AN ANALYSIS OF DE KLERK V DU PLESSIS 1994 6 BCLR 124(T) IN THE LIGHT OF SECTION 35(3) OF THE CONSTITUTION OF SOUTH AFRICA ACT 200 OF 1993

by

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The issue of the vertical/or horizontal operation of the Bill of Rights (chapter 3) is a controversial one. The interim constitution deals with this controversy in a subtle way by avoiding direct horizontal operation of Chapter 3. Instead, it provides for the so-called 'seepage to horizontal relationships' in terms of section 35(3). This apparently was a political compromise between the pro-vertical only and the pro-horizontal groups.

The human rights history of this country justifies a Bill of Rights that would have both vertical and horizontal operation. However, in section 35(3) there is potential for the values enshrined in the constitution and Chapter 3, and the spirit hereof, to permeate and filter through the entire legal system in all its applications. It would seem, however, as demonstrated by the decision in *De Klerk v Du Plessis*, that the extent to which this filtering process will benefit individuals in their private relations, will depend on the interpretation given to section 35(3) by the courts. If courts as it happened in *De Klerk's case* fail to realise the full import of section 35(3) aspects of the existing law which are unjust could remain and the process of creating a just, open and democratic society will be hampered.

Key terms:

Analysis; *De Klerk v Du Plessis*; section 35(3); constitutional interpretation; purposive approach; vertical operation; horizontal operation; Bill of Rights; retrospective operation; Interim Constitution.
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GENERAL INTRODUCTION

The Republic of South Africa Constitution Act 200 of 1993 marks the end of a repressive and unjust legal system and the inception of a legal order based on justice.

This constitution represents a moral consensus among all South Africans. Through it South Africans have identified the values they share. And it is these values which must guide the creation of a new society.

In terms of Section 4 (1) this constitution is the supreme law of the land. It lays the foundation for a new legal order. It forms a broad normative framework for the legitimate exercise of governmental power in all its forms.

It establishes an independent judiciary which will undertake the important task of transforming South African society by ensuring that the values enshrined in the constitution are vigorously enforced and defended against the acts of governmental majorities.

The judiciary, particularly the Constitutional Court, is to act as a sentinel for the constitution. The legal order of the past emasculated the judiciary and rendered it powerless in the face of terrible human rights violations by the then governments. This was the era of parliamentary sovereignty. The dictum in the case of Sachsv Minister of Justice 1934 AD 11 bears testimony to this fact. At p37 the court said: 'Parliament may make any encroachment it chooses upon the life, liberty or property of any individual subject to its sway, and ... it is the function of the courts of law to enforce its will'.

South African law reports are full of dicta such as this. The English heritage of South African constitutional law was identified as the source of this positivistic approach to statutory interpretation. This English influence over South African schooled judges, ill-equipped them for judicial service in a system of Constitutional Supremacy. Proof of this is the performance of former South African judges in the courts of the then independent homelands of Bophuthatswana and Ciskei which had supreme Constitutions.

In the words of I. Southwood 'Naught for your (constitutional) comfort: Monnakale v Republic of Bophuthatswana' (1992) SA PR/PL 169 at p171 these
judges could not 'make the leap from a system of parliamentary supremacy to one of Constitutional Supremacy'. Testimony of this failure to make the 'leap' is found in, e.g., the dictum by Friedman J in the case of Monnakale v Republic of Bophuthatswana1991 (1) SA 598 (BGD). At p621 he said: 'An analysis of the authorities I have cited yields a distillation to the effect that the role of the judiciary is to interpret the enactments of parliament, and where the meaning of the enactment is plain and unambiguous, effect must be given thereto, however unpalatable the result might be. It is not for the court to indulge in an exercise of semantic elasticity in the face of clear language nor can it disregard the well-established and proven canons of construction and interpretation at the slightest seductive beckoning of what the law ought or should be' (my emphasis).

The court here was concerned with the interpretation of the Bophuthatswana Constitution Act 18 of 1977 which is supreme constitution. I.Southwood (supra) criticises the judge's approach to constitutional interpretation in this case. The judge demonstrated his loyalty to his roots by referring, as authority for his decision, to South African and English decisions, countries which had and have parliamentary supremacy, as as opposed to Constitutional Supremacy.

In the former Ciskei, Pickard C.J., in the case of Bongopi v Chairman of the Council state, Ciskei and others 1992 (3) SA 250 (CKGD) at p265 said: 'This court has always stated openly that it is not the maker of laws. It will enforce the law as it finds it. To attempt to promote policies that are not to be found in the law itself or to prescribe what it believes to be the correct public attitudes or standards in regard to those policies is not its function'.

Fortunately the drafters of the South African Constitution Act 200 of 1993 deemed it necessary to expressly give guidance to the courts as to how they are to embark on the new task of interpreting the new Constitution. This is provided for in Section 35.

However, even before the enactment of the Constitution Act there were positive signals, from some judges in the former Bophuthatswana and Ciskei, that the 'leap' form operating in a system of parliamentary supremacy to one
of Constitutional Supremacy is not impossible to make. This is evident in the decisions of Nyamakazi v President of Bophuthatswana 1992 (4) SA 540 (BD) and the appeal case in the case of Bongopi (supra) reported at 1993 (3) SA 494 (CKAD).

The decision in De Klerk v Du Plessis (supra) is among the first cases dealing with the interpretation of the Constitution (Act 200 of 1993). As this and other decisions of the South African courts indicates, the approach adopted by the courts to interpret the Constitution will determine the extent to which South Africans will benefit from the entrenchment of the fundamental rights in Chapter 3 of the Constitution. A literal or positivistic approach to interpreting the Constitution, as it is shown below, will definitely deny South Africans the opportunity to fully enjoy these rights. On the other hand a purposive or teleological approach to interpreting the Constitution will avail to South Africans the opportunity of fully enjoying these rights. The decision is De Klerk's case (supra) will be considered and analysed in this context.
Chapter 1

Section 35: Section 35 guides the courts through the process of Constitutional interpretation. It prescribes an approach to interpretation that will give expression to the values enshrined in the Constitution and Chapter 3 in particular. Only an approach which recognises the purposes, goals or aspirations behind the language of the Constitution can fully give expression to these values.

a) Section 35 (1): Section 35 (1) provides as follows: 'In interpreting the provisions of this chapter a court of law shall promote values which underlie an open and democratic society based on freedom and equality and shall where applicable have regard to public international law applicable to the protection of the rights entrenched in this Chapter and may have regard to comparable foreign case law'.

i) This section is only meant for the interpretation of the provisions of Chapter 3. Chapter 3 (the Bill of Rights) entrenches certain rights. These rights have been chosen for entrenchment because of their fundamental nature. They constitute the minimum condition for the establishment of a society desired and cherished by South Africans, i.e., an open democratic society based on freedom and equality.

ii) The courts are enjoined, in the interpretation of the provisions of Chapter 3, to promote the values that underlie an open and democratic society based on freedom and equality. A court faced with an issue requiring the interpretation of the provisions of Chapter 3 or the interpretation of the nature, purpose, content or scope of a right entrenched in terms of this Chapter, has to promote these values.

This logically requires the court to first discover these values. In other words a court, with an issue requiring the interpretation of, e.g., section 15, which entrenches freedom of expression, has to place this freedom in the context of an open and democratic society based on freedom and equality. In giving meaning to the provision of this section it has to bear in mind these values. Therefore an interpretation which unreasonably restricts the scope and context of this freedom cannot in the end contribute to the promotion of these values.
The court in *S v Ma-kwanyane and Another* 1995 (3) SA 391 (cc) had to decide on the constitutionality of the death penalty. In the process it was required to interpret the relevant provisions of Chapter 3 being Section 9 (the right to life), section 10 (the right to respect for and protection of dignity) section 11 (2) (the right not to be subjected to cruel, inhuman or degrading punishment). The court had therefore, to place, e.g., the right to life and to human dignity, in the context of an open and democratic society based on freedom and equality. In identifying the underlying values, in this regard, it came upon the concept of Ubuntu.

At p500 - 501 Mokgoro J identifies the value of Ubuntu as becoming a shared one among South Africans of all races. She defines Ubuntu at p501D as meaning 'humaness, personhood and morality'; also as enveloping '... the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity...'. She continues at p501E - F to say 'Its spirit emphasises respect for human dignity, marking a shift from confrontation to conciliation. In South Africa Ubuntu has become a notion with particular resonance in the building of democracy. It is part of our rainbow heritage, though it might have operated and still operates differently in diverse community settings. In the Western cultural heritage, respect and value for life, manifested in the all-embracing concepts of 'humanity' and menswaardigheid' are also highly priced. It is values like these that section 35 requires to be promoted. They give meaning and texture to the principles of a society based on freedom and equality'.

The post-emble to *the* Constitution Act titled 'National Unity and Reconciliation' identifies the concept of Ubuntu as one of the values South Africans should embrace in order to survive the consequences of the past system of Apartheid and to lay a good foundation for a new society.

In this way the court, in *Makwanyane's case* (supra) arrived at the conclusion that, the values underlying the rights to life, human dignity and to freedom from being subjected to cruel, inhuman or degrading punishment, among which it identified the value of Ubuntu, demand that the death penalty should be declared unconstitutional.
The value of Ubuntu as described by Mokgoro J in Makwanyane's case is all-encompassing, it is omni-present and it characterises all humanity irrespective of colour or race. In its widest possible meaning it can be found to underlie most, if not all, of the rights enshrined in Chapter 3.

The desire by South Africans to make a new beginning has led to the entrenchment of this value in the Constitution. And it is the spirit of values such as Ubuntu which must permeate the process of giving meaning to the rights in Chapter 3.

iii) Section 35 (1) also provides for South African courts to have regard to the rules of public international law with regard to human rights. The history of South Africa in the human rights field demands this country to learn from other nations. The international nature of human rights also demands that nations should learn from one another in order to co-ordinate the struggle for human rights internationally, with the aim being to establish a just and peaceful world for all mankind. Foreign case law in the human rights field also has invaluable lessons for South African courts.

b) Section 35 (2): This section provides for the unity of the legal system. In terms of this section where a law which limits the rights in Chapter 3 is reasonably capable of an interpretation which does not exceed such limits, such law should be given the latter meaning. The word 'law' in this context can be said to include the common law and customary law if this section is read together with section 35 (3), 33 (2) and 33 (3). The provisions of this and the latter sections are intended to harmonise the common law, customary law and statute law with the Constitution and the values it enshrines.

c) Section 35 (3): It provides as follows: 'In the interpretation of any law and the application and development of the common law and customary law, a court shall have due regard to the spirit, purport and objects of this chapter.'
Analysis:

1. This section provides for the interpretation of a law ('any law') and the application and development of the common law and customary law. The word 'law' in this section clearly refers to statute law. It cannot bear the same meaning it does in section 7 (2), since the common law and customary law are separately and specifically provided for in this section (35(3)). With regard to section 7 (2) most commentators agree, e.g., A Cachalia in Cachalia, H. Cheadle, D. Davis et al (1994) 'Fundamental rights in the new Constitution'; A. Basson 'Labour Law and the Constitution' (1994) THRHR 498 that the word 'law' herein refers to both statute law, common law and customary law (the legal system as a whole). This section provides: 'This chapter (chapter 3) shall apply to all law in force and all administrative decisions taken and acts performed during the period of operation of this constitution'.

Section 7 (2) is preceded by section 4 (in the light of which it must be interpreted). Section 4 is titled 'Supremacy of the Constitution' and provides(4(1)): 'This constitution shall be the Supreme law of the Republic and any law or act inconsistent with its provisions shall, unless otherwise provided expressly or by necessary implication in this constitution, be of no force and effect to the extent of the inconsistency.' Again the word 'law' in section 4 has a wider meaning to include statute law, the common law and customary law. Section 33 (2) confirms this interpretation. However, as stated above in section 35 (3) the word 'law' is used to refer to statute law only.

2. The application and development of the common law and customary law.

The section further provides for the application and development of the Common law and Customary Law. In my opinion this application and development of the common law necessarily involves interpretation. To apply and develop these branches of the law necessarily requires an understanding of the concepts and principles contained therein and this process has to be preceded logically by interpretation.
The provisions of sections 33 (2) and (3) are relevant here. Section 33 (2) provides: 'Save as provided for in subsection (1) or any other provision of this Constitution, no law, whether a rule of the common law, customary law or legislation, shall limit any right entrenched in this chapter'.

Section 33 (3) provides: 'The entrenchment of the rights in terms of this chapter shall not be construed as denying the existence of any other rights or freedoms recognised or conferred by common law, customary law or legislation to the extent that they are not inconsistent with this chapter.

These sections together (and read with sections 7 (2) and 4 (1)) sanction a scrutiny of the common law and customary law (and legislation) to ensure that they comply with the provisions of chapter 3 and this scrutiny involves interpretation.

3. Section 35 (3) further enjoins the courts when embarking on the above processes, i.e., interpretation of statute law and the application and development of the common law and customary law, to '... have due regard to the spirit, purport and objects of this chapter' (chapter 3). This provision is in line with section 7 (2) and sections 33 (2) and (3). The spirit, purport and objects of chapter 3 have to permeate the processes described above.

A question may be asked as to what is the spirit, purport and objects of Chapter 3. To answer this question one logically has to interpret the provisions of Chapter 3. The whole object of Chapter 3, as stated above is to establish an open and democratic society based on freedom and equality. This object is deductible from the nature of the rights enshrined in this chapter. The spirit of the chapter is that of the recognition of and respect for the dignity of all South Africans, their equality and freedom, and that of justice for all South Africans irrespective of race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language.
4. **The implications and objects of section 35 (3)**

The object of section 35 (3) is to enjoin the courts, when interpreting any law and also when applying and developing the common law and customary law, to have due regard to the spirit, purport and objects of chapter 3. In other words the spirit of the values enshrined in Chapter 3 must be made to permeate all these processes. The important question is therefore: 'what are the implications of the provisions of section 35 (3)?'

Debate on the meaning and implications of this section has led to the controversial issue of the vertical/horizontal applicability of Chapter 3 being placed in the spotlight. Views regarding this issue differ. In tracing the origin of this section LM Du Plessis in an article in 'A Background to Drafting the Chapter on fundamental Rights' in Birth of a Constitution edited by D de Villiers at p93 says: It was a matter of contention whether the provisions of the chapter should be enforceable against the state and its organs only or whether they should bind both the state and private institutions and persons. In the end it was agreed that the chapter should operate vertically only, but that provision be made for a seepage to horizontal relationships. As a result a sub-clause was included in the interpretation clause requiring any court of law applying and developing the existing law to have due regard to the spirit, purport and objects of the chapter (section 35 (3)). To allay fears that the predominantly vertical operation of the chapter can be construed as authorising 'privatised apartheid', a provision was also included in the limitation clause permitting measures designed to prohibit unfair discrimination by (private) bodies and persons not explicitly bound by the chapter (sec 33(4))'.

Therefore, according to Du Plessis, Section 35 (3) was inserted to provide 'a seepage to horizontal relationships'. This is achieved by making chapter 3 applicable to the common law, which governs horizontal relationships, i.e., relations between private persons.

J.D. van der Vyver in 'The private sphere in Constitutional Litigation' (1994) 3 THRHR 378 at p 394 gives the example of a contract for the sale of a house which precludes other prospective buyers on the basis of race, i.e., which limits the sale of the property to buyers of a particular race
only. He is of the opinion that even though this contract would, in the past, perhaps be invalidated on the basis of its being contra bonos mores, the latter concept has now acquired added meaning inspired by the provisions of Chapter 3. In his opinion the concept of bonos mores is now to be redefined in view of what would be 'justifiable in an open and democratic society based on freedom and equality.'

Martin Brassey in 'Labour Relations under the new South African Constitution' South African Labour monograms 5/94, Labour Law unit, University of Cape Town at p6, is of the view that: 'The clause mandates a new approach to the interpretation, application and development of our law, one that gives effect to the aspirations of the chapter (chapter 3)'. In what can be said to be a reference to section 35 (2) he continues: 'Behind it there doubtless lies a desire to save laws from invalidity by sanctioning a validating interpretation of them if this is competent. But it also seems intended to ensure that when laws fall beyond the governance of the chapter, they will at least be interpreted, applied and developed in accordance with its spirit'. Section 35 (3) is not intended to save prima facie invalid laws from invalidity by sanctioning a validating interpretation of them if this is competent, it is intended to enjoin the courts to infuse the spirit of chapter 3 into both statute law, common and customary law, i.e., into the entire legal system.

An example of this in the law of defamation is given by Annel van Aswagen in 'The implications of a Bill of Rights for the law of contract and delict' (1995) 11 SAJHR 50.

She is of the opinion, as regards the law of delict, that since the latter is largely based on policy considerations, especially as regards the issue of wrongfullness, it is going to be greatly influenced by chapter 3. She gives the example of the law of defamation, which in the past was loaded in favour of protecting the dignity or reputation of the individual as against freedom of expression. She refers to the decisions in SAUK v O’Malley 1977 (3) SA 394 (A) and Pakendorf v De Flemingh 1982 (3) SA 146 (A) in which the principle of the strict liability of the media was introduced into South Africa Law. The basis of this principle is that in the opinion of the courts public policy demanded that indivi-
duals should be protected against impairment of their dignity and reputation by the comparatively powerful mass media.

Further in Neethling v Du Plessis and others, Neethling v The Weekly Mail 1994 (1) SA 708 (A) the court rejected reliance by the media on a (new) defence of public interest not coupled with truth in that '... in our law public policy did not require such strong protection of freedom of the press (to be) in the public interest'.

It is accepted that public policy in the past, informed by the system of Apartheid could not have required such strong protection of freedom of the press to be in the public interest. It however found strong protection of individuals' reputations to be in the public interest.

Public policy today however has to be informed by the values enshrined in Chapter 3. Freedom of expression is entrenched in Chapter 3. The value of this freedom in democracy has been recognised. The courts now have the duty, in terms of section 35 (3), to ensure that the Common Law of defamation reflects this.

Van Aswagen (supra) at p62 is also of the opinion that '...indirect horizontal application of the provisions of chapter 3 may reverse this development (i.e., strict liability), restoring the original position in the light of the recognition of freedom of the press as a fundamental right.'

The implications of Section 35 (3), according to these authors are therefore, to introduce indirect (as opposed to direct) horizontal operation of Chapter 3, i.e., the seepage to horizontal relationships referred to by Du Plessis (supra), A.C. Basson (supra) on the other hand is of the view that the effect of sections 7 (2), 33 (2), 33 (3) and 35 (3) is that in '... applying the common law, which applies to matters between third parties, the courts will thus be obliged to have due regard to the fundamental rights and freedoms contained in the Bill of Rights and will be able to ensure that no infringement of the entrenched fundamental human rights takes place' (at p501 - 502). The effect hereof is that according to the author these sections bring about the direct (as opposed to indirect) horizontal operation of Chapter 3. This view in my opinion misconstrues the provisions of
section 35 (3) and ignores the provisions of section 33 (4) which clearly indicates that private bodies and persons are not bound by the provisions of Chapter 3.

The existing law of defamation as indicated by Van Aswagen surely cannot and should not survive the provisions of section 15 (freedom of expression) of Chapter 3. Section 35 (3) gives the courts the responsibility and opportunity to ensure that the values underlying the constitution are infused into the entire legal system to accord it with the Constitution. This is the way in which it introduces indirect horizontal operation of the rights in Chapter 3.
Chapter 2

De Klerk and Another v Du Plessis and others 1994 (6) BCLR 124 (T)

a) The facts

Plaintiffs instituted an action for defamation against the defendants being the editor, journalist and publisher of the Pretoria News. The action was based on allegedly defamatory matter published by defendants. The action was instituted before the commencement of the Constitution Act 200 of 1993, i.e., before 27 April 1994. After the Constitution came into operation the defendants sought to amend their plea to add a defence based on section 15 of the Constitution Act (Act 200 of 1993). Section 15 provides for freedom of speech and expression as well as freedom of the press and other media.

The effect hereof would be that Section 15 abrogates the common law principle of the strict liability of the media, established in the case of SAUK v O'Malley (supra), as regards defamation. This would allow the defendants to rely on a defence of absence of animus injuriandi.

In deciding the question whether the application for amendment of the plea should be granted, the following issues were thereby also raised for decision by the court:

i) Whether, since the matter was pending before the Constitution Act came into operation, section 241 (8) precluded restrospective operation of the Constitution Act 200 of 1993.

ii) Whether the fundamental rights in Chapter 3 of the Constitution Act had only vertical operation and not also horizontal operation.

b) The decision

The court held:

i) that according to the authorities binding on it, if an amendment, sought
by a defendant, to a plea, would render the plea excisable, such amend­
ment should not be acceptable. The court found that the amendment sought
by the defendant would render the plea excisable on the following grounds:

a) the matter was pending before the commencement of the Constitution Act and
section 241 (8) precludes retrospective operation of the Constitution Act
for reasons stated in *Kalla v The Master* 1995 (1) SA 261 (T).

b) That the fundamental rights contained in Chapter 3 apply only vertically
and therefore the defendants' reliance on section 15 in this dispute was
improper.

c) The reasons for the decision:

i) The effect of section 241 (8): As regards the effect or meaning of this
section the court relied on the decision in Kalla's case (supra). In this
case the court (also per Van Dijkhorst J) held that the ordinary rules of
interpretation should be applied in interpreting section 241 (8). In applying
these rules, the court gave the words used in the section their ordinary
meaning, which meaning it found to be plain. In concluding that section 241 (8)
precludes the retrospective operation of the Constitution, the court also
relied upon the presumption against retrospective operation of statutes.

The matter has since been finally decided by the Constitutional court in
*S v Mhlungu and others* 1995 (3) SA 867 (cc) this decision will be considered
below.

ii) The question whether Chapter 3 has in addition to vertical operation, hori­
zontal operation: In other words could the defendants in this dispute against
the plaintiffs rely on the provisions of section 15 or are the rights
in Chapter 3, e.g. freedom of the press or expression enforceable against
private persons? In arriving at its decision that the rights in Chapter
3 are only enforceable against the state (vertical) and not against private
persons (horizontal), the court gave the following reasons:
1) By tradition Bills of Rights are inserted in Constitutions to curtail state power and prevent tyranny by states. They are intended to balance the interests of the subject as against those of the state. The regulation of private relations by Bills of Rights is an exception.

2. Fundamental rights are normally protected against state action only. Where there is horizontal protection it is to a limited extent and it is stated expressly. The correct approach to the interpretation of Chapter 3 is to take the view that the South African Constitution is a conventional one unless the contrary is clearly indicated.

3. 'There was a pressing need for a Bill of Rights given the suppressive state action of the past. The call for a conventional Bill of Rights was sharp and clear. But there were no such calls for a Bill of Rights on a horizontal plane' (at p131).

4. 'The fundamental rights and freedoms now set out in chapter 3 had not been curtailed by our common law. In fact they can be found enshrined therein. The removal of all authoritarian encroachment leads to their resuscitation'. (at p131).

5. 'There was no need of the horizontal application of a Bill of Rights. Whatever corrections should be made from time to time to our common law can be done by the legislature'. (at p131 E - F)

6. Subjecting the whole body of the common law to Chapter 3 would result in unprecedented legal uncertainty. If it was the intention of the legislature that this be the case it would have said so expressly.

7. The provisions of section 33 (4) would be entirely redundant if chapter 3 was indeed intended to bind these bodies and persons. These measures would be unnecessary as chapter 3 would have rendered illegal such discriminatory practices by these bodies and persons.

8) The Common Law adequately provides for the protection of life, e.g., in criminal law and even provides for the protection against the impairment of dignity and fame. The whole body of private law would become unsettled
if every act or conduct of individuals inter se was to be subject to the Bill of Rights.

9. Criticizing the decision in Mandela v Falati 1994 (4) BCLR 1 (w) at p132 I he said: '... that political activity occurs at grassroots level and that therefore the drafters intended section 21 to have horizontal application, disregards the fact that historically political activity was not inhibited by the citizenry but by state repression. That is the evil the drafters sought to combat'.

10. The provisions of sections 33(2) and 33(3) do not make any mention of the scope of the rights mentioned, i.e., whether they are vertical or horizontal. Section 35(3) also does not widen the scope of the rights to include their direct horizontal application.

11. On the other hand the provisions of Section 33 (4) and 33 (5) 'provide for legislative intereference with the legal relationship between citizen and citizen in order to apply some of the fundamental norms enacted in the Constitution' (at p 133 B - C).

These reasons are discussed in the Chapter below.
Chapter 3

A critical appraisal of the decision in the light of the Constitution Act and section 35 (3) in particular:

a) The approach to Constitutional interpretation:

The court in De Klerk's case (supra) before dealing with the issues before it also considered what is the proper approach to interpreting a Supreme Constitution such as the Constitution Act 200 of 1993.

The court (at p128 E - F) rejected what is called a 'generous approach' to interpretation and preferred a purposive approach instead. With regard to a generous approach it held that this would 'lead to interpretation based on personal predilections and preferences' (at p128 E). In defining what a purposive approach involves, the court, at p128 G, said: 'In my view one must apply the purposive approach to interpretation of our Constitution, determining from it as a whole what was the aim of Chapter 3 and its constituent sections individually, what problems and aspirations did it seek to address and what does it have in mind for our society. In short what are the values and norms our society cherishes and intends to uphold.'

At p128 - 129 J - B the court continued to say: 'When interpreting the Constitution and more particularly the bill of rights it has to be done against the backdrop of our chequered and repressive history in the human rights field. The state by legislative and administrative means curtailed the common law human rights of most of its citizens in many fields while the courts looked on powerless. Parliament and the executive reigned supreme. It is this malpractice which the bill of rights seeks to combat.'

In Qozeleni v Minister of Law and Order and Another 1994 (3) SA 625 (ECD) Froneman J found similarities between the purposive approach and the common law principles of interpretation as set out in Hleka v Johannesburg City Council 1949 (1) SA 842 (A) at p852 - 3, i.e., the approach to interpretation must be:
a) 'to ascertain what the position was before the enactment of a statute,
b) then to identify the 'mischief' which the later statute sought to remedy,
c) to ascertain the remedy provided by the new provision,
d) and the reason for the remedy'. In the court's opinion (in Qozeleni's case (supra)) 'the only material difference between the common law approach and the present (purposive) approach is the recognition that the previous constitutional system in this country was the fundamental mischief to be remedied by application of the new constitution' (Act 200 of 1993). The approach preferred by Van Dijkhorst J in De Klerk's case (see dicta at p128 – 12 quoted above) does have similarities with the 'mischief rule' followed by the court in Hleka's case (supra).

Despite this, however, Van Dijkhorst J failed to arrive at a conclusion that is consonant with this approach. A proper application of the purposive approach in De Klerk's case would have led the court to a different conclusion which conclusion would have enhanced the values that South African society cherishes and wishes to uphold.

b) The interpretation of section 241 (8):

The relevant part of this section provides: 'All proceedings which immediately before the commencement of the Constitution were pending before any court of law, including any tribunal or reviewing authority established by or under law, exercising jurisdiction in accordance with the law then in force, shall be dealt with as if this constitution had not been passed....'

Until the Constitutional court decision in S v Mhlungu and others different provincial divisions of the supreme court have reached conflicting decisions as regard the meaning of this section. In decisions such as Qozeleni v Minister of law and Order (supra), Shabalala v Attorney General, Transvaal and another 1995 (1) SA 608 (T) and Jurgens v The Editor, Sunday Times Newspaper and another 1995 (2) SA 52 (W) the court concluded that section 241 (8) does not preclude the retrospective operation of the constitution Act while in cases such as Kalla v The Master (supra) and De Klerk's case the words used in section 241 (8) were given their ordinary and literal meaning which is that pending proceedings must be dealt with as if the Constitution Act had not been passed (my emphasis), i.e., section
241 (8) precludes the retrospective operation of the Constitution. This view was shared by the minority in Mhlungu's case (supra). In the latter case the minority (per Kentridge A.J.) held that where the language of a provision such as section 241 (8) is clear it must be given effect and the section should be read as excluding the application of the substantive provisions of the Constitution in pending cases. Kentridge A.J. also relied on the common law presumption against retrospective operation of statutes.

In Kalla's case Van Dijkhorst J. in dealing with section 241 (8) said:

'We may have a new ball game but the goal is still the same, namely to determine the intention of the legislature. It follows that one must start with the words used. The rules to be applied in case of ambiguity have not evaporated or been abolished. They form part of the law of the land, which has not been abrogated by the Constitution' (at p269 C - D).

I disagree with this statement in that the Constitution Act does indeed establish a new legal order. The rules of interpretation to which Van Dijkhorst J. refers are those which applied under the past legal order of parliamentary supremacy. We now have a system of Constitutional Supremacy. The Constitution itself in Section 35 prescribes the rules of interpretation which replace the old rules. Consequently the law of the land has changed (see C.J. Botha 'Steeds 'n paar tekstueleikone teen die regstaatlike muur: Kalla v The Master 1995 1 SA 261 (T)' 1995 THRHR 523 at p525 - 526).

The majority decision in Mhlungu's case, which finally settled this matter, and the decisions in Qozeleni, Shabalala and Jurgens (supra) were inspired by the dictum by Mahomed A.J. (as he then was) in S v Acheson 1991 (2) SA 805 (NM) at p831 A - C where he said: 'The Constitution of a nation is not simply a statute which mechanically defines the structures of government and the relations between the government and the governed. It is a mirror reflecting the national soul, the identification of the ideals and aspirations of a nation, the articulation of the values bonding its people and disciplining its government. The spirit and tenor of the Constitution must therefore preside and permeate the process of judicial interpretation and judicial discretion'. (my emphasis).

In the words of Cloete J in shabalala's case, referring to the above dictum:
'I find it unthinkable, when regard is had to 'the spirit and tenor of the Constitution', that parliament could have intended to exclude any person from exercising any of the rights entrenched in chapter 3 if he were able to do so when the Constitution came into operation' (at p615 F).

Criticising Kentridge A.J.'s approach in interpreting section 241 (8) in Mhlungu's case, Mahomed J at p873-874 H - A said: 'What these and many other examples would suggest is that the approach favoured by Kentridge A.J would remove the protection of fundamental rights from substantial groups of people in the country, simply because the proceedings in which the protection of such rights might be crucial for a person had begun prior to the commencement of the Constitution on 27 April 1994 although the substance of the proceedings takes place only after that date. I would be extremely distressed to accept that this is what the Constitution intended. It seems to negate the very spirit and tenor of the Constitution and its widely acclaimed and celebrated objectives. Fundamental to that spirit and tenor was the promise of the equal protection of the laws to all people of this country and a ringing and decisive break with a past which perpetuated inequality and irrational discrimination and arbitrary governmental and executive action.' The majority decision rejected what it called the literal interpretation of section 241 (8) as this would result in the '... arbitrary selection of one category of persons who would become entitled to enjoy the human rights guarantees of the constitution and the arbitrary exclusion of another group of persons from such entitlement' (at p874 A - B).

The majority decision also held that the presumption against retrospectivity only operates where vested rights would be violated and not where (as it is the case with the Constitution Act) rights are expanded. This decision even though it confirmed the decisions in Shabalala, Qozeleni and Jurgens (supra) rejected the approach of the courts in these decisions, e.g., as regards the distinction between procedural and substantive rights.

The decision in De Klerk's case, on the interpretation of section 241 (8), is therefore wrong. The approach to interpreting section 241 (8) adopted by the court in this case is anachronistic. The court failed to take into
consideration the 'spirit and tenor' of the Constitution Act and instead
resorted to the outdated rules of interpretation.

c) The Vertical/horizontal operation of Chapter 3

The reasons (supra) given by the court for holding that Chapter 3 has only
vertical operation and not also horizontal operation are now considered in
their above sequence:

1. That Bills of Rights are traditionally intended to curtail state power
and not also private power cannot be disputed. The question remains whether
Chapter 3 provides for the exception, i.e., the regulation of private rela-
tions.

2. I am of the opinion that the Constitution Act does expressly provide for
horizontal operation of Chapter 3 though this is only indirect. The provi-
sions of sections 7(2), 33 (2), 33 (3) and 35 (3) are proof of this. The
combined effect of these sections is that Chapter 3 applies to both statute
law, common law and customary law. In terms of section 7 (2) Chapter 3 is
applicable to all these categories of law in all their applications, i.e.,
as well as in instances where they govern private relations. The views
expressed by Martin Brassey (supra) at p6 are not supported.

Section 33 (2) subjects the common law, customary law and legislation to the
provisions of Chapter 3, section 33 (1) (the limitation clause) in particular.

Section 33 (3) recognises rights that exist in terms of the common law,
customary law and legislation to the extent that they do not conflict with
Chapter 3.

While section 35 (3) enjoins the courts, when interpreting legislation and
developing and applying the common law and customary law, to have due regard
to the spirit, purport and objects of chapter 3. This, as already stated
above, mandates the courts to infuse into the whole legal system, the values
enshrined in Chapter 3. The law of defamation (with which the court in De
Klerk's case was concerned) is a good example of the way in which the see-
page to horizontal relations is to take place (see Van Aswagen, supra).
Dicta by Froneman J in *Gardener v Whitaker* 1995 (2) SA 672 (ECD) are also relevant in this regard (see p683 H - I). At p684 E-G he said: 'Where they (i.e., the common law and customary law) restrict or diminish the rights protected in Chapter 3, they cannot survive. The courts are obliged to prevent the restriction of those rights if they are directly threatened (s7(4)) and to adapt the common law to the broader objects of the constitution even where they are not directly affected (35 (1) and (3))'. At p686 A - B he continued to say: 'It follows that in my view, all aspects of the common law, including the present state of the law of defamation, should, in cases that now come before the courts be scrutinised to decide whether they accord with the demands of the constitution. To leave those areas of the common law which are in conflict with the constitution unaffected would in effect, if not by intent, perpetuate aspects of an undemocratic, discriminatory and unjust past.'

3) It is incorrect to say that there were no calls for a bill of rights on a horizontal plane. It is inconceivable that a nation such as this, which suffered so much oppression and discrimination, not only at the hands of state bodies but also at the hands private bodies and persons, should not demand measures to eradicate what had become known as 'privatised apartheid' (see LM Du Plessis 'Enkele gedagtes oor die historiese interpretasie van Hoofstuk 3 van die Oorgangsgrondwet: De Klerk v Du plessis' 1995 THRHR 504 at p508 - 509) and *Gardener v Whitaker* supra at p685 C - E).

4. It is trite that the Common Law is or was the foundation of a just legal system. But the inroads made into this system by Apartheid inspired legislation and the public policy it established contaminated this system of law and resulted in the emasculation of the judiciary. An example of this is the law of defamation (see *SAUK v O' Malley, Pakendor v De Fleming, Neethling v Du Preez, Neethling v Weekly Mail* supra) and administrative law. In the latter the audi alteram partem principle was no longer presumed, parliament could take away this right expressly or by necessary implication and courts were powerless to prevent this.

It is true that the removal of all these authoritarian encroachments will lead to their resuscitation. This the constitution Act does by giving the courts
the powers in terms of section 35 (1) and 35 (3).

5. This again is incorrect for the reasons given in (2) above. The legislature does have the duty in terms of the new Constitution to effect these corrections, e.g., in terms of section 7 (1) as it is bound by the provisions of Chapter 3. However, it is not the only body mandated to make these corrections. The courts are also mandated to undertake the task of resuscitating and correcting the existing law in terms of section 35 (3).

6. In terms of sections 7(2), 33 (2), 33 (3) and 35 (3) the whole body of the common law is expressly subjected to Chapter 3. The legislature has therefore 'said so expressly'. I disagree that there will be (or there is) legal uncertainty if the whole body of the common law is subjected to Chapter 3 as it has been done in terms of the above sections. The Constitution Act per se introduces a new legal order in South Africa. Sections 33 (2) and 33 (3) state what the law is and what is no longer the law. Section 4 (1) states that the constitution Act is the supreme law of the land. There is in my opinion, certainty as to what the law is. Legislation, the common law and customary law, wherever they conflict with the constitution, no longer constitute the law of this land. This new legal order is the product of democratic participation by all South Africans. There can be no uncertainty in the law, at least not to an extent that will justify the retention of sections of the existing law that are unjust (see Garde ner v Whitaker p686B supra).

7. The presence of section 33 (4), which is aimed at enabling the legislature to enact measures designed to prohibit unfair discrimination by private bodies and persons, does not in my opinion preclude the indirect horizontal operation of Chapter 3. While section 33 (4) provides for regulative measures aimed directly at the acts of private bodies and individuals, section 35 (3) provides for judicial action or measures that indirectly affect the acts of individuals and bodies but directly affect the law in terms of which these acts are governed. Chapter 3 does not directly bind private bodies and persons it, however, binds them indirectly by directly being applicable to the law in terms of which individuals conduct their relations (see Garde ner v Whitaker, supra at p685 E - F).
8. The object of section 35 (3) is not to make Chapter 3 applicable to the actions or conduct of individuals inter se, it is to infuse into legislation, the common law and customary law where they govern private relations, the spirit of Chapter 3 to ensure that this filters through all fields of activity among individuals. The aim is to create an open and democratic society based on freedom and equality. If the result of this infusion (of the spirit of Chapter 3 into the common law) be the unsetlement of this system, then this is what the supreme law authorises and it has to be done to adapt this system to the new legal order in terms of sections 33 (2), 33 (3) and 35 (3).

9. The court in Mandela v Falati (supra) in my opinion failed to consider the provisions of section 35 (3). The rights in Chapter 3 do not have direct horizontal application. However, section 35 (3) introduces indirect horizontal application of these rights.

10. Sections 33 (2) and 33 (3) do not, it is accepted, provide for the scope of the rights to which they refer. This is because it is not necessary, when regard is had to the context of these sections. These sections are merely aimed at subjecting the existing law, i.e., its content, to Chapter 3 and the Constitution. Section 35 (3) also does not need to refer to the scope of rights. It is concerned with the manner in which legislation, the common law and customary law are to be interpreted, applied and developed, respectively.

11. Section 33 (4) has a specific purpose, as discussed above, which has no effect on the horizontality or not of Chapter 3, the same applies to section 33 (5).

The court in De Klerk's case favoured the retention of the common law as it exists (see e.g., pl26 C-D and p132 C-E), while on the other hand its interpretation of the meaning and object of section 35 (3) dictated the contrary. At pl 3 E-F the court, with regard to section 35 (3), said: 'Section 35(3) is intended to permeate our judicial approach to interpretation of statutes and the development of the common law with the fragrance of the values in which the constitution is anchored. This means that whenever there is room for interpretation or development of our virile system of law that is to be the point of departure'.
Propagating a retention of the law of defamation as it exists and at the same time giving this meaning to section 35 (3) is, in my opinion, with respect, a contradiction. Section 35 (3) enjoined the court in this case, to infuse the application and development of the common law of defamation with 'the fragrance of the values in which the constitution is anchored 'and this the court has failed to do. The constitution is anchored inter alia, in the values of democracy, and democracy demands, for it to thrive, full recognition of the right to freedom of speech, expression and freedom of the press and other media provided for in terms of section 15. The court refused to apply the provisions of section 35 (3) to the law of defamation notwithstanding the fact that it was obliged to (see dicta in Gardener's case at p684f and p686 A - B and Van Aswagen, supra).

The decision is De Klerk's case, with respect, is wrong and should be discarded, while that of Frone man J in Gardener v Whitaker (supra), which also dealt with the law of defamation and Chapter 3, should be supported for the court in the Gardener case correctly applied the provisions of section 35 (3) to the law of defamation and as a result it was able to expose the latter's inconsistencies with the constitution and Chapter 3.

Conclusion

As it turned out the literal approach adopted by the court in interpreting section 241 (8) denied individuals their rights in terms of the Constitution. Only a purposive or teleological approach, which the court itself propagated (see pl28 G), would have led to a different conclusion.

The unsatisfactory manner in which the court dealt with section 35 (3) also reflected badly on this judgement. The result here again was that individuals were denied their rights in terms of section 15. It would appear that in this case the court could not make the 'leap' from (operating in) a system of parliamentary supremacy to (operating in) the present one of Constitutional Supremacy. South Africa's nascent Constitutional jurisprudence does not need this decision.
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