SACHS J ABRIDGED JUDGMENT

Du Plessis and Others v De Klerk and Another

[175] Given a choice between two well-reasoned but conflicting arguments on the question of horizontality and verticality, each with considerable support in the text, I would prefer the one which leads to the outcome I regard as being most consistent with the well-functioning constitutional democracy contemplated by the Constitution.

[176] Much of the discussion on the question seems, in my view, to conflate two issues that should really be kept separate. The one is the question of the scope of Chapter 3, and the other the matter of how the framers intended the Chapter to be put into operation. By running the two issues into one, an argument in favour of the broadest possible constitutional reach is unfortunately converted into a claim for the widest possible judicial remedy.

[177] I have no doubt that given the circumstances in which our Constitution came into being, the principles of freedom and equality which it proclaims are intended to be all-pervasive and transformatory in character. We are not dealing with a Constitution whose only or main function is to consolidate and entrench existing common law principles against future legislative invasion. Whatever function constitutions may serve in other countries, in ours it cannot properly be understood as acting simply as a limitation on governmental powers and action. Given the divisions and injustices referred to in the postscript, it would be strange indeed if the massive inequalities in our society were somehow relegated to the realm of private law, in respect of which government could only intrude if it did not interfere with the vested individual property and privacy rights of the presently privileged classes. That, to my mind, is not the issue. I accept that there is no sector where law dwells, that is not reached by the principles and values of the Constitution. If there is indeed an area of human activity exempt from legal regulation in terms of constitutional principles, it is not

because the Constitution must be interpreted in a negative way so as to limit its impact, but because the Constitution itself protects such a sphere from legal intervention.

[178] The real issue, in my opinion, is how the Constitution intends fundamental rights in the broadest meaning of the term to be protected. More particularly, is the Constitution self-enforcing in all respects, or does it require legislative intervention to make it implementable in certain areas, especially as far as positive rights are concerned? The question, then, is not only what balance we should strike between the respective roles of our Court and that of the Appellate Division, but what spheres of decision-making belong in the first place to Parliament, and what to ourselves. This is therefore a question of separate but complementary powers as well as one of separate but complementary judicial functions. Should we be in effect legislating on matters of great social and political concern, leaving it to Parliament to fill in the gaps between our judgments, or should Parliament have the principal task of deciding on appropriate legal rights and duties, with ourselves basically standing as sentinels to ensure that Parliament does not stray beyond the framework within which the Constitution requires it to function?

[179] A major advantage of following the indirect approach and allowing the Appellate Division to develop the common law in keeping with the soul of the Constitution, is that the decisions of that court would not have the entrenched permanence automatically resulting from our judgments. Parliament could, following normal procedures, opt for amending or even abrogating Appellate Division decisions, provided that it legislated within the range of possibilities permitted by Chapter 3. Such alterations, however, would be severely limited in relation to determinations by our Court, where only a constitutional amendment, or at most, cautious navigation by Parliament around the prescriptive rocks of our judgments, could produce the change.

[180] The matter is not simply one of abstract constitutional theory. The judicial function simply does not lend itself to the kinds of factual enquiries, cost-benefit analyses,

political compromises, investigations of administrative/enforcement capacities, implementation strategies and budgetary priority decisions, which appropriate decision-making on social, economic, and political questions requires. Nor does it permit the kinds of pluralistic public interventions, press scrutiny, periods for reflection and the possibility of later amendments, which are part and parcel of Parliamentary procedure. How best to achieve the realization of the values articulated by the Constitution, is something far better left in the hands of those elected by and accountable to the general public, than placed in the lap of the courts.

[181] The Constitution contemplates a democracy functioning within a constitutional framework, not a dikastocracy[1] within which Parliament has certain residual powers. The role of the courts is not effectively to usurp the functions of the legislature, but to scrutinize the acts of the legislature. It should not establish new, positive rights and remedies on its own. The function of the courts, I believe, is, in the first place, to ensure that legislation does not violate fundamental rights, secondly, to interpret legislation in a manner that furthers the values expressed in the Constitution, and, thirdly, to ensure that common law and custom outside of the legislative sphere is developed in such a manner as to harmonise with the Constitution. In this way, the appropriate balance between the legislature and the judiciary is maintained.

[182] The above points can well be illustrated by four examples. They deal with defamation, private discrimination, labour law and customary law, respectively.

[183] The first example relates to the kind of **defamation** case before us at the moment. If we followed the indirect or >diagonal' approach to applicability, the Appellate Division would remain in the picture. Say, for purposes of argument, it decided to uphold the approach adopted in the carefully articulated judgment by Cameron J[2] in terms of which the plaintiff would have to prove negligence on the part of the publisher. Parliament could then examine the Appellate Division's decision, decide

to refer the matter to the Law Commission for investigation, and finally opt for a completely different approach.

[184] Say that Parliament eventually came to the conclusion that a better approach would be that when publishing defamatory material about someone in the public domain, the media must take reasonable steps to verify the accuracy of the statements, and that the more injurious to the personal as opposed to the political reputation of the person concerned the more stringent should the investigation be; say that the legislators felt that when there is a manifest invasion of the privacy of someone in public life, it is not for the plaintiff to prove negligence or absence of justification on the part of the publishers, but for the publishers to establish that the invasion of privacy was in all the circumstances justified in the interest of the public knowing about the lives of such figures. Legislation could then be adopted to these effects, and if any publishers felt aggrieved, they could approach this Court and ask us to strike down the offending provisions. We would then weigh up the matter, decide whether the legislation conforms to the principles of free speech and respect for dignity and privacy and make an appropriate ruling, bearing in mind a number of factors, such as the powers of reading down, severance and total invalidation subject to the discretionary power granted to us in section 98(5). Furthermore, in determining the justifiability of the legislation in terms of section 33, we would decide whether the path followed by Parliament was one of many reasonably permissible options, not whether we thought it the best one.

[185] Assume, on the other hand, that the matter was regarded as one of direct, self-enforcing horizontal application, with the result that the Appellate Division was excluded, and our Court came to the very same conclusion as that posited above for the Appellate Division. Parliament would no longer be able to pass the legislation it thought appropriate, unless it was willing to amend the Constitution for this purpose, or, unless, possibly, it could come up with an alternative proposal that met constitutional criteria and did not conflict with the ratio of the Constitutional Court's judgment. Whatever position we adopted when confronted with the issue, our dilemma would be profound. If we made no reformulation whatsoever and simply

left the matter open, the Appellate Division would be out of the picture, and each Division of the Supreme Court could develop its own rulings, with the result that a plaintiff could win in one part of the country and lose in another, the publication being exactly the same in both. If, on the other hand, we reformulated the common law ourselves in the manner we thought most consonant with the Constitution, we would solve the problem of divided decisions, but tie the hands of Parliament until death or a constitutional amendment did us part. There would be little or no scope for Law Commission enquiry, little chance for subsequent amendments in the light of experience and public opinion. Parliament would have to defer to our discretion in the matter, seeking to find some margin of appreciation left in our judgment within which it could dot i's, cross t's and seek alternative, not incompatible, solutions.

[186] Similar problems would arise if we were to attempt ourselves to solve difficult questions which might have to be confronted when dealing with ***de facto* discrimination**. Although considerable progress has been made in this field, our country still abounds with inequality and bigotry. It is not just a question of bad and insulting behaviour. People are denied access to jobs, facilities and accommodation on a daily basis purely because of the colour of their skin. It would be a strange Constitution indeed that had nothing to say about such flagrant denials of dignity and equality. I have no doubt that the Constitution speaks to such issues. Yet in my opinion it would be quite inappropriate to say that each and every violation of personal rights in such a situation raised a constitutional question for ultimate determination by our Court. The appropriate manner for such issues to be dealt with would be through legislation pioneered perhaps by the Human Rights Commission. Litigation is a clumsy, expensive and time-consuming way of responding to the multitudinous problems of racist behaviour. Mediation and education could produce results far more satisfactory for the injured person, and considerably more transformatory for the perpetrator. Widespread research and consultation would be needed to decide precisely where to establish the cut-off point in each situation: in many countries, persons employing only a handful of workers in a close and intimate work environment, or a landlady letting one room in her house, or social activities of a genuinely private character, are expressly excluded from anti-discrimination legislation. The problems of sex discrimination might be considerably different from those related to race discrimination, or discrimination on grounds of

disability. It is Parliament, and not the courts, that investigates these matters and decides on appropriate interventions and remedies.

[187] I am not aware of what remedies in the private sphere could be invoked to enforce what are said to be directly enforceable constitutional rights. A purely defensive remedy to someone denied access to a restaurant or promotion at work, would not be very meaningful. Specific performance would not be appropriate where the complaint is refusal to enter into a contract, rather than failure to fulfil a contact. I have found nothing in the Constitution to suggest that the framers envisaged a new form of damages for violation in the private sphere of constitutional rights. In the United States, special civil rights legislation was passed to enable persons to be sued or prosecuted for violation of or conspiracy to violate the civil rights of another. The European Court of Human Rights has express power to order damages in the case of violation of individual rights, but then only against governments, not against private parties. What clearly seems to have been contemplated by Chapter 3 is that persons whose rights have been violated not by the government but by private actors, must find their remedies either through legislation [section 33(4)] or else by means of constitutionally adapted common law. Thus, even in the absence of anti-discrimination legislation, a person turned away from a hotel because of his or her race might be able to pursue a claim for *injuria*; report the offender to the licensing authorities; or lay a complaint with the Human Rights Commission. Without such legislation, however, I have difficulty seeing this or any other court finding in the Constitution authority to entertain or develop an action for damages for violation of constitutional rights where the State itself has not been the offending party.

[188] The constitutionalizing of private relationships in the industrial sphere could also have unacceptable consequences. Much of **labour law** has a procedural and framework character, leaving it to workers and employers to establish their own agreements in the light of their respective needs and interests. Collective bargaining plays a central role in establishing appropriate balancing of interests. Granting fundamental rights of a constitutional character to individual employees could destroy decades of arrangements, formal and informal, between representatives of employers

and employees. Agreements involving closed shop and stop-order facilities for union dues from salary might be regarded by some as controversial and contestable. I do not wish in any way to prejudge the interpretation of constitutional or other provisions relating to labour law. Yet it does seem to me at first sight that

the remedy for such persons should be to launch any challenges they may have, either in the legislature or in the many bodies, statutory and otherwise, concerned with industrial relations, not in the Constitutional Court.

[189] Finally, sooner or later, the question of the relationship between the Constitution and customary or **indigenous law** will have to be confronted. I have difficulty in seeing how this Court could effectively examine the constitutional propriety of institutions like lobola or bohadi and each and every one of their myriad inter-related rules and practices. Patriarchy permeates many aspects of customary law as it has been developed and applied in the courts over the last century. The direct enforceability of Chapter 3 could require this Court, if asked to do so, to indulge in a wholesale striking down of customary law because of violation of the equality clause in Chapter 3. The indirect approach would permit courts closer to the ground to develop customary law in an incremental, sophisticated and case-by-case way so as progressively, rapidly and coherently to bring it into line with the principles of Chapter 3. At the same time, Parliament could throw the matter open to public debate involving all interested parties, secure investigation by the Law Commission, and come up eventually with what it considers appropriate legislation.

[190] The issue, then, is not about our commitment to the values expressed by the Constitution, but about which institutions the Constitution envisages as being primarily responsible for giving effect to those values. From the above reasoning, it should be clear that I support the judgment of Kentridge AJ on the question of horizontality/verticality. Since I agree with his approach on the other matters raised, I wish to express my overall concurrence with his judgment and with the order he proposes.