

Explanatory Note

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*The following explanation is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.*

The case arose out of a defamation action instituted before the Constitution came into force by Mr De Klerk and a company (Wonder Air (Pty) Ltd) controlled by him, after they had been identified in the Pretoria News as being implicated in the unlawful supply of arms by UNITA. After the Constitution came into force, the defendant sought to raise the defence that the alleged defamation was not unlawful because it was protected by the right to freedom of speech and expression in terms of s 15 of the Constitution. The Transvaal Provincial Division of the Supreme Court referred two issues to the Constitutional Court: (1) whether the Constitution could be invoked where the relevant events had occurred prior to the coming into force of the Constitution and (2) whether Chapter 3 of the Constitution was applicable to legal relationships between private parties.

With regard to the first issue, the Court held that the coming into force of the Constitution could not make lawful what was unlawful at the time. The majority of the Court however, left open the possibility that there might be circumstances of gross injustice in which the Chapter 3 rights could be applied to action which occurred before the commencement of the Constitution.

With regard to the second question, the majority of the Court found that Chapter 3 could not be applied directly to the common law in actions between private parties, but left open the question whether there were particular provisions of the Chapter that could be so applied. Section 15, the right relied upon by the applicant, was in any event, not such a provision. However, in terms of section 35(3) courts were obliged, in the application and development of the common law, to have due regard to the spirit, purport and objects of Chapter 3. The majority held that it was the task of the Supreme Court including the Appellate Division to apply and develop the common law in the manner required by section 35(3). The Constitutional Court had jurisdiction in the final instance over the interpretation of section 35(3).

The judgment of the majority of the Court was delivered by Kentridge AJ and was concurred in by Chaskalson P, Langa J and O'Regan J. Mahomed DP delivered a separate concurring judgment which was concurred in by Langa J and O'Regan J. Ackermann J, Madala J, Mokgoro J and Sachs J delivered separate concurring judgments. Kriegler J (with whom Didcott J concurred) wrote a dissenting judgment. In the opinion of Kriegler J, Chapter 3 applied to all law and all courts were responsible for the application and development of the common law, the Constitutional Court where constitutional issues were involved and the Appellate Division where non-constitutional issues were involved. Where there is no claim based on the Constitution all courts, including the Appellate Division, are required to apply the 'spirit, purport and objects' of Chapter 3.