CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 81/09
[2010] ZACC 12

In the matter of:

THE STATE

versus

KHOLEKILE WITNESS THUNZI

and

SIYABULELA MLONZI

with

MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT

Heard on : 16 February 2010

Decided on : 5 August 2010

JUDGMENT

SKWEYIYA J:

Introduction

[1] On 25 January 1994, the people of this country, through their representatives, adopted our interim Constitution[1] which began operating on 27 April 1994. The interim Constitution provided the platform for the creation of a new order in which all South Africans share a common citizenship in a sovereign and democratic constitutional state, and where all citizens are entitled to exercise their fundamental rights freely and equally. The interim Constitution marked a decisive break from our apartheid past.

[2] The apartheid policy of "separate development", imposed by the National Party when it came to power in 1948, was based on the ideology that it was both possible and desirable to effect a radical – and indeed a constitutional – separation not only of the Black population from the rest of the South African population, but also of Black ethnic groups from one another. "Separate development" entailed the establishment of ten "homelands", each designated to a particular Black ethnic group, and self-governed under a territorial authority.[2]

[3] This system was achieved by a succession of legislation, including the Bantu Authorities Act,[3] the Bantu Homelands Citizenship Act,[4] and the Bantu Homelands

[1] Constitution of the Republic of South Africa Act 200 of 1993 (interim Constitution).

[2] See *Tongoane and Others v Minister for Agriculture and Land Affairs and Others* [2010] ZACC 10, Case No. CCT 100/09, 11 May 2010, as yet unreported, at paras 25-6; and *Western Cape Provincial Government and Others: In re DVB Behuising (Pty) Ltd v North West Provincial Government and Another* [2000] ZACC 2; 2001 (1) SA 500 (CC); 2000 (4) BCLR 347 (CC) at para 42.

[3] 68 of 1951.

[4] 26 of 1970.

Constitution Act.[5] Four of the self-governing "homelands" were converted into "independent" states.[6] These four states, the republics of Transkei, Bophuthatswana, Venda and Ciskei, became known as the "TBVC states".[7]

[4] Our constitutional transition was bound to result in incongruities and anomalies, particularly arising from the integration of the separate legislative regimes in the former TBVC states.[8] The matter before us presents a like anomaly. We have two identical statutes in the same national territory, dealing with the same subject-matter and designated by the same act number and year: the national Dangerous Weapons Act[9] (DWA (SA)) and the Dangerous Weapons Act[10] (Transkei) (DWA (Tk)).

[5] This matter calls upon us to consider the DWA (Tk), "old order legislation" which has continued to apply in the territory of the erstwhile Transkei.[11] The full bench of the Mthatha High Court (High Court), per Schoeman J with Miller J concurring, declared

[5] 21 of 1971.

[6] This was achieved by, inter alia, the drafting of a constitution of the new state, approved by the self-governing legislative assembly, and the passing of legislation by the South African Parliament recognising the "sovereign" status of the new state. See also *Tongoane* above n 2 at paras 25-6.

[7] For a more comprehensive historical account of the establishment of the TBVC states, see Vorster et al (eds) *Constitutions of Transkei, Bophuthatswana, Venda and Ciskei* (Butterworths, Durban 1985).

[8] The problem of the continued existence and application after 1994 of different legislative regimes inherited from the former TBVC states was raised in *S v Makwanyane and Another* [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at paras 31-2.

[9] 71 of 1968.

[10] 71 of 1968.

[11] "Old order legislation" is defined in item 1 of Schedule 6 to the Constitution of the Republic of South Africa, 1996 as "legislation enacted before the previous [interim] Constitution took effect".

invalid the "applicability" of section 4 of the DWA (Tk)[12] in the territory of the former Transkei,[13] and referred its order to this Court for confirmation in terms of sections 167(5) and 172(2)(a) of the Constitution.[14]

Background

[6] Mr Thunzi and Mr Mlonzi, who, for the sake of convenience, are referred to as the applicants, were convicted and sentenced under section 4 of the DWA (Tk) in separate trials. The Director of Public Prosecutions, Mthatha (DPP) acted as a respondent, and the

[12] Section 4 of the DWA (Tk) provides as follows:

> "(1) Whenever a person above the age of eighteen years is convicted of an offence involving violence to any other person and it has been proved that he or she killed or injured such other person by using a dangerous weapon or a firearm, he or she shall, except when he or she is in terms of section 286 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), declared an habitual criminal, notwithstanding anything to the contrary in any law contained, be sentenced to imprisonment for a period of not less than two years, and if he or she is so convicted by a magistrate's court, not exceeding eight years: Provided that if the court is of the opinion that there are circumstances which justify the imposition of a lighter sentence than the punishment prescribed by this section, it shall enter those circumstances on the record of the proceedings and may thereupon impose such lighter sentence on the person so convicted: Provided further that in the case of a magistrate's court, such lighter sentence shall not exceed a fine of R40 000 or imprisonment for a period of two years.
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> (2) Notwithstanding anything to the contrary in any law contained, no person in respect of whom the imposition of a sentence of imprisonment is compulsory in terms of subsection (1), shall be dealt with under section 290 or 297 of the Criminal Procedure Act, 1977.
>
> (3) (a) The provisions of subsections (1) and (2) shall apply only in respect of an offence referred to in subsection (1) which is committed in an are to which the Minister of Justice has, by notice in the Gazette, declared such provisions to be applicable.
>
> (b) The Minister of Justice may at any time by notice in the Gazette amend or repeal any notice issued in terms of paragraph (a)."

[13] *S v Thunzi; S v Mlonzi*, Case No. 213749, Eastern Cape High Court, Mthatha, 5 August 2009, unreported.

[14] Sections 167(5) and 172(2)(a) are set out in n 41 below.

Minister for Justice and Constitutional Development (Minister) was joined to the proceedings by this Court in terms of Rule 5 of the Rules of this Court.[15]

[7] This Court requested Legal Aid South Africa to appoint counsel to represent the applicants, and the Eastern Cape Society of Advocates to appoint counsel to act as amicus curiae. We are grateful to the attorneys at the Port Elizabeth Justice Centre and to counsel for coming to the assistance of the parties and this Court.

[8] The applicants were convicted and sentenced under section 4 of the DWA (Tk), in the Butterworth and Lusikisiki district Magistrate's Court respectively, to terms of imprisonment in excess of the Magistrates' Courts' ordinary penal jurisdiction. The ordinary penal jurisdiction of a district court is defined in section 92 of the Magistrates' Courts Act,[16] and is limited to a maximum of three years' imprisonment.[17]

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[15] Rule 5 of the Constitutional Court Rules, 2003 provides as follows:

> "(1) In any matter, including any appeal, where there is a dispute over the constitutionality of any executive or administrative act or conduct or threatened executive or administrative act or conduct, or in any inquiry into the constitutionality of any law, including any Act of Parliament or that of a provincial legislature, and the authority responsible for the executive or administrative act or conduct or the threatening thereof or for the administration of any law is not cited as a party to the case, the party challenging the constitutionality of such act or conduct or law shall, within five days of lodging with the Registrar a document in which such contention is raised for the first time in the proceedings before the Court, take steps to join the authority concerned as a party to the proceedings.
>
> (2) No order declaring such act, conduct or law to be unconstitutional shall be made by the Court in such matter unless the provisions of this rule have been complied with."

[16] 32 of 1944.

[17] Section 92(1)(a) provides:

> "(1) Save as otherwise in this Act or in any other law specially provided, the court, whenever it may punish a person for an offence—

[9] Section 4(1) of the DWA (Tk) overrides the Magistrates' Courts Act, as it applies "notwithstanding anything to the contrary in any law contained". Section 4(1) provides that the commission of "an offence involving violence to any other person" who has been "killed or injured" through the use of a "dangerous weapon or firearm" carries a minimum sentence of two years' imprisonment, and a possible maximum sentence of eight years. Under this provision, Mr Thunzi was sentenced on 5 December 2007 to five years' imprisonment, and Mr Mlonzi was sentenced on 18 March 2008 to six years' imprisonment, with two years conditionally suspended.

[10] The High Court judgment records that Mr Thunzi's case came before it on automatic review,[18] while Mr Mlonzi lodged an application for leave to appeal in the High Court against his conviction and sentence. Schoeman J consolidated the matters in the High Court, and mero motu called for argument in terms of Rule 16A of the Uniform Rules of Court[19] on "the constitutionality of the provisions of section 4 of the Dangerous Weapons Act 71 of 1968".

(a) by imprisonment, may impose a sentence of imprisonment for a period not exceeding three years, where the court is not the court of a regional division, or not exceeding 15 years, where the court is the court of a regional division."

[18] The procedure on review is contained in section 304 of the Criminal Procedure Act 51 of 1977. The reviewing judge is responsible for ensuring that the proceedings in the court a quo are "in accordance with justice".

[19] Rule 16A provides, in relevant part:

"(1) (a) Any person raising a constitutional issue in an application or action shall give notice thereof to the registrar at the time of filing the relevant affidavit or pleading.

(b) Such notice shall contain a clear and succinct description of the constitutional issue concerned.

[11] Schoeman J found that the "applicability" of section 4 of the DWA (Tk) was unconstitutional on the basis that it unfairly discriminates against perpetrators of crime in the erstwhile Transkei who are subject to its harsher sentencing regime. She limited the order of invalidity to cases where the accused had not yet pleaded, and confirmed the applicants' sentences.[20] The High Court ordered as follows:

> "(a) It is declared that the applicability of s 4 of the Dangerous Weapons Act 71 of 1968 (Tk) is inconsistent with the Constitution and hence invalid to the extent that the applicability thereof differentiates between perpetrators committing acts of violence where dangerous weapons or firearms are used in the area of jurisdiction of this Court and the rest of South Africa.
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> (b) Any change to the applicability of s 4 of [the] Dangerous Weapons Act 71 of 1968 (Tk) shall not invalidate any charge, proceedings, conviction or sentence instituted or imposed in terms of the said Act unless an accused has not yet pleaded to such charge.
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> (c) That the order of invalidity is referred to the Constitutional Court for confirmation.
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> (d) That Mlonzi's application for leave to appeal is dismissed.
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> (e) That the conviction and sentence in respect of Thunzi is confirmed."

> (c) The registrar shall, upon receipt of such notice, forthwith place it on a notice board designated for that purpose.
>
> (d) The notice shall be stamped by the registrar to indicate the date upon which it was placed on the notice board and shall remain on the notice board for a period of 20 days.
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> (2) . . . [A]ny interested party in a constitutional issue raised in proceedings before a court may, with the written consent of all the parties to the proceedings, given not later than 20 days after the filing of the affidavit or pleading in which the constitutional issue was first raised, be admitted therein as *amicus curiae* agreed upon such terms and conditions as may be agreed upon in writing by the parties."

[20] *S v Thunzi; S v Mlonzi* above n 13 at paras 44-5.

[12] The order of the High Court was referred to this Court for confirmation. Before the confirmation hearing, Mr Thunzi sought a review of his sentence in this Court, and Mr Mlonzi lodged an application for leave to appeal against his conviction and sentence. These applications were extraneous to the issues in the confirmation proceedings in that they challenged the evidence against the applicants and the sentences imposed. The applications were dismissed on 16 November 2009 on the basis that it was not in the interests of justice for this Court to hear the applications at that stage, since they could form the subject of a further appeal in the ordinary course to the Supreme Court of Appeal. Applicants' counsel advised us at the hearing that the decision of this Court would be awaited before any appeal to the Supreme Court of Appeal.

[13] It is necessary at this stage to consider the procedural history relating to Mr Thunzi's case.

[14] Mr Thunzi was charged before a magistrate in Butterworth with, among other things, assault with intent to do grievous bodily harm read with the provisions of the DWA (Tk). He was convicted and sentenced to five years' imprisonment in terms of section 4 of the DWA (Tk). The matter came on automatic review before Nhlangulela AJ (as he then was) who raised a query as to whether an enquiry in terms of section 4 of the DWA (Tk) had been conducted. The magistrate's response did not satisfy Norman AJ, the reviewing judge who considered the response. She queried why Mr Thunzi had been charged in terms of section 4 of the DWA (Tk). The magistrate at this stage conceded

that no enquiry had been held in terms of section 4. On this occasion, the matter came before Majiki AJ and Pakade J. In the light of the magistrate's concession, Majiki AJ, with Pakade J concurring, confirmed the conviction on count 3 (which is in issue here), but set aside the sentence and remitted the matter to the magistrate "to hold a pre-sentence enquiry in terms of section 4(1) of the Dangerous Weapons Act 71 of 1968 and then impose sentence afresh antedated to 5 December 2007."

[15] The magistrate conducted the enquiry as directed but again sentenced Mr Thunzi to five years' imprisonment. The matter once again came on automatic review to the High Court. This time it came before Nhlangulela and Miller JJ. They could not find anything wrong with the manner in which the magistrate applied the provisions of section 4. Nor could they find anything wrong with the sentence imposed. They accordingly confirmed the conviction and sentence. This then concluded the automatic review process.

[16] It is not clear on what procedural basis Schoeman and Miller JJ became seized of the review in the *Thunzi* matter. The automatic review process had ostensibly been completed, and there is no indication that there was any application for review or any appeal. It is also not clear why Miller J sat in a further review of the sentence imposed on Mr Thunzi, when he had already confirmed the sentence in the automatic review with Nhlangulela J. This raises doubt about whether the High Court was properly seized of the *Thunzi* matter. The proceedings relating to Mr Thunzi may very well have been irregular. However, in the view I take of the matter, it is not necessary to reach any firm

conclusion on this issue. The proceedings relating to Mr Mlonzi were properly before the High Court. The *Thunzi* matter raises the same issues as the *Mlonzi* matter. Any relief that is afforded to Mr Mlonzi will apply to Mr Thunzi, and he will therefore not be prejudiced. Accordingly, in these proceedings only the case relating to Mr Mlonzi will be considered.

The history of the DWA (Tk)

(i) The coming into operation of section 4 of the DWA (Tk)

[17] The DWA (SA) came into operation in the Republic of South Africa on 3 July 1968. Subsection 4(3) of the DWA (SA) empowers the Minister of Justice to make the sentencing provisions of the Act, contained in subsections 4(1) and (2), applicable to offences committed "in an area to which the Minister of Justice has, by notice in the Gazette, declared such provisions to be applicable". On 7 March 1975, before the Transkei was declared to be an "independent" republic, the Minister exercised this power by publishing a notice in the *Government Gazette* (1975 Notice).[21] The sentencing provisions of the DWA (SA) were therefore made applicable throughout South Africa, which at that stage included the territory of the erstwhile Transkei.

[21] GN R409 GG 4601, 7 March 1975.

(ii) Continued operation of the DWA (Tk) after the Transkei was declared independent

[18] On 26 October 1976, the Republic of Transkei was "declared to be a sovereign and independent state" pursuant to section 1 of the Status of Transkei Act.[22] In terms of section 2(1) of this statute[23] and section 60(1)(a) of the Republic of Transkei Constitution Act,[24] the Republic of Transkei adopted all legislation of the Republic of South Africa that was in force in the Transkei immediately prior to its "independence". This included the DWA (SA). All legislation thus adopted became separate laws of the now-"independent" Republic of Transkei, administered solely by the authorities in the Transkei and in practice designated with the appendage "(Transkei)".[25]

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[22] 100 of 1976. This Act followed the Transkei Constitution Act 48 of 1963, which granted the Transkei self-governance under its own legislative assembly and cabinet, but not independence.

[23] Section 2(1) of the Status of the Transkei Act provided:

> "Subject to the provisions of subsection (2), any rule of law which was in force in the Transkei immediately prior to the commencement of this Act, including the Transkei Constitution Act, 1963 (Act No. 48 of 1963), shall continue in force as a rule of law of the Transkei until repealed or except in so far as it may be amended by the competent authority in the Transkei."

[24] 15 of 1976. The "Transkeian Legislative Assembly" adopted the Republic of Transkei Constitution Act which came into effect on the same day that the Transkei was deemed to be independent – 26 October 1976. Section 60(1)(a) of the Transkei Constitution Act mirrored the provisions of the Status of Transkei Act, and provided:

> "[A]ll laws which immediately prior to the commencement of this Act were in operation in any district of the Transkei. . .
>
> . . .
>
> Shall continue in operation and continue to apply except in so far as such laws are superseded by any applicable law of Transkei or are amended or repealed by Parliament in terms of this Act: Provided that the laws mentioned in Schedule 9 [which includes the Dangerous Weapons Act 71 of 1968], together with any amendment thereof in operation immediately prior to the commencement of this Act, shall apply throughout the Transkei or, as the case may be, to or in respect of all persons in the Transkei".

[25] Section 2(2) of the Status of the Transkei Act provided:

> "Unless otherwise agreed between the Government of the Republic and the Government of the Transkei and subject to the provisions of section 5(2), no authority or person in the Republic shall in terms of any law which by virtue of subsection (1) remains in force in the Transkei, exercise any power or authority or perform any function in or in respect of the Transkei."

[19] In addition, in terms of section 60(2) of the Republic of Transkei Constitution Act "any . . . notice . . . given or granted" under legislation thus adopted was deemed to have been issued or granted by the corresponding Minister or other authority in the Transkei.[26] Thus, the 1975 Notice published under section 4(3) of the DWA (SA) was deemed to have been published by the Republic of Transkei's Minister of Justice under section 4(3) of the DWA (Tk). In this manner, the provisions of section 4 came to be applied in the Republic of Transkei.

[20] In February 1978, the 1975 Notice was withdrawn in the Republic of South Africa in terms of section 4(3)(b) of the DWA (SA).[27] This meant that the provisions of subsections 4(1) and (2) of the DWA (SA) no longer applied in the Republic of South Africa. However, this withdrawal did not affect the continued application of section 4 of DWA (Tk) in the Transkei, which at that stage was "a sovereign independent State and a republic".[28] The application of subsections 4(1) and (2) of the DWA (Tk) in the Transkei could only be terminated by a notice issued under section 4(3)(b) of the DWA (Tk). It

[26] Section 60(2) of the Republic of Transkei Constitution Act provided:

> "All rights, powers, authorities, duties, obligations and functions which were vested in or devolved upon a Minister or other authority or person in the Republic of South Africa . . . by or under any law of the Republic of South Africa which continues to apply in Transkei in terms of subsection (1) shall vest in or devolve upon the corresponding Minister, authority or person exercising similar powers or performing similar duties or functions in Transkei, and any regulation, rule, order, notice, approval, registration or authority made, given or granted and any other action taken under any such law by any Minister or other authority or person in the Republic of South Africa prior to the commencement of this Act shall in relation to the administration of Transkei, be deemed to have been made, given, granted or taken by such corresponding Minister, authority or person in Transkei."

[27] GN R253 GG 5879, 10 February 1978.

[28] Section 1(1) of the Republic of Transkei Constitution Act.

appears that no such notice was ever issued. The provisions of section 4 of the DWA (Tk) therefore continued to apply in the erstwhile Transkei, pursuant to the 1975 Notice.

[21] A similar process of adopting South African legislation occurred in the other TBVC states.[29] On the advent of our constitutional democracy, the DWA (SA) applied in the Republic of South Africa except in the territories of the former TBVC states where the DWA (Tk), the DWA (Bophuthatswana), the DWA (Venda) and the DWA (Ciskei) remained applicable.

(iii) Continued operation of the DWA (Tk) under the interim Constitution

[22] In 1994, South Africa's interim Constitution reunited South Africa as one sovereign territory by reincorporating the TBVC states. Section 230 of the interim Constitution repealed laws specified in Schedule 7 that accorded the TBVC states "independent" status, including the Republic of Transkei Constitution Act[30] and the Status of the Transkei Act. However, section 230 did not repeal the bulk of legislation that applied in these territories, and it left the DWA (Tk) on the statute book.

[29] The adoption and continuation in force of South African laws in the other TBVC states was provided for in section 93 of the Republic of Bophuthatswana Constitution Act 18 of 1977 and section 2(1) of the Status of Bophuthatswana Act 89 of 1977; section 61 of the Republic of Venda Constitution Act 9 of 1979 and section 2(1) of the Status of Venda Act 107 of 1979; and section 72 of the Republic of Ciskei Constitution Act 20 of 1981 and section 2(1) of the Status of Ciskei Act 110 of 1981.

[30] 48 of 1963. The Transkei Constitution Act, 1963 was repealed by the Republic of Transkei Constitution Act 15 of 1976. The reference in the interim Constitution to the Transkei Constitution Act, 1963 seems to be an error, since this Act was repealed *in toto* and replaced by the Republic of Transkei Constitution Act 15 of 1976.

[23] The existence of identical legislation applying to different parts of the country was countenanced by the interim Constitution for a transitional period in order to avoid legislative chaos.[31] Section 229 of the interim Constitution allowed for different but identical laws to continue to exist and to apply in the different geographical areas in which they applied prior to 1994, subject to their consistency with the Constitution and their repeal or amendment by the competent authority.[32] As this Court affirmed in *Ynuico Ltd v Minister of Trade and Industry and Others*,[33] the reference to "laws" in section 229 is not limited to primary legislation, but includes government notices.[34] The transitional arrangements under section 229, therefore, also governed the operation of the 1975 Notice by virtue of which section 4 applied in the territory of the erstwhile Transkei.

(iv) Continued operation of the DWA (Tk) under the 1996 Constitution

[24] The 1996 Constitution also contains transitional provisions dealing with "old order" legislation, which echo the provisions of section 229. Under item 2(1) of Schedule 6 to the 1996 Constitution, old order legislation "continues in force subject to

[31] *S v Makwanyane* above n 8 at paras 31-2; *Mashavha v President of the Republic of South Africa and Others* [2004] ZACC 6; 2005 (2) SA 476 (CC); 2004 (12) BCLR 1243 (CC) at paras 20-2; *Ynuico Ltd v Minister of Trade and Industry and Others* [1996] ZACC 12; 1996 (3) SA 989 (CC); 1996 (6) BCLR 798 (CC) at para 7.

[32] Section 229 provided:

> "Subject to this Constitution, all laws which immediately before the commencement of this Constitution were in force in any area which forms part of the national territory, shall continue in force in such area, subject to any repeal or amendment of such laws by a competent authority."

[33] *Ynuico* above n 31 at para 7.

[34] This Court held that the reference to "laws" in section 229 must be read with the definition of "law" in section 2 of the Interpretation Act 33 of 1957. Section 2 of the Interpretation Act defines "law" as "any law, proclamation, ordinance, Act of Parliament or other enactment having the force of law".

any amendment or repeal and consistency with the new Constitution". However, item 2(2)(a) provides that such legislation "does not have a wider application, territorially or otherwise, than it had before . . . unless subsequently amended to have a wider application", while item 2(2)(b) provides that it "continues to be administered by the authorities that administered it when the new Constitution took effect".

[25] Item 2 of Schedule 6, like section 229, allows different legal orders to exist side-by-side until a process of rationalisation has been carried out. It too requires that these laws be consistent with the Constitution. Item 2 of Schedule 6 serves the same purpose of ensuring an orderly transition, and it reflects the recognition that this process was not yet complete when the 1996 Constitution was enacted. It contemplates that "old order" laws will continue to operate until a uniform system has been established by national and provincial legislatures within their fields of competence.

[26] The Justice Laws Rationalisation Act[35] came into operation on 1 April 1997. It purported to achieve legislative rationalisation by repealing TBVC legislation listed in Schedule II and extending the application of national legislation listed in Schedule I to the territories of the former TBVC states. Crucially, however, the Justice Laws Rationalisation Act makes no mention of the DWA (SA) or the DWA (Tk) in its schedules. As a result, the DWA (SA) has not been extended to apply to the territory of the former Transkei, and the DWA (Tk) has not been repealed in the erstwhile Transkei.

[35] 18 of 1996.

The DWA (Tk) thus remains operative in the territory of the former Transkei, while the DWA (SA) continues to be operative throughout the country to the exclusion of the territories of the former TBVC states.

[27] Certain amendments have since been made to both the DWA (SA) and the DWA (Tk) by the South African Parliament. The DWA (SA) has been amended by the Dangerous Weapons Amendment Act,[36] the Abolition of Corporal Punishment Act[37] and the Child Justice Act.[38] Section 4 of the DWA (Tk) was amended by section 50 of the Criminal Law Amendment Act[39] (CLAA) to bring its wording in line with section 4 of the DWA (SA). The provisions of section 4 of the DWA (Tk) and section 4 of the DWA (SA) are accordingly identical, save for the recent amendments to the DWA (SA) under the Child Justice Act which came into effect after the High Court judgment.

[28] In the result, the High Court had before it two identical pieces of legislation which deal with the same subject-matter, but which are applicable to different parts of our country: the DWA (SA) is applicable in the former South Africa, while the DWA (Tk) is applicable in the territory of the former Transkei. In addition, the provisions of section 4 of the DWA (Tk) continue to apply in the former Transkei pursuant to the 1975 Notice.

[36] 29 of 1990.

[37] 33 of 1997.

[38] 75 of 2008. This Act came into operation on 1 April 2010.

[39] 105 of 1997.

[29] Before the hearing, this Court issued further directions on 27 November 2009 calling on the parties for further submissions on the legislative status and the scope of the application of the DWA (Tk); the effect of a declaration of invalidity in respect of section 4 of the DWA (Tk) on persons serving sentences under its terms and whether any relief should be granted to them; and the implications of findings on these questions for the other TBVC legislation regulating dangerous weapons in South Africa.[40]

Contentions of the parties in this Court

[30] All the parties agreed that the DWA (Tk) is an "Act of Parliament" for the purposes of this Court's confirmation powers. It was nevertheless placed in contention whether the order of the High Court was subject to confirmation in terms of sections

[40] The further directions issued by this Court on 27 November 2009 read in relevant part as follows:

> "a. Whether the Dangerous Weapons Act 71 of 1968 (Transkei) is an Act of Parliament within the meaning of section 172(2)(a) of the Constitution by virtue of it having been amended by the national Legislature under the Criminal Law Amendment Act 105 of 1997 and subsequent national legislation;
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> b. If the Dangerous Weapons Act 71 of 1968 (Transkei) is national legislation—
>
> (i) Does it apply, as amended, only within the erstwhile Transkei or throughout the Republic?
>
> (ii) If it applies only within the erstwhile Transkei, is this constitutionally permissible?
>
> (iii) If it applies throughout the Republic, what are the legal implications of having both the Dangerous Weapons Act 71 of 1968 (Transkei) and the national Dangerous Weapons Act 71 of 1968 regulating substantially the same matter?
>
> c. What effect, if any, will a declaration of invalidity in respect of section 4 of the Dangerous Weapons Act 71 of 1968 (Transkei) have on persons who have been sentenced under its terms and who are currently serving prison sentences?
>
> d. What relief, if any, should this Court grant in respect of persons sentenced in terms of the provisions of the Dangerous Weapons Act 71 of 1968 (Transkei) and who are currently serving prison sentences, but who are not parties in these proceedings?
>
> e. Do the answers to the questions posed in 5 (a)–(d) above have any implications for the Dangerous Weapons Act 71 of 1968 (Venda)?" (Original emphasis.)

167(5) and 172(2)(a) of the Constitution[41] on the basis that the High Court did not declare invalid any *provisions* of the DWA (Tk).

[31] Counsel for the applicants submitted that although it was not necessary for this Court to confirm the order of the High Court, this Court nonetheless had the power to do so. It was further argued that despite the improper referral by the High Court, this Court had raised pertinent issues that needed to be addressed, and that this Court should indeed be seized with the matter.

[32] The DPP similarly submitted that, since the DWA (Tk) has the same wording as that of the DWA (SA) (at least prior to the coming into operation of the Child Justice Act), it could not be said that the provisions of the DWA (Tk) and its general operation were unconstitutional, but only that the application of subsections 4(1) and (2) to the erstwhile Transkei was discriminatory. The DPP submitted that circumstances may arise in a specific area that would require the Minister to exercise his discretion in terms of subsection 4(3) in order to make the minimum sentence applicable in that area. The provisions of the DWA (Tk) therefore serve to extend the discretion that the Minister has

[41] Section 167(5) reads as follows:

> "The Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, a High Court, or a court of similar status, before that order has any force."

Section 172(2)(a) provides:

> "The Supreme Court of Appeal, a High Court or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court."

in respect of the rest of South Africa to the territory of the erstwhile Transkei. The DPP argued further that whilst it is constitutionally permissible for the DWA (Tk) to be applicable only within the Transkei, the continued operation of the DWA (Tk) was nevertheless highly undesirable.

[33] In his written submissions, the Minister also submitted that it is constitutionally permissible to have the DWA (Tk) on the statute book. The Minister proposed that Parliament ought, however, to repeal all old order legislation regulating dangerous weapons and to provide for one uniform Act to apply throughout the Republic. In oral argument counsel for the Minister argued differently that the provisions of section 4 of the DWA (Tk) should be struck down by this Court, as it was difficult to postulate a situation in which section 4 would not be applied unfairly.

[34] Initially, the position of the amicus aligned with that of the applicants: that confirmation by this Court was unnecessary, as it was the application under the 1975 Notice, and not the provisions, of the DWA (Tk) that was the target of the High Court's order. However, in its further written submissions and in oral argument, the amicus urged this Court to strike down the provisions of section 4 of the DWA (Tk).

[35] With regard to relief, all of the parties agreed that the High Court failed to provide an appropriate remedy by restricting the effect of its declaration of invalidity to cases where the accused has not yet pleaded. The Court was requested to amend the High

Court's order to bring it in line with our jurisprudence on the retrospectivity of declarations of invalidity to provide redress for persons sentenced and convicted under section 4 of the DWA (Tk), where the case is subject to appeal or review.[42]

[36] While the parties were invited to address the question whether, if the DWA (Tk) was national legislation but applied only in the Transkei, this was constitutionally permissible, they were not specifically invited to address the question whether the transitional provisions impose a constitutional obligation on Parliament to rationalise the laws governing the use of dangerous weapons in the territories of the former TBVC states.

Issues arising in this case

[37] The following issues call for consideration in this case:

(i) Whether the order of the High Court is subject to confirmation;

(ii) If not, whether it is open to this Court to amend the order of the High Court to provide protection to persons already charged or sentenced under section 4 of the DWA (Tk); and

[42] See *Centre for Child Law v Minister of Justice and Constitutional Development and Others* [2009] ZACC 18; 2009 (6) SA 632 (CC); 2009 (11) BCLR 1105 (CC) at paras 76-8; *Shinga v The State and Another (Society of Advocates, Pietermaritzburg Bar, as Amicus Curiae); O'Connell and Others v The State* [2007] ZACC 3; 2007 (4) SA 611 (CC); 2007 (5) BCLR 474 (CC) at para 57; *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* [1998] ZACC 15; 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC) at para 97; and *S v Bhulwana; S v Gwadiso* [1995] ZACC 11; 1996 (1) SA 388 (CC); 1995 (12) BCLR 1579 (CC) at paras 31-4.

(iii) Whether the transitional provisions impose a constitutional obligation on Parliament to rationalise the laws governing the use of dangerous weapons in the territories of the former TBVC states.

I address these issues in turn.

Is the order of the High Court subject to confirmation?

[38] The question whether the order of the High Court is subject to confirmation arises not from the legislative status of the DWA (Tk), which following its amendment under the CLAA constitutes an "Act of Parliament" for the purposes of this Court's confirmation power.[43] Rather, the question arises because the High Court did not expressly declare any *provisions* of section 4 to be unconstitutional, but declared "the *applicability* of section 4 of the Dangerous Weapons Act 71 of 1968 (Tk) [to be] inconsistent with the Constitution". This requires us to determine what the High Court's order means when it refers to "applicability".

[39] The proper approach to interpreting a court's order is to read the judgment or order and the court's reasons for giving it as a whole in order to determine its meaning.[44] The

[43] In *Weare and Another v Ndebele NO and Others* [2008] ZACC 20; 2009 (1) SA 600 (CC); 2009 (4) BCLR 370 (CC) at para 36, this Court found that the amendment of an old order, provincial ordinance by the post-1994 provincial legislature rendered the Ordinance a "provincial Act" for the purposes of sections 167(5) and 172(2)(a) of the Constitution. This was so because the effect of the amendment was that the Ordinance became "an expression of the legislative will" of the democratically-elected provincial legislature and was to be treated accordingly.

[44] *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (A) at 304E-F, cited with approval in *Minister for Justice and Constitutional Development v Mqabukeni Chonco and 383 Others* [2010] ZACC 9, Case No. CCT 42/09, 8 April 2010, as yet unreported, at para 6.

statutory setting and the relevant provisions against the background of which the court delivered its judgment must also be appreciated. Applying this approach to the High Court's order, it is apparent that, despite using the word "applicability" in its order – which, on a strictly literal reading refers to where section 4 of the DWA (Tk) *may* be applied, and directs attention to the fact that section 4 of the DWA (Tk) may only ever be applied in the erstwhile Transkei – the focus of the High Court's ruling was the *application* of section 4. The reasoning in the judgment suggests that it sought to address the unfair discrimination caused by the actual application of section 4 pursuant to the 1975 Notice.

[40] It is true that the Rule 16A Notice issued by the High Court called for argument on the "constitutionality of the provisions of section 4" and that the opening paragraph of the High Court's judgment suggests that the Court was concerned with "the constitutionality of section 4". However, the High Court described the constitutional complaint as "hing[ing] on the fact that section 4 of the DWA only applies in the erstwhile Transkei and not the rest of South Africa and therefore the constitutional principle of equality is compromised."[45] It defined the issue for determination as follows:

> "Does the operation of s 4 of the DWA (Tk) infringe on the fundamental rights of persons committing crimes of violence in the area, formerly known as 'Transkei', due to the selective *application* of the said section?"[46] (Emphasis added.)

[45] *S v Thunzi; S v Mlonzi* above n 13 at para 8.

[46] Id at para 28.

[41] To decide this issue, the High Court undertook an equality analysis based on section 9(3) of the Constitution,[47] which looked to whether the application of section 4 of the DWA (Tk) in fact causes unfair discrimination. The High Court observed that:

> "It is obvious that the perpetrators of violence . . . [are] *treated differently* in the area of the erstwhile Transkei from the perpetrators in the rest of the Republic of South Africa. The reason for this is the operation of s 4 of the DWA (Tk) in the area of this court's jurisdiction."[48] (Emphasis added.)

[42] Despite using the words "application", "applicability" and "operation" loosely throughout the judgment, the High Court makes its concern plain: the *application* of section 4 of the DWA (Tk) results in a harsher sentencing regime applying to perpetrators of violent crime in the erstwhile Transkei, but not to perpetrators in the rest of South Africa. Moreover, this differential treatment is not justified and so amounts to unfair discrimination. This concern is articulated in the following observations of the High Court:

> "[I]t is not the constitutionality of s 4 of the Dangerous Weapons Act that needs to be assessed, but the applicability of the said section to the erstwhile Transkei. There is

[47] Section 9(3) of the Constitution provides:

> "The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth."

[48] *S v Thunzi; S v Mlonzi* above n 13 at para 34.

> differentiation in respect of *sentences that may be imposed* between the perpetrators in the erstwhile Transkei and the rest of South Africa."[49] (Emphasis added.)
>
> "In the past the perpetrators in the Transkei also suffered from the same disadvantage, in that they were *treated differently* from perpetrators in the rest of South Africa from 1978 when the regulations in South Africa were recalled. After 1994 there was no re-assessment to determine whether there is still the same need for the applicability of s 4 of the DWA (Tk). . . . There is thus no rationale for *applying* s 4 to the whole of the former Transkei, just because it was in operation prior to 1994."[50] (Emphasis added.)

[43] Having regard to the judgment of the High Court and its order, read as a whole, the High Court found that the continued application of section 4 in the erstwhile Transkei unfairly discriminates against perpetrators of violent crime in that region. In the light of this finding, the High Court should have set aside the 1975 Notice which triggered the application of section 4, but it failed to do so. What is also clear from the judgment is that the High Court did not in fact declare the provisions of section 4 to be unconstitutional. The order made by the High Court is therefore not subject to confirmation. In the result, neither the provisions of section 4 of the DWA (Tk), nor the 1975 Notice have been invalidated. The High Court's order therefore falls outside the terms of sections 167(5) and 172(2)(a) of the Constitution, and should not have been referred to this Court for confirmation.[51]

[49] Id at para 36.

[50] Id at paras 39-40.

[51] *Minister of Home Affairs v Liebenberg* [2001] ZACC 3; 2002 (1) SA 33 (CC); 2001 (11) BCLR 1168 (CC) at para 15.

[44] The question remains whether this Court has the power to amend the High Court's order despite the fact that it was mistakenly referred to us for confirmation. This question arises because leaving the High Court's order intact will perpetuate an injustice. The ineffectiveness of the High Court's order means that section 4 of the DWA (Tk) continues to apply in the erstwhile Transkei, and the discriminatory sentencing regime remains operative in the erstwhile Transkei.

[45] Even if the order of the High Court is treated as effective by courts in the erstwhile Transkei, the High Court unjustly limits the effect of its declaration of invalidity to cases where the accused has not yet pleaded to charges under section 4 of the DWA (Tk). The High Court's order leaves out of account accused persons who have pleaded but who have not yet been convicted; accused persons who have been convicted but have not been sentenced; accused persons whose cases have been finalised; and those whose cases are on appeal. The order as it stands unfairly excludes persons who fall in these categories. It is apparent that the attention of the High Court was not drawn to our jurisprudence in this regard.[52]

Power to amend the High Court's order

[46] Ordinarily, a finding that a declaration of invalidity was incorrectly referred to this Court for confirmation would be the end of the matter.[53] The only other basis for

[52] See the cases cited at n 42 above.

[53] *Minister of Home Affairs v Liebenberg* above n 51 at paras 13-5.

reaching and amending an order is if an appeal is brought before us under Rule 16(2).[54] If not, and should there be something wrong with the order that needs correction or requires the attention of the High Court, the course ordinarily followed by this Court would be to refer the matter back to the High Court for it to rectify the order.

[47] In this case, there is no appeal before us. Nor did the parties expressly request that we convert the confirmation proceedings into an application for leave to appeal directly to this Court. However, the parties argued the matter on the basis that this Court has the power to remedy the order of the High Court. The basis for our interference was not extensively canvassed by the parties, but the issue of an appropriate remedy to protect the category of accused persons not included in the order of the High Court was fully argued before us. These are the same issues that would have been canvassed if an application for leave to appeal against the High Court's order had been lodged. In effect, therefore, the matter was argued as an appeal, although it was brought by way of confirmation. Furthermore, it seems fair to assume that had this question been drawn to their attention, the parties may well have requested the Court to convert the confirmation into an application for leave to appeal directly to this Court.

[54] Rule 16(2) provides:

> "A person or organ of state entitled to do so and desirous of appealing against such an order in terms of section 172(2)(d) of the Constitution shall, within 15 days of the making of such order, lodge a notice of appeal with the Registrar and a copy thereof with the Registrar of the Court which made the order, whereupon the matter shall be disposed of in accordance with directions given by the Chief Justice."

[48] The Constitutional Court is a specialised court, whose jurisdiction is limited by section 167(3)(b) of the Constitution to deciding "constitutional matters, and issues connected with decisions on constitutional matters".[55] It is trite that constitutional issues are raised in this matter, and the question is therefore not one of jurisdiction, but rather whether our established procedures and Rules of Court allow us to consider the matter further.[56] It is necessary to consider whether, in the unusual circumstances of this case, there is a basis for this Court properly to rectify an ineffective order with an unjust remedy in the absence of a formal application for leave to appeal. There being no appeal before us, and the matter having been incorrectly referred to us for confirmation, the question is whether there is anything that this Court is able to do without causing further delay in the finalisation of this matter.

[49] Observing our own procedures is vital to legal certainty and the rule of law, values intrinsic to our constitutional order. This Court derives its powers from the Constitution, and in light of these values it is important for this Court to have a clear basis for interfering with the High Court order in the present matter. In exceptional circumstances

[55] Section 167(3) provides:

> "The Constitutional Court—
>
> (a) is the highest court in all constitutional matters;
>
> (b) may decide only constitutional matters, and issues connected with decisions on constitutional matters; and
>
> (c) makes the final decision whether a matter is a constitutional matter or whether an issue is connected with a decision on a constitutional matter."

[56] For a useful discussion of the concepts of jurisdiction and the court's "inherent power" to regulate its own process, see the remarks of Wylie J of the Auckland High Court in *Department of Social Welfare v Stewart* [1990] 1 NZLR 697 at 701, and Joseph "Inherent jurisdiction and inherent powers in New Zealand" (2005) 11 *Canterbury Law Review* 220.

and where the interests of justice demand it, this Court has an inherent power under section 173 of the Constitution to regulate its own process. Section 173 provides:

> "The Constitutional Court, Supreme Court of Appeal and High Courts have the *inherent power to protect and regulate their own process*, and to develop the common law, taking into account the interests of justice." (Emphasis added.)

[50] In *South African Broadcasting Corp Ltd v National Director of Public Prosecutions and Others*,[57] Moseneke DCJ described the nature of the inherent power of the superior courts under section 173 as follows:

> "[T]he power conferred on the High Courts, Supreme Court of Appeal and this Court in section 173 is not an unbounded additional instrument to limit or deny vested or entrenched rights. The power in section 173 vests in the judiciary the authority to uphold, to protect and to fulfil the judicial function of administering justice in a regular, orderly and effective manner. Said otherwise, it is the authority to prevent any possible abuse of process and *to allow a Court to act effectively within its jurisdiction*."[58] (Emphasis added.)

[51] As under the common law,[59] this Court's power to regulate its own process under section 173 must "be exercised sparingly having taken into account interests of justice in

[57] [2006] ZACC 15; 2007 (1) SA 523 (CC); 2007 (2) BCLR 167 (CC).

[58] Id at para 90.

[59] *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service* 1996 (3) SA 1 (A) at 7G-H; *Krygkor Pensioenfonds v Smith* 1993 (3) SA 459 (A) at 469G-I; *Moulded Components Rotomoulding South Africa (Pty) Ltd v Coucourakis* 1979 (2) SA 457 (W) at 462H-463B; and *Enyati Colliery Ltd and Another v Alleson* 1922 AD 24 at 32.

a manner consistent with the Constitution".[60] Departing from our ordinary procedures, and entertaining a matter that was not properly brought before this Court but with whose issues we are nevertheless seized, should be done sparingly and only in exceptional circumstances.[61] Whilst this Court has only had cause up to now to exercise its section 173 powers in cases of legislative lacunae, there is no reason for this Court not to invoke section 173 in other cases that warrant it. It seems to me that in the exceptional circumstances of this case, the interests of justice require this Court to exercise its power under section 173 for the purposes of correcting the High Court's order to the extent that its ancillary order perpetuates an injustice.

[52] This Court is well positioned to address the High Court's order. The parties argued the matter on the assumption that we could rectify the High Court's order, and as

[60] *Phillips and Others v National Director of Public Prosecutions* [2005] ZACC 15; 2006 (1) SA 505 (CC); 2006 (2) BCLR 274 (CC) at para 48; and *S v Pennington and Another* [1997] ZACC 10; 1997 (4) SA 1076 (CC); 1997 (10) BCLR 1413 (CC) at para 22.

[61] Compare *R v Parmanand* 1954 (3) SA 833 (A). In that case, the Appellate Division granted relief in appeal proceedings, notwithstanding the fact that the appeal should have been brought by way of a review. The factors that the Court took into account in deciding to deviate from the ordinary processes were the availability of all materials necessary for the Court to reach a decision on review, the wasted time and expense that would be incurred by the litigant, and an absence of prejudice if the Court were to decide the matter as a review rather than an appeal. The Court held as follows at 838C-E:

> "[I]t is open to the appeal Court in any case, if the circumstances warrant it, to grant relief in appeal proceedings where the proceedings ought to have been by way of review. Thus where there is only an appeal before the Court and it appears that there might be relief open to the appellant by way of review, it would not be proper for the Court to dismiss the appeal and consequently confirm the conviction, thus making it impossible for the appellant . . . to get relief thereafter by way of review. In such a case the Court should at least postpone its decision until the appellant has had an opportunity to bring review proceedings; and if all the material necessary for a decision on review is before the Court, it would be a waste of time and expense to postpone the appeal and not to decide the matter without further proceedings, unless of course there are circumstances in which to do so might cause prejudice to the Crown."

See also *Mthembu v Chief Bantu Affairs Commissioner, Natal* 1976 (4) SA 777 (N) at 781A-D.

a result, the substantive issues were fully canvassed before us. Insisting on a new appeal against the High Court's order may result in a substantial delay, and in the interim, a patent injustice may ensue. It is only in this limited context that it is permissible and appropriate to invoke this Court's inherent power under section 173. The interests of justice therefore dictate that we dispense with the requirement of a formal application for leave to appeal, and treat this matter as an appeal for the purposes of correcting the High Court's order.

[53] I turn now to consider what an appropriate constitutional remedy requires in this matter.

Appropriate remedy

[54] In purporting to declare invalid the application of section 4 of the DWA (Tk), the High Court chose not to invalidate charges under section 4 of the DWA (Tk) in respect of which persons have already pleaded. The High Court reasoned that it was necessary to do so because "if the state realised that the maximum sentence that may be imposed would not have been more than three years' imprisonment, the state might have prosecuted in the regional court."[62]

[55] It may well be that accused persons who have pleaded under section 4 of the DWA (Tk) have committed crimes of such a serious nature that harsher sentences equivalent to

[62] *S v Thunzi; S v Mlonzi* above n 13 at para 43.

those capable of being imposed under the DWA (Tk), which exceed the ordinary penal jurisdiction of the district courts, would be appropriate. In such cases, however, the withdrawal of a charge under the DWA (Tk) would not bar the district courts from committing the case (concerning the remaining charges)[63] to the regional courts for trial or sentencing, notwithstanding the fact that the accused has already pleaded. The Criminal Procedure Act[64] provides for such an exigency, at the request of the prosecutor or at the instance of the magistrate, either in the course of the trial or after conviction but before sentencing.[65] There is therefore no valid basis for treating accused persons who

[63] The application of the sentencing provisions in section 4 of the DWA (Tk) is ancillary to a conviction of an offence involving violence to any other person. A charge relating to the principal offence, such as assault or murder, need not be affected by the withdrawal of a charge under section 4 of the DWA (Tk).

[64] 51 of 1977.

[65] Section 114 applies where the accused has pleaded guilty. It provides in relevant part:

> "(1) If a magistrate's court, after conviction following on a plea of guilty but before sentence, is of the opinion—
>
> (a) that the offence in respect of which the accused has been convicted is of such a nature or magnitude that it merits punishment in excess of the jurisdiction of a magistrate's court;
>
> (b) that the previous convictions of the accused are such that the offence in respect of which the accused has been convicted merits punishment in excess of the jurisdiction of a magistrate's court; or
>
> (c) that the accused is a person referred to in section 286A(1),
>
> the court shall stop the proceedings and commit the accused for sentence by a regional court having jurisdiction."

Section 115A applies where the accused has pleaded not guilty, and provides for the prosecutor to request that the matter be committed to a regional court before any evidence is tendered. It provides in relevant part:

> "(1) Where an accused pleads not guilty in a magistrate's court, the court shall, subject to the provisions of section 115, at the request of the prosecutor made before any evidence is tendered, refer the accused for trial to a regional court having jurisdiction."

Section 116 applies where the accused has pleaded not guilty, and provides for the district court to commit the matter to a regional court for sentencing, after conviction but before sentence. It provides in relevant part:

> "(1) If a magistrate's court, after conviction following on a plea of not guilty but before sentence, is of the opinion—

have pleaded to a charge under section 4 of the DWA (Tk) differently from those who have not yet pleaded.

[56] The High Court was, however, correct insofar as it found that no retrospective relief should be granted in respect of cases *finalised* since the commencement of the final Constitution on 4 February 1997, and in respect of accused persons who are still serving sentences under section 4 of the DWA (Tk). I accept that a blanket order invalidating all convictions and sentences under section 4 of the DWA (Tk) would cause unnecessary disruption and uncertainty in the criminal justice process. However, those serving sentences under section 4 of the DWA (Tk), including the applicants, must be entitled to note an appeal in respect of their sentences if they so choose.

[57] Practically, this requires that persons serving sentences under section 4 of the DWA (Tk) be notified of the invalidity of the application of its provisions, and have access to legal assistance should they wish to take their sentences on appeal or review. This follows the approach adopted by this Court in *National Coalition*,[66] and followed in

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> (a) that the offence in respect of which the accused has been convicted is of such a nature or magnitude that it merits punishment in excess of the jurisdiction of a magistrate's court;
>
> (b) that the previous convictions of the accused are such that the offence in respect of which the accused has been convicted merits punishment in excess of the jurisdiction of a magistrate's court; or
>
> (c) that the accused is a person referred to in section 286A(1),
>
> the court shall stop the proceedings and commit the accused for sentence by a regional court having jurisdiction."

[66] In *National Coalition* above n 42 at para 97, this Court qualified the retrospectivity of an order of invalidity in the following manner:

Centre for Child Law.[67] This approach is necessary for the proper enforcement of the Constitution and the protection of the rights of persons serving sentences under section 4 of the DWA (Tk).

[58] Justice and equity require that persons charged under section 4 of the DWA (Tk) who have not yet been convicted – regardless of whether or not they have pleaded – must have their charges under section 4 of the DWA (Tk) withdrawn, and the remaining charges amended accordingly, by the DPP or the presiding magistrate. This need not affect the proceedings in respect of any other offence with which the accused is charged.

[59] In respect of persons sentenced under section 4 of the DWA (Tk), the importance of their proper identification was recognised by this Court in *Centre for Child Law*, particularly for the purposes of ensuring that they receive any necessary legal assistance.[68] The applicants pointed out that the identification of offenders who have

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> "The least disruptive way of giving relief to persons in respect of past convictions for consensual sodomy is through the established court structures. On the strength of the order of constitutional invalidity such persons could note an appeal against their convictions for consensual sodomy, where the period for noting such appeal has not yet expired or, where it has, could bring an application for condonation of the late noting of an appeal or the late application for leave to appeal to a court of competent jurisdiction. In this way effective judicial control can be exercised. Although this might result in cases having to be reopened, it will in all probability not cause dislocation of the administration of justice of any moment."

[67] *Centre for Child Law* above n 42 at paras 76 and 78.

[68] In *Centre for Child Law*, id, this Court confirmed a declaration of invalidity in respect of subsections 51(1) and 51(2) of the Criminal Law Amendment Act 105 of 1997, as amended by the Criminal Law (Sentencing) Amendment Act 38 of 2007, which made minimum sentences applicable to offenders aged 16 and 17 at the time they committed the offence. The majority of the Court ordered the Minister for Justice and Constitutional Development and the Minister for Correctional Services, who were both party to the proceedings, to furnish the applicant, the Centre for Child Law, with the names of all such young offenders sentenced under the impugned provisions, the case number under which such sentence was passed, the court that passed the sentence and the date on which such sentence was passed.

been convicted and sentenced under the DWA (Tk) may be complicated by the fact that such offenders might not have been charged under the DWA (Tk), but only under the primary common law or statutory offence that they committed. The applicants therefore proposed that the Department of Correctional Services first be required to provide, within one month from the date of this Court's order, the DPP and Legal Aid South Africa with the following information:

> "(i) The names of all prisoners convicted of assault, assault with the intent to do grievous bodily harm, attempted murder and/or statutory offences in terms of the Transkei Penal Code and currently serving sentences between 2 and 8 years direct imprisonment in respect of any one of the mentioned offences;
> (ii) The prison numbers of these prisoners;
> (iii) The name and address of the correctional facility where they are currently serving their sentences;
> (iv) The case numbers under which these prisoners were sentenced;
> (v) The courts that sentenced these prisoners;
> (vi) The date of their sentence; and
> (vii) The sentence imposed."

[60] On receipt of this information, it would still be incumbent on the DPP to verify it by perusing the charge sheets and court records to confirm the basis on which the offender was tried and sentenced, and to determine whether the magistrate held an enquiry in terms of section 4 of the DWA (Tk). The applicants proposed that the DPP be given three months to verify the charges and to provide Legal Aid South Africa with a schedule of offenders sentenced under section 4 of the DWA (Tk), after which the Impact

Litigation Unit of Legal Aid South Africa should be required to consult with such offenders within a specified period of time.

[61] I accept that difficulties may arise in identifying offenders serving sentences under section 4 of the DWA (Tk), and that the assistance of the Department of Correctional Services may be necessary in this regard. As the Minister for Correctional Services was not joined to these proceedings, I am reluctant to order her Department to assist the DPP in identifying persons serving sentences under section 4 of the DWA (Tk). I trust, however, that the Department of Correctional Services will offer its assistance to the DPP to ensure that all relevant offenders are identified.

[62] I support the applicants' proposal that the DPP be ordered to furnish Legal Aid South Africa with a schedule of offenders currently serving sentences under section 4 of the DWA (Tk), within three months of the order of this Court. A copy of this schedule must be lodged with this Court. I also support the applicants' proposal that Legal Aid South Africa be required to consult with all offenders who are serving sentences under section 4 of the DWA (Tk), to provide them with legal assistance where necessary, and to report to the DPP within three months on whether any further relief will be sought on behalf of any of the offenders.[69] A copy of this report is also to be lodged with this Court.

[69] Given that counsel for the applicants was appointed by Legal Aid South Africa (Port Elizabeth Justice Centre), it is assumed that submissions which would entail consequences for Legal Aid South Africa, if accepted by this Court, were made after consulting with Legal Aid South Africa.

[63] As stated above, there is doubt as to whether the High Court was properly seized of the *Thunzi* matter. However, I reiterate here that the *Mlonzi* matter was properly before the High Court, and that any relief available to Mr Mlonzi as a result of this judgment will similarly be available to Mr Thunzi.

[64] Before I proceed to the order, there are further fundamental questions raised in this case that arise from the omission of Parliament to rationalise the multiple Dangerous Weapons Acts still operative in South Africa.

Is there a constitutional obligation on Parliament to establish uniform legislation on the use of dangerous weapons?

[65] We are now more than 16 years into our constitutional democracy. Parliament has not established a uniform system of law governing the use of dangerous weapons. Instead, it has retained the former TBVC states' laws, and amended them to replicate the terms of the DWA (SA). The result is that the different laws governing dangerous weapons have, for all apparent purposes, been deliberately retained by the legislature.

[66] If the constitutional rationale for retaining old order legislation was limited and sought only to facilitate an orderly transition to a new constitutional order, then the question is whether the Constitution contemplates that old order legislation could serve any other purpose. More specifically, if the transitional provisions contemplated that the

DWA (Tk) and its counterparts in Bophuthatswana, Venda and Ciskei would continue to exist only until Parliament establishes a uniform system of law governing the use of dangerous weapons, does it not follow that there is a *constitutional obligation* on Parliament to establish uniform legislation on the use of dangerous weapons? If the transitional provisions create such an obligation, is Parliament in breach of this obligation by failing to establish a uniform system of law governing the use of dangerous weapons? And, if so, what is the appropriate relief?

[67] These questions were not adequately argued before us. But this case has called into question the constitutionality of the very existence of the multiple Dangerous Weapons Acts that continue to operate in South Africa. The constitutional validity of this legislative scheme clearly requires consideration by this Court, and indeed Parliament.

[68] In *Matatiele 1*[70] we observed that—

> "where on the papers before it, there is doubt as to whether a particular law or conduct is consistent with the Constitution, this Court may be obliged to investigate the matter. This would be particularly so where, as here, an important constitutional issue is involved. In the *Executive Council, Western Cape Legislature v President of Republic of South Africa* this Court, subsequent to the hearing, realised that there were questions regarding section 235(8) of the interim Constitution that had not been addressed by counsel in their written or oral argument. Because of the importance of these questions, the Court considered it necessary to afford the parties an opportunity to make submissions on those questions and the Court the benefit of debating them. The parties' legal representatives were

[70] *Matatiele Municipality and Others v President of the RSA and Others (1)* [2006] ZACC 2; 2006 (5) SA 47 (CC); 2006 (5) BCLR 622 (CC).

> therefore invited urgently to canvass the particular issues at a further hearing which was set down at fairly short notice. This is the course that must be followed in this case. It is in the interests of justice that these important issues . . . be investigated."[71] (Footnote omitted.)

[69] We were advised by the Minister and the DPP that the South African Law Reform Commission (SALRC) is currently investigating the repeal of the DWA (Tk), as part of its larger project to revise the statute book with a view to removing obsolete, redundant and unconstitutional legislative provisions.[72] According to their written submissions, a Law Reform Commissioner was assigned to review the DWA (Tk) on 25 August 2009. The outcome of this review was due to be discussed by the SALRC early this year, but has been postponed pending this judgment.

[70] It is necessary in my view for this Court to adopt an approach similar to that in *Matatiele 1*, and to call for further submissions on whether the continued existence of the DWA (Tk), the DWA (Bophuthatswana), the DWA (Venda) and the DWA (Ciskei) on our statute book is constitutionally acceptable. A just order in the circumstances of this case requires that we consider the constitutional validity of the legislative scheme currently governing the use of dangerous weapons in South Africa. Directions to this effect will therefore be issued with the order that I give.

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[71] Id at para 68. (Footnote omitted.)

[72] South African Law Reform Commission, *Statute law: The establishment of a permanently simplified, coherent and generally accessible statute book (Project 25)*. This is a vast and ongoing project, involving the consideration of nearly 3000 statutes, 385 of which are statutes administered by the Department of Justice and Constitutional Development. For reference to the proposed repeal of the DWA (Tk), see the SALRC's *Thirty Fourth Annual Report 2006/2007* at 14, available at http://www.justice.gov.za/salrc/anr.htm (accessed 20 May 2010).

Order

[71] In the result, the following order is made:

(a) Paragraphs (a), (b) and (c) of the order of the Mthatha High Court in *S v Thunzi; S v Mlonzi*, under Case No. 213749, made on 5 August 2009 and referred to this Court for confirmation, are not confirmed.

(b) Those paragraphs of the order are set aside and replaced with the following:

"(i) It is declared that Government Notice R409 published under *Government Gazette* No. 4601 on 7 March 1975 is inconsistent with the Constitution and hence invalid, and is set aside.

(ii) This order does not invalidate any conviction or sentence in terms of the Dangerous Weapons Act 71 of 1968 (Transkei), unless either an appeal from, or a review of, the relevant sentence is pending, or the time for noting an appeal has not yet expired, or condonation for the late noting of an appeal or late filing of an application for leave to appeal is granted by a competent court."

(c) The Director of Public Prosecutions, Mthatha, is directed to withdraw all pending charges under section 4 of the Dangerous Weapons Act 71 of 1968 (Transkei).

(d) The Director of Public Prosecutions, Mthatha, is directed to furnish the Head of the Impact Litigation Unit of Legal Aid South Africa and the Minister for Justice and Constitutional Development with a report, and to lodge a copy

thereof with this Court, within three months of the date of this order, setting out the following details of all persons who are currently serving a sentence of direct imprisonment under section 4 of the Dangerous Weapons Act 71 of 1968 (Transkei):

(i) their full name;

(ii) their prison number;

(iii) the name and address of the correctional facility where they are currently serving their sentence;

(iv) the case number under which they were sentenced;

(v) the court that passed the sentence;

(vi) the date on which the sentence was passed;

(vii) the sentence imposed;

(viii) whether the offender was legally represented at the time of his or her sentence and, if so, the name and contact number, if known, of the legal representative;

(ix) if the offender was unrepresented, whether the case went on automatic review, including the review number and the outcome of the review; and

(x) the outcome and date of any order made in respect of any application for leave to appeal or petition that the offender may have filed.

(e) Legal Aid South Africa is requested to consult with any offender who is serving a sentence under section 4 of the Dangerous Weapons Act 71 of 1968

(Transkei) and to provide any such offender who seeks to take such sentence on appeal or review with legal assistance if necessary.

(f) Legal Aid South Africa is requested to report to the Director of Public Prosecutions, Mthatha, within three months of receiving the details of all persons imprisoned under section 4 of the Dangerous Weapons Act 71 of 1968 (Transkei) on whether any further relief will be sought on behalf of any such offender. A copy of this report is to be lodged with this Court.

[72] The following further directions are made:

(a) This matter is set down for further hearing on Thursday, 11 November 2010 to consider the following issues:

(i) Do the provisions in item 2 of Schedule 6 to the Constitution impose a constitutional obligation on Parliament to rationalise the laws governing the use of dangerous weapons in the territories of the former Transkei, Bophuthatswana, Venda and Ciskei?

(ii) If so, is Parliament in breach of this obligation by failing to establish a uniform system of law governing the use of dangerous weapons throughout the Republic of South Africa?

(iii) If question (ii) above is answered in the affirmative, what order, if any, should this Court make?

(iv) Is the continued operation of the Dangerous Weapons Act 71 of 1968 (Transkei), Dangerous Weapons Act 71 of 1968 (Bophuthatswana),

Dangerous Weapons Act 71 of 1968 (Venda) and Dangerous Weapons Act 71 of 1968 (Ciskei) unconstitutional and should these statutes be struck down on any other basis?

(b) The Speaker of the National Assembly and the Chairperson of the National Council of Provinces are joined as parties to these proceedings.

(c) The Speaker of the National Assembly, the Chairperson of the National Council of Provinces and the Minister for Justice and Constitutional Development are required to lodge further written submissions on the questions specified in (a) above, on or before Thursday, 2 September 2010.

(d) Mr Thunzi and Mr Mlonzi and the Director of Public Prosecutions, Mthatha, may, if so advised, lodge submissions on the questions specified in (a) above on or before Thursday, 16 September 2010.

Moseneke DCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Mogoeng J, Nkabinde J, and Van der Westhuizen J concur in the judgment of Skweyiya J.

NGCOBO CJ:

[73] The apartheid legal order bequeathed to our constitutional democracy a number of

pieces of legislation from the former TBVC states. These states adopted the laws of apartheid South Africa when they were accorded their statutory "independence". Some of these laws have survived the transition into our constitutional democracy. Laws that were adopted by the TBVC states included legislation dealing with the use of dangerous weapons and firearms in the commission of offences involving violence, namely, the Dangerous Weapons Act[1] (DWA (SA)). Each of the TBVC states adopted the DWA (SA) as its own legislation. The reincorporation of the former TBVC states into a new South Africa resulted in almost identical legislation existing side by side, dealing with the use of dangerous weapons and firearms which apply in the erstwhile areas of the TBVC states and apartheid South Africa.

[74] These proceedings concern the Dangerous Weapons Act[2] (Transkei) (DWA (Tk)), which applies in the area of the erstwhile Transkei. This legislation was made applicable in that area by virtue of the 1975 Notice[3] which was issued in terms of section 4(3) of the DWA (SA).[4] Mr Thunzi and Mr Mlonzi were each charged with, and convicted of, assault with intent to do grievous bodily harm. In each case, the provisions of section 4 were invoked resulting in each of them being sentenced to imprisonment exceeding that of the jurisdiction of the district magistrates' court.

[1] 71 of 1968.

[2] 71 of 1968.

[3] GN R409 GG 4601, 7 March 1975.

[4] The history of the 1975 Notice and its application in the area of the erstwhile Transkei is set out in the judgment of Skweyiya J at [17]-[27].

[75] The High Court considered these cases: on appeal in the case of Mr Mlonzi and on review in the case of Mr Thunzi.[5] It confirmed the conviction and sentence in the case of Mr Thunzi and dismissed the appeal in the case of Mr Mlonzi. In addition, the High Court "declared that the applicability of section 4 of the Dangerous Weapons Act 71 of 1968 (Tk) is inconsistent with the Constitution and hence invalid."[6] It thereafter referred "the order of invalidity" to this Court "for confirmation". It neither set aside the 1975 Notice nor declared section 4 invalid. Notwithstanding the "order of invalidity", the High Court concluded that the sentences imposed should stand.

[76] The High Court limited its order of invalidity to accused persons who had not yet pleaded. Its order does not protect other categories of persons, including those who have pleaded but whose cases have not yet been finalised, and those whose cases have been finalised. It is not clear whether the jurisprudence of this Court, as contained in cases such as *Centre for Child Law*,[7] *National Coalition*[8] and *Bhulwana*,[9] was drawn to the attention of the High Court.

[5] As Skweyiya J points out in his judgment at [16], Mr Thunzi's case had already been dealt with by two judges on automatic review and it is therefore not clear how the High Court became seized of the matter on review again.

[6] *S v Thunzi; S v Mlonzi*, Case No. 213749, Eastern Cape High Court, Mthatha, 5 August 2009, unreported, at para 45(a).

[7] *Centre for Child Law v Minister of Justice and Constitutional Development and Others* [2009] ZACC 18; 2009 (6) SA 632 (CC); 2009 (11) BCLR 1105 (CC).

[8] *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* [1998] ZACC 15; 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC).

[9] *S v Bhulwana; S v Gwadiso* [1995] ZACC 11; 1996 (1) SA 388 (CC); 1995 (12) BCLR 1579 (CC).

[77] What must be determined in these proceedings is, first, whether the order of invalidity made by the High Court is subject to confirmation and, if it is not; second, whether we should vary the order of the High Court and grant appropriate relief or whether we should remit the case to the High Court for it to deal with the matter.

[78] While my colleagues Skweyiya J and Yacoob J agree that the order of invalidity made by the High Court is not subject to confirmation, they differ on the meaning of the order and the judgment of the High Court. Skweyiya J holds that the judgment of the High Court is concerned with the application of the provisions of section 4. He therefore concludes that the order of the High Court is not subject to confirmation, as the High Court declared that the application of the provisions of section 4 in the area of erstwhile Transkei is unconstitutional.

[79] Yacoob J concludes that it is "impossible . . . to say whether the High Court had as its focus and declared the application of section 4 of the Transkei law unconstitutional, or whether the declaration related to section 4 itself."[10] In essence, therefore, he holds that the judgment of the High Court is ambiguous. He does not, however, propose that the case be sent back to the High Court for that court to clarify its order. He agrees with Skweyiya J that the order made by the High Court is not subject to confirmation because the High Court neither declared the provisions of section 4 nor the 1975 Notice unconstitutional.

[10] Yacoob J's judgment at [124].

[80] My colleagues are in agreement that the case should not be remitted to the High Court and that this Court should instead vary the order of the High Court itself. However, they disagree on the source of the power of this Court to do so. Skweyiya J finds the source in the inherent power of a superior court to regulate and protect its process contained in section 173 of the Constitution.[11] For Yacoob J, the source lies in the power of this Court to "make any order that is just and equitable" as contained in section 172(1)(b) of the Constitution.[12]

[81] I agree with Skweyiya J on the meaning of the order and the judgment of the High Court. However, I think there are additional considerations that support his conclusion in this regard. In particular, it is important to emphasise the statutory context within which the judgment and the order of the High Court must be understood. I am in agreement with my colleagues that this Court should not remit this case to the High Court. However, in my view, it is not necessary for this Court to rely on the provisions of section 173 nor section 172(1)(b) in order to deal with this matter. Our jurisprudence on

[11] Section 173 provides:

> "The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice."

[12] 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."

section 173, in particular, raises substantial doubt as to whether it is appropriate to invoke the provisions of section 173 in this case. I would prefer to leave these questions open for the future. In my view, the interests of justice demand that we should not remit.

[82] The threshold question that we must decide is whether the order made by the High Court is subject to confirmation under sections 167(5)[13] and 172(2)[14] of the Constitution. The answer to this question depends upon the meaning of the order of invalidity made by the High Court having regard to the judgment as a whole. In this case, the order and the judgment of the High Court must of course be understood in the light of the scheme of the DWA (Tk) of which, we must accept, the High Court was aware.

[83] The scheme of the DWA (Tk) is this. The provisions of section 4(1) and (2) do not become operative by virtue of their mere inclusion in the statute. They require a

[13] Section 167(5) provides:

> "The Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, a High Court, or a court of similar status, before that order has any force."

[14] Section 172(2) provides:

> "(a) The Supreme Court of Appeal, a High Court or a court of similar status may make an order concerning the constitutional validity of a Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court.
>
> (b) A court which makes an order of constitutional invalidity may grant a temporary interdict or other temporary relief to a party, or may adjourn the proceedings, pending a decision of the Constitutional Court on the validity of that Act or conduct.
>
> (c) National legislation must provide for the referral of an order of constitutional invalidity to the Constitutional Court.
>
> (d) Any person or organ of state with a sufficient interest may appeal, or apply, directly to the Constitutional Court to confirm or vary an order of constitutional invalidity by a court in terms of this subsection."

mechanism which will trigger their application. That mechanism is contained in section 4(3) which empowers the Minister to publish a notice indicating the areas in which the provisions of section 4, to use the words of the statute, are "to be applicable." The Minister must first determine areas in which the use of dangerous weapons and firearms is prevalent. Once these areas have been identified, the Minister may then declare, by way of a notice, that the provisions of section 4 are "to be applicable" in those areas. The 1975 Notice makes the provisions of section 4 applicable to the area of the erstwhile Transkei pursuant to section 4(3) of the DWA (Tk). It is this notice that led to the invocation of the provisions of section 4(1) in the matter before us.

[84] It is within this statutory context that the order and the judgment of the High Court must be understood.

[85] I agree with Skweyiya J that the judgment of the High Court is concerned with the application of section 4 to the area of the erstwhile Transkei and that the order of invalidity made by the High Court is not subject to confirmation. What the High Court should have done, but what it did not do, is to set aside the 1975 Notice. It is this notice that triggered the discriminatory application of section 4. As a result of this omission, the 1975 Notice remains. Yet the order and the judgment of the High Court, in effect, make it plain that it may no longer be invoked in the area of the erstwhile Transkei. In effect, therefore, the order of the High Court sets aside the 1975 Notice.

[86] There is another defect in the order made by the High Court. As pointed out above, paragraph 45(b) of High Court's order of invalidity limits its application to those accused persons who have not pleaded.[15] It leaves out of account those accused persons who have either pleaded, or whose cases have been finalised, or are pending on appeal or review. I agree with Skweyiya J that the order of the High Court works a manifest injustice on the category of persons who are not covered by its order. The order of the High Court therefore contains defects that must be corrected.

[87] Ordinarily we would remit the case to the High Court to enable it to correct the defects that we have identified in its order. I agree with my colleagues that this is not a case in which we should remit. However, for reasons that I will set out presently, I do not consider it necessary to decide whether our power to deal with the matter ourselves should be located in section 173, as Skweyiya J proposes, or in section 172(1)(b), as Yacoob J suggests. Apart from this, I have doubts whether we should rely on these provisions in this case. In my view, the question whether we should remit must be guided by the interests of justice.

[88] Skweyiya J relies on the inherent power of this Court to protect and regulate its process in the interests of justice contained in section 173. Relying on this provision, he holds that it is in the interests of justice that we dispense with the requirement of a formal

[15] *S v Thunzi; S v Mlonzi* above n 6.

application for leave to appeal and treat the matter as an appeal for the purposes of correcting the High Court order.

[89] Thus far this Court has invoked the provisions of section 173 where there is a legislative lacuna either because the legislation or rules regulating appeals from decisions of the Supreme Court of Appeal, as contemplated by the Constitution, have not yet been enacted[16] or legislation or rules dealing with confirmation proceedings have not yet been enacted.[17] We have left open the question whether a superior court "could legitimately claim inherent power of holding the scales of justice where no specific law directly provides for a given situation or where there is a need to supplement an otherwise limited statutory procedure".[18] In addition, we have found it unnecessary to consider the circumstances in which a superior court has powers under section 173 in addition to those provided for by statute.[19]

[90] Legislation and rules regulating appeals from the High Court to this Court have now been enacted. The defects in the order of the High Court that we have identified are proper grounds for an appeal. There is, therefore, no vacuum giving rise to "an

[16] *S v Pennington and Another* [1997] ZACC 10; 1997 (4) SA 1076 (CC); 1997 (10) BCLR 1413 (CC).

[17] *Parbhoo and Others v Getz NO and Another* [1997] ZACC 9; 1997 (4) SA 1095 (CC); 1997 (10) BCLR 1337 (CC).

[18] *Phillips and Others v National Director of Public Prosecutions* [2005] ZACC 15; 2006 (1) SA 505 (CC); 2006 (2) BCLR 274 (CC) at para 49.

[19] Id at para 56.

extraordinary" situation as identified in *Pennington*[20] and *Parbhoo.*[21] Moreover, the reasonable alternative to follow would be to remit the matter to the High Court for it to make the appropriate order. The broad question presented, as I see it, is whether we should extend the application of section 173 to the present situation where there is no legislative lacuna. None of the cases which Skweyiya J cites support the view that he expresses. On the contrary, there are strong dicta from our case law which caution against the invocation of section 173 in this case.

[91] This Court first invoked the provisions of section 173 in *Pennington.* At the time, the legislation and rules dealing with appeals to this Court contemplated in section 167(6) of the Constitution had not been enacted. In the light of this "extraordinary" situation, this Court held that it was appropriate to exercise the inherent power to protect and regulate its process.[22] However, the Court emphasised that this power should be exercised in a manner that is consistent with the Constitution and that as far as is possible, the procedure ordinarily followed by this Court in similar cases should be followed.[23] It accordingly required that appeals against the decisions of the Supreme Court of Appeal must be noted to this Court with the leave of this Court.

[20] *Pennington* above n 16 at para 22.

[21] *Parbhoo* above n 17 at para 4.

[22] *Pennington* above n 16 at para 22.

[23] Id at para 23.

[92] *Parbhoo* was the second case in which this Court invoked the provisions of section 173. When this case was decided, legislation dealing with the referral of an order of constitutional invalidity to this Court as contemplated in section 172(2)(c),[24] had not yet been enacted. Nor had the rules or procedures been provided for this Court under section 171 of the Constitution.[25] This Court held that this situation was "at least as extraordinary as the one in *Pennington's* case"[26] and warranted the exercise of the inherent power contained in section 173.

[93] The next case in which the provisions of section 173 were considered was *Phillips.* The issue in that case was whether the High Court had the power to rescind the order under the provisions of the Prevention of Organised Crime Act 121 of 1998 on grounds other than those specified by the Act. The Court analysed the decisions in *Pennington* and *Parbhoo* and concluded that "[i]n both cases the points are made that ordinarily the power in section 173 to protect and regulate relates to the process of court and arises when there is a legislative lacuna in the process."[27] In addition, this Court emphasised that this "power must be exercised sparingly having taken into account interests of justice

[24] Section 172(2)(c) provides:

> "National legislation must provide for the referral of an order of constitutional invalidity to the Constitutional Court."

[25] Section 171 of the Constitution provides:

> "All courts function in terms of national legislation, and their rules and procedures must be provided for in terms of national legislation."

[26] *Parbhoo* above n 17 at para 4.

[27] *Phillips* above n 18 at para 48.

in a manner consistent with the Constitution."[28] Significantly, however, this Court held that:

> "Whatever the true meaning and ambit of section 173 . . . an Act of Parliament can[not] simply be ignored and reliance placed directly on a provision in the Constitution, nor is it permissible to side-step an Act of Parliament by resorting to the common law."[29] (Footnote omitted.)

[94] What emerges from these cases are important principles that should guide the application of section 173. Ordinarily, the power conferred on superior courts by section 173 to protect and regulate relates to the process of court. This is a special and an extraordinary power which must therefore be exercised sparingly and only in extraordinary situations,[30] such as where there is a legislative lacuna. And in exercising this power, the procedure adopted should as far as is possible follow that contemplated in the Constitution. Where there is legislation or rules governing the situation, it is inappropriate to invoke the provisions of section 173.[31] This echoes the principle we alluded to in *Ingledew*[32] and subsequently endorsed in *SANDU*,[33] namely, that it is inappropriate to rely directly on the Constitution when there is legislation dealing with

[28] Id.

[29] Id at para 51.

[30] Id at para 52.

[31] Id at paras 50, 52 and 56.

[32] *Ingledew v Financial Services Board: In re Financial Services Board v Van der Merwe and Another* [2003] ZACC 8; 2003 (4) SA 584 (CC); 2003 (8) BCLR 825 (CC).

[33] *South African National Defence Union v Minister of Defence and Others* [2007] ZACC 10; 2007 (5) SA 400 (CC); 2007 (8) BCLR 863 (CC).

the matter. Finally, in exercising this power, the interests of justice must be taken into consideration.

[95] I am not persuaded that this is an extraordinary situation. There is an option here. That option is to refer the matter back to the High Court. We are not obliged to deal with the matter ourselves as was the case in *Pennington*. What is more, these matters could have been dealt with by way of an application for leave to appeal. The existence of these options for me casts doubt as to whether we are dealing with a matter that is extraordinary and in regard to which we have no option other than to resort to the extraordinary powers in section 173. Our jurisprudence on this provision cautions us to use it sparingly. It is for this reason that I have doubts as to whether section 173 is applicable here. Without the benefit of argument on these issues, I would prefer to leave this question open.

[96] The view expressed by Yacoob J has much that commends it. We have the power to decide whether the order of the High Court is subject to confirmation. It may well be that, in confirmation proceedings, the general powers given to this Court under section 172(1)(b) are wide enough to allow this Court, in special circumstances, to vary an order that is not ordinarily subject to confirmation. The considerations that are relevant to the interests of justice are essentially the same as those that are relevant to what is just and

equitable. What is not in the interests of justice is not likely to be just and equitable.[34] Whether we vary the order of the High Court under our general powers to make an order that is just and equitable or in the interests of justice will therefore involve similar considerations.[35] However, without full argument on this issue I would prefer to leave open the question whether the general power to make an order that is just and equitable is wide enough to apply to this case.

[97] As pointed out above, the question presented in this case is whether we should remit this case to the High Court for it to correct the defects in its order. This question must be answered having regard to the interests of justice. The interests of justice is the guiding principle for the proper exercise of judicial power. Section 167(6) of the Constitution contemplates that any matter or appeal may be brought directly to this Court "when it is in the interests of justice". Section 173 confers on the superior courts an inherent power to regulate and protect their own process, including developing the common law, "taking into account the interests of justice." Indeed, the Constitution requires each judge to "swear or solemnly affirm" that he or she will "administer justice to all persons alike without fear, favour or prejudice".[36] As I see it, therefore, the question is whether it is in the interests of justice to remit the case to the High Court.

[34] *Minister of Justice v Ntuli* [1997] ZACC 7; 1997 (3) SA 772 (CC); 1997 (6) BCLR 677 (CC) at para 31.

[35] Id.

[36] Item 6(1) of Schedule 2 to the Constitution.

[98] This Court in *S v M*,[37] albeit in the context of an appeal, relied upon the interests of justice to determine whether it should resolve the issue of sentence or remit it to the lower court. In determining where the interests of justice lie, we had regard to the fact that the lower court had received "comprehensive, carefully researched and well-drafted reports . . . concerning the interests of the children"; it had heard argument on the appropriate sentence; and many years had elapsed since the offences were committed. We concluded that "[i]n these special circumstances the interests of justice require that this court itself bring the matter to a close by determining the appropriate sentence."[38]

[99] There are compelling considerations, in the public interest, and thus in the interests of justice, which militate against remittal.

[100] First, on the judgment and the order of the High Court, the High Court should have set aside the 1975 Notice. In effect the order of the High Court sets aside the 1975 Notice and renders the notice inapplicable. On the basis of the order of the High Court the notice cannot therefore stand. Second, the appropriate relief to be granted to other categories of persons not covered by the order of the High Court was fully canvassed by the parties, both in their written and oral arguments. This Court is, therefore, in the same

[37] *S v M (Centre for Child Law as Amicus Curiae)* [2007] ZACC 18; 2008 (3) SA 232 (CC); 2007 (12) BCLR 1312 (CC) at paras 49-50.

[38] Id at para 50.

position as the High Court in relation to the appropriate order that should be made. It would, therefore, be a waste of time to remit the matter to the High Court.[39]

[101] Finally, following our decision in *Matatiele 1*[40] we have raised questions with the parties about the constitutional obligation on Parliament to establish uniform legislation on the use of dangerous weapons or firearms. This issue will be argued before us at a later stage. The question that we have raised concerns the constitutionality of the very existence of identical statutes dealing with the use of dangerous weapons or firearms which operate in different parts of a South Africa that is supposed to be one South Africa under our Constitution. This is an important constitutional issue and it is in the interests of justice that these issues, which may well have a bearing on the constitutionality of identical statutes, be investigated. Indeed, in this regard Skweyiya J proposes further directions which call for argument on this issue and sets the matter down for hearing in the future.

[39] Compare *R v Parmanand* 1954 (3) SA 833 (A) at 838C-E where the court said:

> "Thus where there is only an appeal before the Court and it appears that there might be relief open to the appellant by way of review, it would not be proper for the Court to dismiss the appeal and consequently confirm the conviction, thus making it impossible for the appellant . . . to get relief thereafter by way of review. In such a case the Court should at least postpone its decision until the appellant has had an opportunity to bring review proceedings; and if all the material necessary for a decision on review is before the Court, it would be a waste of time and expense to postpone the appeal and not to decide the matter without further proceedings, unless of course there are circumstances in which to do so might cause prejudice to the Crown."

[40] *Matatiele Municipality and Others v President of the RSA and Others (1)* [2006] ZACC 2; 2006 (5) SA 47 (CC); 2006 (5) BCLR 622 (CC).

[102] Given the special features of this case, I consider that it would not be in the interests of justice to remit the case to the High Court. In the event, I concur in the order proposed by Skweyiya J.

YACOOB J:

[103] This is essentially a concurring judgment in which I explain two differences with the judgment of Skweyiya J (the majority judgment).

[104] The confirmation proceedings before us are a direct consequence of the fact that two Acts of Parliament, both in virtually identical terms, remain contemporaneously in force in South Africa today. Both Acts aim at the imposition of increased sentences for offences involving dangerous weapons in certain areas. The one, the Dangerous Weapons Act, Transkei[1] (Transkei law), is a relic and reminder of our painful past and was an important feature of the apartheid evil. The law has application only in the former Transkei, a so-called independent state under apartheid, which remains the home of predominantly poor, vulnerable black people. The other, the Dangerous Weapons Act,

[1] 71 of 1968.

South Africa[2] (national law), applies in the whole of what may be considered white South Africa in the pre-1994 constitutional regime.[3] This Court will, if the confirmation proceedings are properly before us, have to determine the constitutional validity of section 4 of the Transkei law. In doing so, one of the important questions that will arise is whether it remains constitutionally permissible, at this stage in our constitutional development, for section 4 of this apartheid law to continue in force as a separate law that can be applied only in the former Transkei. This, despite the fact that it is virtually identical to section 4 of the national law.

[105] Section 4 of the Transkei law (identically worded with that of the national law) provides:

> "(1) Whenever a person above the age of eighteen years is convicted of an offence involving violence to any other person and it has been proved that he or she killed or injured such other person by using a dangerous weapon or a firearm, he or she shall, except when he or she is in terms of section 286 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), declared an habitual criminal, notwithstanding anything to the contrary in any law contained, be sentenced to imprisonment for a period of not less than two years, and if he or she is so convicted by a magistrate's court, not exceeding eight years: Provided that if the court is of the opinion that there are circumstances which justify the imposition of a lighter sentence than the punishment prescribed by this section, it shall enter

[2] 71 of 1968.

[3] Currently, there are also separate Dangerous Weapons Acts in effect in the former homelands of Venda (Dangerous Weapons Act, Venda 71 of 1968) and the Ciskei (Dangerous Weapons Act, Ciskei 71 of 1968). There was also a separate Dangerous Weapons Act for the former homeland of Bophuthatswana (Dangerous Weapons Act, Bophuthatswana 71 of 1968) which was repealed by the Mpumalanga General Laws Repeal and Application Act 13 of 1998.

> those circumstances on the record of the proceedings and may thereupon impose such lighter sentence on the person so convicted: Provided further that in the case of a magistrate's court, such lighter sentence shall not exceed a fine of R40 000 or imprisonment for a period of two years.
>
> (2) Notwithstanding anything to the contrary in any law contained, no person in respect of whom the imposition of a sentence of imprisonment is compulsory in terms of subsection (1), shall be dealt with under section 290 or 297 of the Criminal Procedure Act, 1977.
>
> (3) (a) The provisions of subsections (1) and (2) shall apply only in respect of an offence referred to in subsection (1) which is committed in an area to which the Minister of Justice has, by notice in the Gazette, declared such provisions to be applicable.
>
> (b) The Minister of Justice may at any time by notice in the Gazette amend or repeal any notice issued in terms of paragraph (a)."

[106] It is apparent that the national law came into force in the whole of South Africa, including the Transkei, at a time when neither the Transkei nor any of the so-called independent states had received their illusory independence. Section 4 therefore initially came into operation or was brought into force in the whole of South Africa including the area that was to become the Transkei. The Transkei law, including section 4, came into operation or into force in the limited Transkei territory when it attained its "independence".

[107] Although section 4 could, in a loose sense, be said to have been applicable in the South African territory and in the Transkei, the terms of section 4(3)(a) of both laws may render this proposition not wholly accurate. This is because inapplicability may be

relative or absolute. Inapplicability could be relative in the sense that the section may be applied after ministerial notice. On the other hand, inapplicability may be absolute in the sense that section 4 of the Transkei law could never apply in any other area except the Transkei. Although the provisions of section 4 would apply in the Transkei only after the ministerial notice, they would be applicable in the Transkei, and only in the Transkei, even if there had been no ministerial notice.

[108] It is important to note here that, as pointed out in the majority judgment, the ministerial notice of 1975 was withdrawn in apartheid South Africa by the then South African Minister of Justice. Consequently the national law does not apply in the former white South Africa.[4] On the other hand, section 4 of the Transkei law does apply in the former Transkei. It must be emphasised here that, although the section is applicable in an absolute sense (it may be rendered applicable in a relative sense by ministerial notice) in those parts of South Africa excluding the Transkei, it is beyond doubt that section 4 can apply or, to use more technical terminology, is capable of being applied, by ministerial notice alone. By the same token, section 4 of the Transkei law could, consequent upon ministerial notice, have been applied only to the territory of the former Transkei and nowhere else.

[109] To sum up, the Transkei law is applicable to the Transkei subject to ministerial notice. There is, on the one hand, an absolute limitation of applicability of section 4 of

[4] Above [20].

the Transkei law to the territory of the former Transkei, in the sense that it can never be applied outside the Transkei regardless of the circumstances. On the other hand, section 4 applies to the former Transkei only if there is a ministerial notice. The ministerial notice does not determine applicability in the absolute sense but allows the application of the section in the Transkei.

[110] I agree with much of the majority judgment. It holds:

(a) The Transkei law and the notice applying section 4 to the former territory of the Transkei remains valid in that territory.[5]

(b) The Transkei law is an Act of Parliament by reason of the fact that the democratic Parliament of South Africa has, by amending it, assumed its ownership.[6]

(c) The High Court had in its focus the application of section 4 in the Transkei and declared the application of section 4 inconsistent with the Constitution.[7]

(d) The High Court, on a proper interpretation of its judgment, declared invalid neither the provisions of section 4 of the Transkei law nor the notice issued by the then Minister of Justice making section 4 applicable in the whole of the Transkei.[8]

[5] Above [28].

[6] Above [38].

[7] Above [38]-[39].

[8] Above [43].

(e) The referral to this Court had therefore not been competently made.[9]

(f) The High Court should have declared the ministerial notice invalid and erred in not doing so expressly.[10]

(g) Regardless of the incompetent referral, this Court has the power to consider the correctness of the order of the High Court on the basis that the order of the High Court can and should be replaced by an order declaring the notice invalid and it would be appropriate to substitute a more equitable remedy.[11]

(h) This the majority judgment does on the basis of the jurisdiction conferred upon this Court by section 173 of the Constitution.[12]

[111] I agree with all the conclusions by the majority judgment including the order made. My disagreement is limited only to two of the propositions set out in the previous paragraph. They are propositions (c) and (h). In my view the order of the High Court is not capable, even if read in the context of the judgment, of being construed to have declared the application of section 4 of the Transkei law invalid. I cannot accept that the High Court had as its focus the application of the section to the exclusion of the applicability of section 4 in an absolute sense. The second issue on which I disagree with the majority judgment is the basis upon which an order should be made by this Court. In my view this Court should proceed in terms of section 172(1)(b) of the Constitution.

[9] Id.

[10] Id.

[11] Above [50]-[52].

[12] Above [52].

[112] This judgment therefore deals with two themes: the meaning and nature of the High Court order and the power of this Court to issue an order in terms of section 172(1)(b).

The meaning and nature of the High Court order

[113] The majority judgment approaches the question of the interpretation of the judgment on the basis of the following passage in the *Firestone* case:[13]

> "The basic principles applicable to construing documents also apply to the construction of a court's judgment or order: the court's intention is to be ascertained primarily from the language of the judgment or order as construed according to the usual, well-known rules . . . . Thus, as in the case of a document, the judgment or order and the court's reasons for giving it must be read as a whole in order to ascertain its intention."[14]

[114] I would agree with this approach subject to two important qualifications. The first is made in *Chonco 3*.[15] The exercise of interpreting a judgment is not aimed at arriving at the subjective intention of the judges concerned. Ascertaining the meaning of a judgment "requires that the meaning and effect of the order then granted be determined, without regard to the accident of individual incumbency or the contingency of the subjective

[13] *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (A).

[14] Id at 304D-E.

[15] *Minister for Justice and Constitutional Development v Mqabukeni Chonco and 383 Others* [2010] ZACC 9, Case No. CCT 42/09, 8 April 2010, as yet unreported.

intentions of the then-members of the Court."[16] The second aspect to bear in mind is that the judgment and order must be assessed in its context.

[115] The High Court did not in so many words declare either section 4 of the Transkei law or the ministerial notice inconsistent with the Constitution and invalid. The order declared the applicability (not the application) of section 4 of the Transkei law "inconsistent with the Constitution and hence invalid to the extent that the applicability thereof differentiates between perpetrators . . . in the area of jurisdiction of this Court and the rest of South Africa." This order itself points in different directions. It refers to section 4 of the Transkei law and conveys that it was the section that was declared invalid. However, the order qualifies the reference to section 4 of the Transkei law by adding the word "applicability", thus pointing to something less than the provisions of section 4 being declared invalid. And, if one assumes (and this may be a reasonable assumption) that the distinction between "application" and "applicability" was not present to the minds of the judges in the High Court, determining the meaning of the judgment becomes even more complex.

[116] For its interpretation, the majority judgment relies mainly on the fact that the High Court relied on the discriminatory impact of the actual application of section 4.[17] The

[16] Id at para 6.

[17] Above [40]-[41].

majority judgment also refers to the High Court's interchangeable use of the terms "applicability", "operation" and "application",[18] and takes "applicability" to mean "application" in the reasoning to support the conclusion that the High Court declared the application of section 4 of the Transkei law, pursuant to the 1975 notice, to be unconstitutional and invalid.

[117] There is some merit in the approach of the majority judgment. But there are problems with it. The first is that the High Court issued a Rule 16A[19] notice calling for argument, not on the constitutional validity of the application of section 4, but rather on the "constitutionality of the provisions of section 4". It follows that the High Court did not have the application of section 4 in mind at the time when the notice was issued. The notice commenced proceedings and was the basis on which the whole case was argued. The Rule requires the notice to "contain a clear and succinct description of the constitutional issue concerned."[20] It is difficult to see how this indication can easily be reduced in its importance.

[118] Secondly, it is not possible to determine the sense in which the word "applicability" was used in the order of the High Court. The majority judgment interprets the word "applicability" to mean "application". On the other hand, the order refers not to

[18] Above [42].

[19] Of the Uniform Rules of the High Court.

[20] Rule 16A(1)(b).

the applicability of the notice, but to the applicability of section 4. And, in the context of the fact that the judgment was concerned with the limitation of the applicability of the section to the former Transkei, I cannot exclude the possibility that the reference by the High Court was not to the application of the section as determined by the ministerial notice, but to the absolute limitation of applicability determined by the Transkei law as a whole. Indeed, the fact that the High Court used the words "application", "applicability" and "operation" interchangeably, would render it invidious to exclude any of the possibilities.

[119] In the third place, the High Court drew no distinction between the validity or otherwise of section 4 of the Transkei law on the one hand, and that of its application pursuant to the 1975 ministerial notice on the other. The distinction in fact drawn was between the constitutionality of section 4 of the Transkei law and, on the other hand, the applicability of the section to the former Transkei. That distinction occurs in the following passage:

> "Mr Kruger argued that the section of the Dangerous Weapons Act is not in itself unconstitutional if regard is had to the case of *S v Dodo*. In these matters, as in Dodo, it is not obligatory to impose the prescribed sentences, if certain conditions are present. In respect of s 4 the provision is that if the court is of the opinion that there are circumstances which justify the imposition of a lighter sentence, it can deviate from the prescribed sentence and the imposed sentence can also be suspended.
>
> I agree with this submission, however it is not the constitutionality of s 4 of the Dangerous Weapons Act that needs to be assessed, but the applicability of the said

> section to the erstwhile Transkei. There is differentiation in respect of sentences that may be imposed between the perpetrators in the erstwhile Transkei and the rest of South Africa. This is so through the applicability of s 4 the DWA (Tk)."[21] (Footnotes omitted.)

[120] There is a credible construction of this passage which is inconsistent with the High Court having focussed on declaring the application of section 4 invalid, but consistent with section 4 of the Transkei law itself having been declared invalid. The High Court, in the context of dealing with the submission by counsel that section 4 was not unconstitutional in its terms because the content of section 4(1) and (2) complied with the requirements laid down in *S v Dodo*,[22] explained that this case had nothing to do with the constitutionality of the content of section 4 of the Transkei law. The High Court made it plain that the proceedings before that Court were concerned with the applicability (the High Court did not say application) to the former Transkei. The distinction drawn may have been between the constitutionality of the content of section 4 and the constitutionality of its limited territorial applicability.

[121] Fourthly, and perhaps most importantly, the opening paragraph of the High Court judgment defines the question before it as follows:

[21] *S v Thunzi; S v Mlonzi*, Case No. 213749, Eastern Cape High Court, Mthatha, 5 August 2009, unreported, at paras 35-6.

[22] *S v Dodo* [2001] ZACC 16; 2001 (3) SA 382 (CC); 2001 (5) BCLR 423 (CC).

> "This judgment concerns the constitutionality of section 4 of the Dangerous Weapons Act 71 of 1968 (the DWA), which is only applicable in the jurisdiction of this Court (the area of the erstwhile Transkei) but not in the rest of the Republic of South Africa."[23]

[122] This sentence, standing alone, can by no means be interpreted to mean that the judgment is concerned with the validity of the application of section 4. This first sentence cannot merely be passed over; it determines the context for the interpretation of the rest of the judgment and is a powerful pointer to the conclusion that what was being considered was the constitutional validity of section 4 of the Transkei law. That law is described as being "only applicable in the jurisdiction of this Court . . . but not in the rest of the Republic of South Africa." This description of the law can have no impact on the focus of the High Court judgment itself. It may be that this description of the Transkei law was aimed at particularising the complaint against its limited applicability in an absolute sense.

[123] The majority judgment in its analysis accords no weight at all to a fifth factor which, in my view, is important and which points in the other direction. The High Court referred the declaration of invalidity for confirmation to this Court. If it is true that the High Court had in fact declared the application of section 4 pursuant to the ministerial notice invalid, the referral to this Court is perplexing to say the least. The referral is consistent with the majority judgment's interpretation of the High Court order only on the postulate that the High Court was unaware that the declaration of invalidity of the

[23] Id at para 1.

application of a law did not have to be referred for confirmation to this Court. I find no basis for this proposition. If one accepts, as one ordinarily should, that both judges in the High Court were aware that declarations of invalidity of provisions of Acts of Parliament, not declarations of invalidity of their application, had to be referred for confirmation, the only inference to be drawn from the referral is that the High Court declared section 4, and not its application, inconsistent with the Constitution and invalid.

[124] It is accordingly impossible for me to say whether the High Court had as its focus and declared the application of section 4 of the Transkei law unconstitutional, or whether the declaration related to section 4 itself. There are pointers both ways. It is on this basis that I agree with the judgment of the majority that the High Court declared neither the notice nor section 4 inconsistent with the Constitution and invalid.

The power of this Court to make an order

[125] I have already indicated that I agree with the order proposed by the majority judgment. However, in my respectful view, section 173[24] of the Constitution does not confer upon this Court the power to make the order issued by the majority judgment. The section confers on all courts the jurisdiction or the "inherent power" to do two things: to protect and regulate their own process and to develop the common law. This case has

[24] Section 173 provides:

> "The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice."

nothing to do with the development of the common law. Nor do I think that the order we make here has anything to do with the protection of the process of this Court or with its regulation. Indeed, the order we make has nothing to do with process at all. This Court has held that a determination of whether court proceedings should be televised[25] and the facilitation of applications for leave to appeal to this Court, absent the requisite rules,[26] are matters embraced within the power to protect and regulate process. The order issued in this case is a far cry from those situations.

[126] The appropriate section is section 172(1)(b).[27] In effect section 172(1)(b) empowers the Court to "make any order that is just and equitable", "when deciding a constitutional matter within its power". If, in this case, we are in the process of deciding a constitutional matter within our power, it is our duty to consider whether a just and equitable order is necessary and if we find this to be the case, to make the order. The Court's power to make a just and equitable order is not limited to circumstances in which a statutory provision is declared to be inconsistent with the Constitution nor is the power

[25] *South African Broadcasting Corp Ltd v National Director of Public Prosecutions and Others* [2006] ZACC 15; 2007 (1) SA 523 (CC); 2007 (2) BCLR 167 (CC).

[26] *S v Pennington and Another* [1997] ZACC 10; 1997 (4) SA 1076 (CC); 1997 (10) BCLR 1413 (CC) and *Parbhoo and Others v Getz NO and Another* [1997] ZACC 9; 1997 (4) SA 1095 (CC); 1997 (10) BCLR 1337 (CC).

[27] Section 172(1) provides:

> "(1) When deciding a constitutional matter within its power, a court—
>
> (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
>
> (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."

restricted to cases in which we consider the constitutionality of laws. In the *Hoërskool Ermelo* case[28] this Court, set aside a decision taken by the head of a provincial education department concerned with the language policy adopted by a school governing body. After doing so, this Court in terms of section 172(1)(b) ordered the governing body to reconsider the school language policy in the light of the judgment of this Court. This Court reasoned:

> "The remedial power envisaged in section 172(1)(b) is not only available when a court makes an order of constitutional invalidity of a law or conduct under section 172(1)(a). A just and equitable order may be made even in instances where the outcome of a constitutional dispute does not hinge on constitutional invalidity of legislation or conduct. This ample and flexible remedial jurisdiction in constitutional disputes permits a court to forge an order that would place substance above mere form by identifying the actual underlying dispute between the parties and by requiring the parties to take steps directed at resolving the dispute in a manner consistent with constitutional requirements."[29] (Footnote omitted.)

[127] There are therefore two questions to be answered. The first is whether this Court is engaged in the process of deciding a constitutional matter. The second is whether the order made by the majority judgment is just and equitable within the meaning of section 172(1)(b). Let us see whether we are concerned with a constitutional issue.

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[28] *Head of Department, Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* [2009] ZACC 32; 2010 (2) SA 415 (CC); 2010 (3) BCLR 177 (CC).

[29] Id at para 97. See also *Sibiya and Others v Director of Public Prosecutions, Johannesburg, and Others* [2005] ZACC 6, 2005 (5) SA 315 (CC); 2005 (8) BCLR 812 (CC) at para 62 and *Billiton Aluminium SA Ltd t/a Hillside Aluminium v Ntokozo Archibald Khanyile and Others* [2010] ZACC 3, Case No CCT 72/09, 18 February 2010, as yet unreported, at paras 32-3.

[128] We obviously are. This Court, in determining whether the High Court declared the provision of an Act of Parliament inconsistent with the Constitution, has ultimately to determine whether the High Court was correct in referring the matter to us for confirmation.[30] This is a constitutional issue. There can moreover be no debate that it is within our power to decide whether a decision has rightly been referred to us for confirmation.

[129] As I have already said, the High Court should at least have set aside the notice as being inconsistent with the Constitution and invalid, on the basis of its finding, which cannot be faulted, that the application of the notice gave rise to inequality and unjustifiable, grossly unfair discrimination. The fact, however, is that the High Court set aside neither the notice nor section 4 as unconstitutional and invalid.

[130] The question that now arises concerns the course of action this Court should take in these circumstances. In other words, do the circumstances call for a just and equitable order in terms of section 172(1)(b). If we do nothing, the order of the High Court will stand. But the unacceptable and unjust consequence would be that neither the notice nor the section would have been set aside as invalid. Indeed both the section and the notice would remain valid. To leave this objectionable apartheid law in operation can never be just and equitable nor justified in any way. The continued existence of the notice and the section raises issues of substance relating to the effectiveness of the order of the High

[30] In terms of section 167(5) read with section 172(2) of the Constitution.

Court. Magistrates might feel obliged in the light of this judgment and the judgment of the majority (concerning the interpretation of the High Court order), to the effect that neither the notice nor section 4 has been set aside, to continue to apply the section in the erstwhile Transkei. This will give rise to unacceptable injustice; injustice which cannot be countenanced by this Court. It is not the kind of injustice that this Court can allow to persist by inaction. It is neither just nor equitable for this unsatisfactory situation to prevail. On the contrary, it is in the interests of justice that this section be rendered inoperative as soon as this can be done, otherwise this Court will fail in its duty.

[131] In any event, the potential for injustice continues to threaten even if one assumes that courts will interpret this order to mean that the notice has been set aside. This is because the only category of people who will benefit from the order made by the High Court consequent upon the declaration of invalidity are those who will not have pleaded to their charges. This means that those people who have already pleaded would continue to be tried under this unjust law, the apartheid law would continue to be enforced on appeal, and offenders serving sentences of imprisonment imposed in accordance with the section will have no recourse at all. The proposition that this train of affairs is just and equitable falls to be rejected out of hand.

[132] It is therefore just and equitable for this Court to make the order contained in the majority judgment. I have no hesitation in supporting it as appropriate.

For Mr Thunzi and Mr Mlonzi:	Advocate L Crouse instructed by Legal Aid South Africa.
For the Director of Public Prosecutions, Mthatha:	Advocate Advocate NJ Du Plessis, Advocate CJH Kruger and Advocate S Mbewu instructed by the Director of Public Prosecutions, Mthatha.
For the Minister for Justice and Constitutional Development:	Advocate PJJ De Jager SC and Advocate J Holland-Müter instructed by the State Attorney, Johannesburg.
For the Amicus Curiae:	Advocate SM Mbenenge SC and Advocate AM Da Silva.