Constitutional Court Review 2021
Volume 11, 433–481
https://doi.org/10.2989/CCR.2021.0016

The Jurisdiction of the Constitutional Court

ESHED COHEN

ABSTRACT: This article has three purposes. First, it describes the principles governing the Constitutional Court's jurisdiction. It claims that there are nine principles that determine whether the Court has jurisdiction over a matter. Second, it critically analyses those nine principles. It argues that most of the principles, properly interpreted, empower the Court to hear all matters. The remaining principles, which limit the Court's jurisdiction, are difficult to justify. Third, it offers a solution to the Court's incoherent approach to jurisdiction. The Court could embrace the full breadth of its principles of jurisdiction and move away from the questionable principles it invokes to limit its jurisdiction. The Court could then use the test for leave to appeal to decide which matters it hears. The test for leave to appeal is capable of addressing many of the practical and normative concerns behind limiting the Court's jurisdiction.

KEYWORDS: civil procedure, constitutional litigation, leave to appeal

AUTHOR: Advocate, High Court of South Africa. Email: eshed.cohen@gmail.com

ACKNOWLEDGEMENTS: I thank Leo Boonzaier and the participants at the Constitutional Court Review XI Conference for their comments. I would also like to thank the anonymous reviewers and editors for their insights and attention to detail.

> 'Determining the parameters of this Court's jurisdiction is complicated, contentious and an evolving area of law.'[1]

I INTRODUCTION

Over which matters does the Constitutional Court have jurisdiction? By 2012, fifteen years after the final Constitution commenced, there was no clear answer to this question. Parliament intervened, amending the Constitution in the hope of making the Court's jurisdiction clear. Yet, as the above quote suggests, the answer remains elusive. For example, in 2019, in *Jacobs v S*, the Court dramatically split five-five on the issue of jurisdiction.[2] Three judges even held that a previous decision of the Court was decided *per incuriam* (as they put it, 'through lack of care'). The effect of the split decision was that the applicants will be in jail for around fifteen years for a murder conviction that, by all accounts, was incorrect. In the same year, in *Jiba*, the Court unanimously held that it lacked jurisdiction, despite all appearances to the contrary.[3] The effect of this finding was that the Deputy National Director of Public Prosecutions remained on the roll of advocates despite several high court judgments finding that she acted dishonestly.

The purpose of this article is threefold. First, I describe the principles determining the Constitutional Court's jurisdiction. My claim is that the following nine principles determine when the Court has jurisdiction over a matter:

- Principle 1: Interpretation, protection, or enforcement of the Constitution.
- Principle 2: Section 39(2) and legislative interpretation.
- Principle 3: The exercise of public power.
- Principle 4: Constitutionally envisaged legislation.
- Principle 5: Fair procedure or courts' powers.
- Principle 6: Arguable points of law of general public importance.
- Principle 7: Factual disputes.
- Principle 8: Application of settled principles.
- Principle 9: Assessment of jurisdiction from pleadings.

The first six are positive principles and the last three are negative principles. A positive principle establishes that a matter is within the Court's jurisdiction. For instance, 'if a matter involves the interpretation of the Constitution, then it is a constitutional matter', is a positive principle. A negative principle does not just negate a positive principle. A negative principle determines that a matter is not within the Court's jurisdiction for reasons other than not falling within the ambit of a positive principle. For instance, 'if a matter is only a dispute about facts, then it is not a constitutional matter', is a negative principle.

The principles have not been codified or given formal authority by the Court, either in a single judgment or directive. My claim is that the nine principles are the best way to categorise and understand the Court's approach to its jurisdiction. I attempt to make clear, throughout this article, what the principles are, so that litigants can plead their cases within the jurisdiction of the Court (or, at least, within the Court's current approach to its jurisdiction).

The second purpose of this article is to highlight issues with these nine principles. The principles are difficult to justify and fraught with inconsistencies. A recurring issue with the positive principles is that they endow the Court with a jurisdiction broader than the Court

[1] Theron J *Kruger v National Director of Public Prosecutions* [2019] ZACC 13, 2019 (6) BCLR 703 (CC) at para 124.

[2] *Jacobs v S* [2019] ZACC 4, 2019 (1) SACR 623 (CC)('*Jacobs*').

[3] *General Council of the Bar of South Africa v Jiba* [2019] ZACC 23, 2019 (8) BCLR 919 (CC)('*Jiba*').

acknowledges. Meanwhile, the negative principles, which attempt to claw back the Court's jurisdiction, have unconvincing rationales and are applied unpredictably. As I demonstrate, the most unfortunate upshot of the Court's ongoing struggle with its jurisdiction is that matters have fallen through the cracks, deprived of the judicial resources they rightly deserved. The issues with the principles must be addressed to prevent further unjustifiable denials of judicial resources, either by the Court or Parliament.

The third purpose of this article is to offer one solution to the Court's jurisdictional quagmire. The solution is to accept the full breadth of the positive principles and abandon the negative principles. The Court can then rely on leave to appeal to decide which matters to hear, since the test for leave to appeal can accommodate the policy concerns behind many of the negative principles. By offering this solution, I am *not* claiming that the Court should have jurisdiction over all matters and use leave to appeal as the only filter for matters. There are various policy reasons for why the Court should have specialist, instead of general, jurisdiction.[4] There may be more than one reasonable way of arranging South Africa's judicial hierarchy. A specialist jurisdiction for the Court is probably one of those reasonable ways. Instead, my claim is more modest: embracing the full breadth of the positive principles, and using leave to appeal as a filter, is a perfectly reasonable way to address the existing problems with jurisdiction. Moreover, it is a solution that is available to the Court. The solution requires only a development of the common law and, as the positive principles demonstrate, would be entirely consistent with the Constitution.

I begin by canvassing the concept of jurisdiction generally. I then discuss the positive principles of jurisdiction. I argue how each principle, given its rationale or application in a given case, implies a breadth at times unappreciated by the Court. After I discuss the positive principles, I turn to the negative ones. I aim to show that these negative principles are inconsistent, either internally or with the positive principles and should, for these reasons, be abandoned. Finally, I discuss leave to appeal to show how this mechanism can address many of the practical and normative concerns behind limiting the Court's jurisdiction.

II JURISDICTION GENERALLY

Jurisdiction means the power or competence of a court to hear and determine an issue between parties.[5] It has been defined as 'a lawful power to decide something in a case, or to adjudicate upon a case, and to give effect to the judgment, that is, to have the power to compel the person condemned to make satisfaction'.[6] The jurisdictions of courts are not necessarily limitless. As Watermeyer CJ held, 'limitations may be put upon such power in relation to territory, subject

[4] By specialist jurisdiction, I mean jurisdiction over a delineated set of matters. For example, the jurisdiction of the Labour Court is specialist. By general jurisdiction, I mean jurisdiction that exists unless there is a rule saying otherwise. For example, s 169(1)(b) of the Constitution provides: 'The High Court of South Africa may decide […] any other matter not assigned to another Court by an Act of Parliament'.

[5] *Gcaba v Minister for Safety and Security* [2009] ZACC 26, 2010 (1) SA 238 (CC), 2010 (1) BCLR 35 (CC) at para 74, citing *Graaff-Reinet Municipality v Van Ryneveld's Pass Irrigation Board* 1950 (2) All SA 448 (A), 1950 (2) SA 420 (A) at 424. See further *Ewing McDonald & Co Ltd v M&M Products* 1991 (1) SA 252 (A) at 256G.

[6] *Spendiff v Kolektor (Pty) Ltd* 1992 2 All SA 50 (A), 1992 (2) SA 537 (A) 551D, citing *Wright v Stuttaford & Co* 1929 EDL 10 at 42.

matter, amount in dispute, parties'.[7] These limitations can be found in statutes,[8] the common law,[9] or as is the case for the Constitutional Court, in constitutions.[10]

The jurisdiction of a court is a question of legal authority: is a court empowered by law to resolve the issue before it? Determining the jurisdiction of a court, especially when that jurisdiction is sourced in a statute, entails interpreting the relevant rules empowering a court with jurisdiction. The rule is then applied to the facts of the case at hand. Once a case falls within the ambit of a jurisdictional rule, the court is empowered to hear the matter. This is perhaps what Zondo DCJ meant in *Jacobs* when he held that a 'matter either falls within or outside of a court's jurisdiction. There is, generally speaking, no discretion involved in deciding that'.[11] In contrast, when granting leave to appeal the court considers an open list of factors that reasonable judges can weigh differently and reach different results.

Without jurisdiction, a court cannot lawfully decide the merits of a matter. If it does so, its order is unlawful.[12] Hence the Constitutional Court has described jurisdiction as a 'threshold requirement' before the Court can determine anything in respect of a matter, including leave to appeal.[13] As Jafta J put it: 'For what the interests of justice warrant matters not if this Court lacks the authority necessary for entertaining the appeal'.[14]

The jurisdiction of the Constitutional Court is delineated in section 167(3), (4), and (5) of the Constitution. Section 167(3)(b) provides for the Constitutional Court's jurisdiction over constitutional matters and 'any other matter'. Section 167(4) and (5) deals with exclusive jurisdiction and confirmation proceedings respectively. I do not deal with exclusive jurisdiction and confirmation proceedings. The rules relating to each of these matters have been discussed

7 *Graaff-Reinet Municipality* (note 5 above) at 424.

8 The most obvious examples being the jurisdictional limits placed on Magistrates' Courts by the Magistrates' Courts Act 32 of 1944

9 For instance, under common law a court's jurisdiction is generally limited to the territory of the Republic. See *Ewing McDonald* (note 5 above) at 256G.

10 The extent to which statutory or common law limitations on the jurisdiction of courts, especially Superior Courts, are constitutional is beyond the scope of this article. But, for example, Parliament cannot legislate in a manner that undermines the independence of the judiciary by passing laws that contradict constitutional provisions protecting the independence of the judiciary. It similarly cannot undertake to regulate or usurp functions that fall within the pre-eminent domain of the judiciary. *Justice Alliance of South Africa v President of Republic of South Africa & Others, Freedom Under Law v President of Republic of South Africa & Others, Centre for Applied Legal Studies & Another v President of Republic of South Africa & Others* [2011] ZACC 23, 2011 (5) SA 388 (CC), 2011 (10) BCLR 1017 (CC) at para 68.

11 *Jacobs* (note 2 above) at para 161. The exception, which Zondo DCJ might have anticipated, is where the rules of jurisdiction allow for the exercise of discretion. For instance, notionally, a court could have jurisdiction over all matters that are in the public interest.

12 The majority of the Constitutional Court held in *Department of Transport v Tasima (Pty) Limited* [2016] ZACC 39, 2017 (1) BCLR 1 (CC), 2017 (2) SA 622 (CC) that a court order, even if unlawfully issued, is valid and binding until set aside. The Constitutional Court (at para 190) explained that older case law, which held that an order issued by a court without jurisdiction was a nullity, considered unlawful orders in the context of *res judicata* (that is, when that unlawful order was being considered by another court).

13 *S v Boesak* [2000] ZACC 25, 2001 (1) BCLR 36, 2001 (1) SA 912 (CC) at para 11; *Fraser v ABSA Bank Limited* [2006] ZACC 24, 2007 (3) SA 484 (CC), 2007 (3) BCLR 219 (CC) at para 35; *Loureiro v Imvula Quality Protection (Pty) Ltd* [2014] ZACC 4, 2014 (5) BCLR 511 (CC), 2014 (3) SA 394 (CC) at para 31.

14 *Jiba* (note 3 above) at para 37.

by others.[15] They are not as controversial as the principles of jurisdiction on which I intend to focus.

Before 2012, section 167(3) of the Constitution gave the Constitutional Court jurisdiction to 'decide only constitutional matters and issues connected with decisions on constitutional matters'. Parliament then passed the Constitution Seventeenth Amendment Act 2012, which amended section 167(3) to read:

> The Constitutional Court—
> (a) is the highest court of the Republic; and
> (b) may decide—
> (i) constitutional matters; and
> (ii) any other matter, if the Constitutional Court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by that Court; and
> (c) makes the final decision whether a matter is within its jurisdiction.

The Preamble to the Seventeenth Amendment Act provides that the purpose of the amendment to section 167(3) is to make the Constitutional Court the highest court 'in all matters'.[16] The Court has expressed acceptance of this new role,[17] going so far as to describe itself as 'a super appellate court'.[18]

The Seventeenth Amendment has extended the Constitutional Court's jurisdiction beyond only constitutional matters. However, though I query this below,[19] the Court's jurisdiction appears limited to arguable points of law of general public importance which ought to be considered by the Court. If the Court was meant to be an apex court on *all* matters, then the limitation in section 167(3)(b)(ii) is difficult to explain. If the Court is an apex court, its jurisdiction should be general, and it should have an unlimited power to decide whether it is in the interests of justice to hear a matter. When the Seventeenth Amendment was introduced as a Bill in Parliament, it reflected this rationale by providing:

> (3) The Constitutional Court—
> (a) is the highest court of the Republic; and
> (b) may decide–
> (i) constitutional matters–
> (aa) on appeal;
> (bb) directly, in accordance with subsection (6); or
> (cc) referred to it as contemplated in s 172(2)(c) or in terms of an Act of Parliament; and

[15] S Seedorf 'Jurisdiction' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* Chapter 4, 4-56 at 4-22. For recent authorities on exclusive jurisdiction, see *Land Access Movement of South Africa & Others v Chairperson of the National Council of Provinces* [2016] ZACC 22, 2016 (5) SA 635 (CC), 2016 (10) BCLR 1277 (CC) at fn 15.

[16] Preamble to the Seventeenth Amendment Act.

[17] *Paulsen v Slip Knot Investments 777 (Pty) Limited* [2015] ZACC 5, 2015 (3) SA 479 (CC), 2015 (5) BCLR 509 (CC) at para 13; *Makate v Vodacom (Pty) Ltd* [2016] ZACC 13, 2016 (6) BCLR 709 (CC), 2016 (4) SA 121 (CC) at para 39; *Jordaan & Others v City of Tshwane Metropolitan Municipality; City of Tshwane Metropolitan Municipality v New Ventures Consulting and Services (Pty) Limited & Others; Ekurhuleni Metropolitan Municipality v Livanos Others* [2017] ZACC 31, 2017 (6) SA 287 (CC), 2017 (11) BCLR 1370 (CC) at para 7; *Turnbull-Jackson v Hibiscus Court Municipality* [2014] ZACC 24, 2014 (6) SA 592 (CC), 2014 (11) BCLR 1310 (CC) at para 58.

[18] *Economic Freedom Fighters v Gordhan; Public Protector & Another v Gordhan* [2020] ZACC 10, 2020 (8) BCLR 916 (CC), 2020 (6) SA 325 (CC) ('*EFF v Gordhan*') at para 30, citing *Tiekiedraai Eiendomme (Pty) Limited v Shell South Africa Marketing (Pty) Limited & Others* [2019] ZACC 14, 2019 (7) BCLR 850 (CC).

[19] Part IIIF.

> (ii) any other matter, if the Constitutional Court grants leave to appeal that matter on the grounds that the interests of justice require that the matter be decided by the Constitutional Court.

The parliamentary debate on the Seventeenth Amendment reveals the intention behind extending the Court's jurisdiction in the limited form of section 167(3)(b)(ii).[20] Ms Smuts, speaking for the Democratic Alliance, explained that her party agreed that there should not be a bifurcation between constitutional matters and other matters, as the old section 167(3)(b) assumed. However, the Democratic Alliance believed that a test narrower than a broad 'interests of justice test' was appropriate for the Court's jurisdiction, namely arguable points of law of significant or general public importance. Mr Swart, speaking for the African Christian Democratic Party, said that the test in the introduced Bill, which was an interests of justice test, 'was clearly too wide'. He then explained: 'The test has now been narrowed to allow the Constitutional Court to hear those matters that raise arguable points of law of general public importance. ... The test will require an appellant to carefully formulate this point of law and will, unlike the interests of justice test, prevent an avalanche of appeals to the Constitutional Court'.

Section 167(3)(b)(ii) was drafted as a compromise between introducing a limitless jurisdiction and not amending the jurisdiction of the Court. The majority of Parliament thought that the previous distinction between constitutional and non-constitutional matters was unworkable. The attitude was reflected in a concurring judgment by Froneman J in *Mankayi*, where he held:

> There is an impossible tension between asserting the fundamental supremacy of the Constitution as the plenary source of all law, and nevertheless attempting to conceive of an area of the law that operates independently of the Constitution. The perceived necessity for the attempt to do so arises from the provisions in the Constitution that provide that this Court 'is the highest court in all constitutional matters' and that the Supreme Court of Appeal 'is the highest court of appeal except in constitutional matters'. The suggestion advanced in this judgment is to acknowledge frankly that this jurisdictional tension cannot be overcome by conceptual separation of certain areas of the law from the Constitution.[21]

Somewhat like the African National Congress, who introduced the Bill, Froneman J went on to suggest that the Court can hear all issues of law and even some facts; and the Court will hear those disputes if it is in the interests of justice to do so.[22] But the Democratic Alliance, whose votes the African National Congress needed to reach the requisite two-thirds majority,[23] refused to agree to a broad 'interests of justice test' to replace the Court's specialist jurisdiction. The result is the limited extension found in section 167(3)(b)(ii).

Other than introducing section 167(3)(b)(ii), section 167(3)(b)(i) differs slightly from section 167(3)(b) pre-amendment. Section 167(3)(b)(i) does not include a reference to 'issues connected with decisions on constitutional matters'. The Court has not addressed this discrepancy. Whether any significance should be attached to this difference is unclear. On the one hand, it appears that the Court's jurisdiction was truncated by the Seventeenth Amendment. The Court can only decide constitutional matters or matters involving arguable points of law of general

[20] NA Debates Col 566 (20 November 2012).

[21] *Mankayi v AngloGold Ashanti Ltd* [2011] ZACC 3, 2011 (5) BCLR 453 (CC), 2011 (3) SA 237 (CC), [2011] 6 BLLR 527 (CC) at para 124.

[22] Ibid at para 125.

[23] The ANC had 264 seats out of 400 in 2012, just three seats shy of two-thirds.

public importance. It can no longer decide on the issues connected with those decisions. On the other hand, as becomes apparent below, the Court's broad approach to constitutional matters enables the Court to decide on all issues connected to decisions on constitutional matters. There is no need, given this broad approach, for the Constitution to provide expressly for the Court's ability to decide on issues ancillary to matters within its jurisdiction.

III POSITIVE PRINCIPLES

The Court's approach to whether a matter is a constitutional matter, or raises an arguable point of law of general public importance, can be distilled into nine principles. This set of principles can be divided into six positive and three negative principles. With respect to constitutional matters, as envisaged in section 167(3)(b)(i), there are the following five positive principles. If a matter involves a dispute over one of the following, then it is a constitutional matter:

- Principle 1: Interpretation, protection, or enforcement of the Constitution.
- Principle 2: Section 39(2) and legislative interpretation.
- Principle 3: The exercise of public power.
- Principle 4: Constitutionally envisaged legislation.
- Principle 5: Fair procedure or courts' powers.

As for arguable points of law, the positive principle is straightforward:

- Principle 6: The Court has jurisdiction over arguable points of law of general public importance.

Below, I discuss each principle. The discussion comprises two elements. First, I describe the principle. Second, I demonstrate that the positive principle has a wide breadth, often effectively endowing the Court with jurisdiction over all matters. The second element is important, first, to demonstrate how the Court has failed to analyse the true extent of its jurisdiction in a principled manner. Second, the breadth of the positive principles is important for the solution I later offer for the issues with the Court's jurisdiction. If the positive principles give the Court general jurisdiction, then the negative principles are the only legal bases for the Court's denials of jurisdiction. If the negative principles are rejected, then the Court will be empowered by the positive principles, which come straight from the Constitution, to hear all matters. The upshot is that the Court would then be free to use leave to appeal to filter matters that it should not hear.

A Principle 1: Interpretation, protection or enforcement of the Constitution

If a matter includes the interpretation, protection and enforcement of the Constitution, then it is a constitutional matter. This principle is found in section 167(7) of the Constitution.

Though section 167(7) provides a constitutional definition of constitutional matters, it has received little attention from the Court. In fact, instead of providing guidance on the wording of section 167(7), the Court has repeatedly misquoted the section.[24] The section was first misquoted in *Boesak*, with the Court holding that '[u]nder s 167(7), the interpretation, application and upholding of the Constitution are also constitutional matters'. Section 167(7)

[24] Seedorf (note 15 above) at 4-56.

does not mention 'application' or 'upholding' of the Constitution. The Court's misquote in *Boesak* has been cited in subsequent judgments.[25]

We are left with interpreting section 167(7) invoking general principles of constitutional interpretation. I deal with 'interpretation', 'protection' and 'enforcement' in turn. I then deal with the 'application' and 'upholding' of the Constitution.

The 'interpretation' of the Constitution implies pronouncements on the meaning of constitutional provisions.[26] If a case involves a dispute about the meaning of 'organ of state',[27] or 'remedial action' of the Public Protector,[28] then the case would raise a constitutional matter. The primary issue will be whether a constitutional rule should be interpreted in a manner such that a given case falls within a provision's ambit. For instance, whether a sport federation constitutes an organ of state raises issues of interpreting the Constitution, as does whether binding orders constitute 'remedial action' of the Public Protector. Another common example is standing, under section 38 of the Constitution – an issue over which the Court has repeatedly asserted its jurisdiction.[29]

The interpretation of the Constitution is a constitutional matter. But the Court does not have jurisdiction every time it interprets the meaning of 'constitutional matters' in section 167(3)(a)(i). If jurisdiction was found in this way, it would result in a contradiction. This argument results in a contradiction. It would mean that the Court both has and lacks jurisdiction over a case. Imagine a case where the Court lacks jurisdiction on an interpretation of 'constitutional matters'. If the mere interpretation of 'constitutional matters' is itself a constitutional matter, then the Court would have jurisdiction, even though on that interpretation the Court does not have jurisdiction. The argument also means, in a circular fashion, that the Court has jurisdiction over all matters, since all matters involve an interpretation of whether that matter is a constitutional matter. These two undesirable implications are a result of assuming that interpretation of the Constitution, as envisaged in section 167(7), includes interpreting section 167(3)(b)(i) and (7). But interpretation as envisaged in section 167(7) must refer to other provisions of the Constitution as well.

It is not as clear what 'protection' of the Constitution means. The issue here is what sort of threats to the Constitution trigger the protection envisaged in section 167(7). At one extreme, cases involving conduct or law which threaten the existence of South Africa's constitutional democracy would be constitutional matters. Protection of the Constitution could then extend to cases involving treason and sedition. More broadly, constitutional matters could include cases involving the Protection of Constitutional Democracy Against Terrorist and Related Activities Act 33 of 2004 (Terrorism Act). Though the Court has considered this Act under

[25] *Carmichele v Minister of Safety and Security* [2001] ZACC 22, 2001 (4) SA 938 (CC), 2001 (10) BCLR 995 (CC) at para 4; *Fredericks & Others v MEC for Education and Training Eastern Cape & Others* [2001] ZACC 6, 2002 (2) BCLR 113, 2002 (2) SA 693 at para 10; *Dikoko v Mokhatla* [2006] ZACC 10, 2006 (6) SA 235 (CC), 2007 (1) BCLR 1 (CC) at 130; *Fraser* (note 12 above) at para 37.

[26] The Court has consistently held that interpretation is the process of attributing meaning to legislation. See *Road Traffic Management Corporation v Waymark (Pty) Limited* [2019] ZACC 12, 2019 (6) BCLR 749 (CC), 2019 (5) SA 29 (CC) at para 29.

[27] Section 239.

[28] Section 182(1)(c).

[29] See *Limpopo Legal Solutions v Vhembe District Municipality & Others* [2017] ZACC 30, 2018 (4) BCLR 430 (CC).

different jurisdictional grounds,[30] the Terrorism Act aims at prohibiting conduct that would, among other things, 'threaten the unity and territorial integrity of the Republic'.[31] Protection of the Constitution is implied then by cases involving this legislation. Jurisdiction on this ground could extend not only to matters involving the interpretation of the Terrorism Act, but also to matters applying this Act, since its application could easily constitute protecting the Constitution against existential threats.

At the other extreme, not all legal violations constitute threats to the Constitution. Speeding or shoplifting, while illegal and in a sense threaten the rule of law, are not things from which the Constitution requires protection. Between the two extremes lies a large grey area. As the Court has repeatedly acknowledged, corruption,[32] sexual offences,[33] sexism,[34] racism,[35] and poverty,[36] to name a few, are all threats to the Constitution and its values. Though the Court has not done so explicitly, we could interpret the 'protection' of the Constitution to include matters involving these and similar threats. The upshot is that the Court's jurisdiction is incredibly broad. It can hear all matters relating to current threats to the envisaged constitutional order. The Court's jurisdiction on this ground would extend both to legal questions pertaining to those threats, but also factual and application disputes around those matters. For example, there is nothing to suggest that the Constitution should not be protected when the dispute in an appeal against a corruption conviction has to do with facts and not law.

Whether the Court will consider a case to involve the protection of the Constitution will depend on a range of factors. Considering what the Court has so far described as a threat to constitutional values, would depend on the prevalence of the threat, its imminence, its link to constitutional rights,[37] and whether the facts of the case allow the Court to vindicate constitutional values. To return to the above example, while ordinary shoplifting might not threaten the Constitution, if certain kinds of theft became systemic, or discriminatory in effect, then the Constitution might need to be protected.

Like 'protection', 'enforcement' of the Constitution is vague. Enforcement suggests that a remedy giving effect to constitutional duties or rights is a constitutional matter. Matters involving the direct enforcement of constitutional provisions would easily be constitutional matters (since most of these cases would also involve the interpretation of the Constitution). As an example, directing a department to comply with its socio-economic, positive duties would be the enforcement of the Constitution. The issue with 'enforcement', however, is whether the

[30] For instance, in *S v Okah* [2018] ZACC 3; 2018 (4) BCLR 456 (CC), 2018 (1) SACR 492 (CC) the Court found jurisdiction because the matter concerned the jurisdiction of South African courts.

[31] Section 1 definition of terrorism.

[32] *Glenister v President of the Republic of South Africa* [2011] ZACC 6, 2011 (3) SA 347 (CC), 2011 (7) BCLR 651 (CC) at para 166.

[33] *Tshabalala v S; Ntuli v S* [2019] ZACC 48, 2020 (3) BCLR 307 (CC), 2020 (2) SACR 38 (CC), 2020 (5) SA 1 (CC), especially the judgment of Khampepe J.

[34] *Rahube v Rahube* [2018] ZACC 42, 2019 (1) BCLR 125 (CC), 2019 (2) SA 54 (CC) at para 24.

[35] *Duncanmec (Pty) Limited v Gaylard NO* [2018] ZACC 29, 2018 (11) BCLR 1335 (CC), 2018 (6) SA 335 (CC) at para 19.

[36] *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* [2009] ZACC 16, 2009 (9) BCLR 847 (CC), 2010 (3) SA 454 (CC) at para 191.

[37] The Constitution may (even necessarily) be in need of protection where it is alleged that government has failed to protect rights, as is required in s 7(2). However, cases alleging a failure to protect rights would easily fall within the Court's jurisdiction on other grounds. For example, those cases require interpreting rights in the Bill of Rights.

concept extends to indirect enforcements of the Constitution. Sentencing a person convicted of a crime, or awarding damages for defamation, in some sense enforces the Constitution. Perhaps even all constitutionally permissive legal remedies, since they are in accordance with the law, enforce the Constitution. Indeed, in the context of contempt of court, the Court in *Matjhabeng* held that '[s]ince the matters relate to the enforcement of court orders, that too, is a constitutional issue'.[38]

As we will see when discussing Principles 2, 3, and 4, the Court has at times adopted the idea of indirect enforcement of constitutional rights to assume jurisdiction. To cohere with these authorities, we would need to interpret 'enforcement' as including indirect enforcement. But it is unclear whether the meaning of enforcement can be stretched to include the enforcement of all legal remedies. The reason is that any interpretation of constitutional provisions must be purposive.[39] If we adopt as a starting point that the Court is not a court of general jurisdiction, then enforcement would be limited, either to the direct enforcement of the Constitution or the indirect enforcement of remedies otherwise recognised as constitutional in nature (for instance, damages in defamation disputes).[40] This would give effect to the purpose of the Court's specialised jurisdiction. However, if the Court truly is a court for 'all' matters, then enforcement can be interpreted as broadly as possible. This would give effect to the purpose of section 167(3): to make the Court the highest court in all matters.

As mentioned, the Court in *Boesak* added the concepts of 'application' and 'upholding' to section 167(7). Until recently, little significance was attached to this misquote. However, Zondo DCJ in *Jacobs* expressly relied on the finding in *Boesak* that section 167(7) gives the Court jurisdiction over the application of the Constitution.[41] Since *Jacobs* is referred to throughout this article, it is worthwhile to describe its background in some detail here.

Jacobs concerned the murder of Mr Patrick Abakwe Modikanele by three co-accused. The co-accused had been part of a mob that had attacked and killed Mr Modikanele in response to an allegation that he had stolen a cell phone belonging to a daughter of one of the co-accused. The trial court found that the attack had occurred in two stages: Mr Modikanele was first apprehended and assaulted outside a store, and then he was taken to the co-accused's daughter's home. The high court made no express finding that all the co-accused were present at the first stage of the assault. The high court also did not pronounce on when Mr Modikanele was fatally struck. The high court nonetheless convicted all the co-accused of murder based on common purpose. On appeal, the full court did the same. Leave to appeal to the Supreme Court of Appeal was refused.

The applicants applied for leave to appeal to the Constitutional Court. They argued that the high court and full court misapplied the doctrine of common purpose and that the application of common purpose raised a constitutional matter. The Court, as has become increasingly common, heard the case with only ten judges.[42] Four judgments were written. The first was by Goliath AJ, with whom four other judges agreed.[43] Goliath AJ dismissed the application,

[38] *Matjhabeng Local Municipality v Eskom Holdings Limited; Mkhonto v Compensation Solutions (Pty) Limited* [2017] ZACC 35, 2017 (11) BCLR 1408 (CC), 2018 (1) SA 1 (CC) at para 69.

[39] *S v Zuma* [1995] ZACC 1, 1995 (2) SA 642, 1995 (4) BCLR 401 (SA) at para 17.

[40] *Dikoko* (note 20 above) at paras 90–92.

[41] *Jacobs* (note 2 above) at paras 134 and 158.

[42] For another example of the Court splitting 5–5, see *Ascendis Animal Health (Pty) Limited v Merck Sharpe Dohme Corporation* [2019] ZACC 41, 2020 (1) SA 327 (CC), 2020 (1) BCLR 1 (CC).

[43] Cachalia AJ, Froneman J, Khampepe J and Madlanga J.

finding that the Constitutional Court had no jurisdiction over the matter. The second was by Froneman J, essentially finding the same.[44] The effect of Goliath J's and Froneman J's judgments is that five judges held that the application for leave to appeal should be dismissed. Theron J wrote a third judgment.[45] Zondo DCJ wrote a fourth judgment concurring in Theron J's judgment. Zondo DCJ's judgment dealt with jurisdiction, finding that the Court did have jurisdiction to hear the appeal. Theron J's judgment agreed with this finding and dealt with the merits of the application. In the result, five judges would have granted leave to appeal. The Court thus split 5–5, so the full court's judgment and order stood.

I discuss Goliath J's and Froneman J's judgments below, when dealing with disputes of fact and applications of settled principles. For now, the focus is on Zondo DCJ's finding with respect to section 167(7). Though there was no majority on this point, Zondo DCJ held that section 167(7) gives the Constitutional Court jurisdiction over the application of the Constitution. The finding was a key premise in Zondo DCJ's judgment that the Constitutional Court had jurisdiction over the application of the doctrine of common purpose. Zondo DCJ held that:

1. The application of common purpose involves the application of public policy;
2. Public policy is founded on the Constitution's values;
3. So, the application of the doctrine of common purpose involves the application of the Constitution;
4. The Constitutional Court has jurisdiction over the application of the Constitution;
5. So, the Constitutional Court has jurisdiction over the application of common purpose.

Zondo DCJ invoked the misquote in *Boesak* to justify premise 4. The Court in *Boesak* could have provided more reasoning for how it moved from 'protection and enforcement' to 'application and upholding'. However, given the Court's commitment to interpreting constitutional matters broadly,[46] and given that section 167(7) is not exhaustive of constitutional matters,[47] it is hard to dispute that the Court has jurisdiction over the application of the Constitution (premise 4). The application of the Constitution, simply, is the use of a constitutional principle to reach a legal outcome on given facts. An application of the Constitution could include many of the matters discussed below, including confirmation proceedings, developing the common law, reviewing public power against the principle of legality, and almost all the matters over which the Court has exclusive jurisdiction. Since *Jacobs*, the Court has confirmed twice that the application of constitutional principles in a matter makes the matter a constitutional one.[48]

More controversial is Zondo DCJ's finding that the application of a doctrine 'based' on public policy necessarily entails the application of the Constitution (premise 5). The conclusion equivocates the concept of 'based'. A rule can be 'based' on public policy in that the rule exists for some public policy reason.[49] The rule 'no smoking' might exist for public policy reasons, like ensuring that non-smokers do not have to endure the smell of smoke. A rule can also be 'based' on public policy in that the rule necessarily entails the application of public policy considerations. The rule 'a contractual term will not be enforced if it is contrary to public

[44] Cachalia AJ and Madlanga J concurring.

[45] Zondo DCJ, Dlodlo AJ, Jafta J and Petse AJ.

[46] *Fraser* (note 12 above) at para 37.

[47] It uses 'including' when defining constitutional matters.

[48] *EFF v Gordhan* (note 18 above) at paras 35–36; *Jiba* (note 3 above) at para 38.

[49] Though unnecessary for my argument, I understand a public policy reason to be one which does not relate to the parties before the Court.

policy' is an example. These two meanings of 'based' are distinct. A rule can exist for public policy reasons but not entail a consideration of public policy every time it is applied.

Zondo DCJ relies on authorities saying that common purpose is a rule that exists for public policy reasons to find that its application necessarily entails the application of public policy.[50] But the latter does not follow from the former. The rule in question in *Jacobs*, that the accused be present at the time the blow was struck, exists for various public policy reasons.[51] But applying that rule does not entail applying public policy. Applying that rule is a matter of determining (a) when the fatal blow was struck and (b) whether the accused was present then. Accordingly, Zondo DCJ's reliance on various delict and contract cases was misplaced. The cases he invoked dealt with either (a) the invocation of public policy to develop the common law or (b) the application of public policy directly in terms of a rule. As an example of the latter, whether something is wrongful in delict is a question of whether 'public policy and public interest favour holding the conduct unlawful and susceptible to a remedy in damages'.[52] Similarly, in *K v Minister of Safety and Security* ('*K*'), public policy was held to inform whether an employee's conduct is sufficiently connected to an employer.[53]

However, in *Jacobs* the Court was not asked to develop common purpose under section 39(2). Moreover, whether someone is guilty of a crime due to common purpose does not depend directly on an application of public policy considerations. It depends on whether the requirements for common purpose have been met. None of those requirements invoke public policy; certainly, the one in dispute in *Jacobs*, whether the co-accused were present at the time of the fatal blow, does not. In that sense, unlike wrongfulness and vicarious liability, applying common purpose does not directly entail an application of public policy.[54]

The implication of equivocating, as Zondo DCJ did, was pointed out by Goliath J and Froneman J. It is difficult to think of a rule that is not informed by public policy, in the sense that it exists for public policy reasons. If the application of a rule so informed by public policy is an application of the Constitution, then the application of any rule constitutes the application of the Constitution. This gives the Court a far-reaching jurisdiction, if not limitless. For instance, Zondo DCJ, in response to Froneman J's concern, posits that disputing whether an accused shot the deceased is not a constitutional matter.[55] But on his approach, it is. The

[50] The only exception is *Makhubela v S, Matjeke v S* [2017] ZACC 36, 2017 (2) SACR 665 (CC), 2017 (12) BCLR 1510 (CC). In that matter, the Court held (at para 24) that the application of common purpose implicates the rights of freedom of the person and the right to a fair trial. Since the judgment of Froneman J in *Jacobs* holds that *Makhubela* is *per incuriam*, Zondo DCJ had to give reasons for why it was right. The argument discussed above explains why Zondo DCJ considered *Makhubela* to be good law.

[51] *Thebus & Another v S* [2003] ZACC 12, 2003 (6) SA 505 (CC), 2003 (10) BCLR 1100 (CC) generally discusses the rationales behind common purpose.

[52] *Steenkamp NO v Provincial Tender Board of the Eastern Cape* [2006] ZACC 16, 2007 (3) SA 121 (CC), 2007 (3) BCLR 300 (CC) at para 42.

[53] *K v Minister of Safety and Security* [2005] ZACC 8, 2005 (6) SA 419 (CC), 2005 (9) BCLR 835 (CC).

[54] It might also be that sometimes a second rule mandates that a constitutional right is applied alongside or instead of a first rule. A well-known second rule of this kind arises where the constitutional right is unjustifiably limited by the first rule in question. In that case, the first rule cannot be applied without applying the constitutional right in question and s 36 of the Constitution. But whether the constitutional right applies is not necessarily a function of the first rule, but of the second rule. Hence, Goliath J and Froneman J were at pains to point out that common purpose was held in *Thebus* not to unjustifiably limit any constitutional rights. The upshot is that there is no second rule engaged that mandates the application of constitutional rights instead of the application of common purpose.

[55] *Jacobs* (note 2 above) at para 155.

rules of evidence for determining whether an accused shot the deceased are informed by public policy;[56] so, applying those rules means the matter is constitutional.

Zondo DCJ's reasoning received the support of four other judges, one shy of a majority. The implication is that the Court was very nearly comfortable with extending its jurisdiction so broadly. While this conclusion might be welcomed, Zondo DCJ's reasoning should not be about why the Court embraces its general jurisdiction. One reason is the one just explained: the equivocation of 'based' in public policy. Another is that the Court had jurisdiction in *Jacobs* on other, much clearer ground, so it was unnecessary to develop Principle 1 to include the application of all rules giving effect to public policy. The obvious basis for the Court's jurisdiction was section 167(3)(b)(ii): the matter raised an arguable point of law of general public importance. The question was whether an accused had to be present when the fatal blow was struck to be convicted of murder through common purpose. The matter raised this question because both the high court, the full court, and Supreme Court of Appeal did not seem to think so. The state similarly did not think so. The point was certainly arguable,[57] and, since it had never been considered by the Court,[58] of public importance. The Court's jurisdiction was accordingly engaged.

Compare how the Court assumed jurisdiction in *Tshabalala*.[59] That case concerned whether common purpose could be applied to convict an accused of rape under the common law. The Court did not find jurisdiction on the ground that the application of common purpose entails the application of public policy. Instead, the Court held that the matter raised an arguable point of law of general public importance: whether common purpose could be applied to rape. The approach to jurisdiction in *Tshabala* could have been taken in *Jacobs*.[60]

The approach of the five judges who granted leave to appeal reflects that the case, in substance, concerned an arguable point of law. Theron J, whose judgment dealt with the merits of the matter, found as a matter of law that the accused had to be present when the fatal blow was struck to be convicted of murder through common purpose.[61] She then would have set aside the conviction since '[i]n this matter, it has not been established that the applicants were present when the fatal blow was administered'.[62] Theron J did not find that the lower courts misapplied the doctrine of common purpose. She found that they were wrong about the requirements themselves. In other words, she resolved a legal question, not a question of application, and then remitted the matter for sentencing.[63]

---

[56] For example, Schwikkard notes how even the process of cross-examination is laden with public policy and normative assumptions. PJ Schwikkard 'Does Cross-Examination Enhance Accurate Fact-Finding?' 136(1) *South African Law Journal* (2019) 27–41.

[57] There is Appellate Division authority for the proposition. See *S v Mgedezi* [1988] ZASCA 135, [1989] 2 All SA 13 (A) and *S v Motaung* 1990 (4) SA 485 (A).

[58] In *Thebus* (note 51 above) at para 21, the Court expressly left open the question whether common purpose applies in situations other than when the accused is present.

[59] *Tshabalala* (note 32 above) at para 30.

[60] Since *Jacobs*, the Court has refused to follow Zondo DCJ's reasoning that the application of common purpose necessarily raises a constitutional matter. See *Shipalana v S* [2019] ZACC 20. Moreover, tellingly, the Court has not attempted to invoke *Makhubela* (note 50 above) since Froneman J in *Jacobs* held that it was *per incuriam*.

[61] *Jacobs* (note 2 above) at para 73.

[62] Ibid at para 81.

[63] She does so after finding that the applicants were guilty of assault as a competent verdict. *Jacobs* (note 2 above) at para 82.

So much for the 'application' leg of the *Boesak* misquote. While the application of the Constitution would, generally, easily constitute a constitutional matter, it is less obvious what 'upholding' the Constitution means. One issue is that the Constitution can be 'upheld' negatively; any law that does not violate the Constitution in a sense upholds the Constitution. Another issue is that the Constitution or constitutional values are upheld through the application of many private law and criminal principles. For instance, the value of dignity might be upheld in defamation cases, while the value of bodily integrity might be upheld in assault convictions. On this interpretation of 'upheld', the Court's jurisdiction is truly limitless. No decision since *Boesak* has actively relied on the 'uphold' leg of its finding, but it is unlikely that the Court intended the word to be so loosely interpreted.[64] What the Court might have intended was something along the lines of protect or enforce as discussed above.

Interpretation, protection, enforcement, application, and upholding are not mutually exclusive. Often a single matter might involve all or several. The concepts are also not meant to be exhaustive of constitutional matters, though it is hard to imagine a constitutional matter that would not implicate one of these concepts. On the contrary, it seems like most constitutional matters decided by the Court could be pigeon-holed into at least one of these concepts. The result is that Principle 1 overlaps with Principles 2 to 5, if not swallowing them up completely. Interpreting legislation or developing the common law under section 39(2) (Principle 2) constitutes an application of the Constitution, as does reviewing the exercise of public power based on legality (Principle 3). The Constitution can then be enforced through legislation (Principle 4); the same being true of regulating fair hearings and determining the scope of judicial power (Principle 5).

The advantage of linking each of the below principles back to Principle 1 is that it grounds the Court's jurisdiction in an express provision of the Constitution: section 167(7). However, the five concepts embedded in Principle 1 are malleable and bleed into each other. The result is that constructing a clear framework for the Court's jurisdiction on the back of section 167(7) is difficult. Moreover, the section can be interpreted to give the Court jurisdiction over almost all matters, especially if one thinks that the purpose of section 167 is to provide the Court with a general jurisdiction. One solution is to have sub-rules under Principle 1 which are clearer, more concrete, and yet impose limits on the Court's jurisdiction. The Court has purported to adopt this approach. As we shall see, the Court's attempt to limit section 167(7) with sub-rules has not worked, since the rules introduced are themselves of immense breadth.

B Principle 2: Section 39(2) and legislative interpretation

Section 39(2) of the Constitution provides: 'When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights'. The Court has held, and this is Principle 2, that a lower court's failure in its duty under section 39(2) is a constitutional matter. It has done so both in the context of developing the common law and interpreting legislation.

With respect to the common law, the Court has repeatedly held that whether the common law should be developed under section 39(2) is a constitutional matter.[65] A constitutional matter arises either when a court reaches the wrong outcome when considering the development

[64] As explained in part IV, *Boesak* imposed important restrictions on the Court's jurisdiction.

[65] *K* (note 53 above); *Carmichele* (note 25 above); *Boesak* (note 13 above).

of the common law, or fails to consider the possibility of developing the common law at all.[66] The Court has contrasted 'developing' the common law with 'applying' the common law, holding that the latter generally is not a constitutional issue. In *K*, the Court explained the difference between applying and developing the common law as envisaged in section 39(2):

1. applying: deciding a case because the facts fall within the established ambit of a legal rule;
2. developing: deciding a case after extending or restricting the ambit of a legal rule to include or exclude a set of facts unlike any set of facts previous adjudicated.[67]

I discuss the application of rules, and whether they raise a constitutional issue, under Principle 8 below. Principle 8 deals with the application of settled principles, over which the Court does not have jurisdiction. As we shall see, distinguishing between 'applying' and 'developing' the common law is difficult to do.

Other than contrasting development with application, the Court has highlighted various features of what constitutes the development of the common law under section 39(2). Development generally refers to using the Constitution's foundational values to draw normative impetus and develop new doctrines that address the common law's deviation from the spirit, purport, and object of the Bill of Rights.[68] The distinguishing feature of a 'development' case is a proposed change to the common law to harmonise it with the Bill of Rights. Paradigm examples include changing the test for vicarious liability to include an objective leg founded in public policy,[69] maintaining the *in duplum* rule pending litigation,[70] and the extension of the common law definition of rape to include non-consensual anal penetration of females.[71] Thus, the moment a case involves an allegation that the common law should be changed, since its current form deviates from the spirit of the Bill of Rights, then the case is a constitutional matter.

With respect to legislation, the Court has held that challenging the constitutionality of a court's interpretation of a statute raises a constitutional matter.[72] A challenge to the constitutionality of an interpretation does not challenge the constitutionality of the act.[73] Instead, it alleges either that (a) a court has failed in its duty under section 39(2) to interpret legislation in accordance with the spirit, purport and object of the Bill of Rights; or (b) failed to interpret legislation otherwise consistently with the Constitution.

The distinction between these two kinds of interpretation cases is subtle but important for jurisdiction. Legislation must be interpreted consistently with all provisions of the Constitution, not only the Bill of Rights.[74] If a matter involves the interpretation of legislation in conformity

[66] Ibid *Carmichele* at para 37.

[67] *K* (note 53 above) at para 16.

[68] *Beadica 231 CC v Trustees for the time being of the Oregon Trust* [2020] ZACC 13, 2020 (5) SA 247 (CC), 2020 (9) BCLR 1098 (CC) at paras 74–75.

[69] *K* (note 53 above).

[70] *Paulsen* (note 17 above).

[71] *Masiya v Director of Public Prosecutions Pretoria (The State)* [2007] ZACC 9, 2007 (5) SA 30 (CC), 2007 (8) BCLR 827.

[72] *National Education Health & Allied Workers Union v University of Cape Town* [2002] ZACC 27, 2003 (2) BCLR 154, 2003 (3) SA 1 (CC) ('*NEHAWU*') at para 15.

[73] A challenge of this nature is obviously a constitutional matter.

[74] *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd In re: Hyundai Motor Distributors (Pty) Ltd & Others v Smit NO* [2000] ZACC 12, 2000 (10) BCLR 1079, 2001 (1) SA 545 (CC); *Democratic Alliance v Speaker of the National Assembly* [2016] ZACC 8, 2016 (5) BCLR 577 (CC), 2016 (3) SA 487 (CC) ('*DA v Speaker*') at para 34.

with the constitutional imperative to best promote the spirit, purport and object of the Bill of Rights, then that matter raises a constitutional issue that engages the Court's jurisdiction.[75] A classic example of this sort of case is *Fraser*, where the applicant argued that the Supreme Court of Appeal's interpretation of the Prevention of Organised Crime Act 121 of 1998 did not promote his fair trial rights. The Court found jurisdiction invoking section 39(2), holding that a constitutional question had been raised in the form of 'whether the Supreme Court of Appeal's interpretation ... has failed to promote the spirit, purport and objects of the Bill of Rights in terms of section 39(2)'.[76]

On the other hand, if the allegation is that an interpretation is inconsistent with other provisions of the Constitution, then section 39(2) is not triggered.[77] The Court could nonetheless have jurisdiction under Principle 1 since the matter will involve the interpretation of a provision in the Constitution. For instance, assuming the matter was not before the Court on confirmation proceedings, the Court would easily have had jurisdiction in *Democratic Alliance*.[78] The case concerned the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act 4 of 2004 and whether a provision of that Act was, on one interpretation, inconsistent with members' of parliament right to freedom of speech.[79] Since the case turned on interpreting a constitutional provision (that was not in the Bill of Rights), the Court would have had jurisdiction.

A difficult issue for the Court is whether all disputes over statutory interpretation are constitutional matters, even when the constitutionality of an interpretation is not at issue. It is possible for legislative interpretation to be 'neutral' with respect to the Bill of Rights and the Constitution, such that a challenge to the interpretation is not based on its constitutionality, but on its validity. The Court appears to have contradictory dicta on whether these challenges are constitutional matters within its jurisdiction.

On the one hand, as Froneman J has pointed out in at least two separate judgments, the Court has never held that the interpretation of legislation necessarily gives rise to a constitutional matter.[80] The Court, when dealing with issues of interpretation, looks to link the legislation in question to the Constitution. In the context of section 39(2), the Court finds jurisdiction because the interpretation of legislation 'implicates' a right. If interpretation of legislation limits a constitutional right, then the interpretation of that legislation raises a constitutional matter under section 39(2).[81] For instance, in *Links*, the Court held that it had jurisdiction over a contested interpretation of the Prescription Act,[82] since the interpretation limited the right to access to courts.[83] We should note that this approach significantly extends

[75] *Competition Commission of South Africa v Standard Bank of South Africa Limited; Competition Commission of South Africa v Standard Bank of South Africa Limited; Competition Commission of South Africa v Waco Africa (Pty) Limited* [2020] ZACC 2, 2020 (4) BCLR 429 (CC) at para 39; *Jordaan v City of Tshwane Metropolitan Municipality* [2017] ZACC 31, 2017 (6) SA 287 (CC), 2017 (11) BCLR 1370 at para 8; and *S v Shaik* [2007] ZACC 19, 2008 (2) SA 208 (CC), 2007 (12) BCLR 1360 (CC) at para 83.

[76] *Fraser* (note 12 above) a para 47.

[77] *DA v Speaker* (note 74 above) para 34.

[78] Ibid.

[79] Section 58 of the Constitution.

[80] *Mankayi* (note 21 above) at 119–120; *Jacobs* (note 2 above) at 114.

[81] *Jiba* (note 3 above) para 44.

[82] Act 68 of 1969.

[83] *Links v Member of the Executive Council, Department of Health, Northern Cape Province* [2016] ZACC 10, 2016 (5) BCLR 656 (CC); 2016 (4) SA 414 (CC) at para 22; *Mtokonya v Minister of Police* [2017] ZACC 33, 2018

the meaning of a constitutional matter. All that matters is that a right is 'implicated' by the interpretation in question. The Court has never held that it makes a difference whether the limitation is justified or trivial.

On the other hand, there are dicta and decisions by the Court suggesting that the interpretation of legislation is necessarily a constitutional matter, even if a constitutional right is not implicated. In *Jordaan*, the Court held that 'this Court has emphasised that virtually all issues – including the interpretation and application of legislation and the development and application of the common law – are, ultimately, constitutional'.[84] This dictum could be read to have been made in the context of section 39(2). But that would not cohere with the rationale for the dicta, given in *My Vote Counts*, that 'this is because the Constitution's rights and values give shape and colour to all law'.[85] The dicta suggest that the interpretation of statute will, necessarily, give rise to a constitutional matter, since *all* law is coloured by the Constitution.

Kubyane also suggests that all disputes over interpretation are constitutional matters.[86] The case concerned a dispute over the interpretation of the National Credit Act 34 of 2005. The Court said the matter was a constitutional one. The reason was novel: 'the interpretation of the Act's notice provisions implicates fundamental notions of equity in, and the transformation of, the credit market. Such an interpretation is therefore inherently linked to the constitutional objective of achieving substantive equality'. Unlike previous cases, like *Links*, the Court did not find that the interpretation of the Act contended for by the respondents limited the applicant's right to equality. On the contrary, equality is only mentioned once in the judgment – to find jurisdiction. The basis of the judgment's ultimate finding (the Act does not require a credit provider to bring the contents of a s-129 notice to the subjective attention of a consumer) was not based on section 9 of the Constitution, but on a constitutionally neutral interpretation of the Act.

The approach in *Kubyane* appears to be that the interpretation of legislation that is somehow linked to a 'constitutional objective' is a constitutional matter. This is a serious expansion of the Court's jurisdiction over the interpretation of statutes, since all legislation is linked to some constitutionally legitimate purpose.[87] The Court has since applied the reasoning in *Kubyane* to other cases involving the National Credit Act.[88]

Nevertheless, the Court has not fully embraced the approach in *Kubyane*. In contradiction to *Kubyane*, the majority of the Court in *Media 24* refused to hold that the interpretation of the

(5) SA 22 (CC), 2017 (11) BCLR 1443 (CC) at para 9. Further examples of the Court having jurisdiction over legislation 'implicating' a right include *A M v H M* [2020] ZACC 9, 2020 (8) BCLR 903 (CC); *Competition Commission of South Africa v Pickfords Removals SA (Pty) Limited* [2020] ZACC 14, 2020 (10) BCLR 1204 (CC); *Spilhaus Property Holdings (Pty) Limited and Others v MTN & Another* [2019] ZACC 16, 2019 (6) BCLR 772 (CC), 2019 (4) SA 406 (CC); *Maswanganyi v Minister of Defence and Military Veterans & Others* [2020] ZACC 4, (2020) 41 ILJ 1287 (CC), 2020 (6) BCLR 657 (CC), 2020 (4) SA 1 (CC), [2020] 9 BLLR 851 (CC); *Mankayi* note 21 above; *Mhlongo v S; Nkosi v S* [2015] ZACC 19, 2015 (2) SACR 323 (CC), 2015 (8) BCLR 887 (CC); *Maledu & Others v Itereleng Bakgatla Mineral Resources (Pty) Limited & Another* [2018] ZACC 41, 2019 (1) BCLR 53 (CC), 2019 (2) SA 1 (CC).

[84] *Jordaan* (note 75 above) para 8.

[85] *My Vote Counts NPC v Speaker of the National Assembly* [2015] ZACC 31 at para 51.

[86] *Kubyana v Standard Bank of South Africa Ltd* [2014] ZACC 1, 2014 (3) SA 56 (CC), 2014 (4) BCLR 400 (CC) at paras 16–17.

[87] Otherwise it is unconstitutional. See s 36 of the Constitution.

[88] Act 34 of 2005; *Paulsen* (note 17 above) at para 14; *Sebola & Another v Standard Bank of South Africa Ltd* [2012] ZACC 11, 2012 (5) SA 142 (CC), 2012 (8) BCLR 785 (CC) ('*Sebola*') at para 36.

Competition Act necessarily raises a constitutional matter.[89] Goliath AJ, for the minority and echoing *Kubyane*, held that the Act 'implicate[s] the right of equality contained in s 9 of the Constitution. Section 9(2) enjoins the state to take legislative and other measures to advance the equality of previously disadvantaged people and [the relevant sections] of the Competition Act is a legislative measure of this kind'.[90] Therefore, Goliath AJ held that the interpretation of the Competition Act 89 of 1998 was a constitutional matter.

Six judges disagreed with Goliath AJ's reasoning. Cameron J,[91] Froneman J and Khampepe J, writing for this majority, held that (a) the Competition Act is not the legislation the Constitution mandated to give effect to the right to equality; (b) this was not the basis on which the Competition Commission brought its application; and (c) Goliath AJ did not dispose of the merits of the matter on equality grounds. These three reasons apply with equal force to *Kubyane*. Yet the Court found jurisdiction in *Kubyane* for similar reasons to those given by Goliath AJ.

The tension in the Court's approach to legislative interpretation has mostly been resolved by the introduction of section 167(3)(b)(ii). Questions of statutory interpretation will be arguable points of law of general public importance. An example of this is *Media 24*. Six judges held that the case raised an arguable point of law of general public importance concerning the meaning of 'predatory pricing' in the Competition Act. The Court thus had jurisdiction over a dispute of statutory interpretation that was 'neutral' with respect to the Bill of Rights or the Constitution. This effectively gives the Court jurisdiction over all disputes of statutory interpretation.

C Principle 3: The exercise of public power

In the late 1990s and early 2000s, the Constitutional Court and the Supreme Court of Appeal jousted over whether reviews of public power brought under the common law were constitutional matters. The argument was resolved by the Constitutional Court finding that all reviews of public power, including those invoking the older common law grounds of review, are constitutional matters.[92] The conclusion followed from finding that the constitutional principle of legality (found in section 1(c)) underpins the older common law grounds of review, like ultra vires.

Since then, the Court has repeatedly held that the exercise and control of public power is always a constitutional matter.[93] Reviews of administrative action are constitutional matters for this reason (and because those reviews are brought under PAJA,[94] which is constitutionally

[89] Act 35 of 1999. *Competition Commission of South Africa v Media 24 (Pty) Limited* [2019] ZACC 26, 2019 (9) BCLR 1049 (CC), 2019 (5) SA 598 (CC) ('*Media 24*').

[90] Ibid at para 30.

[91] Who was the author of the above dicta in *Jordaan* (note 75 above) and *My Vote Counts* (note 85 above).

[92] *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 (1) BCLR 1 (CC), 2006 (2) SA 311 (CC) at para 313; *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* [1998] ZACC 17, 1999 (1) SA 374, 1998 (12) BCLR 1458; *Commissioner for Customs and Excise v Container Logistics (Pty) Ltd, Commissioner for Customs and Excise v Rennies Group Limited t/a Renfreight* [1999] ZASCA 35; *Pharmaceutical Manufacturers Association of South Africa & Another: In re Ex Parte President of the Republic of South Africa & Others* [2000] ZACC 1, 2000 (2) SA 674, 2000 (3) BCLR 241.

[93] *Steenkamp* (note 57 above) at para 20; *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Limited* [2019] ZACC 15; 2019 (6) BCLR 661 (CC), 2019 (4) SA 331 (CC) at paras 35–36.

[94] Promotion of Administrative Justice Act 3 of 2000.

envisaged legislation).[95] Reviews of non-administrative public power,[96] and 'self-reviews' based on legality,[97] are similarly constitutional matters. The Court has also invoked the principle of legality to assert jurisdiction over disputes concerning the Competition Tribunal's and Competition Appeal Court's powers under the Competition Act,[98] as well as the Competition Commission's investigatory powers.[99] The Court has also invoked the ground to assert jurisdiction over reviews of decisions by commissioners and arbitrators in the labour dispute system.[100]

There appears to be a further, more recent development with respect to Principle 3. In *Public Protector v SARS*, the Constitutional Court assumed jurisdiction over an appeal against a personal costs order against the Public Protector.[101] Its reasoning was novel.[102] It held:

> Unwarranted costs orders against the Public Protector in her personal capacity in work-related litigation may have a chilling and deleterious effect on the exercise of her powers. Because of this likely *impact on the exercise of constitutional powers*, unwarranted – not just any – costs orders engage this Court's constitutional jurisdiction.[103]

The Court exercised jurisdiction because of the way in which personal costs orders could impact on the exercise of constitutional powers. The Court cited no authority for this proposition, but it follows from Principle 3. If the Court has jurisdiction over the exercise of public power, it should also have jurisdiction over that which impacts on the exercise of public power.

The Court's jurisdiction on this ground, especially in light of the development in *Public Protector v SARS*, is broad. The Court's jurisdiction is engaged when a review is a matter of

---

[95] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism & Others* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) at para 25. More recently, see *Trustees of the Simcha Trust v Da Cruz and Others; City of Cape Town v Da Cruz & Others* [2019] ZACC 8, 2019 (3) SA 78 (CC), 2019 (5) BCLR 648 (CC) at para 19. However, the latter appears to mis-cite *Giant Concerts CC v Rinaldo Investments (Pty) Ltd* [2012] ZACC 28, 2012 JDR 2298 (CC), 2013 (3) BCLR 251 (CC) at para 27. *Giant Concerts* concerned standing to bring a review under PAJA, not the review itself.

[96] *Minister of Defence and Military Veterans v Motau* [2014] ZACC 18, 2014 (8) BCLR 930 (CC), 2014 (5) SA 69 (CC); *Law Society of South Africa & Others v President of the Republic of South Africa & Others* [2018] ZACC 51, 2019 (3) BCLR 329 (CC), 2019 (3) SA 30 (CC); *Albutt v Centre for the Study of Violence and Reconciliation & Others* [2010] ZACC 4, 2010 (3) SA 293 (CC), 2010 (2) SACR 101 (CC), 2010 (5) BCLR 391 (CC); *Democratic Alliance v President of South Africa* [2012] ZACC 24, 2012 (12) BCLR 1297 (CC), 2013 (1) SA 248 (CC).

[97] *State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited* [2017] ZACC 40, 2018 (2) BCLR 240 (CC), 2018 (2) SA 23 (CC); *Buffalo City v Asla* (note 93 above). These have generated a fair deal of controversy, see L Boonzaier 'A Decision to Undo' (2018) 135(4) *South African Law Journal* 642.

[98] *Standard Bank* note 75 above at para 41; *Competition Commission of South Africa v Senwes Ltd* [2012] ZACC 6, 2012 (7) BCLR 667 (CC) at para 17; *Competition Commission v Yara South Africa (Pty) Ltd* [2012] ZACC 14, 2012 (9) BCLR 923 (CC) at para 13.

[99] *Competition Commission of South Africa v Hosken Consolidated Investments Limited* [2019] ZACC 2, 2019 (4) BCLR 470 (CC), 2019 (3) SA 1 (CC) at para 31.

[100] *Duncanmec* (note 35 above) at para 30; *South African Revenue Service v Commission for Conciliation, Mediation and Arbitration* [2016] ZACC 38, 2017 (1) SA 549 (CC), 2017 (2) BCLR 241 (CC); *Sidumo v Rustenburg Platinum Mines Ltd* [2007] ZACC 22, 2008 (2) SA 24 (CC), 2008 (2) BCLR 158 (CC).

[101] *Public Protector v Commissioner for the South African Revenue Service* [2020] ZACC 28.

[102] Compare the reasoning in *Public Protector v South African Reserve Bank* [2019] ZACC 29, 2019 (9) BCLR 1113 (CC), 2019 (6) SA 253 (CC) at para 33, where the Court assumed jurisdiction because of an arguable point of law.

[103] Ibid at para 29 (emphasis added.)

applying settled principles of administrative law and even when the only dispute in the review is of a factual nature.[104]

D Principle 4: Constitutionally envisaged legislation and legislation implementing rights

Principle 2 dealt with the interpretation of legislation in accordance with section 39(2) of the Constitution. The Court has developed another rule concerning legislation. The interpretation and application of legislation that either (a) is constitutionally envisaged or (b) gives effect to a constitutional right, is a constitutional matter. This rule, Principle 4, differs from Principle 2 in two respects. It extends the Court's jurisdiction to the application of legislation to a set of facts, even when there is no dispute concerning the meaning of that legislation. Additionally, it allows the Court to assume jurisdiction even if no right is limited (or needs to be promoted) by the interpretation of certain legislation.

Constitutionally envisaged legislation could mean one of six things. First, there is national legislation that must be enacted to 'give effect' to a constitutional right. Only the rights to access information and just administrative action prescribe the passing of legislation in this way.[105] Secondly, there are rights in the Bill of Rights that oblige the passing of national legislation. These rights, unlike section 32 and section 33, do not say that the national legislation will 'give effect' to the right. They simply provide that national legislation must be passed. These rights are the right to equality[106] and the right to secure tenure or comparable redress.[107] Thirdly, there are rights in the Bill of Rights that oblige government to take 'legislative measures'. These are the right to a safe environment,[108] the right to property,[109] the right to housing,[110] and the rights in section 27.[111] The last two envisage legislative measures 'progressively realising' these rights. Fourthly, the Bill of Rights allows for certain legislation, but does not prescribe its enactment. For example, section 23(5) provides that national legislation may be enacted to regulate collective bargaining, and section 23(6) says that national legislation may recognise union security arrangements contained in collective agreements. Section 9(2) also provides that legislative measures may be taken with respect to affirmative action.

Fifthly, there are provisions outside of the Bill of Rights mandating the passing of legislation. The first is section 3(1) of the Constitution, which provides that national legislation must provide for the acquisition, loss and restoration of citizenship. There are then many other instances of mandated legislation, including legislation providing for an electoral system,[112] legislation providing for the referral of an order of constitutional invalidity to the Constitutional Court,[113] legislation ensuring the promotion of the values and principles relating to public

[104] *Camps Bay Ratepayers and Residents Association v Harrison* 2011 2 BCLR 121 (CC), 2011 (4) SA 42 (CC) at para 51.

[105] Sections 32 and 33 of the Constitution.

[106] Section 9(4) provides that 'national legislation must be enacted to prevent or prohibit unfair discrimination'.

[107] Section 25(6) and (9).

[108] Section 24.

[109] Section 25(5) provides: 'The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.'

[110] Section 26.

[111] Health care, food, water and social security.

[112] Section 46(1)(a).

[113] Section 172(2)(c).

administration,[114] legislation establishing the powers and functions of the police service,[115] and legislation establishing a national treasury and prescribing measures to ensure both transparency and expenditure control in each sphere of government.[116]

Finally, there are provisions outside the Bill of Rights permitting the passing of legislation, but not prescribing it. For example, section 58(2) provides that other privileges and immunities of the National Assembly, Cabinet members and members of the Assembly may be prescribed by national legislation. Similarly, section 180 provides that national legislation may provide for any matter concerning the administration of justice that is not dealt with in the Constitution, including the training of judicial officers.

Using Principles 1 and 2, one would think that the Court's jurisdiction over disputes relating to each kind of legislation would differ. Disputes concerning legislation that 'gives effect' to a constitutional right are constitutional matters, since the constitutional right is applied and interpreted through the legislation.[117] As for the second to fourth types of legislation, where the right to which the legislation is related will be limited by or requires promotion through an *interpretation* of that legislation, the Court will have jurisdiction through section 39(2). The Court's jurisdiction over the fifth and sixth types of legislation will depend on whether the dispute entails the interpretation of a constitutional provision. Accordingly, only on Principles 1 and 2, would the Court not have jurisdiction over all disputes concerning constitutionally envisaged legislation, especially where the dispute concerns only factual disputes or application of settled legislative meanings to facts.

However, the Court has not approached constitutionally envisaged legislation in this manner. Instead, the Court has held that it has jurisdiction over the interpretation and application of all constitutionally 'envisaged' or 'authorised' legislation.[118] It makes no difference which of the above types of legislation the Court is dealing with. The legislation could be giving effect to a constitutional right, or it could be permitted under a provision outside of the Bill of Rights. What matters is that the legislation has a constitutional provision that somehow envisages its enactment. For instance, the Court has jurisdiction over all interpretation and application of PAIA[119] and PAJA, since those acts are mandated by the Constitution to give effect to constitutional rights.[120] The Court has jurisdiction over the interpretation and application of ESTA since it is constitutionally mandated under section 25(9).[121] The same is true of the

[114] Section 195(3).

[115] Section 205(2).

[116] Section 216(1).

[117] Save to the extent that the dispute concerns the legislation limiting the right, in which case the Court assumes jurisdiction because the right is applied directly.

[118] *National Union of Metal Workers of South Africa v Lufil Packaging (Isithebe)* [2020] ZACC 7, 2020 (6) BCLR 725 (CC), (2020) 41 (ILJ) 1846 (CC) at para 27; *Waymark* (note 26 above) at para 27; *Dikoko* (note 20 above) at para 29.

[119] Promotion of Access to Information Act 2 of 2000. See further *Standard Bank* (note 75 above) at para 38, where the Court assumed jurisdiction over a dispute around the rules of the Competition Tribunal because those rules incorporated PAIA. The implication is that further legislation, or even court rules, incorporating or referring to constitutionally envisaged legislation also fall within the Court's jurisdiction.

[120] *PFE International Inc (BVI) v Industrial Development Corporation of South Africa Ltd* [2012] ZACC 21, 2013 (1) SA 1 (CC), 2013 (1) BCLR 55 (CC) at para 16; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 (4) SA 490 (CC), 2004 (7) BCLR 687 (CC) at para 25; *Jacobs* (note 2 above) at para 128.

[121] Extension of Security of Tenure Act 62 of 1997. Though the Court did not make this reason express in *Snyders v De Jager (Appeal)* [2016] ZACC 55, 2017 (5) BCLR 614 (CC), 2017 (3) SA 545 (CC) at para 28. But see *Daniels*

Restitution of Land Rights Act,[122] which is envisaged in its section 25(7).[123] The Court has asserted jurisdiction over the interpretation of the PFMA,[124] since the PFMA regulates the management of public finances as envisaged s 216 of the Constitution.[125] Other legislation, like PIE,[126] PEPUDA,[127] NEMA,[128] and the MPRDA[129] have all similarly been considered by the Court given how the Constitution in some way envisages their enactment.

The Court has gone further than asserting jurisdiction over all interpretation and application of constitutionally envisaged legislation. If legislation purports to give effect to a constitutional right, even though the Constitution does not envisage its enactment, then all interpretation and application of that legislation is a constitutional matter. The seminal case making this finding is *NEHAWU*. The Court held that since the LRA[130] purports to 'give content' to the right to fair labour practices, its interpretation and application are constitutional matters.[131] To be clear, the LRA is not constitutionally mandated or envisaged legislation; section 23 imposes no duty on the legislature to pass laws giving effect to the right to fair labour practices.[132] Nonetheless, *NEHAWU* has been applied since then by the Court to assert jurisdiction over all labour matters.[133] As one commentator has suggested, *NEHAWU* made the Court a 'Labour Appeal Appeal Court'.[134]

The Court made the rationale behind *NEHAWU* clear. The Court has jurisdiction over the interpretation and application of constitutional rights. If legislation gives effect to those rights,

v Scribante & Another [2017] ZACC 13, 2017 (4) SA 341 (CC), 2017 (8) BCLR 949 (CC) at para 12.

[122] Act 22 of 1994.

[123] Ibid. *Salem Party Club v Salem Community* [2017] ZACC 46, 2018 (3) BCLR 342 (CC), 2018 (3) SA 1 (CC) at para 61.

[124] Public Finance Management Act 1 of 1999.

[125] *Waymark* (note 26 above) at para 27.

[126] Prevention of Illegal Eviction and Unlawful Occupation Act 19 of 1998. *Port Elizabeth Municipality v Various Occupiers* [2004] ZACC 7, 2005 (1) SA 217 (CC), 2004 (12) BCLR 1268 (CC) at para 7.

[127] Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. *MEC for Education: Kwazulu-Natal v Pillay* [2007] ZACC 21, 2008 (1) SA 474 (CC), 2008 (2) BCLR 99 (CC) at para 40.

[128] National Environmental Management Act 107 of 1998. *Fuel Retailers Association of Southern Africa v Director General Environmental Management, Department of Agriculture, Conservation and Environment Mpumalanga Province* 2007 (6) SA 4 (CC), 2007 (10) BCLR 1059 (CC) at para 40.

[129] Mineral and Petroleum Resources Development Act 28 of 2002. *Normandien Farms (Pty) Limited v South African Agency for Promotion of Petroleum Exportation and Exploitation (SOC) Limited* [2020] ZACC 5, 2020 (6) BCLR 748 (CC), 2020 (4) SA 409 (CC) at para 38; *Magnificent Mile Trading 30 (Pty) Limited v Charmaine Celliers NO* [2019] ZACC 36, 2020 (1) BCLR 41 (CC), 2020 (4) SA 375 (CC) at para 19; *Agri South Africa v Minister for Minerals and Energy* [2013] ZACC 9, 2013 (4) SA 1 (CC), 2013 (7) BCLR 727 (CC) at para 21; *Minister of Mineral Resources v Sishen Iron Ore Company (Pty) Ltd* [2013] ZACC 45, 2014 (2) SA 603 (CC), 2014 (2) BCLR 212 (CC) at para 37.

[130] Labour Relations Act 66 of 1996.

[131] *NEHAWU* (note 72 above) at para 14.

[132] Pace Cameron J, Froneman J and Khampepe J in *Media 24* (note 89 above) at para 128.

[133] See most recently *National Union of Metal Workers of South Africa v Aveng Trident Steel (a division of Aveng Africa (Pty) Ltd)* [2020] ZACC 23; *Association of Mineworkers and Construction Union v Ngululu Bulk Carriers (Pty) Limited (In Liquidation)* [2020] ZACC 8, 2020 (7) BCLR 779 (CC), (2020) 41 ILJ 1837 (CC), at para 11; *National Union of Metal Workers of South Africa v Lufil Packaging (Isithebe)* [2020] ZACC 7, 2020 (6) BCLR 725 (CC), (2020) 41 (ILJ) 1846 (CC); and *Road Traffic Management Corporation v Tasima (Pty) Limited; Tasima (Pty) Limited v Road Traffic Management Corporation* [2020] ZACC 21, 2020 (10) BCLR 1227 (CC), (2020) 41 ILJ 2349 (CC) at para 20.

[134] Seedorf (note 15 above) at 480.

it 'will of course always be subject to constitutional scrutiny to ensure that it is not inconsistent with the Constitution'.[135] This is in respect of both the interpretation and application of that legislation.[136] We should note that the rationale is not entirely watertight. Just because the Court has jurisdiction over the interpretation and application of constitutional rights does not mean it has jurisdiction over every dispute relating to legislation giving effect to those rights. Some labour disputes, for instance, might not turn on a purposive reading of the LRA. Parties might agree on the purpose of a provision but disagree on other constitutionally neutral issues (like the text or structure of the LRA). Since there is no dispute about consistency with or promotion of constitutional rights, the Court would not have jurisdiction.

It is not entirely clear how far *NEHAWU* goes. The Court has at times assumed jurisdiction over legislation, albeit alongside other reasons, if one of the legislation's objects was to give effect to a right in the Constitution. For instance, in *Bengwenyama* the reason the Court had jurisdiction was because the objects of the MPRDA include the promotion of equitable access to mineral resources for historically disadvantaged people and to give effect to the environmental right in section 24.[137] In *Sishen* this was made even clearer:

> There can be no doubt that this case raises constitutional issues of importance. It involves the interpretation and application of a statute that was enacted to discharge a constitutional obligation to redress inequalities caused by past racial discrimination and to create equitable access to mineral and petroleum resources.[138]

At the same time, the Court in *Media 24* refused to find that the interpretation of the Competition Act is a constitutional matter, despite the Competition Act providing that one of its objects is to promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons.[139] More strikingly, the Court distinguished *NEHAWU* from a case involving the BCEA.[140] The matter turned on whether the respondent was the applicant's employer under the BCEA, which involved applying the meaning of employer in the BCEA to the facts of the case. A slim majority held that this was a purely factual dispute, despite it clearly involving the application of legislation intended to give effect to section 23 of the Constitution.[141]

These decisions are difficult to reconcile. On the rationale of *NEHAWU*, it should make no difference whether an act solely gives effect to a right, like the LRA, or has various objects, one of which is to give effect to a right, like the MPRDA. If so, any act that has a single object of giving effect to a constitutional right should be within the Court's jurisdiction, which makes *Media 24* difficult to explain. In addition, the Court has not explained whether legislation

[135] *NEHAWU* (note 72 above) para 15.

[136] Ibid.

[137] *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd & Others* [2010] ZACC 26, 2011 (4) SA 113 (CC), 2011 (3) BCLR 229 (CC) at para 42. Cf. the reasoning in *Normandien Farms (Pty) Limited v South African Agency for Promotion of Petroleum Exportation and Exploitation (SOC) Limited* [2020] ZACC 5, 2020 (6) BCLR 748 (CC), 2020 (4) SA 409 (CC) at para 38, where the fact that the MPRDA was constitutionally mandated by s 24 was used to assert jurisdiction.

[138] *Minister of Mineral Resources v Sishen Iron Ore Company (Pty) Ltd* [2013] ZACC 45, 2014 (2) SA 603 (CC), 2014 (2) BCLR 212 (CC) at para 37, recently affirmed in *Magnificent Mile Trading* (note 131 above) para 19.

[139] Section 2(f).

[140] Basic Conditions of Employment Act 75 of 1997. *Mbatha v University of Zululand* [2013] ZACC 43, 2014 (2) BCLR 123 (CC), (2014) 35 ILJ 349 (CC).

[141] The Basic Conditions of Employment Act 75 of 1997 provides in its s 2 that its purpose is to give effect to and regulate the right to fair labour practices conferred by s 23(1) of the Constitution.

needs to provide expressly that it gives effect to a constitutional right or if implication suffices for jurisdiction. In most cases, the Court has only assumed jurisdiction over legislation that has been express in its object of giving effect to a constitutional right, suggesting that the rule is limited to the former. Most importantly, the Court has repeatedly insisted that it does not have jurisdiction over all criminal matters.[142] The CPA[143] clearly 'gives content' to the rights in section 35 of the Constitution,[144] but it does not have an express provision saying that its object is to do so. The Court's refusal to become a 'Criminal Appeal Appeal Court' suggests that the legislation needs to give effect to a constitutional right expressly.

There are exceptions that are difficult to square with the Court's approach to the CPA. In *Robinson*, the Constitutional Court held that it had jurisdiction over a dispute relating to whether a magistrate lawfully admitted evidence in an extradition hearing. The Court held: 'All people who are unlawfully extradited to serve a sentence of imprisonment abroad would have their rights infringed contrary to the provisions of the Constitution'. Accordingly, 'whether there was proper authentication [of evidence] in the extradition enquiry before the magistrate is a constitutional matter'.[145] The Court thus assumed jurisdiction over the application of the Extradition Act 67 of 1962, even though the Act only implicitly gives effect to various constitutional rights. But if an unlawful extradition violates constitutional rights, so too does an unlawful conviction. So, all criminal matters are constitutional matters on the reasoning of *Robinson*.

If the Court's approach is only to take jurisdiction over legislation that is express in its purpose to give effect to constitutional rights, then the approach is difficult to justify given the *NEHAWU* rationale. Limiting jurisdiction only to legislation that expressly gives content to constitutional rights seems formalistic and contrary to the imperative to interpret the Court's jurisdiction broadly.[146] The Court's jurisdiction would, absurdly, turn on whether Parliament decides to acknowledge that its legislation is implementing a constitutional right. The only other option is to accept that the Court has widespread jurisdiction over disputes regarding legislation, regarding both meaning and application. If we think that the Court should have jurisdiction over legislation that gives content or effect to constitutional rights, as in *NEHAWU*, it should make no difference if the legislation does so implicitly. The upshot is that the Court has jurisdiction over most legislation, from the Prescription Ac 68 of 1969[147] to the Consumer Protection Act 68 of 2008,[148] and of course the Criminal Procedure Act.

Once again, much of this tension is resolved by section 167(3)(b)(ii). Disputes about the meaning of legislation will invariably raise an arguable point of law. The only aspect of *NEHAWU* not dealt with by section 167(3)(b)(ii) is the *application* of legislation. As with labour cases, applicants might want to argue that there is no dispute about the meaning of the law. Yet the application of the legislation, one object of which is to give effect to their constitutional rights, was incorrect. On the plain reading of *NEHAWU*, and to fully realise

[142] *Boesak* (note 13 above).
[143] Criminal Procedure Act 51 of 1977.
[144] Seedorf (note 15 above) at fn 334.
[145] *Director of Public Prosecutions: Cape of Good Hope v Robinson* [2004] ZACC 22, 2005 (4) SA 1 (CC), 2005 (2) BCLR 103 (CC) at para 20.
[146] *Fraser* (note 12 above).
[147] Right of access to courts.
[148] The right to equality.

its rationale, the Court should have jurisdiction in such cases. In the end then, the Court will have jurisdiction over most cases involving statutes.

E Principle 5: Fair procedure or courts' powers within the judicial system

The Court has assumed jurisdiction over disputes around fair process and judicial power in lower courts. At its broadest, the principle is that disputes about the scope of judicial power are constitutional matters.[149] For instance, in *Tasima*, the Court assumed jurisdiction over a dispute about whether a court may refuse to adjudicate a review application if there is a court order directing that the impugned decision be implemented.[150] Similarly, in *ACSA* the Court had jurisdiction over whether a settlement agreement setting aside a previous court order can be made an order of court.[151] The Court has also held that it has jurisdiction over contempt of court proceedings, since those proceedings relate to the enforcement of court orders.[152] The rationale for Principle 5 is obvious: the Court has the duty to oversee and ensure the administration of justice in all courts.

The Court has not limited its jurisdiction under this rule to the high court. The Court has exercised jurisdiction over whether the Land Claims Court had the power to appoint a special master.[153] It also exercised jurisdiction over the scope of the powers of the Competition Appeal Court.[154] In this context, since the lower court is governed by statute, there is significant overlap with Principle 3. The overlap was made clear in *Standard Bank*, where the Court invoked both the principle of legality and fair litigation to assert jurisdiction over an issue relating to the powers of the Competition Appeal Court.[155]

The Court has asserted jurisdiction over certain allegations of unfair process and irregularities in a lower court. The Court has held that the question of whether a judicial officer should recuse himself or herself is a constitutional matter.[156] Although, in *Tjiroze* the Court declined to take jurisdiction because 'the underlying factual question whether [the allegedly biased judge] was conflicted must first be resolved. In truth, therefore, this is a factual dispute dressed in constitutional garb'.[157] Unfortunately, *Tjiroze* directly contradicts *Basson*, which held that the question of bias is a legal one, and where the Court considered the record in detail to ascertain whether the judge concerned was biased.[158]

---

[149] *Tasima* (note 12 above) at 62.

[150] Ibid.

[151] *Airports Company South Africa v Big Five Duty Free (Pty) Limited* [2018] ZACC 33, 2019 (2) BCLR 165 (CC), 2019 (5) SA 1 (CC).

[152] *Matjhabeng Local Municipality v Eskom Holdings Limited*; *Mkhonto v Compensation Solutions (Pty) Limited* [2017] ZACC 35, 2017 (11) BCLR 1408 (CC), 2018 (1) SA 1 (CC) at para 69; *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma & Others* [2021] ZACC 18 at para 24 onwards.

[153] *Mwelase v Director-General for the Department of Rural Development and Land Reform* [2019] ZACC 30, 2019 (11) BCLR 1358 (CC), 2019 (6) SA 597 (CC).

[154] *Standard Bank* (note 75 above).

[155] Ibid at para 41.

[156] *S v Basson* [2004] ZACC 13, 2005 (1) SA 171 (CC), 2004 (6) BCLR 620 (CC) at para 21; *Ramabele v S; Msimango v S* [2020] ZACC 22, 2020 (11) BCLR 1312 (CC) at para 34.

[157] *Tjiroze v Appeal Board of the Financial Services Board* [2020] ZACC 18 at para 16.

[158] *S v Basson* [2005] ZACC 10, 2005 (12) BCLR 1192 (CC), 2007 (3) SA 582 (CC) para 19ff.

The Court has assumed, without deciding, that it has jurisdiction over whether judges provided adequate reasoning for decisions relating to leave to appeal.[159] It similarly assumed, without deciding, that it had jurisdiction to review the Supreme Court of Appeal's President's decision to not reconsider a petition for leave to appeal.[160]

The Court has developed a set of sub-rules with respect to judicial irregularities impacting the right to a fair trial. Most of these cases turn on an interpretation of fairness in section 35(3). These cases could then be Principle 1 type cases. For instance, in *Van der Walt*, the applicant was convicted of culpable homicide. The magistrate decided on the admissibility of various pieces of evidence for the first time in the judgment on conviction. She also introduced medical evidence through her own research in the judgment. The Court held that its jurisdiction is engaged where the alleged irregularity is sufficiently serious to undermine basic notions of trial fairness and justice. Not all procedural irregularities are sufficiently serious to constitute an infringement of the constitutional right to a fair trial, but those that are raise a constitutional matter. On the facts, the pronouncement on admissibility at the stage of conviction and reliance on medical literature not proved in testimony implicated the right to a fair trial, in particular, the right to adduce and challenge evidence.[161] So, the matter was constitutional.[162] Similarly, in *Ramabele,* a judgment handed down just after *Van der Walt*, the Court held that the issue of unreasonable delays in criminal proceedings raises a constitutional matter. The Court reiterated that '[t]he right to a trial within a reasonable time is expressly cast as an incident of the right to a fair trial'.[163]

But there are some cases that go beyond an interpretation of the right to a fair trial. These cases suggest that the Court exercises its jurisdiction because what is at stake is also the scope of judicial power and the administration of justice. For instance, the Court has held that absent any other constitutional issue, the question of sentence will generally not be a constitutional matter. The Court held that an irregularity in sentencing is insufficient to raise a constitutional matter; there must also be a failure of justice.[164] The invocation of justice, instead of fairness in section 35(3), suggests that the ground of jurisdiction is not necessarily based on the right to a fair trial, but in the Court's power to regulate judicial proceedings in lower courts. As another example, in *Makhokha*, the Court set aside a sentencing order that contravened the requirement in the CPA that the maximum period for non-parole is two-thirds of the sentence.[165] *Makhokha* suggests that the Court will assume jurisdiction over sentencing disputes where it can be shown

[159] *Mphahlele v First National Bank of South Africa Ltd* [1999] ZACC 1, 1999 (2) SA 667, 1999 (3) BCLR 253 at para 7.

[160] *Liesching v S* [2018] ZACC 25, 2018 (11) BCLR 1349 (CC), 2019 (4) SA 219 (CC) at para 127. Although, in *Cloete v S; Sekgala v Nedbank Limited* [2019] ZACC 6, 2019 (5) BCLR 544 (CC), 2019 (4) SA 268 (CC), the Court explained that ordinarily such appeals will not fall within its jurisdiction since they concern factual disputes.

[161] *Van der Walt v S* [2020] ZACC 19, 2020 (2) SACR 371 (CC) at para 15.

[162] Also see *M T v S; A S B v S; September v S* [2018] ZACC 27, 2018 (2) SACR 592 (CC), 2018 (11) BCLR 1397 (CC) at para 35, which held that whether the failure to include the relevant section of the Criminal Law Amendment Act 105 of 1997 in a charge sheet infringes an accused's right to be informed of the charge with sufficient detail to answer it is a constitutional matter. See further *Phakane v S* [2017] ZACC 44, 2018 (1) SACR 300 (CC), 2018 (4) BCLR 438 (CC) at para 23, which held that whether the state's failure to provide a record of proceedings on appeal implicates the right to a fair trial and thus raises a constitutional matter.

[163] *Ramabele* (note 156 above) at para 34.

[164] *S v Bogaards* [2012] ZACC 23, 2013 (1) SACR 1 (CC), 2012 (12) BCLR 1261 (CC) at para 42. See also *Makhokha v S* [2019] ZACC 19, 2019 (7) BCLR 787 (CC), 2019 (2) SACR 198 (CC).

[165] *Makhokha* ibid.

that the sentencing judge contradicted legislation by making the sentencing order concerned.[166] Again, this speaks to judicial power, not only trial fairness.

The Court has asserted jurisdiction over questions of admissibility of evidence mainly by invoking section 35(3). In *Basson*, the Court held: 'Fairness during a trial is a requirement of the Constitution. Therefore, the question whether the admission of the bail record would be fair to the accused is a constitutional matter and falls within the jurisdiction of this Court'. Similarly, in *Mhlongo*, the Court exercised jurisdiction over 'whether the Constitution permits the admission of an extra-curial statement by an accused against a co-accused in a criminal trial'.[167] The Court's reasoning was that the question 'implicates the rights to equality before the law and to a fair trial'.[168] The Court went on to hold that extra-curial statements by an accused cannot be used against a co-accused.

On the reasoning of both *Basson* and *Mhlongo*, an allegation that the admission of specific evidence renders a trial unfair raises a constitutional matter. While *Mhlongo* dealt with a constitutional challenge to a rule of admissibility, its reasoning was centred on the right in section 35(3), which could be implicated, as *Basson* held, by the admission of inadmissible evidence. So, the Court's jurisdiction extends not only to challenges to principles of evidence, but also to the application of those principles in respect of specific evidence. This was confirmed by *Molaudzi* which simply applied the post-*Mhlongo* position to rule that the admission of certain extra-curial statements was unconstitutional.[169]

The upshot of *Molaudzi* is that the Court appears to have significant jurisdiction over criminal matters, despite it saying otherwise.[170] *Molaudzi* suggests that the application of principles of admissibility necessarily raises constitutional issues, since conviction based on inadmissible evidence implicates the right to a fair trial. *Molaudzi* echoes the rationale discussed earlier in *Robinson*, which held that an unlawful extradition would be contrary to the Constitution, thus giving the Court jurisdiction over the application of the Extradition Act. The rationale of these cases implies that the Court has jurisdiction over the application of all criminal legal principles, since a conviction based on a misapplication of substantive criminal law would undermine the right to a fair trial just as much as a misapplied principle of admissibility. This implication could have been avoided if the Court only invoked the administration of justice as a rationale for intervening in cases of wrongly admitted evidence. The argument would be that the administration of justice only concerns the procedures and powers of a court, like admitting evidence.[171] The administration of justice, on the other hand, does not justify intervention in matters in which substantive criminal law is misapplied. The issue for this approach, however, is that there is no reason why the administration of

[166] *Klaas v S* [2018] ZACC 6, 2018 (5) BCLR 593 (CC), 2018 (1) SACR 643 (CC), where the failure to consider the relevant minimum sentencing provisions was said to raise a constitutional matter as it implicated the right to a fair trial.

[167] *Mhlongo v S; Nkosi v S* [2015] ZACC 19, 2015 (2) SACR 323 (CC), 2015 (8) BCLR 887 (CC) at para 16. See *Molaudzi v S* [2015] ZACC 20, 2015 (8) BCLR 904 (CC), 2015 (2) SACR 341 (CC).

[168] *Mlhongo* ibid.

[169] *Molaudzi* (note 167 above) at para 46. See also *Khanye v S* [2017] ZACC 29, 2017 (11) BCLR 1399 (CC), 2017 (2) SACR 630 (CC).

[170] *Boesak* (note 13 above).

[171] For example, see s 21 of the Superior Courts Act 10 of 2013, which envisages wrongly admitted evidence as a ground of reviewing a magistrate's decision.

justice cannot also include a substantive element, especially since the right to fair trial is constitutionally guaranteed. Put differently, justice is hardly administered if trials are unfair.

The Court has attempted to avoid the implication that it has wide-ranging jurisdiction over criminal matters by introducing the negative Principles 7 and 8, discussed below. As we will see, this introduction is difficult to defend. We should note that even if the Court has jurisdiction, on appeal the Court will be slow to interfere with the decision to admit or not admit evidence.[172] The decision is considered an exercise of true discretion, which can only be interfered with in limited circumstances.[173]

F Principle 6: Arguable point of law of general public importance

I have already mentioned that the Court has 'jurisdiction' over arguable points of law of general public importance. This was the basis on which the Court had jurisdiction in *Jacobs*, and this is the basis on which the Court will have jurisdiction over the interpretation of constitutionally neutral legislation. I now deal with this principle in further detail.

Section 167(3)(b) provides:

> The Constitutional Court—
> (b) may decide—
> (i) constitutional matters; and
> (ii) any other matter, if the Constitutional Court *grants leave to appeal* on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by that Court (emphasis added.)

The text of section 167(3)(b)(ii) is clear. The Court may decide constitutional matters and 'any other matter'. One would have thought that section 167(3)(b)(ii) would bring an end to confusion over the Court's jurisdiction, since the Court may now decide 'any other matter'. The Court can only decide those other matters if it *grants leave to appeal* for certain reasons. But granting leave to appeal is distinct from jurisdiction. Jurisdiction is thus general and leave to appeal is prescribed. If we adopt this interpretation of section 167(3)(b)(ii), the main issue in this article is resolved: the Court has jurisdiction over all matters. But the Court has not interpreted section 167(3)(b)(ii) this way. For no express reason, and contrary to the plain meaning of section 167(3)(b)(ii), the Court has developed Principle 6 in the context of jurisdiction. The rule developed by the Court is that the Court has *jurisdiction* over arguable points of law of general public importance.[174] Whether these points 'ought to be heard' by the Court is then a question of granting leave to appeal.

The leading case for Principle 6 is *Paulsen*.[175] The Court undertook a systematic analysis of section 167(3)(b)(ii), explaining each element of its new basis for jurisdiction. The Court held that there are three elements to section 167(3)(b)(ii). First, the matter must raise an arguable point of law. This element is bifurcated: the point must be one of law and it must be arguable. A point is about law when it is not about facts. The Court held that cases about disputes of

[172] *Basson* (note 158 above) at paras 113–114.

[173] *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited* [2015] ZACC 22, 2015 (5) SA 245 (CC), 2015 (10) BCLR 1199 (CC); *Giddey NO v JC Barnard & Partners* [2006] ZACC 13, 2007 (5) SA 525 (CC), 2007 (2) BCLR 125 (CC) at para 19.

[174] Most recently *A M* (note 83 above) at para 23; *Maswanganyi v Minister of Defence and Military Veterans* [2020] ZACC 4, (2020) 41 ILJ 1287 (CC), 2020 (6) BCLR 657 (CC) at para 31.

[175] *Paulsen* (note 17 above).

fact, discussed below under Principle 7, will be instructive in determining this requirement.[176] A point is arguable if it has some prospects of success. Not all legal arguments are 'arguable' then.[177] Unmeritorious points, even if engineered into seemingly convincing arguments, are not arguable. Instead, the Court will consider a range of factors in determine whether a point is arguable:

1. The Supreme Court of Appeal may have expressed itself on the matter by a narrow majority.
2. A minority view in the Supreme Court of Appeal may be quite forceful.
3. Different divisions of the High Court may have expressed divergent views on the point, with no pronouncement on it by the Supreme Court of Appeal.
4. There may be no authoritative pronouncement on an issue; with available, cogent academic or expert views on it being divergent.
5. The matter may raise a new and difficult question of law; or
6. The answer to the question in issue may not be readily discernible.[178]

Secondly, the arguable point of law must be of general public importance. After considering the position in Kenya and the United Kingdom, the Court held: 'for a matter to be of general public importance, it must transcend the narrow interests of the litigants and implicate the interest of a significant part of the general public'. Quoting from an English case, the Court explained that 'issues do not have to be of importance to all citizens or the whole nation in order to be of "general public importance", it is enough to be "of importance to a sufficiently large section of the public"'.[179] The Court warned: 'It will serve a litigant well to identify in clear language what it is that makes the point of law one of general public importance'.[180] Thirdly, the arguable point of law of general public importance 'ought to be considered' by the Court. The Court in *Paulsen* held that this third element equates to the interests of justice enquiry in deciding to grant leave to appeal in constitutional matters.[181] I discuss leave to appeal in part V below.

We should note that *Paulsen*, no doubt deliberately, does not say that the Court only has *jurisdiction* over cases that meet the above three requirements. On the contrary, the Court held that '[r]educed to bare essentials, this section provides for this Court *to grant leave*' if the above three requirements are met.[182] The relevant part of Madlanga J's judgment in *Paulsen* concludes with the finding that leave to appeal is granted – not that jurisdiction is assumed.[183] Only in subsequent cases the Court has held, inexplicably, that the Court only has jurisdiction over matters raising arguable points of law of general public importance.[184] For example in *Mashongwa* the Court held: 'This Court also derives jurisdiction from the realisation that this

[176] Ibid at para 20.

[177] Ibid at para 21.

[178] Ibid at para 23.

[179] Ibid at para 26, citing *R (on the application of Compton) v Wiltshire Primary Care Trust* [2008] ECWA Civ. 749; [2009] 1 All ER 978 (*Wiltshire Primary Care Trust*) at para 16.

[180] Ibid.

[181] Ibid at para 30. Confirmed in *Tiekiedraai* (note 18 above) at para 12.

[182] *Paulsen* (note 17 above) at para 16.

[183] Ibid at para 30.

[184] Further recent examples include *Big G Restaurants (Pty) Limited v Commissioner for the South African Revenue Service* [2020] ZACC 16, 2020 (6) SA 1 (CC) at paras 10–11 (which was penned by Madlanga J, the author of *Paulsen*); and *Media 24* (note 89 above) at para 42–45; *De Klerk v Minister of Police* [2019] ZACC 32, 2019 (12) BCLR 1425 (CC), 2020 (1) SACR 1 (CC) at para 11.

matter raises an arguable point of law of general public importance'.[185] This is incorrect. The Court has jurisdiction over constitutional matters and all other matters. It can only grant leave to appeal for non-constitutional matters in certain circumstances, but that is different from jurisdiction.

Since *Paulsen*, the Court has expanded on its approach to section 167(3)(b)(ii). In *Tiekiedraai*, the Court held that interpreting the parties' contract did not raise an arguable point of law of general public importance.[186] Interpreting the contract was a legal issue but was not of public importance. The Court held: 'It might be different if the lease had been a standard form document in widespread use, affecting a large number of consumers'.[187] The Court has since assumed jurisdiction based on section 167(3)(b)(ii) over the interpretation of contracts it finds to be widespread.[188]

As argued in Principle 2 above, section 167(3)(b)(ii) implies that the Court will have jurisdiction over all meritorious disputes concerning the interpretation of legislation. The Court has repeatedly held that the meaning of legislation is a legal issue, and by its nature one of public importance.[189] The only remaining question will be whether the point raised by the applicant has prospects of success, a factor the Court nonetheless considers in deciding leave to appeal.[190] The upshot is that section 167(3)(b)(ii) provides a way out of the conflicting dicta on whether interpretation is necessarily a constitutional matter.

The same is true of interpretations of common law rules.[191] The Court has held that determining wrongfulness in the context of delict raises an arguable point of law of general public importance. In *Mashongwa*, the applicant was assaulted and thrown off a moving train.[192] He sued the Passenger Rail Agency of South Africa (PRASA) for the damages he sustained. The issue was whether PRASA was delictualy liable to the applicant, including whether its omission to have security on the train was wrongful. The Court held: 'the safety and security of the poor people who rely on our train network to go to work or move from one place to another does raise an arguable point of law of general public importance'.[193] The Court's finding is significant in two respects. First, it means that the application of the wrongfulness test is an arguable point of law.[194] Secondly, the Court found jurisdiction based on wrongfulness, but

[185] *Mashongwa v PRASA* [2015] ZACC 36, 2016 (2) BCLR 204 (CC), 2016 (3) SA 528 (CC) at para 14.

[186] *Tiekiedraai* (note 18 above) at para 13.

[187] Ibid at para 14. The Court distinguished *Tiekiedraai* from *Mokone v Tassos Properties CC* [2017] ZACC 25, 2017 (10) BCLR 1261 (CC), 2017 (5) SA 456 (CC) since the latter concerned a contractual clause that was widely used.

[188] *Big G Restaurants* (note 184 above) at para 14.

[189] *Maswanganyi v Minister of Defence and Military Veterans* [2020] ZACC 4, (2020) 41 ILJ 1287 (CC), 2020 (6) BCLR 657 (CC); at paras 32–33; *Masemola v Special Pensions Appeal Board* [2019] ZACC 39, 2019 (12) BCLR 1520 (CC), 2020 (2) SA 1 (CC) at para 18; *Ruta v Minister of Home Affairs* [2018] ZACC 52, 2019 (3) BCLR 383 (CC), 2019 (2) SA 329 (CC) at para 12; and *Ascendis* (note 442 above) at paras 36–37, where the Court held: 'To answer [the question before the Court], this Court has to ascertain whether the different grounds housed under s 61 of the Act constitute a single cause of action or not. This is an interpretational exercise of provisions contained in legislation, *which surely triggers our jurisdiction on its own*' (emphasis added.)

[190] See below part V.

[191] Interpretation of customary law will also trigger jurisdiction under s 167(3)(b)(ii). The Court has not yet assumed jurisdiction over a customary law matter on this basis.

[192] *Mashongwa* (note 185 above).

[193] Ibid at para 14.

[194] Wrongfulness can also raise a constitutional matter. The Court held at para 13 that PRASA's duties under s 7(2) were implicated in the wrongfulness analysis, raising a constitutional matter.

went on to determine negligence and causation, which are factual issues.[195] The upshot of this finding is as suggested above: the Court has interpreted its new jurisdiction as extending to matters connected to arguable points of law of general public importance. This does not imply that the Court will always determine factual matters connected to arguable points of law. But it does mean that the Court can and will do so if the interests of justice so demand.[196]

To conclude, even though section 167(3)(b)(ii) gives the Court jurisdiction over all matters, the Court has refused to make this clear. Instead, it considers its jurisdiction to be determined by the grounds for leave to appeal mentioned in section 167(3)(b)(ii). These grounds are not as wide as a broad interests of justice test. But they have been interpreted broadly by the Court.

G Conclusion on positive principles

The above principles do not paint a picture of a specialist court. The principles imply that the Court has jurisdiction over all disputes involving legislation, whether the dispute is over the meaning of the legislation or the application of legislation (Principles 2, 4, and 6). The Court has jurisdiction over all criminal matters, labour matters, and all matters regulated by legislation. Another implication is that the Court will hear factual disputes relating to constitutional matters or arguable points of law. Given the breadth of both grounds of jurisdiction, this is significant scope to hear factual disputes. The Court could also have jurisdiction over common law disputes, since most common law remedies would 'enforce' the Constitution, even if only indirectly. On the reasoning in some cases, notably Zondo DCJ's in *Jacobs*, the Court's jurisdiction is truly general, since all law (either common law or legislation) is aimed at a constitutionally sanctioned objective.

IV NEGATIVE PRINCIPLES

The Court has resisted the conclusion that its jurisdiction is limitless. It has done so by introducing three negative principles on jurisdiction:

- Principle 7: Factual disputes
- Principle 8: Application of settled principles
- Principle 9: Assessment of jurisdiction from pleadings

These principles are discussed in turn. Once again, the discussion has two elements. First, the principle is described; secondly the principle is criticised. As my description of the negative principles reveals, none of the negative principles come directly from the Constitution, unlike most of the positive principles. Instead, the Court has developed these negative principles. My criticism of the negative principles is that the principles cannot be sustained either on their own terms nor given the rationales and implications of the six positive principles discussed above. The implication, which I return to when discussing leave to appeal, is that the negative rules can easily be abandoned. Whatever value the negative rules bring can, moreover, be easily accounted for by the test for leave to appeal.

[195] Ibid at paras 31 and 63. It is well-established that both these legs of delictual liability are factual in nature. See most recently *Osman Tyres and Spares CC v ADT Security (Pty) Ltd* [2020] ZASCA 33 at para 31.

[196] Though no express reason is given for why the Court considered negligence and causation in *Mashongwa* (note 185 above), the only explanation is that the Court considered it in the interests of justice to do so. Presumably, had the facts been harder to determine, for example, the Court might have remitted the matter to the trial court.

A Principle 7: Factual disputes

The Court has repeatedly refused to hear matters that only concern factual disputes. The seminal case for this principle is *Boesak*. The applicant challenged the Supreme Court of Appeal's finding that he was guilty of fraud and theft. He argued that the Supreme Court of Appeal had not evaluated the evidence before it correctly when deciding to convict him. The Court held that it had no jurisdiction to hear the applicant's appeal. It held that a challenge to a judicial decision on the basis that it is wrong on the facts is not a constitutional matter. It gave three different rationales for this conclusion:

1. otherwise all criminal matters would be constitutional matters;
2. there is a need for finality in criminal matters; and
3. disagreement with the Supreme Court of Appeal's assessment of the facts is not sufficient to constitute a breach of the right to a fair trial.[197]

The first rationale has not been consistently applied by the Court. In other contexts, the Court has no issue with subsuming an entire area of law into its jurisdiction. In *NEHAWU*, the Court was clear: 'If the effect of this requirement is that this Court will have jurisdiction in all labour matters that is a consequence of our constitutional democracy'.[198] In administrative law, the Court has gone so far as to render questions of fact as constitutional matters. In *Camps Bay Retailers*, the Court held that the 'interpretation and application of PAJA ... will always constitute constitutional matters ... . This holds true even where the outcome of the issue raised under PAJA depends on the determination of factual disputes'.[199] It is unclear then why criminal law cannot be so subsumed into 'constitutional matters'. The second rationale begs the question as to why finality ends with the Supreme Court of Appeal. The third rationale might be true; an accused could have a fair trial even when a judge incorrectly assesses evidence. Nonetheless, their right to freedom and security of person would necessarily be limited, and often the right to a fair trial is implicated, when a court incorrectly evaluates evidence and convicts an accused incorrectly. For instance, in *De Klerk* the Court held that it had jurisdiction over whether an arrest was lawful since the 'issue as to whether the applicant's detention was consistent with the principle of legality and his right to freedom and security of the person in s 12(1) of the Constitution is a constitutional matter'.[200] If the legality of an arrest limits the right in section 12(1), so too must an incorrect conviction. So, the three rationales in *Boesak* are hard to accept.

The Court has applied the principle since *Boesak*, and has offered a fourth rationale: (4) the Court should not interfere with the factual findings of a lower court.[201] The difficulty with this rationale is that the Court is willing to resolve factual disputes in labour and administrative law contexts, as well as when the factual dispute is linked to a constitutional matter.[202] Moreover, if the concern is interference, then this is addressed by tempering the standard of review for factual findings, not by declining jurisdiction.

[197] *Boesak* (note 13 above) at para 15.

[198] *NEHAWU* (note 72 above) at para 16.

[199] *Camps Bay Ratepayers* (note 104 above) at para 51. See also *Koyabe v Minister of Home Affairs* [2009] 12 BCLR 1192 (CC), 2010 (4) SA 327 (CC) at para 32.

[200] *De Klerk* (note 184 above) at para 11.

[201] *Minister of Safety and Security v Van Niekerk* [2007] ZACC 15, 2007 (10) BCLR 1102 (CC), 2008 (1) SACR 56 (CC) at para 10.

[202] *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* [2004] ZACC 20, 2005 (2) SA 359 (CC), 2005 (4) BCLR 301 (CC) at para 52.

We could try to come up with further rationales. We might argue that factual disputes are necessarily mundane and should not bother the Court, but we know that this cannot be true. Factual disputes are sometimes important, and if they are not important leave to appeal can be refused. We might argue that the Court is not institutionally equipped to deal with facts since it does not hear the evidence itself. But this is inconsistent with how the Supreme Court of Appeal regularly overturns factual findings based on the record of proceedings. Finally, we might say that the Court will be flooded with applications if the Court said it had jurisdiction over factual disputes. But (a) then the Court should never hear factual disputes, including in administrative and labour proceedings; and (b) applications can be deterred if the factors for granting leave to appeal are made clear by the Court.

There is then no cogent rationale for Principle 7. Given Principles 1 to 6, there is no reason why the Court categorically does not have jurisdiction over purely factual disputes. To say so contradicts at least one of the above rules. To say that Principle 7 should be an exception to the above rules, as the Court has tried to do, is hard given the rationales for the rule. Of course, whether leave to appeal should be granted in such cases is a separate issue.

Nonetheless, Principle 7 exists for now.[203] It is worth discussing how the Court has applied the rule, at times struggling to do so consistently. The Court fully discussed the difference between legal and factual disputes in *Mtokonya*.[204] The discussion did not arise in the context of jurisdiction, but in the context of prescription. The applicant argued that prescription did not start running until he realised that the respondent's conduct was wrongful. The applicant argued that this is what is meant by s 12(3) of the Prescription Act, which provides that 'a debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and *of the facts from which the debt arises*' (emphasis added). The Court rejected the argument because whether conduct is wrongful is not a question of fact but a question of law. The Court defined a question of fact as being one that is capable of proof.[205] A question of law is when a Court is bound to answer in accordance with a rule of law.[206] Whether conduct is wrongful, the Court held, is not proven as fact. Wrongfulness is a legal conclusion that follows from applying the legal rules relating to wrongfulness. Hence prescription did not start to run only when the applicant knew of the wrongfulness of the respondent's conduct.

The Court struggles to apply the distinction between law and fact. Two recent examples are worth noting. First, in *Kruger*, the Court split 6–4 over whether the applicant's case was only a factual dispute, with the majority finding that it was. The case concerned whether the applicant's claim for malicious prosecution against the National Prosecuting Authority (NPA) had prescribed. The issue was whether the applicant had knowledge of the 'the facts from which the debt arises' at the time the NPA withdrew its charges or, much later, when he had access to the police docket. If the former, the debt prescribed; if the latter, it had not under s 12(3) of the Prescription Act. Froneman J, writing for the majority, held that the matter only raised the question of when the applicant knew the material facts giving rise to his cause of action. This is a factual question. Zondo DCJ, dissenting, held that the matter involved interpreting the Prescription Act. The interpretative issue was whether 'knowledge' in s 12(3)

[203] For recent examples, see *Ramabele* (note 156 above) at para 33; *Buffalo City Metropolitan Municipality v Metgovis (Pty) Limited* [2019] ZACC 9, 2019 (5) BCLR 533 (CC).

[204] *Mtokonya v Minister of Police* [2017] ZACC 33, 2017 (11) BCLR 1443 (CC), 2018 (5) SA 22 (CC).

[205] Ibid at para 44.

[206] Ibid at para 42.

meant only knowing that charges had been withdrawn.[207] Jafta J, also dissenting, took it a step further, holding that the application of the Prescription Act, since it limits the right in section 34, is necessarily a constitutional matter.[208]

Theron J wrote a separate judgment. She held that given the strong disagreement between the judges, the matter should have been set down for a hearing. She refused to pronounce on jurisdiction. Theron J, in *obiter* comments, nonetheless exposed the difficulty with the majority's and minority's approaches. With respect to the majority's approach, Theron J pointed out that the case might not have involved a factual dispute; it may have involved an application of legislation that impacts a constitutional right to undisputed facts. In that case, the Court might have had jurisdiction.[209] As for the minority's approach, Theron J suggested that there was no dispute over the meaning of the Prescription Act. All the judges agreed that if a creditor did not know that a prosecution was malicious, then prescription should not begin to run. So, Zondo DCJ's interpretative question is hardly an interpretative question. Zondo DCJ's approach elides the difference between proving knowledge with respect to a fact (withdrawal of charges) and defining the meaning of knowledge in law.[210]

The second example is *Media 24*. As discussed above, a majority of six judges held that the matter raised an arguable point of law of general public importance. Four judges disagreed, holding that the issue was 'a mixed one of fact and law' and not an arguable point of law.[211] The reasoning of this minority was that determining the meaning of predatory pricing entails assessing the relative merits of expert evidence regarding predatory pricing. Doing so, they held, 'does not fall within the functional competence of this Court' and 'is not a purely legal interpretative exercise'.[212]

The reasoning reveals a strong hesitation by some members of the Court to adjudicate complex competition law matters. More generally, the reasoning is difficult to reconcile with the Court's approach to engage in legal questions that have policy implications over which experts disagree. *Makwanyane* is the obvious example, but so too are *Prince III* and *New Nation Movement*.[213] The reasoning is also opaque on what makes a question 'mixed' with facts and law. That there are policy implications to interpreting legislation cannot be what turns a legal question (even partially) into a factual one. In any event, as Theron J noted, in *Mtokonya* the Court held that if a rule of law must be applied prior to the reaching of a conclusion, then that conclusion is necessarily one of law.[214] It follows that the Court may have jurisdiction to adjudicate matters involving mixed questions of fact and law.[215] Mere 'mixture' does not necessarily imply that the matter does not raise legal questions.

[207] *Kruger* (note 1 above) at para 22.
[208] Ibid at para 105.
[209] Ibid at para 124. See Principle 4 on the discussion on the Prescription Act.
[210] Ibid at para 85.
[211] *Media 24* (note 89 above) at para 134.
[212] Ibid at para 137.
[213] *New Nation Movement NPC v President of the Republic of South Africa* [2020] ZACC 11, 2020 (8) BCLR 950 (CC), 2020 (6) SA 257 (CC).
[214] *Media 24* (note 89 above) at paras 43–44.
[215] Ibid at para 144 fn 173.

B Principle 8: Application of settled principles

There is ample authority for the proposition that the Constitutional Court ordinarily has no jurisdiction over the misapplication of settled legal principles.[216] The now seminal case on this principle is *Jiba*. The case concerned the application to strike three advocates off the roll: Nomgcobo Jiba, Lawrence Mrwebi and Sibongile Mzinyathi. All three were senior prosecutors, with Jiba being the Acting National Director of Public Prosecutions at the time of her impugned conduct. All three had been implicated in dishonesty and bad faith in various reviews of their prosecutorial decisions. For instance, in the *Zuma* matter, the Supreme Court of Appeal described Jiba as having been deliberately unhelpful and having 'been less than truthful'.[217] At the request of the NPA, the General Council of the Bar of South Africa (GCB) initiated proceedings to strike them off the roll. They succeeded in the high court, but the decision was overturned on appeal by the Supreme Court of Appeal. The GCB applied for leave to appeal to the Constitutional Court.

The Court refused leave to appeal for want of jurisdiction. Jafta J, for the majority, held:

1. For a constitutional issue to arise the claim advanced must require the consideration and application of some constitutional rule or principle in the process of deciding the matter.[218]
2. The GCB sought to have the respondents' names removed from the roll of advocates because they were no longer fit and proper persons in terms of s 7 of the Admission of Advocates Act 74 of 1964 (Admission Act).
3. The interpretation and application of s 7 of the Admission Act does not of itself alone raise a constitutional issue.
4. So, no constitutional issue arises.

Premise 1 is a summary of the principles discussed above. Premise 2 relates to how the GCB pleaded its case and how jurisdiction is to be determined based on pleadings.[219] To justify premise 3, Jafta J held that no constitutional right or value was implicated by the interpretation or application of s 7 of the Admissions of Advocates Act 74 of 1964 in this case.[220] Instead, all that was at issue was the application of the test for fitness and propriety. The test was not in dispute, only its application to the facts.[221] The application of a settled test to a set of facts does not on its own raise a constitutional issue.[222]

There are at least four issues with Principle 8. The first is how it was applied in *Jiba*. The Court acknowledged that on the facts, the application of s 7 of the Admissions Act would result in the removal of the Deputy National Director of Public Prosecutions.[223] The Court held that the Admissions Act is separate from the National Prosecuting Authority Act 32 of 1998 and

[216] *Booysen v Minister of Safety and Security* [2018] ZACC 18, 2018 (6) SA 1 (CC), 2018 (9) BCLR 1029 (CC) at para 50; *Loureiro* (note 13 above) at para 33; *Mbatha* (note 140 above) at paras 193–194; *Mankayi* (note 21 above) at paras 10–12; *Phoebus Apollo Aviation CC v Minister of Safety and Security* [2002] ZACC 26, 2003 (2) SA 34 (CC), 2003 (1) BCLR 14 (CC) (*Phoebus Apollo*) at para 9.

[217] *Zuma v Democratic Alliance* [2014] ZASCA 101, [2014] 4 All SA 35 (SCA) at para 40.

[218] *Jiba* (note 3 above) at para 38.

[219] See below on Principle 9.

[220] *Jiba* (note 3 above) at para 44.

[221] Ibid at para 47.

[222] Ibid at para 49.

[223] Ibid at para 53.

interpreting one did not entail interpreting the other.[224] But this misses the point. The NPA Act is constitutionally envisaged legislation, so the Court would have had jurisdiction over its application based on Principle 4.[225] Moreover, in *Corruption Watch* the Court held that the independence of the NPA, which includes the protection of senior prosecutors from removal, is constitutionally guaranteed.[226] In *Certification II*, the Court held concerning the NPA that '[t]here is … a constitutional guarantee of independence, and *any* legislation or executive action inconsistent therewith would be subject to constitutional control by the courts'.[227] If the independence of the NPA is a constitutional matter, and independence includes security of tenure, then the form of the removal of NPA senior officials should not matter. If in substance a case entailed the removal of an NPA official, then a constitutional matter arises.[228] Accordingly, *Jiba* was wrongly decided.[229]

However, the above argument was not pleaded by the GCB. The GCB 'pithily' pleaded that the case concerned s 7 of the Admission Act and did not link the case to the independence of the NPA.[230] If the Court assesses jurisdiction based on pleadings, then the Court could not have assumed jurisdiction in *Jiba* because of the GCB's pleadings. I discuss this principle in the next subsection.

The second issue with Principle 8 is its inconsistent application to laws that entail the application of constitutional values. There is one line of cases holding that the application of a rule that includes a direct consideration of public policy necessarily raises a constitutional issue, since public policy is grounded in the Constitution. This is no matter how 'settled' that rule is. A recent example is *EFF v Gordhan; Public Protector v Gordhan*.[231] The applicant, the Public Protector, appealed the granting of an interim interdict against her by the high court to the Constitutional Court. The Court acknowledged that it generally does not have jurisdiction over an alleged misapplication of established legal tests.[232] However, it held:

1. Applying the test for granting an interim interdict against a state entity includes considering the impact the interdict could have on the entity's constitutional functions and ensuring that the order promotes the objects, spirit and purport of the Constitution;
2. An entity's constitutional functions and the objects, spirit and purport of the Constitution are constitutional matters;

[224] Ibid.

[225] Section 179 of the Constitution.

[226] *Corruption Watch NPC v President of the Republic of South Africa; Nxasana v Corruption Watch NPC* [2018] ZACC 23, 2018 (10) BCLR 1179 (CC), 2018 (2) SACR 442 (CC) at para 19.

[227] *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996* [1996] ZACC 26, 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC) at para 146 (emphasis added.)

[228] In *S v Basson* [2004] ZACC 13, 2005 (1) SA 171 (CC), 2004 (6) BCLR 620 (CC) at para 33, the Court considered whether a charge was lawfully quashed because quashing of charges interferes with the NPA's constitutional duty to prosecute.

[229] Additionally, we might think that since all advocates owe a duty, which is paramount to the Court, then the Court has jurisdiction over their fitness and propriety to be advocates. Principle 5, which concerned the administration of courts, could be used to assert jurisdiction in this way. Another basis for jurisdiction would be that removal of a senior prosecutor impacts on their exercise of public power. See the dicusscion of *Public Protector v SARS* (note 101 above) under Principle 5.

[230] *Jiba* (note 3 above) at para 46.

[231] *Economic Freedom Fighters v Gordhan; Public Protector v Gordhan* [2020] ZACC 10, 2020 (8) BCLR 916 (CC), 2020 (6) SA 325 (CC).

[232] Ibid at para 39.

3. Therefore, applying the test for granting an interim interdict against a state entity raises a constitutional matter.[233]

The logic of *EFF v Gordhan* is not novel. The basic idea is that if applying a rule entails invoking constitutional values, normally through the concept of public policy, then the application of that rule raises a constitutional matter. The reasoning was discussed briefly in paragraph III(B) above, when discussing Principle 2. In the context of contract, the Court has held: 'Whether the enforcement of a contractual clause would be contrary to public policy, in that it is inimical to constitutional values, is a constitutional issue'.[234] In respect of delict, the Court has held: 'an appeal against a finding on wrongfulness on the basis that it failed to have regard to normative imperatives of the Bill of Rights does ordinarily raise a constitutional issue'.[235] In the context of defamation, the Court went so far as to hold that it had jurisdiction over a matter, which amounted to an application of principles of defamation, 'since it involves a nuanced and sensitive approach to balancing the interests of the media, in advocating freedom of expression, privacy and dignity of the applicants'.[236]

Nevertheless, there is a line of cases going in the opposite direction: the application of a settled rule does not raise a constitutional matter even when that rule entails direct considerations of public policy. *Booysen* is the prime example.[237] The applicant's partner, a police officer, had been dining with the applicant at the applicant's home. He was doing so while on duty and in uniform. During the meal, he shot the applicant in the face with his police pistol. The applicant sued the Minister of Police for damages. She won in the high court but lost in the Supreme Court of Appeal. She appealed to the Constitutional Court. Her ground of appeal was that the Supreme Court of Appeal was wrong in its normative assessment of whether there was a sufficient link between the policeman's conduct and the Minister of Police. The Court held that the applicant's case was nothing more than disputing the application of the settled legal test for vicarious liability, not raising a constitutional issue.[238] The Court emphasised how in *K* the Court held that not all applications of vicarious liability will raise constitutional issues.[239]

The conclusion and reasoning of the Court in *Booysen* is difficult to sustain. The Court, despite declining jurisdiction, found that '[t]he difference between the reasoning in the Supreme Court of Appeal majority and the minority (and the high court) judgments ultimately comes down to the weight that was attached to the different normative considerations underpinning vicarious liability based on their assessment of the facts'.[240] While *K* held that

[233] Ibid at para 40.

[234] *Beadica* (note 68 above) at para 16; *A M v H M*) [2020] ZACC 9, 2020 (8) BCLR 903 (CC) at para 25.

[235] *Loureiro* (note 13 above) at para 34. See further *Phumelela Gaming And Leisure Limited v André Gründlingh* [2006] ZACC 6, 2007 (6) SA 350 (CC), 2006 (8) BCLR 883 (CC) (*Phumelela Gaming and Leisure*) at para 23; *Mashongwa* note 185 above at para 13.

[236] *NM v Smith* [2007] ZACC 6, 2007 (5) SA 250 (CC), 2007 (7) BCLR 751 (CC) at para 31.

[237] Other examples include *Phoebus Apollo* and *Loureiro*, where the Court held: 'the mere fact that a matter is located in an area of the common law that can give effect to fundamental rights does not necessarily raise a constitutional issue. It must also pose questions about the interpretation and development of that law and not merely involve the application of an uncontroversial legal test to the facts'. This was with respect to the same rules that were considered in *K*. As others have commented, the distinction between *Loureiro* and *K* is unsustainable. See Seedorf (note 15 above) at 4-64.

[238] *Booysen* (note 216 above) at para 57.

[239] Ibid at para 53.

[240] Ibid at para 58.

not all applications of vicarious liability will be constitutional matters, it said that they often will, especially where the normative assumptions imbued in the law are at issue.[241] If the dispute was about normative weight, and if normative weight is grounded in the Constitution, then the matter raises a constitutional issue.[242]

A third problem with Principle 8 is maintaining a principled distinction between applying and developing the common law. As mentioned under Principle 2, in *K* the Court held that 'applying' means deciding a case because the facts fall within the established ambit of a legal rule. 'Developing' then means deciding a case after extending or restricting the ambit of a legal rule to include or exclude a set of facts unlike any set of facts previous adjudicated.[243] This definition means that there are very few cases that will entail the application of common law rules. No two cases are identical, meaning that judges develop the law every time they apply common law rules.[244] The Court in *K* accepted this, holding:

> The obligation imposed upon courts by s 39(2) of the Constitution is thus extensive, requiring courts to be alert to the normative framework of the Constitution not only when some startling new development of the common law is in issue, but in all cases where the incremental development of the rule is in issue.[245]

Just before this finding, the Court explained that 'incremental development' refers to how 'the common law develops incrementally through the rules of precedent'.[246] The Court thus accepted that the application of precedent will almost always entail development of the common law. For instance, the test for fitness and propriety in *Jiba* was developed by the lower courts, since, among other novel factors, no other senior prosecutor has ever been struck off the roll for failure to disclose evidence in review proceedings.

A fourth issue, assuming that we can maintain the distinction between application and development, is that there is no reason why the application of legislation giving effect to constitutional rights is a constitutional matter but the same is not true of common law rules. In *Loureiro*, the Court held:

> The Loureiro family relies on the law of contract and the law of delict to protect their constitutionally recognised rights. It is well-established that the law of contract and of delict gives effect to, and provide remedies for violations of, constitutional rights. However, the mere fact that a matter is located in an area of the common law that can give effect to fundamental rights does not necessarily raise a constitutional issue. It must also pose questions about the interpretation and development of that law and not merely involve the application of an uncontroversial legal test to the facts.[247]

If we accept, as the Court does, that common law rules give effect to constitutional rights, then the Court should have jurisdiction over their application. The jurisdiction exists for the same reason as given by the Court in *NEHAWU* in the context of Principle 4. The Court has jurisdiction over the interpretation and application of constitutional rights. If common law

[241] *K* (note 53 above) at para 22.

[242] Compare further Mhlantla J's more recent judgment in *A M v H M* [2020] ZACC 9, 2020 (8) BCLR 903 (CC) at para 25, which held that the application of public policy in the context of contract raised a constitutional matter. If that is so, then it is unclear why there was no jurisdiction in *Booysen*.

[243] *K* (note 53 above) at para 16.

[244] I am of course not the first to make this argument. See Seedorf (note 15 above) at 4-65.

[245] *K* (note 53 above) at para 17.

[246] Ibid at para 16.

[247] *Loureiro* (note 13 above) at para 33.

gives effects to those rights, it 'will of course always be subject to constitutional scrutiny to ensure that it is not inconsistent with the Constitution'.[248]

For these reasons, Principle 8 is difficult to justify. Courts are developing the common law when applying precedent to the case before them. It becomes difficult, if not impossible, to draw the line between ready-set application and development. *Booysen* is an example of what happens when the Court tries to draw this line. The Court ends up arbitrarily and inconsistently deciding that it does not have jurisdiction. Even if we can draw the line, the application of common law ordinarily gives effect to some constitutional right. So, the Court should have jurisdiction over its application.

C Principle 9: Jurisdiction is assessed from the pleadings

In his dissent in *Chirwa*, which was later endorsed by a unanimous court in *Gcaba*, Langa CJ held that a court must assess its jurisdiction in the light of the pleadings.[249] His rationale was straightforward. The correctness of an assertion cannot determine jurisdiction, because an applicant can raise a constitutional matter 'even though the argument advanced as to why an issue is a constitutional matter, or what the constitutional implications of the issue are, may be flawed'.[250] In other words, the Court cannot assess the correctness of an argument to determine jurisdiction, because to assess the correctness of an argument is to adjudicate on subject matter, something over which the Court must have jurisdiction in the first place. If the correctness of an assertion cannot determine jurisdiction, then what matters is what the applicant pleads and not whether their argument in that regard is valid.

The Court has applied this principle, that jurisdiction must be made out in the pleadings, on numerous occasions since *Gcaba*.[251] For instance, in *Jiba*, the Court held that since the GCB only pleaded its case under s 7 of the Admissions Act, and made no case for a constitutional matter, the Court did not have jurisdiction. Similarly, in *Paulsen* the Court decided it had jurisdiction (or granted leave to appeal) under section 167(3)(b)(ii) since the applicants did not plead that their application raised a constitutional matter. This notwithstanding the Court commented that their matter raised a constitutional matter.[252]

The Court's approach to applying this principle can be divided into two phases. First, the Court asks what legal basis the applicant purports to find jurisdiction. At a general level, the legal basis can only be a constitutional matter or an arguable point of law. But the Court will look to whether the applicant specifically invokes one of the above positive principles. For example, whether the interpretation in question limits a constitutional right or concerns the scope of judicial power. Secondly, the Court will assess how the pleadings support that purported ground for jurisdiction. The Court will not stop at the mere mention of the words 'constitutional matter'. As the Court has repeatedly held, a non-constitutional issue cannot 'somehow morph into a constitutional issue through the simple facility of clothing it in

[248] *NEHAWU* (note 72 above) at para 15.

[249] *Chirwa v Transnet Limited* [2007] ZACC 23, 2008 (4) SA 367 (CC), 2008 (3) BCLR 251 (CC) at para 169. *Gcaba v Minister for Safety and Security* [2009] ZACC 26, 2010 (1) SA 238 (CC), 2010 (1) BCLR 35 (CC) at para 75.

[250] *Fraser* (note 12 above) at para 40.

[251] For example, *Nekokwane v Road Accident Fund* [2019] ZACC 11, 2019 (6) BCLR 745 (CC). The Court even applied this rule in the context of exclusive jurisdiction. See *My Vote Counts NPC v Speaker of the National Assembly & Others* [2015] ZACC 31 at para 131.

[252] *Paulsen* (note 17 above) at para 14.

constitutional garb',[253] and 'an issue does not become a constitutional matter merely because an applicant calls it one'.[254] The applicant must demonstrate the existence of a bona fide constitutional question.[255] Normally this is done by linking the issues raised by the application to one of the positive principles. A 'pithy' statement that the Court has jurisdiction will not suffice.[256]

Principle 9 has some serious implications. If an applicant fails to plead correctly, the Court will not have jurisdiction, even if the Court clearly does have jurisdiction in substance. For example, if an applicant brings a review of public power, arguing that the matter is ultra vires, but does not plead the principle of legality, Principle 9 would exclude the Court from hearing the matter.

Principle 9 is difficult to defend. The Court's rationale in *Gcaba* does not imply that jurisdiction must be determined on the pleadings. The rationale was that the Court must not determine jurisdiction based on the correctness of an applicant's assertion. Yet the Court can still assume jurisdiction, without assessing the correctness of any assertion, even if jurisdiction is not pleaded. For instance, in *Jiba*, jurisdiction was effectively not pleaded. The Court, nonetheless, could have assumed jurisdiction because the matter implicated the independence of the NPA. Had the Court done so, it would not have assumed jurisdiction based on whether the allegations made by the GCB against the respondent were correct.

Principle 9 is also hard to square with the generally substantive approach the Court takes to adjudication. The Court has eschewed 'formalism' repeatedly in the context of the Labour Court's jurisdiction,[257] and more generally.[258] The Court's approach to objective constitutionality, by now well-known, is also hard to reconcile with an approach that considers constitutional matters to arise only if pleaded by applicants. If legislation declared unconstitutional was always unconstitutional, then a constitutional matter exists even though no one has pleaded it.[259]

Moreover, the Court has made exceptions to this rule. In *Sarrahwitz*, the Court held: 'It does become necessary at times to read the papers of a party – especially a vulnerable litigant – with a measure of compassion, when it is in the interests of justice to do so'.[260] On the facts, the applicant had not pleaded that her matter raised a constitutional matter. However, since she was a vulnerable litigant – she was unrepresented and faced losing her home – the Court held that 'in essence' her case was premised on certain constitutional rights, despite not mentioning these rights in her pleadings.[261] There is nothing wrong with the outcome

[253] *Mbatha* (note 140 above) at para 222; *Tjiroze* (note 157 above) at para 16; *Booysen* (note 216 above) at para 52.

[254] *Fraser* (note 12 above) at para 40.

[255] Ibid.

[256] *Jiba* (note 3 above) at para 46.

[257] *National Union of Metal Workers of South Africa v Intervalve (Pty) Ltd* [2014] ZACC 35, 2015 (2) BCLR 182 (CC), (2015) 36 ILJ 363 (CC) at para 36; *September v CMI Business Enterprise CC* [2018] ZACC 4, 2018 (4) BCLR 483 (CC), (2018) 39 ILJ 987 (CC) at para 54.

[258] *KwaZulu-Natal Joint Liaison Committee v MEC Department of Education, Kwazulu-Natal* [2013] ZACC 10, 2013 (6) BCLR 615 (CC), 2013 (4) SA 262 (CC).

[259] We could also argue that if courts are under a duty, in s 39(2), to develop the common law and interpret legislation in accordance with the Bill of Rights, then pleadings should not matter. The Court is obliged to consider constitutional issues relating to a matter, regardless of parties raising them in pleadings. Of course, the Court should not decide on those issues without asking parties to lead evidence or submit argument on that point.

[260] *Sarrahwitz v Martiz NO* [2015] ZACC 14, 2015 (4) SA 491 (CC), 2015 (8) BCLR 925 (CC) at para 27.

[261] Ibid.

in *Sarrahwitz*.[262] On the contrary, *Sarrahwitz* is an example of the Court asking whether, in substance, a matter engages its jurisdiction. It is unclear, however, why the vulnerability of a litigant should determine whether the Court takes a substantive approach. The Court should assess its jurisdiction substantively when litigants are vulnerable, but it also should when litigants are powerful corporations or government entities whose dispute raises important constitutional matters. If what matters is the vindication of constitutional rights and principles, then pleadings alone cannot determine whether the Court has jurisdiction over a matter.

V LEAVE TO APPEAL

In part III, I demonstrated how the positive principles of jurisdiction endow the Court with what is effectively general jurisdiction. In part IV, I examined how the negative principles, designed to narrow down the Court's jurisdiction, are hard to defend. The upshot of embracing the full breadth of the positive principles, while rejecting the negative principles, is that the Court has a general jurisdiction.

There are various ways of resisting this conclusion. We could argue that the Court should be specialist and not generalist; so maybe there is something wrong with the breadth of the positive principles. The reasons could emerge from normative conceptions about the role of the Court in South Africa. We might prefer a twin-peaks model, where the Supreme Court of Appeal is generally the highest court, while the Constitutional Court specialises in human rights and separation of powers. The reasons could also be practical. The Court comprises eleven judges and must decide each application with at least eight judges.[263] A general jurisdiction would open the floodgates of applications to the Court, demanding from judges that they apply their minds to hundreds of applications each year and reach a majority of at least five on each of those applications. Unlike the lower courts, the time taken for each judge to read and decide on each application is compounded by the time taken to reach a majority on each application. Moreover, ordinarily the sort of cases that the reach the Court require far more of judges.[264] The result is that judges of the highest court will be stretched thin, leading to mistakes or less thorough judgments. These concerns appear to be behind the limited nature of the Seventeenth Amendment, and the Court's reluctance to adopt a general jurisdiction.

Rebutting the practical concerns with general jurisdiction is straightforward. As the Court has noted,[265] apex courts of other jurisdictions have general jurisdiction. Those courts manage case flow through various court rules, like prescribing the format of applications, limiting the page number of those applications, employing clerks or court staff to filter or summarise applications, and having clear rules on when the Court will entertain an appeal.[266] The Court

[262] In *Shaik v Minister of Justice and Constitutional Development* [2003] ZACC 24, 2004 (3) SA 599 (CC), 2004 (4) BCLR 333 (CC) at para 25, the Court made another exception, holding: 'It constitutes sound discipline in constitutional litigation to require accuracy in the identification of statutory provisions that are attacked on the ground of their constitutional invalidity. This is not an inflexible approach. The circumstances of a particular case might dictate otherwise. It is, however, an important consideration in deciding where the interests of justice lie'.

[263] Section 167(2) of the Constitution.

[264] For instance, the Court has recently been forced to decide complex issues of competition law, an area of law few judges have had experience in.

[265] *Paulsen* (note 17 above) at para 25 regarding Kenya and the United Kingdom.

[266] See IM Rautenbach and S Heleba 'The jurisdiction of the Constitutional Court in non-constitutional matters in terms of the Constitution Seventeenth Amendment Act of 2012' (2013) *Journal of South African Law/Tydskrif vir die Suid-Afrikaanse Reg* 405 for an overview of the UK Supreme Court.

has adopted some of these internal mechanisms. The Court employs clerks whose job includes writing memoranda on new applications to the Court. The office of the Court's Registrar refuses to accept applications that do not comply with some requirements, like lateness or the requisite number of copies. The Court could of course adopt more measures. It could limit applications for leave to appeal to a certain number of pages,[267] require applications to have a set format conducive to quick reading, and employ more staff to filter out applications. Practical concerns are not reasons to limit the Court's jurisdiction.

Addressing normative arguments about the role of the Court is harder. The difficulty is that there is conceivably more than one reasonable way of arranging South Africa's judicial hierarchy. A twin-peaks model and a generalist apex court both seem plausible. Each has advantages and disadvantages. The former model allows for specialist judges at the Constitutional Court whereas the latter model avoids the difficulty of defining the Constitutional Court's specialist jurisdiction. I do not propose to resolve this question.

Instead, the balance of this article has a narrower aim: presenting a reasonable solution to the jurisdiction problem. Currently, the Court's approach to jurisdiction is difficult to justify. One solution is to embrace the full breadth of the positive principles and reject the negative principles. Leave to appeal can then be used to filter cases. This solution is reasonable for two reasons. First, the test for leave to appeal can be used to address many of the practical and normative concerns we may have with general jurisdiction. I focus on this reason below by examining the test for leave to appeal. Secondly, the solution is available to the Court. As I demonstrated above, the positive principles are in the Constitution. The negative principles are judge-made. If the Court developed the common law to abrogate the negative principles, then the Court would not contradict the Constitution. On the contrary, the Court would give effect to the clear meaning of section 167(3)(b); it would accept that it can decide 'constitutional matters' *and* 'any other matter'. This solution is therefore the quickest and most parsimonious way to fix the Court's approach to jurisdiction. The alternatives, like redefining the Court's specialist jurisdiction, require constitutional amendments and parliamentary intervention.

I focus then on the test for leave to appeal. My intention is to show how leave to appeal is a powerful mechanism that could be used to ensure that the Court is not overwhelmed with cases. Leave to appeal can also be used to ensure that the Court, normatively, plays a significant role as a court specialising only in the most important legal issues.

As it stands, jurisdiction is not a sufficient condition for the Constitutional Court to adjudicate a matter. The Constitutional Court must also grant leave to appeal. The Court has held that it will only grant leave to appeal when it is in the interests of justice to do so.[268] Determining the interests of justice is an exercise of discretion, and the Court has considered the following factors:

1. prospects of success;
2. the importance and complexity of the issues raised;
3. public interest in the issues raised;
4. the position of the applicants in society;
5. factual nature of the dispute;
6. mootness;
7. prematurity and interlocutory appeals;

[267] Currently the Court imposes no limit other than to limit heads of argument to 50 pages.

[268] *Boesak* (note 13 above) at para 12.

8. abstract challenges;
9. ventilation of issues before the lower courts; and
10. direct appeals.

These factors are not exhaustive, but they are recurring factors in the Court's assessment of what the interests of justice entail. No factor is determinative. For instance, just because a case lacks prospects of success does not mean the Court will not hear the matter,[269] and just because a case has prospects of success does not mean that the court will hear it.[270] Similarly, a point might be moot, abstract, or unripe, and the Court could still hear it. The same is true of constitutional points raised on appeal for the first time or direct appeals. Each matter is assessed individually, with the Court balancing the above factors against each other.

For that reason, it is difficult to distil more specific rules for when the Court will grant leave to appeal. Ultimately, the question is what the interests of justice demand. Nonetheless, we can be guided by how the Court has approached each factor.

Starting with prospects of success, the Court has held that an applicant who seeks leave to appeal must ordinarily show that there are *reasonable* prospects that the Court will reverse the appealed decision.[271] Put differently, the contentions made by the applicant must be 'reasonably arguable'.[272] As with 'arguable' points of law, not all points have reasonable prospects of success just because they are arguable or convincing. The factors mentioned in *Paulsen* relevant to establishing whether a point is arguable would apply with equal force to deciding whether a point has reasonable prospects of success. An important factor here is whether there are conflicting or no authorities on the point.

Another important aspect of prospects of success is the standard of review or appeal demanded by the appeal. If the appeal is against the exercise of true discretion, then the Court generally will not interfere with the exercise of that discretion. The Court will take this into account when determining whether there are prospects of succeeding on appeal. The applicant will have to show not only that the exercise of discretion was incorrect, but injudicious. The application for leave to appeal must then disclose reasonable prospects of demonstrating that the decision fell afoul of this higher standard.

The Court has repeatedly invoked the importance or complexity of a matter to justify granting leave to appeal.[273] This is not to say all matters in which the public has taken an interest will be granted leave to appeal.[274] Similarly, the Court has refused to hear matters that raise important constitutional matters where resolving the dispute has no practical effect.[275] But the Court will often hear matters if the issues in it are of constitutional import and implicate

[269] Ibid.

[270] For example, though an argument might have prospects of succeeding, the Court may still decide that it is not in the interests of justice to hear it if it is raised on appeal for the first time. See *Tiekiedraai* (note 18 above). Alternatively, the point might be moot, unripe or abstract, despite its cogency.

[271] *Boesak* (note 13 above) at para 12.

[272] *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd* [2013] ZACC 48, 2014 (5) SA 138 (CC), 2014 (3) BCLR 265 (CC) at para 52.

[273] *African Christian Democratic Party v Electoral Commission* [2006] ZACC 1, 2006 (3) SA 305 (CC), 2006 (5) BCLR 579 (CC) at para 17.

[274] *EFF v Gordhan* (note 231 above) at para 97.

[275] *Radio Pretoria v Chairperson, Independent Communications Authority of South Africa* [2004] ZACC 24, 2005 (4) SA 319 (CC), 2005 (3) BCLR 231 (CC).

constitutional rights of persons beyond the litigants, even if other factors push against hearing it. For instance, the importance of a matter could trump mootness and abstractness.

The Court has taken note of whether applicants for leave to appeal are vulnerable and whether persons effected by the judgment ordinarily cannot afford to litigate.[276] The more vulnerable and indigent persons implicated in the matter are, the more the interests of justice speak to granting leave to appeal.

Even if the Court has jurisdiction over the dispute of fact in question,[277] the Court might still refuse to grant leave to appeal because it is undesirable for the Court to resolve that factual dispute.[278] We should note that dealing with the factual nature of a dispute under leave to appeal instead of jurisdiction is easier to defend than positing Principle 9. The interests of justice would ordinarily demand that the Court, sitting as an appellate tribunal, not overturn the factual findings of the lower court.[279] For this reason, the Court should be slow to hear factual disputes. However, there may be exceptions where the interests of justice require otherwise, such as when the factual dispute is easy to resolve or is inextricably linked to an important constitutional issue. Considering the factual nature of a dispute in this way does not create the rigid and inconsistent Principle 9 but uses the interests of justice as a touchstone.

A matter is moot if it no longer raises an existing or live controversy between the parties, such that the Court's order will have no practical effect or result.[280] Normally a court will not entertain a moot matter because, simply, there is little practical point in doing so. Nonetheless, the Court will hear a moot matter if it is in the interests of justice to do so.[281] The Court has recently heard a moot case because (a) it raised important issues relating to children that had a practical impact beyond the litigants; (b) there were conflicting and incorrect judgments on the issue; (c) the Court had heard extensive argument; and (d) persons in applicants' situation would normally not have the resources to bring a matter before the Court.[282]

The Court has dealt with several matters that were allegedly premature or concerned appeals against decisions that were not yet final. The general rule is that appeals lie only against final decisions or decisions that are final in effect. The reason is that the Court is loath to interfere with an ongoing decision-making process and create piece-meal litigation. Exceptionally, the Court will hear appeals against interim or interlocutory decisions if the interests of justice so demand.[283] The Court has repeatedly endorsed the Supreme Court of Appeal's definition in *Zweni* of a final decision.[284] A decision is final if it is determinative of the rights of the parties

[276] Most recently *AB v Pridwin Preparatory School* [2020] ZACC 12, 2020 (9) BCLR 1029 (CC), 2020 (5) SA 327 (CC) at para 116.

[277] See Rule (7) above.

[278] *Rail Commuters* note 208 above at para 54 onwards; *Carmichele* (note 325 above) at para 81; *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC), 2007 (7) BCLR 691 (CC) at para 39; *Maphango* at para 109; *Sarrahwitz* at para 30; *Mighty Solutions* at para 65.

[279] *Makate v Vodacom (Pty) Ltd* [2016] ZACC 13, 2016 (6) BCLR 709 (CC), 2016 (4) SA 121 (CC) at paras 38–40.

[280] *AB v Pridwin* (note 276 above) at para 110.

[281] *President of the Republic of South Africa v Democratic Alliance* [2019] ZACC 35, 2019 (11) BCLR 1403 (CC), 2020 (1) SA 428 (CC) at para 14; *Sebola v Standard Bank of South Africa Ltd* [2012] ZACC 11, 2012 (5) SA 142 (CC), 2012 (8) BCLR 785 (CC) at para 32.

[282] *AB v Pridwin* (note 276 above) at para 112 onwards. The Court cites *Pillay* (note 127 above) for authority that these factors are relevant to hearing a moot matter.

[283] *EFF v Gordhan* (note 231 above) at para 50; *Cloete* (note 160 above) at para 39; *Law Society of South Africa v President of the Republic of South Africa* [2018] ZACC 51, 2019 (3) BCLR 329 (CC), 2019 (3) SA 30 (CC) at para 25.

[284] *Zweni v Minister of Law* [1992] ZASCA 197, 1993 (1) SA 523 (A) at 532J-533A.

and has the effect of disposing of a substantial portion of the relief claimed.[285] The Court recently clarified, in the context of an appeal against an interim interdict pending review, the factors it will consider when deciding whether to hear an appeal against an interim order.[286] Other than the factors already mentioned, the Court will consider the potential for irreparable harm if leave is not granted,[287] whether, in deciding an appeal against an interim order, the appeal court would usurp the role of the review court,[288] and whether allowing the appeal would lead to piecemeal adjudication and prolong the litigation or lead to the wasteful use of judicial resources or legal costs.[289]

An abstract challenge refers to a challenge to the constitutionality of legislation removed from a factual matrix. Normally, it is not in the public interest for proceedings to be brought in the abstract. The rationale is obvious: the Court is not there to give advice on hypothetical matters. But the Court will hear abstract challenges if the interests of justice nonetheless demand so. Other than the above factors, the Court will consider whether there is another reasonable and effective manner in which the challenge can be brought, the nature of the relief sought, and the extent to which the challenge is of general and prospective application, and the range of persons or groups who may be directly or indirectly affected by any order made by the court, and the opportunity that those persons or groups have had to present evidence and argument to the court.[290]

It will usually not be in the interests of justice to grant leave to an appeal if the application for leave raises a constitutional matter or point of law for the first time before the Court. The Court has provided various rationales for this rule, including allowing the high court and the Supreme Court of Appeal to exercise their constitutionally endowed jurisdiction to decide on constitutional matters and arguable points of law.[291] However, in exceptional circumstances the Court will hear a matter as a court of first and last instance. The following list of factors (unclosed), which are different to the ones already considered, can be distilled from case law for determining exceptional circumstances:[292]

1. whether the matter relates to the common law or the development thereof;[293]

[285] *Cloete* (note 160 above) at para 39; *EFF v Gordhan* (note 231 above) at para 49.

[286] *EFF v Gordhan* (note 231 above) at para 51.

[287] *Law Society* (note 283 above) at para 27 in the context of reviewing a decision to sign a treaty before the treaty was ratified by Parliament.

[288] In the context of parliamentary process, the Court will consider whether it usurps the role of further separation of power safeguards, such as the President's role in assenting to legislation. *Doctors for Life International v Speaker of the National Assembly* [2006] ZACC 11, 2006 (6) SA 416 (CC), 2006 (12) BCLR 1399 (CC) at para 55.

[289] *Cloete* (note 160 above) at para 42 onwards.

[290] *Corruption Watch* (note 226 above) at para 37; *Lawyers for Human Rights v Minister of Home Affairs* [2004] ZACC 12, 2004 (4) SA 125 (CC), 2004 (7) BCLR 775 (CC) at para 16; *Ferreira v Levin NO; Vryenhoek v Powell NO* [1995] ZACC 13, 1996 (1) SA 984 (CC), 1996 (1) BCLR 1 (CC) at para 234.

[291] Other rationales are (a) increasing the chances of a decision being correct; (b) empowering the Court when deciding complex matters with the considered judgments of other judges; (c) developing jurisprudence under the Constitution as reliably and harmoniously as possible; (d) ensuring that opposing parties have adequate opportunity to respond to arguments raised; and (e) where the constitutionality of legislation is implicated, respecting the separation of powers. See *Tiekiedraai* (note 18 above) at para 19–20 and the authorities cited there.

[292] Each of these is neither sufficient nor necessary to grant leave to appeal. They can merely be considered when deciding the question of leave. The Court recently applied most of these factors in *Tiekiedraai* (note 18 above) to refuse to entertain a point about contract law that was raised on appeal.

[293] *S v Bierman* [2002] ZACC 7, 2002 (5) SA 243 (CC), 2002 (10) BCLR 1078 at para 7; *Amod v Multilateral Motor Vehicle Accidents* Fund [1998] ZACC 11, 1998 (4) SA 753 (CC), 1998 (10) BCLR 1207 (CC) para 33; *De*

2. whether parties have changed their arguments before the lower courts;[294]
3. whether the matter raised is complex, intricate and of public importance;[295]
4. whether opposing or interested parties had sufficient opportunity to contest the points raised and whether considering the point will cause them prejudice;[296]
5. whether the applicant was legally represented and received proper legal advice;[297]
6. whether dire consequences would ensue if leave to appeal was refused;[298]
7. whether the point was contained, or at least foreshadowed, by the pleadings;[299]
8. whether parties knew of the point and decided not to raise it in the lower court, or whether the Court raised the point *mero motu* on appeal.[300]

Finally, the Court normally requires matters appealed against in judgments of the high court to be pursued first through the Supreme Court of Appeal. Exceptionally, the Court will hear a direct appeal if the interests of justice demand it.[301] Relevant factors include whether there are only constitutional issues involved, the importance of the constitutional issues, the saving in time and costs, the urgency, if any, in having a final determination of the matters in issue, the prospects of success, the disadvantages to the management of the Court's roll and to the ultimate decision of the case if the Supreme Court of Appeal is bypassed.[302] The Court also

Freitas v Society of Advocates of Natal [1998] ZACC 12, 1998 (11) BCLR 1345 (CC) para 23; *Carmichele* (note 25 above) at para 53; *Lane and Fey NNO v Dabelstein* [2001] ZACC 14, 2001 (2) SA 1187 (CC), 2001 (4) BCLR 312 at para 5; *Dormehl v Minister of Justice* 2000 (2) SA 987 (CC), 2000 (5) BCLR 471 (CC) at para 5; *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* [2011] ZACC 30, 2012 (1) SA 256 (CC), 2012 (3) BCLR 219 (CC) at para 63.

[294] *Everfresh* ibid at para 63.

[295] In the context of raising on appeal, normally the more important, the less likely the matter will be adjudicated on. See *Everfresh* (note 293 above) at para 64; *Carmichele* (note 25 above) at para 58; *Lane* (note 293 above) at para 6; *Minister of Local Government, Environmental Affairs and Development Planning of the Western Cape v Lagoonbay Lifestyle Estate (Pty) Ltd* [2013] ZACC 39, 2014 (1) SA 521 (CC), 2014 (2) BCLR 182 (CC) at para 42; cf. *Member of the Executive Council for Development Planning and Local Government, Gauteng v Democratic Party* [1998] ZACC 9, 1998 (4) SA 1157 (CC), 1998 (7) BCLR 855 (CC) at para 33.

[296] *Everfresh* (note 293 above) at para 65; *Barkhuizen* (note 278 above) at para 39 (in the context of a trial, prejudice will take the form of non-disclosure of the point materially influencing the facts an opposing party agreed to place before the trial court); *Maphango v Aengus Lifestyle Properties (Pty) Ltd* [2012] ZACC 2, 2012 (3) SA 531 (CC), 2012 (5) BCLR 449 (CC) at para 109; *Sarrahwitz v Martiz N.O.* [2015] ZACC 14, 2015 (4) SA 491 (CC), 2015 (8) BCLR 925 (CC) at para 30; *Carmichele* (note 25 above) at para 59; *Campus Law Clinic* at para 26; *Mighty Solutions CC t/a Orlando Service Station v Engen Petroleum Ltd and Another* [2015] ZACC 34, 2016 (1) SA 621 (CC), 2016 (1) BCLR 28 (CC) at para 63.

[297] *Everfresh* (note 293 above) at para 66.

[298] Ibid at paras 66 and 74.

[299] *Barkhuizen* (note 278 above) at para 39; *Maphango* (note 296 above) at para 109; *Sarrahwitz* (note 296 above) at para 30; *Campus Law Clinic (University of KwaZulu-Natal Durban) v Standard Bank of South Africa Ltd* [2006] ZACC 5, 2006 (6) SA 103 (CC), 2006 (6) BCLR 669 (CC) at para 24; *Mighty Solutions* (note 309 above) at para 63.

[300] *Lagoonbay* (note 295 above) at para 41.

[301] Pursuant to s 167(6)(a) of the Constitution.

[302] *Union of Refugee Women v Director, Private Security Industry Regulatory Authority* [2006] ZACC 23, 2007 (4) SA 395 (CC) [2006] ZACC 23, 2007 (4) BCLR 339 (CC) at para 21. *Nandutu & Others v Minister of Home Affairs & Others* [2019] ZACC 24, 2019 (8) BCLR 938 (CC), 2019 (5) SA 325 (CC) at para 28; *Zondi v MEC for Traditional and Local Government Affairs* [2004] ZACC 19, 2005 3 SA 589 (CC), 2005 (4) BCLR 347 (CC) at para 13; *Freedom of Religion South Africa v Minister of Justice and Constitutional Development* [2019] ZACC 34, 2019 (11) BCLR 1321 (CC), 2020 (1) SA 1 (CC) at para 28.

considers whether the lower courts have pronounced on the issues raised by the direct appeal in other matters.[303]

The Court's approach to leave to appeal is fact-sensitive and flexible. The downside is that leave to appeal may be unpredictable for litigants. To a certain extent, this will always be true. Leave to appeal depends on the exercise of a discretion, which depends on each case. However, firstly, the Court's approach to jurisdiction has hardly been predictable. Secondly, it would assist litigants considerably if the main factors for granting leave to appeal were codified in the Court's rules or in a single judgment. Other than that, there is nothing problematic about the factors the Court employs to decide leave to appeal. The absence of clear rules may be appropriate for a court of final instance, since, as demonstrated in the first four parts of this article, it can be difficult to craft principles for which matters the Court can hear.

Importantly, the Court's approach to leave to appeal is nuanced enough to deal with various practical concerns arising from it realising its generalist jurisdiction. The Court can filter out cases that are undesirable for the Court to hear generally, such as simple disputes of fact and misapplication cases. If the Court were to make these rules clear and accessible, then pleadings could be drafted accordingly, reducing the number of applications or the time it takes to process whether leave to appeal should be granted. Leave to appeal can also address some of the normative ideals we expect the Court to achieve. For instance, it can ensure that the Court hears only complex, important matters that effect the public.

VI ALL MATTERS AND ALL THAT MATTERS

Answering the question posed right at the start of this article is no simple task. The principles governing the Court's jurisdiction are difficult to present clearly and coherently. My first aim in this article was to do just that. The nine principles I have presented are drawn from the Court's jurisprudence on jurisdiction. My claim is that these nine principles form the basis of the Court's approach to jurisdiction. They represent the rules and considerations applied by the Court when deciding whether it has jurisdiction.

My second purpose was to demonstrate how the positive principles have a breadth far greater than the Court appears to realise, and the negative principles are mostly ad hoc and inconsistent. The Court's approach to jurisdiction, accordingly, is incoherent. Cases are not decided when they should be decided; cases are decided when they should not be decided.

My third aim was to offer a reasonable solution to the problem of jurisdiction. There are many ways of ensuring that the Court hears all that matters, only one of which is empowering it to hear all matters. In the main, deciding between these solutions is a policy-choice, best left to Parliament. But there is at least one option available to the Court. The Court can properly interpret the positive principles concerning its jurisdiction as the relevant principles exist in the Constitution. In particular, the Court can accept that it can decide 'constitutional matters' *and* 'any other matter'. The Court can move away from the negative principles it developed – unconvincingly – to limit its jurisdiction. The Court can then use its test for leave to appeal to address practical and normative concerns with its general jurisdiction. If the Court did so, it would address the doctrinal difficulties with its approach to jurisdiction, and potentially ensure better allocation of judicial resources.

[303] *Gelyke Kanse v Chairperson of the Senate of the University of Stellenbosch* [2019] ZACC 38, 2019 (12) BCLR 1479 (CC), 2020 (1) SA 368 (CC) at para 13.

VII POSTSCRIPT

Just before this article was published, the Constitutional Court handed down its judgment in *Mediclinic*.[304] The matter concerned the merger of two private hospital companies. The Competition Tribunal prohibited the merger for various reasons, including that the merger would impermissibly increase prices. The Competition Appeal Court overturned the Tribunal's finding. The issue broadly before the Court was whether the Competition Appeal Court was entitled to interfere with the Tribunal's finding.

Mogoeng CJ wrote for the majority. He held that the Court had jurisdiction to hear the matter for four reasons. First, the matter implicated the right to access health care services.[305] Second, the matter concerned the state's duty to respect, protect, and promote the rights in the Bill of Rights.[306] Third, the matter concerned section 39(2) of the Constitution. Fourth, determining the circumstances in which the Competition Appeal Court may interfere with the findings of the Tribunal raised arguable points of law of general public importance. Mogoeng CJ then held the following:

> Noteworthy are factors that implicate this Court's jurisdiction. They do not necessarily have to be raised by litigants. It would suffice that 'the matter raises' an arguable point of law of general public importance for this Court to have jurisdiction. Meaning, even if an applicant might not have raised an arguable point of law of general public importance, that is manifestly raised by the matter, it would still be open to this Court to consider its jurisdiction as established, based on that point.[307]

Without any references to cases like *Jiba*, and without any explanation, the majority has now overruled Principle 9, at least in respect of arguable points of law of general public importance. If jurisdiction must be assessed from the pleadings, then it cannot also be that jurisdiction could 'manifestly' be raised by a matter. Moreover, if arguable points of law can be manifestly raised by a matter, then there is no reason why a constitutional matter cannot be manifest (and instead must be pleaded). By implication therefore, the majority in *Mediclinic* abandoned Principle 9. Whether this signals a new approach to determining jurisdiction remains to be seen.

Theron J, with Khampepe J concurring, dissented. She held that the Court lacked jurisdiction to hear the matter. Theron J held that each of the four grounds invoked by the majority does not establish jurisdiction. The keystone to her dissent was that the Competition Appeal Court held, as a matter of fact, that prices would not go up if the companies merged.[308] If prices would not go up, then the right in section 27 was not implicated. The upshot was that the matter also did not involve sections 7(2) and 39(2) of the Constitution.[309] As for the majority's finding that the matter raised a point of law, Theron J held that the matter only concerned whether the Competition Appeal Court properly interfered with the Tribunal's

[304] *Competition Commission of South Africa v Mediclinic Southern Africa (Pty) Ltd & Another* [2021] ZACC 35 ('*Mediclinic*').

[305] Ibid at para 36.

[306] Ibid.

[307] Ibid at para 38.

[308] Ibid at paras 103–104.

[309] Ibid paras 105–108. In particular, Theron J held that the questions of statutory interpretation raised by the Competition Commission were premised on a finding that prices would go up after merger. Since that was not the case, the questions did not arise.

finding of facts. This is not a question of law but involved a question of fact or the application of a settled test.[310]

The difference between the majority and minority highlights the tension in Principle 4 discussed above. There is one line of authority, stemming from *NEHAWU*, saying that the interpretation and application of legislation implementing constitutional rights are constitutional issues. The Competition Act, as the majority emphasises in *Mediclinic*, was enacted to give effect to various constitutional rights, in this case the right to access to healthcare.[311] On the rationale of *NEHAWU*, the Court has jurisdiction over the application of the Competition Act, including whether a merger should be prohibited and the Competition Appeal Court could interfere with the Tribunals findings. The majority was correct in that sense.

On the other hand, the Court has not been consistent in its application of *NEHAWU*. I discussed above how *NEHAWU* cannot be squared with *Media 24*. I also discussed how *NEHAWU* cannot be reconciled with the Court's approach to the common law. The minority draws on this side of the tension in Principle 4, invoking cases like *Loureiro* to deny jurisdiction.[312] In this sense, the minority was also correct.

Mediclinic is a neat example of the Court's inconsistent approach to its jurisdiction. There is authority supporting both the majority and the minority approaches. Those authorities do not cohere, in that they lead to different conclusions on whether the Court has jurisdiction.

The two judgments in *Mediclinic* represent some of the normative concerns that lie behind the Court's lack of coherence in its approach to jurisdictional questions. The majority, especially in its abandonment of Principle 9, eschews the formalism accompanying the negative principles that purportedly constrain the Court's jurisdiction.[313] The minority, on the other hand, laments the majority's approach arguing that 'our doors would be thrust open to adjudicate any and all disputes'.[314] One lesson from *Mediclinic* is that a judge's normative preferences for the Court's jurisdiction might influence which of the conflicting authorities they will choose to invoke when determining jurisdiction. Another lesson is that insofar as the Court's jurisdictional approach remains unaddressed, its judges will continue to differ sharply and unpredictably on whether the Court has jurisdiction. It is thus time for the Court, and if not the Court then Parliament, to address its approach to jurisdiction.

[310] Ibid at para 119.

[311] As I discuss above, Goliath AJ made the same finding in *Media 24* (note 89 above). However, the majority in that case refused to concur with her.

[312] *Mediclinic* (note 304 above) at para 98. See the fourth issue I raise with Principle 8 above and note 247 above.

[313] It is no surprise that Mogoeng CJ abandoned Principle 9 given his judgment in *Sarrahwitz* (note 260 above).

[314] Ibid at para 99. Although Theron J had no issue concurring in Zondo DCJ's judgment in *Jacobs*. As I demonstrated above, Zondo DCJ's judgment similarly opens the Court's jurisdiction to all matters.