

# PRECEDENT AND THE CONSTITUTIONAL COURT

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The way is shut.  
It was made by those who are dead, and the Dead keep it, until the time comes.  
The way is shut.<sup>1</sup>

## 1 Introduction

The purpose of this piece is to consider the role of precedent in the development of our constitutional jurisprudence and to seek to discern some of the attitudes of the Constitutional Court to it – primarily through the lens of *Gcaba v Minister for Safety and Security and Others*.<sup>2</sup>

As a wide-eyed law clerk starting work at the Constitutional Court, together with my colleagues I had an opportunity to participate in an introductory seminar to the functioning of the Court facilitated by a former justice of the Court. At the end of the seminar some time was allowed for questions. I plucked up the courage to ask one: ‘Could the Constitutional Court overrule one of its own decisions?’

It was a question that troubled me. If the Court could not overrule itself, in decades down the road would it be stuck with decisions that were perhaps wrong at the time or alternatively had been rendered

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<sup>1</sup> Legolas (translating an inscription) in JRR Tolkien *Lord of the rings: The return of the king* (original 1954, 2004 50 ed) 798.

<sup>2</sup> 2010 1 SA 238 (CC), handed down on 7 October 2009.

anachronistic by changes in the social conditions or political landscape of the country. If it could overrule its earlier decisions, did this not expose our jurisprudence to the risk of purely casuistic reasoning and the possibility of the personal predilections of judges unseating ‘settled’ legal principles? What of legal certainty? What ‘test’ should be applied when the Constitutional Court considered whether to overrule an earlier decision? Would our Court follow the practice of the United States Supreme Court,<sup>3</sup> whose evolving, politically-determined composition generates periodic shifts to the left or the right on controversial constitutional questions such as abortion, campaign finance regulation and affirmative action?<sup>4</sup>

The judge concerned answered with characteristic restraint and precision, saying that the Court had not yet had to consider the question and that he was not sure in what circumstances the Court might exercise the power to overrule an earlier decision.

For the first decade and a half of its existence, the Constitutional Court was able to avoid facing this question directly: through a minimalist approach to decision making and by distinguishing, rather than overruling, its earlier decisions where they appeared to stand in the way of an outcome.

In 2009, however, the Constitutional Court explicitly raised the question whether it could overturn its earlier decisions for the first time, without committing itself, in *Gcaba*. In the same year, the majority of the Supreme Court of Appeal (SCA) arguably went further in *True Motives*, holding that the Constitutional Court had erred in deciding the case of *Walele*. These cases have finally admitted the elephant in the room: that the Constitutional Court, being human, may err, and that it (and perhaps the SCA, too) needs to know how to respond when its error surfaces.<sup>5</sup>

<sup>3</sup> For a comparison of the trajectory of rights jurisprudence in South Africa and the United States, see M Kende *Constitutional rights in two worlds* (2009).

<sup>4</sup> For an analysis of these trends in the United States, see R Dworkin *The Supreme Court phalanx: The new court’s right-wing bloc* (2008); R Dworkin *Justice in robes* (2006); C Sunstein *Radicals in robes: Why extreme right-wing courts are wrong for America* (2005).

<sup>5</sup> *Gcaba* (n 2 above); *True Motives 84 (Pty) Ltd v Mahdi* 2009 4 SA 153 (SCA); *Walele v The City of Cape Town* 2008 6 SA 129 (CC). The discussions of the *Gcaba* and *True Motives* decisions in this piece have their roots in the review of these cases by Michael Bishop and myself in *Juta’s quarterly review*. My gratitude goes to Michael for sowing some of the seeds of this article and allowing me to use some of the fruits of his labour, but any errors are attributable to me alone.

## 2 *Gcaba*: The blame game and infallibility

*Gcaba* raised – not for the first time – substantive questions about the relationship between administrative law and labour law under the Constitution, which formed the focus of Hoexter’s contribution to the 2008 edition of this work.<sup>6</sup> Although my current concern is not the question whether the conduct of a public sector employer in respect of an employee falls to be reviewed under the Labour Relations Act<sup>7</sup> alone or also in terms of the Promotion of Administrative Justice,<sup>8</sup> it is useful to remind ourselves of the issues before the court in *Gcaba* and their history.

The decision in *Gcaba* attempted to bring clarity to the mess created in the lower courts by the Constitutional Court’s conflicting decisions in *Fredericks*<sup>9</sup> and *Chirwa*.<sup>10</sup> It is necessary at the outset briefly to describe the statutory landscape and the conflicts between *Fredericks* and *Chirwa*.

In *Fredericks*, a unanimous Court held that public sector employees were entitled to rely on the right to just administrative action in employment-related disputes. It held, further, that section 157(1) of the LRA does not exclude the jurisdiction of the High Court where the LRA only permits the Labour Court to review a decision of the Commission for Conciliation, Mediation and Arbitration (CCMA).

In two separate majority judgments in *Chirwa*, the Court held that the High Court did not have jurisdiction to hear a claim of unfair dismissal by a public-sector employee. In essence, it held that the LRA created a ‘one-stop shop’ for labour disputes and that all disputes that were ‘in essence’ labour disputes fell within the exclusive jurisdiction of the Labour Court. The *Chirwa* majority also held that public sector dismissals were not administrative action. Langa CJ (joined by Mokgoro and O’Regan JJ) dissented on the jurisdiction issue, although he agreed that this particular dismissal was not administrative action. Langa CJ argued that *Chirwa* was indistinguishable from *Fredericks*.

Hoexter described the basis on which the *Chirwa* court distinguished *Fredericks* as ‘unconvincing’,<sup>11</sup> and concluded that *Chirwa* contradicted the court’s earlier jurisprudence.<sup>12</sup> The

<sup>6</sup> C Hoexter ‘Clearing the intersection? Administrative and labour law in the Constitutional Court’ (2008) *Constitutional Court Review* 209.

<sup>7</sup> Act 66 of 1995 (LRA).

<sup>8</sup> Act 3 of 2000 (PAJA).

<sup>9</sup> *Fredericks v MEC for Education and Training, Eastern Cape* 2002 2 SA 693 (CC).

<sup>10</sup> *Chirwa v Transnet Limited* 2008 4 SA 367 (CC).

<sup>11</sup> Hoexter (n 6 above) 220.

<sup>12</sup> Hoexter (n 6 above) 234.

contradiction between *Chirwa* and *Fredericks* created a mass of conflicting case law in the High Courts and the Supreme Court of Appeal.<sup>13</sup> Some judges interpreted *Chirwa* as overruling *Fredericks*, while others saw the two as compatible. It was inevitable that the Constitutional Court would be called on to settle the matter. And so there came *Gcaba*.

The factual situation in *Gcaba* – which had become moot by the time the case was decided – faded into the background as the case was heard in order to resolve the theoretical tensions between *Fredericks* and *Chirwa*, not to provide relief for the applicant. After unsuccessfully approaching the relevant bargaining council, Gcaba sued the Minister for Safety and Security in the High Court, alleging that the decision not to appoint him to an upgraded post was unfair administrative action. The High Court held that it lacked jurisdiction. It followed the line of cases that read *Chirwa* as overruling *Fredericks*.

Van der Westhuizen J wrote for a unanimous Constitutional Court that upheld the High Court's decision. There are three parts to the decision: a discussion on precedent and the rule of law; whether the decision constituted administrative action; and whether the High Court had jurisdiction to hear the claim. It is the Court's approach to precedent that interests me here.

Van der Westhuizen J begins with a fascinating passage on certainty and the rule of law:

One of the purposes of law is to regulate and guide relations in a society. One of the ways it does so is by providing remedies and facilitating access to courts and other fora for the settlement of disputes. As supreme law, the Constitution protects basic rights. These include the rights to fair labour practices and to just administrative action. Legislation based on the Constitution is supposed to concretise and enhance the protection of these rights, amongst others, by providing for the speedy resolution of disputes in the workplace and by regulating administrative conduct to ensure fairness.

Yet the legislature, courts, legal representatives and academics often create complexity and confusion rather than clarity and guidance. In the case of fairly new legislation based on a young constitution, this is perhaps understandable. Sometimes a jurisprudence needs to develop along with the insight and wisdom emerging from a debate over some time. The legislature may also have to intervene in appropriate circumstances, for example, when incremental

<sup>13</sup> For a full list, see *Gcaba* (n 2 above).

development results in uncertainty or an otherwise unsatisfactory situation.<sup>14</sup>

Later, he had this to say:<sup>15</sup>

[P]recedents must be respected in order to ensure legal certainty and equality before the law. This is essential for the rule of law. Law cannot ‘rule’ unless it is reasonably predictable. A highest court of appeal – and this Court in particular – has to be especially cautious as far as adherence to or deviation from its own previous decisions is concerned. It is the upper guardian of the letter, spirit and values of the Constitution. The Constitution is the supreme law and has had a major impact on the entire South African legal order - as it was intended to do. But it is young; so is the legislation following from it. As a jurisprudence develops, understanding may increase and interpretations may change. At the same time, though, a single source of consistent, authoritative and binding decisions is essential for the development of a stable constitutional jurisprudence and for the effective protection of fundamental rights. *This Court must not easily and without coherent and compelling reason deviate from its own previous decisions, or be seen to have done so.* One exceptional instance where this principle may be invoked is when this Court’s earlier decisions have given rise to controversy or uncertainty, leading to conflicting decisions in the lower courts.

This rhetorical assertion of the importance of clear rules for the maintenance of the rule of law and the adherence to precedent as necessary to ensure legal clarity seems to indicate that the Court is aware of the dangers of the sins it is alleged to have committed in *Chirwa*. However, while it is aware of the dangers, the Court refuses to take full responsibility for the lack of clarity. The Court never directly admits that it made a mistake in at least one of its previous judgments and tries to lay the fault at the doors of ‘the legislature, courts, legal representatives and academics’. De Vos has provocatively remarked: ‘This is a bit cheeky, to say the least, as the Constitutional Court now seems to want to blame others for the balls-up entirely of the Constitutional Court’s own making.’<sup>16</sup> De Vos therefore reads the reference to ‘courts’ in the quote above as a reference to *other* courts, rather than as a (rather muted) *mea culpa* directed at the Constitutional Court itself.

In approaching the two substantive questions, the Court does not declare that *Chirwa* contradicted *Fredericks* and/or overruled it; nor does it adjudge either decision to have been wrong. Instead, in an

<sup>14</sup> *Gcaba* (n 2 above) paras 1-2.

<sup>15</sup> *Gcaba* (n 2 above) para 62 (my emphasis).

<sup>16</sup> P de Vos ‘Constitutional Court tries to fix its own balls-up’ <http://constitutionallyspeaking.co.za/constitutional-court-tries-to-fix-its-own-balls-up/> (accessed 15 January 2010).

uneasy alliance of judges that included some who had earlier dissented in *Chirwa*, the *Gcaba* court fudges the administrative action and jurisdiction questions.

On the question whether the failure to appoint Gcaba is administrative action, Van der Westhuizen J begins with this statement: ‘Generally, employment and labour relationship issues do not amount to administrative action within the meaning of PAJA.’<sup>17</sup> However, this is not an absolute rule. An employment-related issue may be administrative action if it has ‘direct implications or consequences for other citizens’.<sup>18</sup> He again repeats similar reasoning in *Chirwa* to the same effect. He gives the example (in a footnote) of the appointment or dismissal of the commissioner of the SAPS. ‘This decision is taken by the President as head of the national executive and is of huge public import’ and might, therefore, be administrative action.<sup>19</sup>

This approach did at least furnish an easy-to-recite rule to determine when public sector employment issues amount to administrative action: They do not, unless the decision has ‘direct implications or consequences for other citizens’. There are several problems with the Court’s analysis, but it goes beyond the scope of this piece to consider them.

The Court’s approach to jurisdiction is even more opaque, however, as the judgment contains certain *dicta* suggesting that the High Court had jurisdiction to consider Gcaba’s claim, and other statements that pull in the opposite direction.<sup>20</sup> The best reading of the judgment seems to be that the High Court lacked jurisdiction, given the following *dicta*:<sup>21</sup>

If ... the pleadings, properly interpreted, establish that the applicant is asserting a claim under the LRA, one that is to be determined exclusively by the Labour Court, the High Court would lack jurisdiction. An applicant like Mr Gcaba, who is unable to plead facts that sustain a cause of administrative action that is cognisable by the High Court, should thus approach the Labour Court.

And:<sup>22</sup>

The order of the High Court was correct. The applicant’s complaint was essentially rooted in the LRA, as it was based on conduct of an employer towards an employee which may have violated the right to fair labour

<sup>17</sup> *Gcaba* (n 2 above) para 64.

<sup>18</sup> As above. See also para 66.

<sup>19</sup> *Gcaba* (n 2 above) para 68, n 107.

<sup>20</sup> See *Gcaba* (n 2 above) paras 63 & 73-76 respectively.

<sup>21</sup> Para 75.

<sup>22</sup> Para 76.

practices. It was not based on administrative action. His complaint should have been adjudicated by the Labour Court.

However, just like *Chirwa* before it, *Gcaba* has been read by different courts to mean different things. In three subsequent cases, the SCA has seemingly interpreted *Gcaba* to mean that the High Court *does* enjoy jurisdiction in public sector dismissal disputes founded in administrative law.<sup>23</sup> For instance, in *Tshavhungwa v National Director of Public Prosecutions*, Nugent JA held ‘on the basis of *Gcaba*’ that a claim that a public sector dismissal was administrative action ‘is justiciable in the High Court’.<sup>24</sup> At the same time, the High Court has interpreted *Gcaba* to exclude the High Court’s jurisdiction in labour matters.<sup>25</sup>

Should this have surprised the Constitutional Court, which set out in *Gcaba* to clear up the intersectional mess that Hoexter and others have bemoaned? Consider the following paragraph, which appears at the end of the judgment in *Gcaba*:<sup>26</sup>

As stated earlier, this court's decision in *Chirwa* has been interpreted to have ‘overruled’ its previous decision in *Fredericks*, but also as not to have done so. This term was not used in *Chirwa*, however. The distinction between the two cases was pointed out, as indicated earlier. In this judgment the relevant factual and procedural similarities and differences between *Fredericks*, *Chirwa* and *Gcaba* are highlighted. To the extent that this judgment may be interpreted to differ from *Fredericks* or *Chirwa*, it is the most recent authority.

The Constitutional Court seems to acknowledge in this *dictum*, albeit implicitly, that it is once more leaving it to the ‘legislature, courts, legal representatives and academics’ responsible for the pre-*Gcaba* confusion to interpret its judgment. It is left to these mischievous readers to decide whether and, if so, to what extent, *Gcaba* departs from *Fredericks* or *Chirwa*. The paragraph seems to suggest, at best, that *Chirwa* did not overrule *Fredericks*, but only distinguished it; and that *Gcaba* *probably* did not overrule either of those cases. The only thing that we know for sure, though, is that *Gcaba* asserts its own

<sup>23</sup> *City of Tshwane Metropolitan Municipality v Engineering Council of South Africa* (unreported, referred to as [2009] ZASCA 151, 27 November 2009) [http://www.justice.gov.za/sca/judgments/sca\\_2009/sca09-151.pdf](http://www.justice.gov.za/sca/judgments/sca_2009/sca09-151.pdf) para 38; *Mkumatela v Nelson Mandela Metropolitan Municipality* (unreported, referred to as [2009] ZASCA 137, 6 November 2009) [http://www.justice.gov.za/sca/judgments/sca\\_2009/sca09-137.pdf](http://www.justice.gov.za/sca/judgments/sca_2009/sca09-137.pdf) para 15; *Tshavhungwa v National Director of Public Prosecutions* (unreported, referred to as [2009] ZASCA 136, 2 November 2009) [http://www.justice.gov.za/sca/judgments/sca\\_2009/sca09-136.pdf](http://www.justice.gov.za/sca/judgments/sca_2009/sca09-136.pdf) at para 22.

<sup>24</sup> *Tshavungwa* (n 23 above) para 22.

<sup>25</sup> See *Sibeko v Premier for the Province of the Northern Cape* (unreported, referred to as [2009] ZANHC 66, 6 November 2009) <http://www.saflii.org/za/cases/ZANHC/2009/66.html>).

<sup>26</sup> *Gcaba* (n 2 above) para 77.

authority over the earlier judgments. We might more readily accept this if *Gcaba* itself brought clarity to the law. The *Gcaba* court sought to have its cake and eat it – ultimately, however, it was impossible both to bring clear guidance without admitting having erred.

One is left wondering why the court saw fit to champion the role of precedent in maintaining legal certainty and upholding the rule of law, and then to discuss the application of the doctrine in some detail, when the judgment ultimately leaves open the question whether questions of *stare decisis* are even engaged. As I develop in more detail below, we perhaps learn more about the court's attitude to precedent from its obfuscation of the substantive issues in *Gcaba* and its muted refusal to overrule *Chirwa* or *Fredericks* than we do from its explicit *dicta* on the subject – that is, we take more from what the court does *not* say than from what it does. I argue that there is more at play than the court churlishly protecting its pride against confessing any error. It is also too simplistic to dismiss *Gcaba* as mere avoidance and minimalism. Some clues to the court's mysterious behaviour in *Gcaba* - invoking the doctrine of precedent only to ignore it - may be found in other areas of the court's jurisprudence, which I consider in part 5 below.

Some insight into the subject may also be gained from the rather breathtaking decision of the SCA in *True Motives*, to which I now turn. As will be seen, while the Constitutional Court has never stated that any of its earlier decisions was wrongly decided, the SCA has now done exactly that, unabashedly declaring a Constitutional Court decision 'wrong'.

### 3 The *True Motives* of the Supreme Court of Appeal

On the face of it, the ironically-named *True Motives* was concerned with the proper interpretation of legislation governing approval for buildings plans. However, the real storm raging beneath the surface concerned whether the SCA was bound by the earlier decision of the Constitutional Court in *Walele*, which it considered to be wrong. Heher JA delivered the majority decision of the SCA, holding that the SCA was not bound by the relevant Constitutional Court *dicta* because they were wrong and, in any event, *obiter*. Jafta JA, who happened to have authored the majority decision of the Constitutional Court during an acting stint on that court, dissented. Separate judgments were also penned by Cameron JA and Scott JA, responding to some of the contentions advanced by Jafta JA.

In order to understand the debate about whether the SCA was bound by the Constitutional Court decision in *Walele*, it is necessary



briefly to describe the facts and issues in *True Motives* that engaged this question. The second respondent, a local authority, had approved certain building plans submitted to it by the first respondent, proposing alterations to his home. The plans were approved under section 4(1) (which requires local authority approval for buildings and alterations requiring the submission of building plans), read with section 7(1), of the National Building Regulations and Building Standards Act 103 of 1977 (NBR Act). The appellant, the owner of the adjoining erf, unhappy with the look and extent of the alterations being done to the first respondent's home, asked the High Court for a declaratory order to the effect that the second respondent had failed to lawfully approve the building plans as intended in section 6 (which regulates the functions of building control officers) and section 7 of the Act, alternatively for an order setting aside the second respondent's decision to approve the plans. The High Court dismissed the application and granted the appellant leave to appeal to the SCA on the issue of whether or not the second respondent's decision fell to be set aside in the light of a proper interpretation and application of section 7.

The appellant argued that section 7 required a local authority to be satisfied that its approval of a building plan did not result in a building that would diminish (derogate from) the value of a neighbouring property.

The appellant relied on a *dictum* in *Paola v Jeeva NO*,<sup>27</sup> stating that once it was clear that the execution of proposed plans would diminish the value of adjoining property, section 7(1)(b)(ii)(aa)(ccc) would prohibit their approval. This *dictum* had subsequently been quoted with approval by the majority of the Constitutional Court (*per* Jafta AJ) in para 32 of *Walele*. The appellant also relied on a statement in paragraph 55 of *Walele* to the effect that any approval of plans facilitating the erection of a building that devalued neighbouring properties was liable to be set aside on review.

In *True Motives*, Heher JA, Cameron JA and Scott JA all delivered majority judgments attracting four votes. In his judgment, Heher JA stated:<sup>28</sup>

The *dicta* in paras 32 and 63 are in my view not supported by an examination of *Paola v Jeeva* and are, with respect, wrong. As I shall attempt to show, however, they were also delivered *obiter*. Paragraph 55, likewise, I respectfully suggest, contains wrong statements of the law and is also *obiter*.

<sup>27</sup> 2004 1 SA 396 (SCA).

<sup>28</sup> *True Motives* (n 5 above) para 35.

Heher JA proceeded to consider the reasoning of the Constitutional Court in *Walele* in relation to the specific *dicta* relied upon by the appellant, concluding that they were all merely *obiter dicta*, but adding that they were also wrong in law.<sup>29</sup> Having rejected the appellant's first submission, which relied upon *Walele*, Heher JA ultimately dismissed the appeal.

Jafta JA dissented on two grounds. First, he held that the interpretation advanced by the majority was based on a literal approach, which defeats the purpose of section 7(1)(b)(ii) and does not comply with the obligation imposed on courts by section 39(2) of the Constitution. Secondly, he held (in paragraph 64) that the SCA was bound by the Constitutional Court's decision in *Walele*. Jafta JA held that the SCA was bound by decisions of the Constitutional Court on constitutional matters even if it considers them wrong:<sup>30</sup>

According to the doctrine of judicial precedent, this court is bound to follow decisions of the Constitutional Court on constitutional issues. In particular this court is bound by the interpretation given by the Constitutional Court to s 7(1)(b)(ii) in *Walele*, regardless of whether in its view such interpretation is correct or not. For even wrong decisions of the Constitutional Court are binding on this court until they are set aside by that court.

On the facts, Jafta JA found that, in any event, the appellant had not established that the erection of the building concerned had derogated from the value of its property. He would therefore also have dismissed the appeal.

Cameron JA, who concurred in the judgment of Heher JA, also wrote separately, speaking specifically to the question of precedent. The thrust of Cameron JA's reasoning is that the contentious *dicta* in *Walele* were not part of the *ratio decidendi* of the case, but mere *obiter dicta*, on the basis that<sup>31</sup>

[t]he doctrine [of precedent] obliges courts of equivalent status and those subordinate in the hierarchy to follow only the binding basis of a previous decision. Anything in a judgment that is subsidiary is considered to be 'said along the wayside', or 'stated as part of the journey' (*obiter dictum*), and is not binding on subsequent courts.

Cameron JA describes Jafta JA's claim that the majority was failing to respect the doctrine of precedent as 'a grave charge'.<sup>32</sup> He acknowledged that the Constitutional Court was the highest court in

<sup>29</sup> *True Motives* (n 5 above) paras 36-39.

<sup>30</sup> *True Motives* (n 5 above) para 80.

<sup>31</sup> *True Motives* (n 5 above) para 101.

<sup>32</sup> *True Motives* (n 5 above) para 102.

constitutional matters (Constitution section 167(3)(a)); and that it is also the final arbiter of whether a matter is a constitutional matter (section 167(3)(c)). Accordingly, other courts, including the SCA, must follow the binding basis of its decisions in all cases in which it has assumed jurisdiction (paragraph 102), but not mere *obiter dicta*:

The views the CC expressed on that point, though persuasive as coming from the highest court in the land on constitutional matters (a jurisdiction exercised in *Walele*), are therefore not automatically binding on other courts, nor on the CC itself, which will be free to reconsider the matter should it arise in that form before it. Presumably, the CC will in such a case have the benefit of the argument the amicus advanced before us, as well as of Heher JA's elucidation of the decision in *Paola v Jeeva*, whose expression seems to me to have been the source of much trouble in both *Walele* and this case.

It follows that, despite the high authority a considered expression of opinion by the country's highest court in constitutional matters should enjoy, I consider that this court is free, with proper deference to the Constitutional Court, and with fidelity to the rule of law, to endorse the approach the amicus advocated.<sup>33</sup>

Scott JA, who formed part of the majority, also wrote a brief concurrence, defending what Jafta JA described as the 'literal' interpretation of the relevant provisions and contending that there was nothing constitutionally untoward about such an interpretation.<sup>34</sup>

*True Motives* brushed up against, but managed to avoid confronting directly, an especially controversial constitutional question: whether decisions of the Constitutional Court are binding (on that court, the SCA and other courts) if clearly wrong. The SCA managed to avoid answering this question by holding that the problematic *dicta* in *Walele* were *obiter*. As Cameron JA noted, the Constitutional Court has been criticised recently for ignoring some of its own precedents.<sup>35</sup>

#### 4 (Addendum) from beyond the *Walele* grave

In a judgment delivered shortly before this piece was finalised, the spectre of *Walele* – and the SCA's remarkable *dicta* that the Constitutional Court had erred in this case – reappeared before the Constitutional Court. In *Camps Bay Ratepayers' and Residents'*

<sup>33</sup> *True Motives* (n 5 above) paras 116-117.

<sup>34</sup> *True Motives* (n 5 above) para 121.

<sup>35</sup> Cameron JA referred (para 103, fn 3) to W Freedman 'Constitutional application' (2008) 21 *South African Journal of Criminal Justice* 134-141; and, for general criticism bearing on the Court's fidelity to law, to S Woolman 'The amazing, vanishing Bill of Rights' (2007) 124 *South African Law Journal* 762-764.

*Association and Another v Harrison and Another*,<sup>36</sup> the applicants argued that the Court was required to resolve the uncertainty about the proper interpretation of section 7(1) of the Building Act as interpreted in *Walele* and *True Motives*. The applicants contended that such uncertainty is inimical to the principles of sound public administration and more particularly to the correct and uniform application of the statutory provisions involved.<sup>37</sup>

Although, as I recount below, the Constitutional Court ultimately – and yet again – avoided confronting this question, it did make certain remarks about the doctrine of precedent which De Vos has described as a sermon on *stare decisis* and interpreted as an ‘extraordinary and pointed slap-down of the SCA’.<sup>38</sup> Brand AJ wrote for a unanimous Constitutional Court that now included both Jafta and Cameron JJ, who were previously key players in the *Walele / True Motives* episode.<sup>39</sup> The choice of Brand AJ, an acting judge from the SCA, to write the judgment, is itself an interesting one. Brand AJ makes some general comments about the doctrine of precedent – without any explicit criticism of the SCA – emphatically endorsing the doctrine and its application to all courts:<sup>40</sup>

The doctrine of precedent not only binds lower courts but also binds courts of final jurisdiction to their own decisions. These courts can depart from a previous decision of their own only when satisfied that that decision is clearly wrong. *Stare decisis* is therefore not simply a matter of respect for courts of higher authority. It is a manifestation of the rule of law itself, which in turn is a founding value of our Constitution. To deviate from this rule is to invite legal chaos.

Brand AJ notes that the doctrine of precedent may come into tension with the section 39(2) duty to develop the common law, but since *Walele* was not pre-constitutional case law, that problem did not arise.<sup>41</sup> Then comes the passage that De Vos interprets as a ‘slap-down’:<sup>42</sup>

Of course, it is trite that the binding authority of precedent is limited to the *ratio decidendi* (rationale or basis of deciding) and that it does not

<sup>36</sup> [2010] ZACC 19 (unreported, decided on 4 November 2010).

<sup>37</sup> Para 26.

<sup>38</sup> P de Vos ‘Braamfontein = 1; Bloemfontein = 0’ *Constitutionally Speaking*, 8 November 2010 <http://www.constitutionallyspeaking.co.za> (accessed 31 March 2011).

<sup>39</sup> It will be recalled that Jafta AJ penned the Constitutional Court’s decision in *Walele*, which a majority of the Supreme Court of Appeal in *True Motives* (n 5 above), including Cameron J, declared to have been wrongly decided (and in any event, *obiter*). Jafta J, having returned to the SCA from his acting stint in the Constitutional Court, dissented in *True Motives*.

<sup>40</sup> Para 28.

<sup>41</sup> Para 29.

<sup>42</sup> Para 30.

extend to *obiter dicta* or what was said ‘by the way’. But the fact that a higher court decides more than one issue in arriving at its ultimate disposition of the matter before it does not render the reasoning leading to any one of these decisions *obiter*, leaving lower courts free to elect whichever reasoning they prefer to follow. It is tempting to avoid a decision by higher authority when one believes it to be plainly wrong. Judges who embark upon this exercise of avoidance are invariably convinced that they are ‘doing the right thing’. Yet, they must bear in mind that unwarranted evasion of a binding decision undermines the doctrine of precedent and eventually may lead to the breakdown of the rule of law itself. If judges believe that there are good reasons why a decision binding on them should be changed, the way to go about it is to formulate those reasons and urge the court of higher authority to effect the change. Needless to say, this should be done in a manner which shows courtesy and respect. Not only because it relates to a higher court but because collegiality and mutual respect is owed to all judicial officers, whatever their standing in the judicial hierarchy.

It is hard to read the references to temptation and ‘unwarranted evasion’ and the instruction on how courts should correctly approach precedents that they consider wrong other than as an indictment of the SCA in *True Motives*. However - and perhaps ironically - these comments appear to be *obiter*, as Brand AJ ultimately concluded, that *Camps Bay Ratepayers Association* engaged a different subsection to that in issue in *Walele* and *True Motives*. He therefore declined – and probably correctly so – to reconsider the Court’s interpretation of the provision engaged by those cases and also held that it was not in the interests of justice to decide whether the SCA was correct in its approach to *Walele* in *True Motives*.<sup>43</sup>

*Camps Bay Ratepayers’ Association* therefore does two things. It sounds a not-so-subtle warning to the SCA to respect decisions of the Constitutional Court. And, in the same breath, it reminds the SCA that the Constitutional Court will always have the final say by controlling the gatekeeper principles governing jurisdiction.<sup>44</sup> As De Vos notes, ‘in the end, this is not a fight [the SCA] can ever win’.<sup>45</sup> Ultimately, however, just as in *Gcaba*, the Constitutional Court again invokes the doctrine of precedent but declines to apply it. In order to try to understand why the Court does so, it is necessary to consider its approach to precedent over the years, to which I now turn.

<sup>43</sup> Para 47 (original footnotes omitted).

<sup>44</sup> The original jurisdictional tussle between the SCA and the Constitutional Court was resolved in *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the RSA & Others* 2000 2 SA 674 (CC).

<sup>45</sup> De Vos (n 38 above).

## 5 The Constitutional Court's approach to precedent: An overview

### 5.1 An introduction to the doctrine of precedent

*Gcaba* and *True Motives* thus set the scene for us to consider the Constitutional Court's approach to precedent and what these judgments tell us about the future. It is useful, before analysing the route followed by the Constitutional Court, to take two steps back: first, to remind ourselves how the courts – and in particular the Appellate Division – approached the doctrine of precedent in the pre-constitutional era; and, secondly, to consider the Constitutional Court's initial, tentative *dicta* on precedent.

The doctrine of precedent is often expressed by the Latin maxim *stare decisis et non quieta movere* ('to stand by decisions and not to disturb settled matters').<sup>46</sup> The essence of the doctrine may be captured in the rule that a court is bound by the previous decisions of a higher court and by its own previous decisions in similar matters,<sup>47</sup> which is qualified by the following sub-rules:

(1) One High Court is not bound by another. Provincial and local divisions are bound by decisions made within their own territorial areas of jurisdiction, and not by other provincial and local divisions of the High Court. However, these courts are bound by the decisions of the Supreme Court of Appeal and the Constitutional Court.<sup>48</sup>

(2) It is only the *ratio decidendi* or reason for the decision that is binding.<sup>49</sup> Thus, decisions on questions of fact are not binding,<sup>50</sup> but when a decision is such that legal consequences follow from certain facts, the decision will be binding when similar facts are raised.<sup>51</sup>

(3) Courts equal in status can depart from an earlier decision only when the court which determined it before clearly erred.<sup>52</sup>

<sup>46</sup> *Gcaba* (n 2 above) para 58.

<sup>47</sup> As above.

<sup>48</sup> LAWSA para 287.

<sup>49</sup> *R v Nxumalo* 1939 AD 580 586; *Fellner v Minister of the Interior* 1954 4 SA 523 (A) 537. As to the meaning of the term, see *Collett v Priest* 1931 AD 290 302; *Pretoria City Council v Levinson* 1949 3 SA 305 (A) 317; *McNally v M & G Media (Pty) Ltd* 1997 3 All SA 584 (W); 1997 6 BCLR 818 (W); *KBI v Willers* 1994 3 SA 283 (A) 331F. *R v Wells* 1949 3 SA 83 (A) 87-88; *Khupa v SA Transport Services* 1990 2 SA 627 (W) 636.

<sup>51</sup> *Shepherd v Mossel Bay Liquor Licensing Board* 1954 3 SA 852 (C). See also *R v Manasewitz* 1933 AD 165 180; *R v Faithfull & Gray* 1907 TS 1077 1081; *Bloemfontein Town Council v Richter* 1938 AD 195 232; *Harris v Minister of the Interior* 1952 2 SA 428 (A) 452; *S v Nienaber* 1976 2 SA 147 (NC).

<sup>52</sup> *Collett v Priest* 1931 AD 290 297; *R v Du Preez* 1943 AD 562 583; *Robin Consolidated Industries Ltd v Commissioner for Inland Revenue* 1997 2 All SA 195 (A); 1997 3 SA 654 (SCA) 666F-H.

(4) The SCA and the Constitutional Court are also bound by their own decisions, unless they have clearly erred.<sup>53</sup>

## 5.2 The Constitutional Court's retention of the doctrine of precedent

In a statement seemingly designed to tempt fate, the authors of LAWSA prophesied that '[t]here is no reason to expect that the Constitutional Court will in future in respect of its own previous judgments in the application of the *stare decisis* rule adopt an approach different from that of the Supreme Court of Appeal'.<sup>54</sup>

And the Constitutional Court indeed professed its commitment to the doctrine right at the outset in the *Certification* judgment,<sup>55</sup> where it stated: 'The sound jurisprudential basis for the policy that a court should adhere to its previous decisions unless they are shown to be clearly wrong is no less valid here than is generally the case.'<sup>56</sup>

As noted by van der Westhuizen J in *Gcaba*,<sup>57</sup> the court in *Van der Walt v Metcash*<sup>58</sup> emphasised the merit of legal certainty and the like treatment of similarly situated litigants.<sup>59</sup> Furthermore, in a minority judgment in *Daniels v Campbell*,<sup>60</sup> Moseneke J, reiterating the *dicta* in *Van der Walt*, reasoned that the doctrine of precedent, an incident of the rule of law, advances justice by ensuring certainty of law, equality, equal treatment and fairness before the law. He stated further that, to that end, the doctrine imposes a general obligation on a court to follow legal rulings in previous decisions.<sup>61</sup> Moseneke J acknowledged the recognised exceptions to the *stare decisis* principle, namely, 'where the court is satisfied that its previous decision was wrong or where the point was not argued or where the issue is in some legitimate manner distinguishable'.<sup>62</sup>

<sup>53</sup> *Robin Consolidated Industries Ltd v Commissioner for Inland Revenue* 1997 3 SA 654 (SCA) at 666F-G.

<sup>54</sup> LAWSA para 168, citing *Ex parte Minister of Safety & Security: In re: S v Walters* 2002 7 BCLR 663 (CC); 2002 4 SA 613 (CC) 646; *Afrox Healthcare Bpk v Strydom* 2002 4 All SA 125 (SCA); 2002 6 SA 21 (SCA) 38F-40F.

<sup>55</sup> *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of the Republic of South Africa*, 1996 1997 2 SA 97 (CC); (1997 1 BCLR 1.

<sup>56</sup> n 55 above, para 8.

<sup>57</sup> *Gcaba* (n 2 above) para 58.

<sup>58</sup> *Van der Walt v Metcash Trading Limited* [2002] ZACC 4; 2002 5 BCLR 454 (CC); 2002 4 SA 317 (CC).

<sup>59</sup> *Van der Walt* (n 58 above) para 39.

<sup>60</sup> *Daniels v Campbell NO & Others* [2004] ZACC 14; 2004 7 BCLR 735 (CC); 2004 5 SA 311 (CC).

<sup>61</sup> *Daniels* (n 60 above) para 94.

<sup>62</sup> *Daniels* (n 60 above) para 95.

So, at least in theory, the more things changed with the advent of the Constitution, the more they remained the same as concerned the doctrine of precedent. In practice, however, the approach of the Constitutional Court to the doctrine of precedent marked a decisive break from the previous approach. In some respects, the Constitution itself directed, or at least empowered, courts to depart from pre-constitutional precedents. The approach of the Constitutional Court to pre-constitutional jurisprudence and to instances in which the final Constitution was amended deliberately to depart from the provisions of the interim Constitution thus constitutes the ‘easy’ case of precedent.

Where the Court was faced with one of its own decisions, the techniques of judicial avoidance and distinguishing cases allowed the Court to avoid questions around precedent by marking the cases before them as ‘different’. Eventually, however, in *Gcaba*, the Court had to confront (at least the notional existence of) the ‘hard’ case – where a precedent directly on point stood in its way. In the future, as our constitutional system matures, the Court is likely also to have to face the question how to approach prior decisions where the socio-political or economic circumstances underpinning them have changed substantially over time.

The Court’s approach to precedent can therefore be traced over time and in relation to these different scenarios.

### ***5.2.1 The easy case: Pre-constitutional jurisprudence and constitutional amendments***

Where the text of the Constitution explicitly or by necessary implication authorises courts to depart from precedent, the courts are confronted by an ‘easy’ case in respect of the doctrine of precedent. There are at least three examples of the easy case. First, the adoption of the Constitution brought an injunction to courts to develop the common law in terms of section 39 of the Constitution to bring it in line with the spirit, purport and objects of our basic law.<sup>63</sup> Secondly, the transition from the interim Constitution to the final Constitution involved certain significant amendments to the text, which necessitated a change in approach by the Court. A notable example of this is perhaps in relation to the horizontal application of

<sup>63</sup> For an example of the development of the common law in terms of sec 39(2) in the context of vicarious liability, see *K v Minister of Safety and Security* 2005 6 SA 419 (CC).



the Constitution.<sup>64</sup> Thirdly, other (ordinary) constitutional amendments notionally provide a basis for changed interpretations and approaches to the text.<sup>65</sup> Technically, the second and third instances cited above do not engage the doctrine of precedent, as courts are not faced with earlier judicial decisions but rather with interpreting newly adopted constitutional provisions.

### 5.2.2 The 'different' case: Avoidance and distinctions

As a body of jurisprudence began to emerge, it was inevitable that parties appearing before the Constitutional Court would contend that the Court had already decided an issue – and was bound by its earlier decision.

Sometimes, distinctions will be easily drawn. However, there are cases in which the question of distinguishing a prior case is fraught and contentious. An example is the attempts in *Kaunda and Others v President of the Republic of South Africa and Others*<sup>66</sup> to distinguish the Court's earlier decision in *Mohamed v President of the Republic of South Africa*.<sup>67</sup> The following passage from O'Regan J who, in my view, had the better of this argument, sets out the basis on which it is argued that the majority (*per* Chaskalson CJ) erred in trying to distinguish *Mohamed*:<sup>68</sup>

The Chief Justice rejects this argument and distinguishes *Mohamed* on the basis that the action of the state officials in that case had been unlawful and wrongful. He points to the fact that the exchange of information in this case is lawful, and indeed, a failure to pass information of a suspected *coup* to another state might constitute a breach of South Africa's international law obligations. Accordingly, the Chief Justice concludes that as the state officials had not acted unlawfully or wrongfully, the reasoning in *Mohamed* was not relevant.

<sup>64</sup> Compare *Du Plessis & Others v De Klerk & Another* 1996 3 SA 850 (CC), holding that the interim Constitution did not generally apply horizontally; and *Khumalo & Others v Holomisa* 2002 5 SA 401 (CC), developing an approach to the horizontal application of the final Constitution. However, see D Moseneke 'Transformative constitutionalism: Its implications for the law of contract' (2009) 20 *Stellenbosch Law Review* 3 8, arguing that *Khumalo* did not overrule *Du Plessis*.

<sup>65</sup> See *United Democratic Movement v President of the Republic of South Africa & Others (African Christian Democratic Party & Others Intervening; Institute for Democracy in South Africa & Another as Amici Curiae)* (No 2) 2003 1 SA 495 (CC) (*UDM*). Although the Court had not previously considered floor-crossing prior to the challenge to the constitutional amendment in *UDM*, other courts had done so. The effect of the amendment was to denude those decisions of any precedential force, as the question in *UDM* then became the constitutionality of the impugned amendment.

<sup>66</sup> 2005 4 SA 235 (CC).

<sup>67</sup> 2001 3 SA 893 (CC) (2001 2 SACR 66; 2001 7 BCLR 685).

<sup>68</sup> *Kaunda* (n 66 above) paras 252-254.

[253] In my respectful opinion, this is not a valid basis upon which to distinguish that case. On my reading of *Mohamed*, it is clear that the Court would have held that there was an obligation upon the state to seek assurances that the death penalty would not be imposed or, if imposed, not carried out even were the extradition to have been otherwise lawful ...

[254] Nor, on my reading of *Mohamed*, can the facts in that case and this be distinguished on the basis that all the relevant facts took place in South Africa, for as in the case at hand, the application to this Court was only made after Mr Mohamed had arrived in the United States. Nor can the facts be distinguished on the ground that the applicants left voluntarily, for in *Mohamed* too, the Court was willing to accept that Mr Mohamed had consented to his removal from South Africa.

Although O'Regan J herself ultimately distinguished *Mohamed* (on another basis), this passage reveals that the majority's attempts to do so were, at the very least, strained.

### **5.2.3 *The hard case: Fallibility and the power to overrule previous decisions***

The Court in *Gcaba* and previously has confirmed unequivocally that it has the power to find that it erred in a previous decision and so to depart from that precedent. If the power exists, the Court must recognise that such cases can and will arise.

The 'hard' case arguably did arise in *Gcaba*. On most people's analysis, the Court had contradicted itself in *Chirwa* and *Fredericks*. *Gcaba* presented an opportunity for the Court to declare that it had erred in one of the cases – most likely *Fredericks* – and expressly overrule it. Instead, the Court approached *Gcaba* as a 'different' case.

### **5.2.4 *Changing circumstances***

One tantalising question that has not yet been directly considered by the Court is whether, if circumstances change sufficiently after a decision is reached, the Court could or would overrule or revisit its earlier decision.

An example of a case where this argument was attempted by a party is *Glenister v President of Republic of South Africa and Others*.<sup>69</sup> In that matter, the United Democratic Movement argued that since the separation of powers doctrine is dynamic, it should be adapted to the prevailing conditions (in which, it argued, there

<sup>69</sup> 2009 1 SA 287 (CC).

was a danger of ‘one-party domination’) and accommodate institutional developments that have crucially shifted the balance of power between the branches of government.<sup>70</sup> The relative marginalisation of the legislature, argued the UDM, has a disastrous impact on the ability of opposition parties to make their voices heard in policy formulation. The UDM urged the court to ‘act as a counterweight if the ruling party overreaches itself and, it contend[ed], if the court does not act, it is unlikely anyone else will’.<sup>71</sup> The Court did not directly consider whether changing circumstances justify overturning precedent, but its *dicta* in rejecting the UDM’s argument seem to suggest an ‘originalist’ view of its powers as frozen in time at the adoption of the Constitution: ‘The role of this court is established in the Constitution. It may not assume powers that are not conferred upon it.’<sup>72</sup>

Justice Sachs, writing extra-curially, has suggested the opposite view, however, saying:<sup>73</sup>

To the extent that the community’s understanding of the law needs constantly to evolve, I might be aware that a particular position I am advancing could be ahead of what most members of that community regard as correct. Nevertheless I will put my name to it because my judicial conscience tells me that the need for change has ripened.

It remains to be seen whether the Court will ever explicitly assert that it is departing from a decision because of a change in the underlying social, political or economic circumstances. If *Gcaba* and the other decisions discussed here are indicative of a view, the Court is much more likely simply to distinguish the new case on the basis of new facts.

### 5.2.5 *The strange case of the Sachsian concurring dissent/ dissenting concurrence*

Although the approach cannot be attributed to the entire Constitutional Court or even a majority of the judges, it is useful to consider the surprising phenomenon of certain minority judgments of Sachs J in which he agrees with both sides of an already divided Court.<sup>74</sup>

<sup>70</sup> *Glenister* (n 69 above) para 22.

<sup>71</sup> As above.

<sup>72</sup> *Glenister* (n 69 above) para 55.

<sup>73</sup> A Sachs *The strange alchemy of life and law* (2009) 145.

<sup>74</sup> In addition to the cases discussed in more detail below, see also the judgment of Sachs J in *Kaunda* (n 66 above) (especially para 275). In addition, although ultimately concurring with only one side of a split court, see also the judgments

In *Sidumo v Rustenberg Platinum Mines*,<sup>75</sup> the majority of the Constitutional Court, *per* Navsa AJ, held that the review of CCMA awards does constitute administrative action, is not subject to PAJA review, but is now infused by the standard of ‘reasonableness’ contained in section 33 of the Constitution. Ngcobo J dissented, holding that the review of administrative action is not administrative conduct, but judicial, and is accordingly subject to the requirements of the right of access to courts in section 34 of the Constitution, which guarantees a ‘fair public hearing’.

Justice Sachs filed the following separate judgment, which can be characterised as a concurring dissent or a dissenting concurrence:

[146] I find myself in the pleasant but awkward position of agreeing with colleagues who disagree with each other. In my view the rationale of each of their judgments is essentially the same, even though they are framed in different conceptual matrices. Employing almost identical processes when weighing the facts they unsurprisingly arrive at the same outcome. This concurrence of result comes about not through happenstance, but because *in substance, though not in form, they concur on the context, interests and values* involved. Both judgments are animated by the same goal, which is to determine in a constitutionally proper way the standard of conduct that can be expected of a public official arbitrating a labour dispute in an open and democratic society based on human dignity, equality and freedom. I would add that, formal trappings aside, *it is difficult to see how a reasonable commissioner can act unfairly, or a fair commissioner can function unreasonably* (emphasis added).

If there exists a conceptual stratosphere of legal reasoning, with ‘values’ and ‘rules’ at either extreme and ‘principles’ perhaps in between, the constituent arguments that underpin disputes can engage at these different levels of this stratosphere. Most simply, one might depict this stratosphere of reasoning thus:

of Sachs J in *NM & Others v Smith & Others (Freedom of Expression Institute as Amicus Curiae)* 2007 5 SA 250 (CC) and *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services: In re Masetlha v President of the Republic of South Africa & Another* 2008 5 SA 31 (CC) (especially para 152).

<sup>75</sup> *Sidumo & Another v Rustenburg Platinum Mines Ltd & Others* [2007] 12 BLLR 1097 (CC).

<b>Values</b>	<i>Equality, dignity, freedom,</i>
<b>Principles</b>	<i>Fairness, reasonableness rationality, pacta sunt servanda</i>
<b>Legal rules</b>	<i>CCMA awards are reviewable under administrative law</i>

Justice Sachs is a proponent of an approach that prefers abstracting legal disputes to the level of foundational values. In *Sidumo*, he said:

[150] The Bill of Rights does specifically identify a number of rights for special constitutional protection. Each is independently delineated, reflecting historical experience pointing to the need to be on guard in areas of special potential vulnerability and abuse. Each has produced an outgrowth of specialist legal learning. Yet enumerating themes for dedicated attention does not presuppose or permit detaching the listed rights from the foundational values that nurture them. *Nor does it justify severing the rights from the underlying values that give substance and texture to the Constitution as a whole. On the contrary, in a value-based constitutional democracy with a normative structure that is seamless, organic and ever-evolving, the manner in which claims to constitutional justice are typified and dealt with, should always be integrated within the context of the setting, interests and values involved.*

A similar approach allowed Justice Sachs to deliver another dissenting concurrence/concurring dissent in *Minister of Finance v Van Heerden*.<sup>76</sup>

*Paradoxical as it may appear, I concur in the judgment of Moseneke J on the one hand, and the respective judgments of Ngcobo J and Mokgoro J, on the other, even though they disagree on one major issue and arrive at the same outcome by apparently different constitutional routes. As I read them, the judgments appear eloquently to mirror each other. In relation to philosophy, approach, evaluation of relevant material and ultimate outcome, they are virtually identical. In relation to starting point and formal road travelled, they are opposite. The majority judgment comes to the firm conclusion that the composition of the new Parliament overwhelmingly pointed to members having been disadvantaged by race discrimination and political affiliation, and therefore started and finished its enquiry within the framework of the affirmative action provisions of s 9(2). The two minority judgments balked at the idea of categorising the new parliamentarians as disadvantaged by discrimination, and started and completed their analysis within the non-discrimination provisions of s 9(3). In my view it is no accident that even though they started at different points and*

<sup>76</sup> 2004 6 SA 121 (CC).

*invoked different provisions they arrived at the same result. Though the formal articulation was different the basic constitutional rationale was the same. I agree with this basic rationale. I would go further and say that the core constitutional vision that underlies their separate judgments suggests that the technical frontier that divides them should be removed, allowing their overlap and commonalities to be revealed rather than to be obscured. If this is done, as I believe the Constitution requires us to do, then the apparent paradox of endorsing seemingly contradictory judgments is dissolved. Thus, I endorse the essential rationale of all the judgments, and explain why I believe that the Constitution obliges us to join together what the judgments put asunder.*

The striking consequence of the approach of arguing at a level of values is that, suddenly, specific legal rules seem to disappear! This includes the doctrine of precedent, which is rendered irrelevant by an approach such as that of Sachs J in *Sidumo* and *Van Heerden* because the rule-bound ratio of the judgment evaporates and is replaced by value-based, largely *ad hoc* reasoning. Sachs J has issued similar judgments seeking to build a bridge over a split court in several other cases.<sup>77</sup>

As noted above, this approach has not been adopted by other members of the Court, at least not in such extreme and explicit form. Sachs J is also unique among the judges of the Court in having articulated his own theory of judging publicly and in considerable detail.<sup>78</sup> But, I will suggest below, Sachs J's concurring dissents/dissenting concurrences are not entirely inconsistent with certain judicial habits of the Court as a whole.

What Sachs J has done in articulating a theory of judging and in emphasising the underlying values of the Constitution in his judgments is to encourage us to place individual cases within the paradigm of the entire body of our constitutional jurisprudence - to see the bigger picture. Commentators seeking to explain this bigger picture have usefully employed certain metaphors. In the next section, I examine those metaphors and the role of precedent in each.

## **6 Trees, bridges, rainbows and roads: The development of constitutional jurisprudence**

The Constitutional Court's approach to precedent is about much more than simply calibrating a legal rule to apply to determine when it may depart from its decisions. It speaks to the very trajectory and growth

<sup>77</sup> See *Kaunda* (n 66 above); *NM* (n 73 above); *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services: In re Masetlha v President of the Republic of South Africa & Another* 2008 5 SA 31 (CC).

<sup>78</sup> Sachs (n 73 above).

of our constitutional jurisprudence as a whole. This broader subject has found expression in a number of metaphors for the development of our constitutional jurisprudence. I intend to examine three of those metaphors – the tree, bridge and rainbow – and to ask where precedent fits into each.

## 6.1 The ‘living tree’

In Canadian law, the ‘living tree doctrine’ of constitutional interpretation says that a constitution is organic and must be read in a broad and progressive manner so that it may adapt it to the changing times. The doctrine was entrenched in *Edwards v Canada (Attorney-General)*, also referred to as the *Persons Case*,<sup>79</sup> in which Lord Sankey said: ‘The British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits.’

Although the ‘living tree’ doctrine has not yet been affirmed in judicial decisions – and is only referred to somewhat more literally in certain forestry legislation<sup>80</sup> – it has been considered by some academic commentators. Weinrib has even found traces of the doctrine in the reasoning of Schreiner J under the pre-democratic constitution.<sup>81</sup> As she explains the doctrine, it certainly finds some resonance with the South African constitutional condition.<sup>82</sup>

Canadian commentators understand the living tree metaphor to connote progressive interpretation - a way to keep the constitution current and relevant as society changes. But trees mark stability and continuity in human life, not change or progress. It is for this reason that they stand as favourite symbols of law in many cultures. The metaphor is appropriate to constitutional interpretation because it connotes organic growth. For a constitution to grow as a living tree, its interpretation must continue to fulfil the basic principles of constitutionalism, in a diverse and liberal society. The constitution’s supremacy safeguards the fundamental values of national life, including full civic engagement beyond the bounds of family, racial or linguistic groups, or gender. Constitutions must be rooted in the past, as Schreiner understood, but they must also leave behind those traditions and customs that, as time passes, become inimical to our basic commitment to personal autonomy and equality.

Weinrib therefore emphasises not merely the aspect of the ‘tree’ metaphor that represents the progressive growth of jurisprudence, but its conservative, historical attributes: the linking of current

<sup>79</sup> [1930] AC 124.

<sup>80</sup> National Forests Act 84 of 1998.

<sup>81</sup> LE Weinrib ‘Sustaining constitutional values: The Schreiner legacy’ (1998) 14 *South African Journal on Human Rights* 351.

<sup>82</sup> Weinrib (n 81 above) 371.

decisions to existing precedent and to what she describes as ‘the basic principles of constitutionalism’.

Although the ‘living tree’ has not been adopted in our jurisprudence, the justices of the Constitutional Court did adopt the image of a tree as the logo of the Court. The Court’s official website states that the logo depicts ‘people sheltering under a canopy of branches – a representation of the Constitution’s protective role and a reference to a theme that runs through the Court, that of justice under a tree’.<sup>83</sup>

In the traditional Canadian metaphor of the ‘living tree’, precedent plainly exists all the way up and throughout the tree, from the earliest cases constituting the roots – perhaps cases such as the *Certification* judgment, *Makwanyane* and *Grootboom* – to the most recent that lie at the outermost branches of the tree. Ours is still a relatively young tree with fairly shallow roots and only the beginnings of branches in some areas of constitutional law. *Gcaba* is an example of a case dealing with precedents that lie, not in the roots or even the trunk, but nearby on the very same branch. In time, however, the Court is likely to confront issues that engage some of its earliest and most ground-breaking decisions, for example if – as is sometimes mooted by political parties – a constitutional amendment were to seek to reintroduce the death penalty. Such a case would wrench the very roots of the tree.

<sup>83</sup> While it may not have adopted the ‘tree’ metaphor in its judgments, the justices of the Constitutional Court adopted and adapted the metaphor in their choice of an official logo for the Court. The first icon of the Constitutional Court, a plaque depicting its logo, was unveiled by President Nelson Mandela on 14 February 1995, the day of the Court’s inauguration. See <http://www.constitutionalcourt.org.za/site/thecourt/thelogo.htm>. The logo is depicted thus:



The idea comes from traditional African societies: This was where people would meet to resolve disputes. The website attributes to Justice Sachs the comment that the logo was intended to reveal the Court’s ‘ethos and culture as a source of protection for all’. It needed to convey the Court’s place in Africa and the Constitution’s historical roots in the struggle for human rights. And it needed to be infused with the spirit of a new democracy. Of course, in the Court’s logo, the ‘tree’ strictly represents the Court, rather than its jurisprudence. Interestingly, according to Sachs J, the Court as a tree finds its roots not in existing statute and case law/precedent, but in ‘the struggle for human rights’.



## 6.2 The 'historic bridge'

In a prescient piece of writing at the birth of the interim Constitution, Etienne Mureinik described the Constitution as a 'bridge' away from a 'culture of authority' to a 'culture of justification'.<sup>84</sup> Mureinik drew on the Epilogue to the interim Constitution, which provided that the Constitution is

a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.

In *Azanian Peoples Organisation (AZAPO) and Others v President of the Republic of South Africa and Others*,<sup>85</sup> Mahomed DP commented on the importance of amnesty to the effectiveness of this bridge:

Both the victims and the culprits who walk on the 'historic bridge' described by the epilogue will hobble more than walk to the future with heavy and dragged steps, delaying and impeding a rapid and enthusiastic transition to the new society at the end of the bridge, which is the vision which informs the epilogue.

Former Chief Justice Pius Langa has acknowledged the criticism by some scholars of the bridge metaphor in that it seems to suggest that transformation is a temporary event, that at some point we will reach the other side of the bridge and that transformation then ends because we have reached our desired destination.<sup>86</sup> He notes that we might instead<sup>87</sup>

view the bridge of the interim Constitution as a space between an unstable past and an uncertain future. There is no preference for one side over the other, rather, the value of the bridge lies in remaining on it, crossing it over and over to remember, change and imagine new and better ways of being.

In similar vein, Davis and Le Roux have sought to develop the metaphor of the bridge:<sup>88</sup>

The rich metaphor of the bridge needs to be extended beyond its current use as offered by Mureinik. The bridge also represents the model of

<sup>84</sup> E Mureinik 'A bridge to where? Introducing the interim Bill of Rights' (1994) 10 *South African Journal on Human Rights* 32.

<sup>85</sup> 1996 4 SA 671 (CC) para 18.

<sup>86</sup> P Langa 'Transformative constitutionalism' (2006) 3 *Stellenbosch Law Review* 351-354.

<sup>87</sup> Langa (n 86 above) 354.

<sup>88</sup> D Davis & M le Roux *Precedent and possibility: The (ab)use of law in South Africa* (2009) 7.

transformation that was followed in South Africa. There was no revolution, no violent rupture from the past. The old was, in many instances, to remain although the substance of the old would be changed in incremental stages. The path of negotiated evolution rather than violent, sudden revolution can be illustrated by the manner in which the bridge was constructed.

This bridge, the authors explained, was to be created mostly by bridge builders who were fluent in the old legal traditions and the only tools available to them would be our inherited legal traditions and a constitutional mandate to engage in the reconstruction of these traditions.<sup>89</sup> And precedent, for Davis and Le Roux, was to play a key role in the construction of the bridge.<sup>90</sup>

The dominant conception of the common law is that of a timeless, universal body of truth inherited from the days of the Dutch occupation of the Cape. Through this, precedent retains its tenacious hold on progress as courts, in the main, follow decisions handed down in the distant past. A court is not free to decide a case without constraint. An earlier decision by the higher court which set out a rule of law or interpreted a provision of legislation which is applicable in the case before the later court is now binding and therefore must be followed. All these legal rules and conduct form the traditions of which we speak. But it now becomes mixed with the new constitutional text and the interpretive moves of the courts in giving meaning to the new text. In this way, fresh legal material is manufactured which, in turn, is employed in the construction of the bridge.

In the metaphor of the bridge, precedent forms the very material of the bridge. The metaphor captures the way in which precedent has both forward-looking and backward-looking dimensions. As one looks back across the bridge already travelled, one sees the cases already decided. They provide the support underfoot and run all the way to the beginning of the bridge. However, precedent also determines the route of the bridge ahead. There may be occasions on which, having seen a blockage ahead, litigants can take a legal detour.<sup>91</sup> But, as the image of the unfinished raised highway (bridge) depicted on the cover of Davis and Le Roux's book so graphically emphasises, once the route

<sup>89</sup> Davis & Le Roux (n 88 above) 7-8.

<sup>90</sup> Davis & Le Roux (n 88 above) 8.

<sup>91</sup> An example is *Sex Worker Education and Advocacy Task Force v Minister of Safety and Security* 2009 6 SA 513 (WCC), which may be seen as a creative litigation strategy to provide palliative relief to sex workers in the wake of the Constitutional Court's refusal, in *S v Jordan (Sex Workers Education and Advocacy Task Force as Amici Curiae)* 2002 6 SA 642 (CC), to strike down the law criminalising prostitution. Since a direct challenge to the criminalisation of prostitution was no longer possible because of precedent in the form of *Jordan*, the applicant instead sought and obtained an interdict precluding the arrest of sex workers on the basis that arrests were being made for the ulterior purpose of harassing and deterring sex workers.

of a bridge is chosen and construction is underway, there can be no turning back.<sup>92</sup>

### 6.3 ‘Rainbow jurisprudence’

Another metaphor that has been employed to describe our constitutional jurisprudence – as well as South Africa’s political transition more generally – is the rainbow. Cockrell’s seminal article ‘Rainbow jurisprudence’ perceived this development in the Constitutional Court’s first year of jurisprudence.<sup>93</sup>

Cockrell’s core argument was that the Constitution would entail a transition from a ‘formal vision of law’ to a ‘substantive vision of law’, in terms of which judges who are accustomed to dealing with ‘formal reasons’ were now required to engage with ‘substantive reasons’ in the form of moral and political values.<sup>94</sup> Despite its romantic connotations of a hopeful new beginning for a diverse society, for Cockrell the Court’s nascent ‘rainbow jurisprudence’ is like a rainbow in two other ways: first, it flits before the eyes like a rainbow, but ultimately lacks substance; and, secondly, it denies the conflict of substantive reasons, portraying an attractive but false image of ‘normative harmony’.<sup>95</sup> Thus, Cockrell states, rainbow jurisprudence allows ‘all competing values [to be] mysteriously accommodated within the embrace of a warm, fuzzy consensus’.<sup>96</sup>

This comment brings to mind the Sachsian concurring dissents/dissenting concurrences discussed above. It also seems to fit the Court’s approach in *Gcaba*, in which glaring inconsistencies between *Fredericks* and *Chirwa* are fictitiously reconciled to suggest ‘normative harmony’.

A more sympathetic view of the Court’s model of judicial decision making – and, in particular, its faltering adoption of a substantive vision of law – is that it has in fact adopted a deeply theorised, but unarticulated, minimalism. Sunstein’s understanding of minimalists and the concept of ‘incompletely theorised agreements’ might fit our

<sup>92</sup> An example may be the treatment of the ‘minimum core’ doctrine in socio-economic rights cases. After attempts to rely on the doctrine had been rejected in earlier cases, the applicant in *Mazibuko* attempted to reframe the doctrine within the ‘reasonableness’ paradigm of *Grootboom*. The Court, however, rejected the argument and the road ahead seems now to be firmly blocked in relation to minimum core.

<sup>93</sup> A Cockrell ‘Rainbow jurisprudence’ (1996) 12 *South African Journal on Human Rights* 1. For another use of the ‘rainbow’ metaphor, see H Combrinck ‘The dark side of the rainbow: Violence against women in South Africa after ten years of democracy’ 2005 *Acta Juridica* 171.

<sup>94</sup> Cockrell (n 93 above) 3.

<sup>95</sup> Cockrell (n 93 above) 11.

<sup>96</sup> Cockrell (n 93 above) 12.

Constitutional Court.<sup>97</sup> He explains that minimalists attempt to reach incompletely theorised agreements in which the most fundamental questions are left undecided. Minimalists know that such principles are contested and that it is difficult for diverse people – including judges – to agree on them. Law and social peace are therefore only possible when people are willing to set aside their deepest disagreements, and are able to agree what to do without necessarily agreeing on why to do it. It is on this basis that minimalists approach precedent:<sup>98</sup>

Judges may not agree with how previous judges have ruled, but they can agree to respect those rulings – partly because respect for precedent promotes stability, and partly because such respect makes it unnecessary for judges to fight over the most fundamental questions whenever a new problem arises.

In the rainbow, as understood by Cockrell, prior decisions are blended into the spectral whole and harmonised in an aesthetically appealing, but ultimately unpersuasive way. *Gcaba* certainly fits this picture, having joined *Fredericks* and *Chirwa* to form a tri-colour image that has drawn the gaze of observers but – as demonstrated by yet further conflicting interpretations in the lower courts – left them befuddled.

In a recent article, Woolman perceived similar qualities – captured in the metaphor of an ‘amazing, vanishing Bill of Rights’ – in a trio of decisions of the Constitutional Court which, for Woolman, revealed a ‘penchant for outcome-based decision making, and a concomitant lack of analytical rigour’.<sup>99</sup> Woolman bemoaned the Court’s overriding preference for indirect application of the Bill of Rights and its refusal to engage in direct application. Woolman observed that ‘[f]laccid analysis in terms of three vaguely defined values – dignity, equality and freedom – almost invariably substitutes for more rigorous interrogation of constitutional challenges in terms of the specific substantive [constitutional] rights’.<sup>100</sup> Woolman drew a clear link between this mode of judicial reasoning and the Court’s attitude to precedent:<sup>101</sup>

[T]his strategy – of speaking in values – has freed the Court almost entirely from the text, and thereby grants the court the licence to decide each case as it pleases, unmoored from its own precedent. Our Constitutional Court sits as a court of equity: That, again, cannot be what the drafters of the Constitution intended.

<sup>97</sup> Sunstein n 4 above).

<sup>98</sup> Sunstein (n 4 above) 28.

<sup>99</sup> Woolman (n 34 above) 763.

<sup>100</sup> Woolman (n 34 above) 764.

<sup>101</sup> As above.

There is thus a clear relationship between the Court's model of decision making and its attitudes to precedent. In the next section, I search for explanations for this relationship.

## 7 Conclusion

*Gcaba* and the *True Motives/Walele* saga speak to the Constitutional Court's great fear of precedent, a fear that has infected or informed constitutional litigators. The Court steadfastly refuses to declare any of its previous decisions wrong – even when all other avenues seem closed to it. Recognising that, practitioners also fear to tread on that path,<sup>102</sup> declining to ask the Court to overrule its previous decisions and instead employing the same techniques of distinction and avoidance at which the Court is so adept.

Perhaps some of the contradictions apparent from the Court's approach to the precedential force of its earlier decisions are explained in this frank admission by former Justice Albie Sachs:<sup>103</sup>

The legal community is by its nature both conservative in thinking, yet restless for change. Hence the dilemma facing a judge of deciding whether to locate himself or herself as the upholder or the transformer of established legal principles. A principled judgment cannot, however, be based simply on a personal preference as to whether to move forward to stay still. Whether adhering to the *status quo* or supporting transformation, each judgment must be reasoned and justified in terms that the legal community would find at least defensible, if not totally convincing. *In particular, a judgment that bases itself on introducing radical changes to the principles and standards hitherto firmly accepted by the legal community would have to set out persuasive references to the impact the new constitutional order has on redefining the way the problem has to be looked at.*

Sachs J concludes this discussion by saying that 'it is particularly important that when we re-arrange elements that the legal community has long regarded as virtually axiomatic, we explain precisely what we are doing in the most open and transparent way possible'.<sup>104</sup> The sub-text here seems to be that judges face a difficult challenge in deciding whether to uphold or overturn existing law, including precedent. The legal community can be alarmed when precedents are overturned and there must therefore be persuasive

<sup>102</sup> A recent counter-example arose in the matter of *Gundwana v Steko Development CC & Others* [2011] ZACC 14, decided on 11 April 2011, in which it is understood - although this is not reflected in the judgment - that counsel sought to encourage the Court to overrule its decision in *Jaftha v Schoeman; Van Rooyen v Stoltz* 2005 2 SA 140 (CC), 2005 1 BCLR 78 (CC).

<sup>103</sup> Sachs (n 73 above) 152 (my emphasis).

<sup>104</sup> Sachs (n 73 above) 153.

reasons to do so. Overturning a case requires substantive reasoning, which must be full and frank.

It was precisely such substantive reasoning that Cockrell and others have called for. Cockrell concludes his discussion of ‘rainbow jurisprudence’ with the observations that<sup>105</sup>

[a] rigorous engagement with substantive reasoning will on occasion make it necessary for the Constitutional Court to acknowledge that there is no space on the rainbow for (say) ‘red’ or ‘yellow’ [and that it will] make us aware of constitutional colours that we never dreamt of whilst we laboured under our fixation with rainbow jurisprudence – not just green and blue, but emerald, jade, azure, turquoise and aqua.

If Sachs J – albeit extra-curially – is able to articulate an approach that entails substantive reasoning in approaching precedent, why is the *Gcaba* court plainly so reluctant to adopt it? The Court’s fear of precedent, it seems to me, rests on at least three terrors.

First, the Court is apprehensive that the doctrine of precedent, which operates as a constraint on future decision making, may turn certain potential juridical roads into dead-ends. If the Court cannot find that a decision was wrong – or cannot bring itself to say so – its earlier decision will declare that ‘the way is shut’. Far better, then, the Court seems to think, to distinguish earlier decisions than to face them head-on and limit the outcome options. This fear seems to explain the Court’s reluctance to apply the doctrine of precedent in a manner that determines the outcome of cases. However, this is a fear that can only grow if left in the closet: the longer the Court goes without overruling one of its decisions, the bigger deal this becomes. Also, distinguishing is never going to provide the clarity that overruling does. And sacrificing clarity in favour of preserving precedent is counter-productive because the only reason for having precedent is to maintain clarity.

The second unknown terror that seems to haunt the Court is the fear that an explicit declaration that a previous decision was wrongly decided will declare open season on all its earlier decisions and lead to radical swings in its jurisprudence as the composition of the Court changes over time. This poses the risk of unsettling the political and legal communities and diminishing the Court’s legitimacy. Given the substantial turnover in composition of the Court recent years, Constitutional Court watchers are unlikely to be surprised if the Court decides cases differently than the ‘old’ Court would have. The doctrine of precedent operates as a control valve to mediate the competing pressures of the will of a ‘new’ Court and the constraints

<sup>105</sup> Cockrell (n 93 above) 38.

of the 'old' Court's jurisprudence. *Gcaba* and the *True Motives* line of cases suggest that the Court is still self-consciously calibrating this valve.

The third, and perhaps deepest, terror relates to what Cockrell calls the 'substantive vision of law' embodied by the Constitution. To overturn a decision requires rigorous, explicit reasoning that strikes at the very foundational premises of the earlier case – even when those premises are of a narrow, technical nature that do not necessarily engage fundamental constitutional values or principles. Whether one views the Court's approach as mere 'rainbow jurisprudence', visually appealing but lacking in substance or rigour, or one takes the view that the Court has adopted a deeply-theorised minimalism of the Sunstein variety, it does appear that the Court has not fully embraced an overt model of reasoning that assumes the form of the 'substantive vision of law' foreshadowed by Cockrell. While the Constitution may require such a vision – and although certain decisions of the Court undoubtedly fulfil it – the Court displays a lingering affection for a *style* of decision making more consonant with the formal vision of law.<sup>106</sup> And this affection may itself be explained by Roux's analysis of the Court's attempts, through its decision making, to enhance its own institutional legitimacy.<sup>107</sup>

As Sachs alludes to, explicit substantive reasoning overturning settled legal principles may alarm the legal community and undermine the Court's attempts to legitimise itself. (One might remark that the Court ought to be more concerned at the impact of legal uncertainty on government officials, businesses and private citizens.) One sees a clue to this type of thinking in the *Gcaba* court's statement that '[t]his Court must not easily and without coherent and compelling reason deviate from its own previous decisions, *or be seen to have done so*'.<sup>108</sup> The Court's approach to precedent in *Gcaba* thus points to far more than its application of this common law doctrine. It sheds light of the Court's preferred model of reasoning and its very theory of judging. Ultimately, though, like Cockrell's rainbow, *Gcaba* provides us with just a faint image of the reality behind the judgment.

<sup>106</sup> My comment in this regard is limited to the *form* that the decisions of the Court take and does not extend Cockrell's criticism of the substance of early decisions of the Court to its more recent jurisprudence. To consider such a claim would require treatment extending beyond the scope of this article.

<sup>107</sup> See T Roux 'Legitimizing transformation: Political resource allocation in the South African Constitutional Court' in S Gloppen *et al* (eds) *Democratisation and the judiciary: The accountability function of courts in new democracies* (2004) 92ff.

<sup>108</sup> *Gcaba* (n 2 above) para 62.

