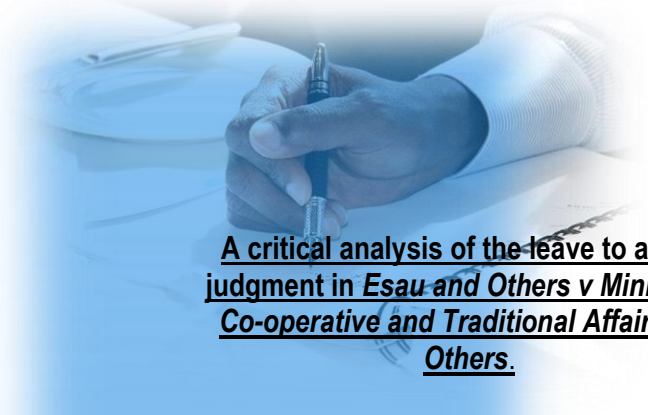

A critical analysis of the leave to appeal judgment in *Esau and Others v Minister of Co-operative and Traditional Affairs and Others*.

By Thabo Nongogo[1]

19 August 2020

1. Introduction

The onset of the COVID-19 pandemic has led to what has been an arduous five months for the South African populace. This state of arduousness has been further exacerbated by what appears to be a lack of rationality in the promulgation of the myriad regulations ostensibly aimed at curtailing the number of COVID-19 infections. This analysis seeks to provide a critical evaluation of the judgment in the application for leave to appeal in *Esau and Others v Minister of Co-operative and Traditional Affairs and Others*.

2. Facts and Issues

On Monday 15 June, the Western Cape High Court in Cape Town, South Africa, heard argument in a challenge by five university students, a civil servant, a media intern and a data analyst-cum-researcher against the provenance of the National Coronavirus Command Council (the NCCC) and the regulations and directions promulgated, ostensibly, in terms of the Disaster Management Act, 2002 (the DMA).

These litigants are to be commended for taking on the Herculean task of being at the forefront of this challenge – especially considering the trying times that we are currently living in.

The applicants are:

- Mr Duwayne Esau, a student at the University of Cape Town
- Mr Neo Nkwane, a civil servant
- Ms Thami Jackson, a media intern
- Ms Lindo Khuzwayo, a student at the University of Cape Town
- Mr Mikhail Manuel, a research assistant and PhD student at the University of Cape Town
- Mr Riaan Salie, a student at the University of South Africa
- Mr Scott Roberts, a student at the University of Cape Town
- Mr Mpiyakhe Dlamini, a data analyst and researcher

The respondents are:

- Minister of Cooperative Governance and Traditional Affairs (the COGTA Minister)
- President of South Africa
- Minister of Trade, Industry and Competition (the Trade Minister)
- Government of South Africa
- National Coronavirus Command Council (the NCCC)
- National Disaster Management Centre (the Centre)

The challenge before the court saw the applicants advancing the following issues:

- Whether the establishment and existence of the NCCC is consistent with, and warranted by, the Constitution of the Republic of South

[1] Thabo Nongogo, 24, is a recent BA(Law) graduate (English Literature Major) from the University of Cape Town. He is currently reading towards his Bachelor of Laws (LLB) at UCT and hopes to further fuel his love of English literature by pursuing an Honours degree in English upon completion of his LLB.

Africa, 1996 (the Constitution) and the DMA, and therefore valid.

- Whether the NCCC acts lawfully and in a manner that is consistent with the Constitution when it exercises the powers of the Centre.
- Whether any decision taken by the NCCC in relation to the DMA is constitutional and valid.
- Whether the COVID-19 regulations issued by the COGTA Minister on 29 April 2020, in particular those restricting people's movement (reg 16) and trade (reg 28) are constitutional and valid.
- Whether the directions issued by the Trade Minister on 12 May 2020 relating to the sale of clothing, footwear and bedding during alert level 4 restrictions should be set aside as being unconstitutional and invalid.

The challenge advanced by the applicants came as a response to the national lockdown regulations that were announced by President Cyril Ramaphosa on Monday 23 March 2020, and effected on Friday 27 March 2020. This initial lockdown was meant to last for only 21 days but, as I am writing this analysis, the number of lockdown days stands at 146. As the 21-day period was drawing to a close, concerns of a struggling economy – coupled with a great deal of public uncertainty – saw President Ramaphosa taking to the podium on Thursday 23 April 2020 to announce a "risk-adjusted strategy" to the reopening of the economy. This "risk-adjusted strategy" encompassed the implementation of different alert levels, qualified by different regulations for each level, in an effort (we were told) to curtail the spread of COVID-19 infections. The applicants in this case made the conscious decision to challenge some of the regulations along with the circumstances said to have necessitated them.

On Friday 26 June 2020, the court dismissed the challenge on all fronts in an 84-page judgment. This dismissal eventually led to the application for leave to appeal that is now the subject of this analysis.

The applicants sought leave to appeal in terms of section 17(1)(a)(i) and (ii) of Superior Courts Act 10 of 2013, namely, that the appeal had reasonable prospects of success and/or there were compelling reasons why the appeal should be heard, including conflicting judgments on the matters that were under consideration.

The first to seventh applicants relied on the following grounds in order to justify why they believed they had reasonable prospects of success:

- They believed that the Supreme Court of Appeal would find that the Minister of CoGTA could not have applied her mind rationally to the making of the Disaster Management Regulations of 29 April 2020. The basis for this contention was that the Minister had called for a public participation process less than 48 hours before making the regulations and it was not possible for the Minister and her team to collate and carefully consider the 70,000+ public submissions in this time frame for the purpose of promulgating well-informed regulations. As a result, the court erred in finding that the urgency and exigency of government's actions in addressing the COVID-19 pandemic justified the truncated public participation process.
- The regulations were concerned with the phased reopening of the economy as opposed to "flattening the curve" and as a result there was no rational connection between the regulations and curtailing the spread of COVID-19.
- The consultations that the Minister had with state entities such as NEDLAC, PPC, SALGA, NATJOINTS, Cabinet Ministers and Premiers do not constitute participation by the broader public in the law-making process, and so the court erred in finding that they did.
- The court erred in finding that there was a dispute of fact concerning the rationality of the public participation process and ought not to have applied the *Plascon-Evans* principle.

- The court erred in failing to find that, on the Minister's timeline, public participation could not have been meaningful and effective.
- The court failed to consider the particular violations of rights caused by the impugned regulations, namely Regulations 16(1) – (4); 28(1) and 28(4) read with Table E of Part 1. In doing so the court failed to recognise the violations to the right to dignity, freedom and security, freedom of movement, freedom of trade, occupation and profession.
- The court erred in viewing the rationality test as analogous to the section 36 limitations test and failed to engage in a limitations analysis as a result.
- The clothing directions were incorrectly found to be moot as a litigant cannot create a moot situation by withdrawing the offending provision. Furthermore, the directions were made for an impermissible purpose and the Minister of the DTIC could not rely on Regulation 4(10) to publish clothing directions.

Mr Mphiyake Dlamini, the eighth applicant, sought leave to appeal on different grounds. He relied on the following factors:

- The court erred in failing to find whether the NCCC consists of only 19 Cabinet members and not the entire Cabinet. This is because:

    (a) The president's letter attached to the answering affidavit only made mention of 19 Cabinet members and there was no filing of a subsequent letter including all members of the Cabinet.
    (b) The court tacitly accepted that all Cabinet members sit on the NCCC. The court was mistaken in this belief and should have rejected the Minister's assertion that the NCCC was expanded to include all Cabinet members due to the Minister's failure to explain why a letter appointing the remaining Cabinet members was not produced. The Minister's failure to do so amounted to an abuse of power as facts in support of her claim lie exclusively within her knowledge so there should have been an evidentiary burden on the Minister to prove her assertions – claiming that an assertion is fact does not mean that the assertion holds any truth to it.
    (c) The Minister's version that all Cabinet members are appointed to the NCCC conflicts with the President's explanation that the NCCC, *inter alia,* consists of inter-ministerial committee and that the committee consisted of twenty ministers. Other members were subsequently invited to attend the NCCC meetings.
    (d) The court should not have accepted the argument advanced by the Minister that the conflicts and contradictions arose from the loose use of language and the President's failure to file a confirmatory affidavit in support of the Minister's claim was reason enough to reject the claims and assertions advanced by the Minister.
    (e) The court erred in its legal finding that it was not necessary for the President to adduce any evidence.
    (f) The Minister failed to explain why the Cabinet could not assume the role of NCCC as opposed to creating what appeared to be an *ad hoc* committee to deal with the COVID-19 pandemic.

- The NCCC had taken at least three policy decisions since its establishment:

    (a) The court erred in failing to recognise the three policy decisions in question, namely, placing the country under lockdown, extending the lockdown and the implementation of the various alert levels.
    (b) The court erred in not finding the Minister's explanation pertaining to NCCC decisions to be contradictory and the courts should have applied the *Plascon-Evans Principle* to the Minister's version.
    (c) The court erred in finding that section 12 of the Promotion of Access to Information Act 2 of 2000 protected the Minister from having to adduce

evidence sourced in Cabinet meeting minutes as the Act does not prevent the court's access to that information.

(d) The court erred in failing to find that the NCCC did not have the authority to make policy decisions as this falls under the exclusive jurisdiction of the executive. Policy decisions are to be made by the Cabinet as a whole unless powers are delegated to another entity.

(e) No policy making powers concerning the National Disaster are delegated by the DMA.

The applicants also made the following submissions concerning section 17(1)(a)(ii) of the Superior Courts Act:

- They submitted that the *De Beer* decision in the North Gauteng High Court under case no. 21542/2020, represents a conflicting decision to the judgment of the court *a quo* and hence leave to appeal to the SCA should be granted as the court in that case ruled that the regulations were invalid whereas in this case, the court deemed them to be valid.
- The issues raised in this case are of such importance to the public that leave to appeal is warranted and should be granted.
- Applicants' Counsel submitted that because the Minister of CoGTA continues to make regulations, it is of the utmost importance that the appellate court give finality on the issue of whether the regulations are being made in a manner, and for a purpose, that is constitutionally valid.
- The court found that the narrow construction ought not to be placed on the DMA because it would conflict with the purposive approach to interpretation and that finding needs to be confirmed by the SCA.
- The President's failure to depose to an affidavit concerns a rule of law issue and leave to appeal should be granted.
- The eighth applicant had belated oral submissions presented and filed updated heads of argument. The contents of these heads and submissions dealt with the higher duty, as imposed by section 195 of the Constitution, on Ministers and public officials to adduce substantial evidence to support their version and it is not acceptable for the President to rely solely on confirmatory affidavits from Cabinet members. The rationale informing the filing of these belated oral submissions is that an infringement of section 195 would warrant a ground for leave to appeal to the SCA envisaged by section 17(1)(a)(ii) of the Superior Courts Act.

In an extraordinary 23-page judgment that seems written by two judges pulling in opposite directions, the court granted leave to appeal to the SCA although there were some points raised by the applicants that were contested by the court. I shall now address these points in conjunction with the respondents' rebuttal.

3. Analysis

3.1. Public Participation Process and Procedural Rationality

In the leave to appeal judgment of the *Esau* case the court found that the DMA does not envisage public participation. The court assessed the evidence presented concerning the forms of public participation that the Minister of CoGTA and her cabinet allowed for – the forms of engagement were not disputed on the papers.

Now, although the DMA does not explicitly make public participation a requirement for the promulgation of valid regulations, it does not rule out the requirement either. Section 9 of the DMA states the objectives of the National Centre in times of National Disaster Management as follows:

> **"The objective of the National Centre is to promote an integrated and co-ordinated system of disaster management, with special emphasis on prevention and mitigation, by national, provincial and municipal organs of state, statutory functionaries, other role-players involved in disaster management and communities."**

The objective of the National Centre cannot be fulfilled without meaningful public participation

as diminishing this type of participation poses a risk to the integrated nature of the disaster management system.

The court did indeed acknowledge the truncated public participation process but held that the truncated process was justified due to the fact that the Minister of CoGTA and the Minister of the DTIC had embarked on a wider public participation process prior to the regulations being made on Wednesday 29 April 2020. The alleged process was said to include public representation such as labour, business and the Disaster Management Centre in its fora. The issue, however, is that no evidence of the types of discussions that were taking place at these fora was presented.

One should also consider that, in light of the assertions made by the respondent, this is a huge deal of trouble to go through considering the fact that the DMA does not – allegedly – call for the facilitating of public participation. Thus far there does not seem to be much reassurance that there has been much meaningful public participation and engagement - if any at all.

Even if one does dismiss the interpretation of section 9 of the DMA that I am advancing, one cannot so easily dismiss the highest legislation in the land and common law precedent. Meaningful public participation cannot simply be dismissed as some sort of formality spoken of frivolously just to appease the masses. It is integral to the legislative process and a Constitutional imperative that ensures that we do not descend into chaos or be subjected to oppressive, and unjust regimes or institutions. Sections 59 and 72 of the Constitution exist to enforce this Constitutional imperative. These sections mandate Parliament to involve the public in the legislative process and to conduct its affairs in an open and transparent manner. In conducting its affairs in this manner, Parliament is also required to provide the general public with a reasonable opportunity to participate in the law-making process and this is done through facilitating avenues for participation such as ensuring that the public is able to take full advantage of these avenues.[2]

Public participation loses all meaning and force where these avenues are not provided and monitored for the benefit of the public. The Minister's reluctance to provide numbers on all those who assisted in the collation of the 70,000 submissions means that there is no way to gauge whether, despite the truncated process, the views of the public were carefully considered in the policy-making process. Even in light of the need for an expedited public participation process in order to "**flatten the curve**" as quickly as possible, we cannot turn a blind eye to the goals and objectives that the Constitution seeks to achieve. Procedural rationality cannot be compromised in light of pandemic management, but rather it should work in tandem with it to ensure the unnecessary infringement of our Constitutionally-protected liberties, rights and freedoms lest we set bad precedent for the future.

The court heard the two versions submitted by the applicants and respondents, respectively, and held that the opposing versions amounted to nothing more than a dispute of material facts. This it did without much legal reasoning. It simply expressed a preference for the respondents' version. This was an opportunity lost to develop an underdeveloped area of our constitutional jurisprudence: procedural rationality in the face of disaster management.

3.2 Reasonable and Justifiable?

According to this judgment, the applicants contended that the phased re-opening of the economy was one of the purposes of the DMA. The court ruled that this purpose could not be viewed in isolation and separate from the purpose of disaster management because it is only due to the rise of COVID-19, and the Minister's obligation to manage it, that the economy was closed. As a result, there needed

[2] Doctors for Life International v Speaker of the National Assembly and Others 2006 (6) SA 416 (CC) at para 129

to be regulations allowing for the re-opening of the economy. This means that the objects and purposes of the regulations that the applicants sought to impugn were much wider in scope than they asserted.

In order to justify the aforementioned, the respondents relied on the powers afforded to the Minister by the DMA, namely, the power to make regulations dealing with the management of the national disaster but also the consequences flowing from it, and the re-opening of the economy was viewed to be both a function of managing the disaster and mitigating consequences of the disaster.

This judgment seems to give the impression that the coronavirus itself has the capacity to close the economy. The economy's closure was part of an effort to try and limit transmission of the virus, and cannot be said to be caused by the virus. The contention by the applicants is that the purpose of the regulations, and not the DMA itself, was the phased reopening of the economy. Although I do somewhat agree with the applicants vis-á-vis their contention pertaining to the regulations, I cannot help but think that there is more to the impugned regulations than meets the eye. The favouring of an expedited law-making process coupled with the unjustifiability of the regulations serves as a great gauge of public subservience.

On one hand, I am of the opinion that the broad nature of the regulations was just an attempt by the South African government to cover all their bases as quickly as possible without really giving much thought as to whether all bases did in fact need covering – it would appear that our government was so concerned with delivering fast service that it overlooked whether it was delivering the service that we, as South African citizens, want and deserve. In doing this the executive tried addressing all **possible** facets of the pandemic as opposed to addressing all **probable** facets of the pandemic. On the other hand, gauging public subservience to ostensibly purposeful regulations in times of crises allows governments to assess the extent to which they may push the limits of public acquiescence and patience. The type of rationale used in the main judgment means that we may very well be deprived of so many rights and liberties if the executive is able to demonstrate some, ostensibly, just purpose that is served by the deprivation of these rights and liberties. It was not so long ago that Police Minister Bheki Cele was calling for the permanent banning of alcohol as a means to doing away with instances of alcohol-related accidents, a drastic measure that in no way aligns with the express purpose of the making of regulations under s 27(3) of the DMA! As a nation, we should always expect nothing less than accountability from our government as it is easy to blur the lines between rationality and arbitrariness.

In this leave to appeal judgment the court reiterated that it would not be correct to claim that the court failed to consider particular violations of human rights caused by the making of regulations 16(1) – (4); 28(1) and 28(4) read with Table E of Part 1. The court considered the arguments advanced by the applicants in paragraphs 182, 183 and 190 of the main judgment. The court addressed the need for these regulations in paragraphs 235 – 240, and cited reasons to justify the violation of rights such as how confining individuals to their homes minimises the spread of the virus and how the imposition of a curfew would limit the **"window of opportunity"** for the disease to spread. The Minister of the DTCI made it clear that the objective of the regulations was to save lives in a manner that limited foot traffic and time spent at stores unnecessarily. The Minister further illustrated the importance of saving lives by citing the emphasis placed on the rights to life and dignity in the case of *S v Makwanyane.*

However, this reasoning cannot negate the flimsy limitations test that the regulations were subjected to prior to implementation. One might argue that the right to life is one of the most important rights in the Constitution – if not the most important right[3] – but this right cannot

[3] S v Makwanyane and Another 1995 (2) SACR 1 at para 95

survive as a free-standing right. The manner in which the court assessed the regulations seems to suggest a hierarchy of rights when Constitutional rights are actually interconnected. The full realisation of one's right to life cannot come to be when they are not able to qualify this right through the right to dignity, freedom of movement, freedom of trade, occupation and profession. This interconnectedness of rights means that sometimes infringing one right means infringing another so a limitations analysis needs to carefully take this into account[4]. What was needed was a weighing up of different methods of achieving the same goal and then choosing the method that was less invasive as opposed to just adding merit to the first method that appears plausible in respect of each regulation.

To dismiss suggestions for other less invasive methods simply as interference with executive policy-making powers is both wrong and smacks of worrying lack of accountability that borders on dictatorship in the nature of **"It is either my way or the high-way"**. That is not the sort of governance that our Constitution envisages. And as to policy-making, there is yawning gap between making policy and implementing it as the Constitutional Court has made clear[5]. The courts may not second-guess government policy. But the courts have every right to second-guess the manner in which that policy is implemented. The executive does not have exclusive jurisdiction over both policy-making and policy implementation. Otherwise, what are the courts for if only government is to be judge in the implementation of its own policy?

The court also found that the applicants were mistaken in believing that they could seek leave to appeal on the ground that the Minister continues to make regulations. It said each regulation and the circumstances leading up to it must be decided on its own facts. Consequently, the court held that it cannot grant leave to appeal merely because applicants have an apprehension of how the Minister will act in future.

I find this justification somewhat troubling. The court seemed to disregard the fact that over the past five months we have been subjected to an array of different regulations in an effort to save lives. The pandemic is still very present in South Africa so more lives are going to need saving. So it should follow that there is a very high probability that regulations are still going to be made. This would mean that the applicants' apprehension is not really a true apprehension but rather an **expectation** based on precedent. With that being said, it is of the utmost importance that we rectify the issue of substantive and procedural irrationality to ensure that we are certain that future regulations comply with the Constitution.

3.3 The establishment and functions of the NCCC

The arguments presented on behalf of the eighth application vis-á-vis the challenge to the court's acceptance of the Minister's evidence in relation to the composition of the NCCC and extent of its influence rests on the submission that the court should have made a credibility finding against the Minister in motion proceedings. The applicant's Counsel based this contention on the incongruency between the Minister's explanation and the public statements made by the President, and the fact that the President did not depose to an affidavit in support of the Minister's allegations. The applicant's Counsel called for the court's application of the *Plascon-Evans* rule which states:

> **"In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact. If in such a case the respondent has not availed himself of his right to apply for the**

[4] Ibid at para 156

[5] Minister of Defence and Military Veterans v Motau and Others (CCT 133/13) [2014] ZACC 18; 2014 (8) BCLR 930 (CC); 2014 (5) SA 69 (CC) (10 June 2014), paras 36-39

deponents concerned to be called for cross-examination under Rule 6(5)(g) of the Uniform Rules of Court and the court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks. Moreover, there may be exceptions to this general rule, as, for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers"[6]

The judgment seems to not specifically address this issue and instead foregoes considering it in acceptance of the Minister's acknowledgment of the outlined contradiction and the manner in which the forum that is the NCCC makes its decisions pertaining to lockdown and the various alert levels. As much as these explanations are welcome, the court does not explain whether it ignores application of the *Plascon-Evans* principle because it is not satisfied by the credibility of the applicant's averments or because it believes that the Minister's explanation suffices. Surely the latter cannot be sound without submission of further evidence.

The use of the NCCC throughout the duration of the pandemic has become a highly-contentious issue as the use of this entity seems somewhat redundant. The Minister explained that the NCCC's purpose is solely to facilitate a forum to consider subject matter pertaining only to the pandemic. The Minister went on to further explain that this meant that the NCCC did not address general Cabinet business and that its implementation was necessary as the matters addressed during NCCC meetings were matters very distinct from usual Cabinet business – namely, disaster management. According to the respondents, this justification is also given weight by section 85 of the Constitution (which sets out the powers and functions of the President and other members of the executive – including the Cabinet members).

However, I am not quite convinced by the alleged authority that the respondents claimed flowed from this section. Section 85(2)(b) states that policy-making power is entrusted to the President "**together with other members of the Cabinet**". This means that the Executive's general policy-making powers in the national sphere is conferred on Ministers.[7] Considering that this is the case, the Cabinet has always been empowered to make policy decisions with the President in the name of disaster management so the establishment of the NCCC seems unjustified. Even if one considers the Minister's assertion that the matters discussed in NCCC meetings were merely recommendations which would be implemented subject to review by the Cabinet, an influx of recommendations from an amalgam of different sources who are not empowered to make policy decisions at a national level is sure to affect the constitutional validity of the content of the regulations that are eventually promulgated.

The Minister relied heavily on the argument that the NCCC was a part of the Cabinet so there was never an infringement of section 85 but it almost seems as if the NCCC is an appendage that the Cabinet uses subject to its own discretion and this perpetuates the notion that the NCCC is some sort of external *ad hoc* advisory committee, and not an integral part of the executive. It cannot be that on one end the NCCC is a part of Cabinet but on another end it is also an *ad hoc* committee, and its establishment seems unnecessary considering that section 85 confers power on the President and the executive to make policy decisions.

4. Grounds for Leave to Appeal

The court granted leave to appeal to the SCA on the following three grounds:

[6] Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) at para 9 - 11

[7] Electronic Media Network Limited and Others v e.tv (Pty) Limited and Others 2017 (9) BCLR 1108 (CC) at para 115

- The court's finding concerning the narrow construction that applicants sought to place on the objects and purpose of the DMA and the extent to which that construction conflicts with the contextual and purposive approach to interpretation. The court held that this merits consideration on appeal.
- The court's decision to consider and make findings on applicant's new matter raised in reply, to which respondents were unable to respond, because of the urgency and seriousness of the matter is another decision that merits the appeal court's attention.
- The fact that the disputed issues are of such significant public importance that leave to the Supreme Court of Appeal should be granted.

Based on this judgment, it is clear that the court was not entirely convinced with the merits of the arguments advanced by the applicants. However, it still granted leave to appeal to the SCA. It appears, from the listed grounds for leave to appeal, that the court did not place much faith in the reasonable prospects of success of the applicants in granting this leave to appeal to the SCA but rather placed reliance on section 17(1)(a)(ii) of the Superior Courts Act 10 of 2013 which states:

> **"Leave to appeal may only be given where the judge or judges concerned are of the opinion that there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration.**

With the exception of the second ground listed, these grounds could have been considered in the court *a quo*, allowing the SCA to address matters that truly require rigorous juridical engagement.

5. Conclusion

Although leave to appeal to the SCA was granted, the court wasted an opportunity to critically engage with matters of Constitutional Law and Civil Procedure. Issues raised should be a welcome chance to strengthen South Africa's constitutional jurisprudence and the issues of procedural and substantive irrationality dealt with in this case, along with the issues of civil procedure, were a perfect opportunity to do so. It seems that this type of meaningful engagement will have to be done by the SCA.