were socially recognised as a couple, undertook reciprocal support duties, and intended to marry. Mr Ruch died before the marriage could take place, leaving a will that did not provide for Ms Bwanya.

After his death, Ms Bwanya lodged claims against the deceased estate for maintenance under the Maintenance of Surviving Spouses Act 27 of 1990 and for inheritance under the Intestate Succession Act 81 of 1987. Both claims were rejected on the ground that she was not a "spouse" as defined in those Acts. She challenged the exclusion of permanent life partners from both statutes, arguing that this violated her rights to equality and dignity.

Although her personal claims were later settled, the Constitutional Court considered the matter in the public interest because it affected a large and vulnerable group, particularly women in permanent life partnerships.

Legal issues before the Court

The Court was required to decide whether:

- The exclusion of surviving partners in permanent life partnerships from the Maintenance of Surviving Spouses Act unfairly discriminated on the grounds of marital status and violated dignity.
- The exclusion of such partners from the Intestate Succession Act was unconstitutional.
- The Court should revisit or depart from its earlier decision in Volks NO v Robinson, which upheld a similar exclusion in relation to maintenance.

Court's findings and reasoning

The majority judgment (Madlanga J) held that excluding permanent life partners from both Acts was unconstitutional. The Court found that the legislation unfairly

discriminated on the ground of marital status and infringed dignity, particularly where partners had undertaken reciprocal support duties and functioned as a family unit.

A central feature of the Court's reasoning was the rejection of the assumption that unmarried partners always "choose" not to marry. The Court recognised the social and economic realities in South Africa, including gendered power imbalances, migration status, poverty, and cultural practices, which often leave women without meaningful choice.[39] The law's insistence on marriage as the sole gateway to legal protection was therefore found to be disconnected from lived realities.

The Court emphasised that families take many forms and that permanent life partnerships often fulfil the same social and economic functions as marriage. Where the underlying rationale for legal protection exists – namely mutual support and dependency – excluding life partners serves no legitimate constitutional purpose.

Importantly, the Court expressly acknowledged that the impact of exclusion falls disproportionately on women, who are more likely to be economically dependent and to be left destitute upon the death of a partner.

While the Court did not formally overrule Volks, it effectively confined it and moved the law decisively forward, grounding its reasoning in evolving constitutional values, including equality, dignity, and substantive fairness.

Court order

The Court declared unconstitutional:

- The exclusion of permanent life partners from the definitions of "survivor" and "spouse" in the Maintenance of Surviving Spouses Act.
- The exclusion of permanent life partners from section 1(1) of the Intestacy Act.
- It was ordered that reading-in remedies be used to include surviving partners in permanent life partnerships where reciprocal duties of support existed. The declarations of invalidity were suspended for 18 months to allow Parliament to cure the defects, with interim relief available if Parliament failed to do so.

39 See para 1, where the Court notes that "[c]ensus data of 2016 reveals that approximately 3.2 million South Africans cohabit outside of marriage and that this number is increasing steadily". The Court further situates this figure in comparative context, observing that "the nuclear family has, for a long time, not been the norm in South Africa" and that South Africans have "lower rates of marriage and higher rates of extra-marital child-bearing than found in most countries" (para 29, approvingly quoting Paixão v Road Accident Fund [2012] ZASCA 130). These demographic realities underpin the Court's rejection of the assumption that non-marriage is always a matter of free choice, and inform its substantive equality and dignity analysis, particularly in relation to the vulnerability of women (para 16).

Why the case matters

Bwanya marks a decisive shift away from formalistic, marriage-centric notions of family and affirms that constitutional protection must respond to social reality. The case establishes that permanent life partners are no longer legal strangers upon death and are entitled to maintenance and inheritance where a relationship of mutual support existed.

The judgment recognises that women in long-term relationships are often structurally disadvantaged, economically dependent, and unable to insist on marriage. By extending statutory protections, the Court directly addresses gendered vulnerability, poverty, and exclusion at moments of acute risk following a partner's death.

Sex workers

28. S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae) CCT31/01 [2002] ZACC 22; 2002 (6) SA 642; 2002 (11) BCLR 1117 (9 October 2002)[40]

The case entrenched the criminalisation of sex work in South Africa, affirming that sex work remains unlawful.

Parties

The applicants were Ms Jordan and others, all sex workers charged under section 20(1)(aA) of SORMA. The amici curiae included the Sex Workers Education and Advocacy Task Force (SWEAT). The respondent was the state, represented by the National Director of Public Prosecutions.

Background and facts

Section 20(1)(aA) of SORMA criminalised having unlawful carnal intercourse or committing an indecent act with another person for reward. Ms Jordan and others challenged the constitutionality of this provision. They argued that it unfairly discriminated against sex workers, violated their rights to equality, dignity, freedom of trade, occupation and profession, and constituted an unjustifiable limitation under the Constitution.

[40] https://www.saflii.org/za/cases/ZACC/2002/22.html

Legal issues before the Court

- Whether section 20(1)(aA) of SORMA unjustifiably infringed the constitutional rights of sex workers, particularly the rights to equality (s 9), dignity (s 10), and freedom of trade, occupation and profession (s 22).
- Whether the provision discriminated unfairly by targeting sex workers (mostly women) while failing to criminalise clients.
- Whether the limitations imposed could be justified under section 36 of the Constitution.

Court's findings and reasoning

The Constitutional Court, in a majority judgment, upheld the constitutionality of section 20(1)(aA). It found:

- The prohibition applied equally to sex workers and clients, though in practice prosecutions tended to target sex workers.
- The law did not unfairly discriminate on the basis of gender: although the majority of sex workers were women, the offence was framed in gender-neutral terms.
- The Court held that prostitution is "inherently degrading" and therefore that the limitation of the right to dignity was justified.
- Regarding freedom of trade and occupation, the Court ruled that this right was not absolute and could be limited in the interests of public morality and policy.

The minority judgment (per O'Regan J and Sachs J) found that the law discriminated unfairly. They reasoned that sex workers are overwhelmingly women and that the law disproportionately burdened them, whereas clients were seldom prosecuted. The minority held that this perpetuated gender inequality and violated dignity.

Court order

The Constitutional Court dismissed the challenge and confirmed the validity of section 20(1)(aA) of SORMA.

Why the case matters

The case entrenched the criminalisation of sex work in South Africa, affirming that sex work remains unlawful. The majority judgment reinforced prevailing moral and policy views, while the minority laid the groundwork for later advocacy by highlighting the gendered impact of criminalisation. The case remains central to debates on law reform regarding sex work, particularly regarding dignity, equality, and women's rights.

29. Kylie v Commission for Conciliation, Mediation and Arbitration CA10/08 (2010) 7 BLLR 705 (LAC)[41]

The Court held that sex workers are covered by and protected by labour legislation such as the Labour Relations Act. Employers have to follow due process if they dismiss sex workers, as they would for all employees.

Parties

The appellant was Kylie, a sex worker employed at a brothel. The respondents were the Commission for Conciliation, Mediation and Arbitration (CCMA) and her employer.

Background and facts

Kylie was employed at a brothel, providing sexual services for payment. She was dismissed by her employer without due process and referred the dispute to the CCMA, claiming unfair dismissal under the Labour Relations Act 66 of 1995 (LRA). The CCMA initially ruled that, because her contract was illegal and unenforceable under SORMA, she was not entitled to the protections of the LRA. Kylie challenged this finding, arguing that despite the illegality of sex work, she retained constitutional rights entitling her to fair labour practices.

Legal issues before the Court

- Whether a sex worker employed under an unlawful contract (prohibited by SORMA) could be considered an "employee" for the purposes of the LRA.
- Whether constitutional rights, including the right to dignity and fair labour practices (s 23 of the Constitution), extend to sex workers despite the criminalisation of sex work.
- Whether public policy considerations precluded the enforcement of employment rights in this context.

Court's findings and reasoning

The Labour Appeal Court found in Kylie's favour, ruling as follows:

- Although the employment contract was unlawful, constitutional rights remain applicable. Sex workers are not deprived of their right to dignity merely because of the nature of their work.

[41] https://www.saflii.org/za/cases/ZALAC/2010/8.html

- The Court emphasised that the Constitution is the supreme law, and even those engaged in criminalised work enjoy fundamental rights.
- The Court distinguished between enforcing the terms of an illegal contract and upholding constitutional labour rights. The LRA, read in light of section 23 of the Constitution, protects all workers against unfair dismissal.
- The Court recognised the moral complexities of sex work but held that constitutional values of dignity, equality, and fair treatment must prevail.

Court order

The Labour Appeal Court ruled that Kylie qualified as an employee under the LRA and was entitled to protection against unfair dismissal. The matter was remitted to the CCMA for determination on its merits.

Why the case matters

This case affirmed that constitutional rights apply even to workers engaged in unlawful activities such as sex work. It established that sex workers retain their right to dignity and fair labour practices, highlighting that criminalisation does not erase basic human rights. The case has become central in advocacy for the decriminalisation of sex work, underscoring that human rights protections extend to all persons regardless of occupation.

Table of cases

Case citation	Key constitutional principles	Core rights established
Sexual offences		
S v Jackson (35/97) [1998] ZASCA 13	The "cautionary rule" which required courts to view the testimony of complainants in sexual offences cases with caution, was discriminatory.	In sexual offences cases, the complainant's testimony is not to be treated with caution but given equal weight to all evidence.
Director of Public Prosecutions, Western Cape v Prins and Others (369/12) [2012] ZASCA 106; 2012 (2) SACR 183 (SCA)	The Court could impose penalties even if not explicitly provided for in the SORMA.	SORMA was amended to reflected.

Case citation	Key constitutional principles	Core rights established
Embrace Project NPC and others v Minister of Justice and Correctional Services and others [2024] JOL 66923 (GP)	High Court held that sections of SORMA dealing with "consent" unconstitutional.	Constitutional Court judgment awaited.
Lategan and Another v Director of Public Prosecutions, Western Cape and Another (314/2022) [2024] ZASCA 74; 2024 (2) SACR 227 (SCA) (10 May 2024)	Procedural/evidentiary elements of SORMA apply retrospectively. Only substantive elements may not.	Substantive retrospectivity not permitted by procedural retrospectivity is.
Director of Public Prosecutions, Eastern Cape, Makhanda v Coko [2024] ZASCA 59 (24 April 2024)	Consent must be a clear, voluntary 'yes' to the specific act; passivity or silence is not consent and consent can be withdrawn at any time; conviction reinstated.	It is acceptable to say yes to some sexual activity such as foreplay and not to consent to full penetration. Consent to some acts is not consent to all acts.
State duty / police liability in SGBV		
Carmichele v Minister of Safety and Security 2001 (4) SA 938 (CC)	Police and prosecutors can be delictually liable for failing to protect against foreseeable harm.	Police and prosecutorial authorities should protect the communities' safety. Not acceptable to release an awaiting trial prisoner known to be a danger to women.
AK v Minister of Police [2022] ZACC 14; 2023 (2) SA 321 (CC)	SAPS's negligent failures in search and investigation in a rape matter attracted liability; judgment underscores victim-centred policing; High Court's 40% apportionment confirmed.	Police need to not only investigate all crimes thoroughly, but gender based violence should attract even greater thouroughness.

Case citation	Key constitutional principles	Core rights established
Prescription in sexual violence cases		
Levenstein and Others v Estate of the Late Sidney Lewis Frankel and Others CCT 170/17	Abolished the 20-year time limit so that all sexual offences (not only rape/compelled rape) have no prescription; order applied retrospectively to 27 April 1994.	In respect of all sexual crimes, prescription does not run.
Common purpose in sexual offences		
Tshabalala and another v S and a related matter 2020 (3) BCLR 307 (CC)	The common purpose doctrine can be used in rape cases.	Two men raped eight women and even though one or other of them may not have penetrated the women, they were both found guilty through common purpose doctrine as they both actively associated with the crime.
Intersectionality		
Mahlangu and Another v Minister of Labour and Others [2020] ZACC 24; 2020 (6) SA 494 (CC)	The situation of a black woman domestic worker is systematically disadvantaged by virtue of her colour, gender and class (intersectionality).	It is discriminatory and unfair that the Compensation for Occupational Injuries and Diseases Act (COIDA) excludes domestic workers from its ambit.
Sexual harassment (workplace)		
Piliso v Old Mutual Life Assurance Company (SA) Ltd and Others (C32/2005) [2006] ZALC 107	To hold an employer liable under s 60 EEA, the harasser must be shown to be a co-employee; failure to prove that link defeats the deeming	The employee needs to be able to demonstrate that her harasser was employed by the company.

Case citation	Key constitutional principles	Core rights established
	provision.	
Gaga v Anglo Platinum Ltd and Others (2012) 33 ILJ 329 (LAC)	Unwelcome conduct of a sexual nature is harassment even if the victim sometimes appears cordial; policies must be known to staff.	A fair labour practice requires an employer to ensure that all employees have sight of and are cogniscent of their sexual harassment policies.
Simmers v Campbell Scientific Africa (Pty) Ltd and Others [2014] ZALCCT 34	A single unwelcome sexual advance may justify dismissal; dignity in the workplace must be protected.	An unwelcome advance is a dismissible offence.
Moboea / Avbob Mutual Assurance Society [2010] 5 BALR 524 (CCMA)	Employers must have clear sexual-harassment policies and procedures, communicated to all staff.	It is a requirement of labour law that there are sexual harassment policies in place.
Motsamai v Everite Building Products (Pty) Ltd (LAC)	Victim-centred approach: unless the complainant agrees otherwise, the employer should proceed with a disciplinary hearing; forced mediation is inappropriate.	Sexual harassment and gender based violence cases must be dealt with in accordance with what a victim requests. A victim centred approach respects dignity.
Delay in reporting		
Rustenburg Platinum Mines Ltd v UASA obo Pietersen and Others [2018] ZALCJHB 72	Courts recognise many valid reasons for delayed reporting; delays should be assessed sensibly and contextually.	Reasons why victims delay reporting are complex and need to be respected.
Venter v The State (A611/11) [2018] ZAGPPHC 615	Late reporting does not, on its own, undermine credibility of a complainant in sexual-offence matters.	Formalistic approaches are not appropriate in GBV cases.

Case citation	Key constitutional principles	Core rights established
Liberty Group Limited v Masango [2017] ZALAC 107	The Court should not interpret terms too formalistically in harassment matters.	Not reporting "immediately" should not negate a claim despite the wording of the Employment Equity Act.
Domestic violence – onus / enforcement		
S v Baloyi and Others [1999] ZACC 19; 2000 (2) SA 425 (CC)	In criminal prosecutions for breaching protection orders, the state must prove guilt beyond a reasonable doubt; presumption of innocence remains intact.	Failure to adhere to a protection order is a criminal offence in terms of the Domestic Violence Act. Usual rules of criminal law apply.
Kula v S (CAB 02/2023) [2023] ZANWHC 35	The Court clarified different bail regimes for different crimes.	In crimes involving domestic relationships the accused must only be given bail if the interests of justice require it, and they bear the onus of of proof on the balance of probabilities.
Tabatha v S (Bail Appeal) (CA&R 04/25) [2025] ZAECMHC 21	Bail conditions must be more stringent than in other crimes.	The state bears the responsibility of setting appropriate bail conditions and police bail may not be granted in domestic violence matters.
Women who kill abusive partners		
S v Campher 1987 (1) SA 940 (A)	Strict imminence requirement for self-defence; long-term abuse acknowledged but not a defence on these	The defence of self-defence remains intact.

Case citation	Key constitutional principles	Core rights established
	facts.	
S v Engelbrecht 2005 (2) SACR 41 (W)	Battered women syndrome recognised as a mitigating factor against murder sentence.	A woman who is abused for years and kills her partner may be able to reduce her sentence but not argue for self defence.
Marriage		
Bhe and others v Magistrate, Khayelitsha and others 2005(1)SA 580 (CC)	Customary law marriages are not inferior or less formal than civil marriages and must be treated equally.	The rights of parties in customary law marriages should not be any less than those in other recognised marriages.
Gumede v President of the Republic of South Africa 2009(3) SA 152 (CC)	Because a marriage was concluded before the Recognition of Customary Marriages Act, 1998, it should not be regarded as a lesser marriage attracting fewer rights and obligations.	All customary law marriages, no matter when entered, have the same status as one another and as other marriages.
Women's Legal Centre Trust v President of the Republic of South Africa and Others [2022] ZACC 23; 2023 (1) BCLR 80 (CC)	Failure to recognise Muslim marriages under the Marriage and Divorce Acts is unconstitutional; interim Divorce Act relief granted pending reform.	The failure to recognise Muslim marriages was discriminatory and racist and in breach of the Constitution.
Bwanya v Master of the High Court, Cape Town and Others [2021]ZACC 51	Long term life partnerships are recognised must attract the same protections as marriages do.	Partners in long term life partnerships, particularly women, are entitled to spousal support in terms of the Maintenance of Surviving Spouses

Case citation	Key constitutional principles	Core rights established
		Act and to being heirs in terms of the Intestate Succession Act.
Sex workers		
S v Jordan and others, CCT31/01[2002] ZACC 22; 2002 (6) SA 642; 2002 (11) BCLR 1117 (9 October 2002)	Sex work is a criminal activity.	The rights of sex workers were not established, and their work remains criminalised.
Kylie v CCMA CA 10/08 (2010) 7 BLLR 705 (LAC)	A sex worker is entitled to the same labour law protections as any other employee.	The Labour Relations Act covers sex workers and they cannot be dismissed without proper procedures being followed in line with the Act.

Current enforceable rights

- **The cautionary rule.** This is not part of our law. All evidence, whether given by the complainant or the accused, is of equal weight, and the court does not have to treat the complainant's evidence with caution.
- **Bail.** In domestic violence cases, bail is granted only if it is in the interests of justice. The accused bears the burden of proof and must prove this on the balance of probabilities.
- **Consent in sexual offences cases.** The Constitutional Court is currently considering "consent" as a defence in sexual offences cases. In Coko, the Court held that a person can agree to some sexual acts and not others, and that consent can be withdrawn at any time.
- **State duty.** The state has a duty to protect women from sexual violence. This includes keeping dangerous perpetrators in prison and responding to and adequately investigating cases. The police should adopt higher standards of diligence in gender-based violence cases.
- **Prescription.** There is no prescription in sexual offence cases.

- **Common purpose.** An accused can be convicted of common purpose in rape cases, even if they did not actually sexually penetrate the victim.
- **Intersectionality.** The law recognises the particularly harsh situation of African women, owing to intersectionality shaping the various dimensions of their lives. Race, class and gender all contribute to the overlay of disadvantage.
- **Vicarious liability.** Employers can be held vicariously liable if they fail to exercise a duty of care and protect their workers from abuse and harassment (Employment Equity Act).
- **The test for sexual harassment in the workplace** is whether the recipient's dignity and comfort are impaired, not the harasser's intent or whether the time was visible to the recipient. In particular, where a superior abuses their authority over a subordinate, the misconduct is clear.
- **One incident is sufficient to justify dismissal.** Even one act of sexual harassment is a dismissible offence.
- **Sexual harassment policies.** All employers must have a policy to address sexual harassment that includes clear procedures for victims to follow.
- **Complainant-centred.** An employer must consider and take a complainant's views into account and not foist inappropriate conflict-resolution methods, such as mediation and conciliation, on sexual harassment victims.
- **Delay in reporting sexual harassment.** There are many reasons why complainants delay reporting, and none of these should weaken their case.
- **Onus of proof in breach of protection order cases.** When a perpetrator of domestic abuse breaches their protection order, they are guilty of a criminal offence, and the state must prove the breach beyond a reasonable doubt.
- **Domestic Violence Act.** This Act is designed to address domestic abuse, and the standard of proof required of an applicant is the "balance of probabilities".
- **Women who kill their partners.** Self-defence requires an imminent threat of attack to be used as a successful defence to murder. Currently, there is no defence for women who kill their partners after years of abuse, violence and degradation. Battered women syndrome can be used in mitigation of sentence.
- **Customary and other marriages.** Customary marriages have the same protection under the Constitution as civil marriages and are not inferior or less formal, whether entered before or after the Recognition of Customary Marriages Act. Muslim marriages are of equal status to all other marriages.

- **Long-term life partnerships.** Partners in long-term life partnerships are to be recognised as if they were spouses by the Intestate Succession Act and the Maintenance of Surviving Spouses Act.
- **Sex work.** Sex work is still criminalised, but sex workers are protected by labour legislation.

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