

Constitutional practice, in terms of Regulation 6(10)(a)



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GUIDE FOR CONSTITUTIONAL PRACTICE

Regulation 6 (10)(a)

FIFTEEN GUIDES

There are fifteen guides for practical vocational training of candidate attorneys. This guide deals with the Constitutional Practice module in regulation 6(10)(a).

OVERVIEW

On 20 September 2014 Parliament assented to the Legal Practice Act 28 of 2014 (LPA). In terms of section 4 of the LPA, the Legal Practice Council (LPC) was established on 31 October 2018. The following day, on 1 November 2018 the bulk of the rest of the LPA came into effect.

The Legal Practice Act regulates all legal practitioners whether on the practising roll or the non-practising roll. There are three forms of legal practice. They are an attorney, an advocate and an advocate with a Fidelity Fund certificate: see section 34 of the LPA.

Under section 109(1)(a) of the LPA, the LPC published GN R921 in GG 41879 of 31 August 2018, as amended by GN R3779 in GG 49104 of 11 August 2023. The compulsory course work required in the regulations for candidate attorneys was standardised by the LPC in terms of the Norms and Standards. Regulation 6(10) reads:

“(10) The programme of structured course work referred to in sub-regulation (1)(a) and (b) must be standardised and uniform throughout the Republic and comprise the following modules:

- (a) **constitutional practice;**
- (b) professional legal ethics;
- (c) personal injury claims;
- (d) high court practice;
- (e) magistrate’s court practice;
- (f) criminal court practice;
- (g) labour dispute resolution;
- (h) alternative dispute resolution;
- (i) attorneys’ bookkeeping;
- (j) wills and estates;
- (k) matrimonial law;
- (l) legal costs;
- (m) drafting of contracts;
- (n) information and communication technology for practice, and associated aspects of cyber law; and
- (o) introduction to practice management.”

The LPC published the Norms and Standards on 11 December 2020 in Government Gazette 43981 under section 3 (g)(i) read with section 6(1)(b)(i) and section 95(1)(n) of the LPA.

Regulation 6(10) requires candidate attorneys to be trained in the modules listed above. The similarity between regulation 6(10) for candidate attorneys and regulation 7(9) for pupils is not an accident. Section 32 of the LPA permits legal practitioners at any time, as determined in the rules and upon payment of the fee determined by the LPC, to apply to the LPC to convert their enrolment as attorneys to that of advocates and *vice versa*. Consequently, the training of candidate legal practitioners must allow for seamless section 32 conversions.

Each guide *per* module deals with the requirements in regulation 6(10). Examiners are required to set questions drawn only from the latest LPC candidate attorneys' curriculum and reading list. The combined curriculum and reading list is referred to as the "syllabus".

Each of the fifteen guides will assist training supervisors, mentors, busy legal practitioners and candidate attorneys to navigate the syllabus. The focus of the syllabus is on practical vocational training.

INTRODUCTION TO EACH GUIDE

Each guide *per* module in Regulation 6(10) is designed to assist candidate attorneys to understand, in real time, the minimum necessary under practical vocational training to become effective attorneys in practice. The essence of effective legal practitioners is the ability to read, to assimilate legal principles from that reading and to apply those principles to the facts of your client's case and in argument before courts, tribunals, disciplinary bodies, and any other forms of formal gatherings and meetings.

The guides avoid prolixity.
However each guide requires dedicated concentration.

For the examinations, candidate legal practitioners (candidate attorneys and pupils) must be up to date with the latest Constitutional Court and Supreme Court of Appeal cases to within one week before the date of each exam.

The guides do not rehash what you studied at University. Your LLB proves your capability. This guide will assist you to prepare for the LPC admission examinations. More importantly, this guide will also equip you to be an effective, competent, calm and (reasonably) confident attorney when you enter the legal profession.

REQUEST TO CANDIDATE ATTORNEYS FOR DUE DILIGENCE

Please read this guide attentively.

Please carry out all recommended court attendances.

Please carry out all the recommended practical exercises.

Please complete reading all the material in the LPC syllabus.

Please note the notional hours to complete all 15 guides are 400 hours.

Please note this guide, like the other fourteen guides, is sufficient for self-study.

Please remember, the exams are based on the LPC's most up to date syllabus (reading list).

- Currently the most up to date syllabus dates from 28 March 2025: Notice 3086 of 2025 published in Government Gazette 52388.
- Matters omitted from the LPC syllabus will not be in the examinations unless the statute, case or article under question is included in your exam paper and you are allowed extra reading time to consider that statute, case or article.
- Matters mentioned in the LPC syllabus are the subject of exam questions.
- You will be required to answer the exam questions from the perspective of:
 - Facts first
 - Law later
- The LPC exams, also referred to as assessments, are practical in nature.
- The questions will proceed from the following perspectives: –
 - What would you, as attorney of record, advise your client to consider?
 - What would you, as attorney of record, advise your client to do?
 - When and why would you refer a matter to another attorney or to counsel?
 - And similar practical questions.

REFERENCES

One of the products of Juta & Co Ltd is Jutastat. Many of the notes to this guide are downloaded from Jutastat. Please read the notes with care and diligence. This guide also relies on the Southern African Legal Information Institute (SAFLII).

SAFLII is free and open access on the Internet.

NOTE WELL

The sequence of this guide follows the sequence in the most recent LPC syllabus of 28 March 2025 for candidate attorneys. The fifteen guides are designed to be updated when the LPC so requires. Bullet points below are drafted to assist you to grasp the material in the reading list. You must decide whether to accept or to amend the bullet points to suit your understanding. When there are no bullet points, you need nonetheless to read the rule or case or article to prepare for your exams.

LPC SYLLABUS AND THE OFFICIAL SOURCE FOR ALL EXAMINATION QUESTIONS AT THE LPC ATTORNEYS' ADMISSION EXAMS

CURRICULUM AND COURSE CONTENT	READING LIST
<p>Introduction to Constitutional Law</p> <p>This column is sourced from the Norms and Standards the LPC published on 11 December 2020 in Government Gazette 43981</p> <p>What is “the rule of law” ?</p> <p>How the Constitution is transformative in nature</p> <p>Jurisdiction of our courts to hear constitutional matters: the 2013 change to the jurisdiction of the Constitutional Court.</p> <p>Rules and Directives: Constitutional Court.</p> <p>Eleven ways to the Constitutional Court.</p> <p>Advising clients about their Constitutional rights, duties and obligations.</p>	<p>Constitution of the Republic of South Africa, 1996 Rules of the Constitutional Court, 2003 Directives of the Constitutional Court</p> <p>1. GENERAL This course will prepare candidates to understand the principles, concepts and the procedure of Constitutional litigation.</p> <p>1.1. Access to the Constitutional Court - Superior Courts Act, sections 16 and 17 - Constitutional Court Rule 19 What is a “constitutional matter”? <i>S v Boesak</i> 2001 (1) SA 912 (CC) especially paras [10] to [15].</p> <p>1.2. The Bill of Rights, Constitutional matters & any other matter that raises an arguable point of law of general public importance which ought to be considered - Constitution, section 167(3)(b) & 167(6)(a) & (b) CC Rule 18. CC Rule 19. Jurisdiction of the Constitutional Court <i>University of Johannesburg v Auckland Park Theological Seminary and Another</i> 2021 (6) SA 1 (CC); 2021 (8) BCLR 807; [2021] ZACC 13 at paras [39] to [52]</p> <p>- Intervention in the Constitutional Court CC Rule 8. - Confirmation proceedings in the Constitutional Court</p>

<p>Advising clients on the Constitutional Court's stance on legal standing</p> <p>Advising clients on the remedies that can be awarded by the Constitutional Court</p> <p>How to apply Chapter 2 of the Bill of Rights and the limitations clause.</p> <p>How to apply the rest of the Constitution in giving advice to clients.</p> <p>Candidates must be up to date with case law from the Constitutional Court and the Supreme Court of Appeal to within one week before their exams.</p> <p>1. GENERAL</p> <p>1.1. Historical approach to customary law</p> <ul style="list-style-type: none"> - Law of Evidence Amendment Act 1988 s 1(1), (2) <p>1.2. Customary law under the constitution</p> <ul style="list-style-type: none"> - The Constitution, sections 30, 31, 39, 211 <ul style="list-style-type: none"> o Alexkor Ltd and Another v Richtersveld Community and Others 2004 (5) SA 460 (CC) (2003 (12) BCLR 1301; [2003] ZACC 18) at para [51] o Bhe and Others v Magistrate, Khayelitsha and Others; Shibi v Sithole and Others; SA Human Rights Commission and Another v President of the RSA and Another 2005 (1) BCLR 1 (CC) 2005 o Shilubana and Others v Nwamitwa and Others 2009 (2) SA 66 (CC) (2008 (9) BCLR 914; [2008] ZACC 9) 	<p>Section 167(5) of Constitution. CC Rule 16.</p> <ul style="list-style-type: none"> - The exclusive jurisdiction of the Constitutional Court CC Rules 14 to 1. <p>Section 167(4) of Constitution</p> <p>Content and limitation of rights Chapter 2 of the Constitution, especially section 36. <i>NM v Smith</i> 2007 (5) SA 250 (CC) especially paras [33] to [45]. <i>Government of the Republic of South Africa and Others v Grootboom</i> 2001 (1) SA 46 (CC) especially paragraphs [39] to [46].</p> <p>1.3. Costs in Constitutional matters</p> <ul style="list-style-type: none"> - <i>Biowatch Trust v Registrar Genetic Resources and Others</i> 2009 (6) SA 232 (CC) paras [16] and [20] to [24] and [56] <p>2. SPECIFIC PROCEDURES</p> <p>2.1. Direct access applications</p> <ul style="list-style-type: none"> - Constitutional Court Rule 18 - <i>Lesbian & Gay Equality Project v Minister of Home Affairs</i> 2006 1 SA 524 (CC) par 39 - <i>Ashebo v Minister of Home Affairs and Others</i> [2023] ZACC 16 at footnote 1 and paras [57] and [60] - <i>Mazibuko v Sisulu</i> 2013 6 SA 249 (CC) - <i>SA Informal Traders Forum v City of Johannesburg; SA National Traders Retail Assoc. v City of Johannesburg</i> 2014 4 SA 371 (CC) - <i>UDM v Speaker, NA</i> 2017 (5) SA 300 (CC) (2017 (8) BCLR 1061; [2017] ZACC 21) at para [23] - Urgent applications Constitutional Court Rule 12 <p>2.2. Declaration of constitutional invalidity</p> <ul style="list-style-type: none"> - Constitution, section 172(2) - Constitutional Court Rules 15 and 16 - <i>Director of Public Prosecutions v Mohamed</i> 2003 (4) SA 1 (CC) at para [56] - <i>Arena Holdings (Pty) Ltd t/a Financial Mail and Others v South African Revenue Service and Others</i> [2023] ZACC 13; 2023 (8) BCLR 905 (CC) especially at paras [141], [147], [158] and [193] to [195] <p>2.3. <i>Amicus curiae</i> and joinder applications</p> <ul style="list-style-type: none"> - Constitutional <i>amicus</i> interventions in the High Court Uniform Rule 16A. - Constitutional <i>amicus</i> interventions in the the SCA SCA Rule 16. - Constitutional Court Rules 5, 8 and 10 - <i>Ex parte Institute for Security Studies: In re S v Basson</i> 2006 (6) SA 195 (CC) especially at paras [5] to [11] <p>3. CONSTITUTIONAL REMEDIES</p> <ul style="list-style-type: none"> - <i>Minister of Health and Others v Treatment Action Campaign and Others (No 2)</i> 2002 (5) SA 721 (CC) especially paras [96] to [114]. - <i>Mwelase v Director General, Department of Rural Development & Land Reform</i> 2019 (6) SA 597 (CC) at para [51].
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<p>Remember to cross-reference the following notes from the Guide for High Court Practice regulation 6(10)(d) to wit:</p> <p>Uniform Rules of Court The vital aspect of jurisdiction <i>Standard Bank of SA Ltd v Mpongo</i> 2021 (6) SA 403 (SCA): <i>South African Human Rights Commission v Standard Bank of South Africa Ltd and Others</i> 2023 (3) SA 36 (CC)</p>	<p>3.1. Declaration of invalidity, reading down, reading in & severance</p> <ul style="list-style-type: none"> - Hierarchy of remedies <i>Van Rooyen v The State</i> 2002 (5) SA 246 (CC) - Declarations of invalidity <i>S v Makwanyane</i> 1995 (3) SA 391 (CC) par 151 <i>National Coalition for Gay and Lesbian Equality & Others v Minister of Home Affairs & Others</i> 2000 (2) SA 1 (CC) par 73–76 - Reading down & Severance Investigating Directorate: Serious Economic Offences & Others v Hyundai Motor Distributors (Pty) Ltd & Others: In re Hyundai Motor Distributors (Pty) Ltd v Smit NO & Others 2001 (1) SA 545 (CC) <i>Lawyers for Human Rights & Another v Minister of Home Affairs & Another</i> 2004 (4) SA 125 (CC) <i>Coetzee v Government of the RSA; Matiso & Others v Commanding Officer, Port Elizabeth Prison</i> 1995 (4) SA 631 (CC) par [51] <i>Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO)</i> 2005 (3) SA 280 (CC) <i>National Coalition for Gay and Lesbian Equality & Others v Minister of Home Affairs & Others</i> 2000 (2) SA 1 (CC) par 63-64 - Reading In <i>National Coalition for Gay and Lesbian Equality & Others v Minister of Home Affairs & Others</i> 2000 (2) SA 1 (CC) par 67-68 <i>Khosa & Others v Minister of Social Development & Others; Mahlaule & Others v Minister of Social Development & Others</i> 2004 (6) SA 505 (CC) <i>Bhe & Others v Magistrate, Khayelitsha & Others; Shibi v Sithole & Others; SA Human Rights Commission & Another v President of the RSA & Another</i> 2005 (1) SA 580 (CC) <p>3.2. Retrospectivity and suspension of invalidity</p> <ul style="list-style-type: none"> - <i>Nyathi v MEC of the Department of Health & Another</i> 2008 (5) SA 94 (CC) - <i>Matatiele Municipality & Others v President of the Republic of South Africa & Others</i> 2007 (1) BCLR 47 (CC) par 96 - <i>Ex Parte Women’s Legal Centre: In re Moise v Greater Germiston TLC</i> 2001 (4) SA 1288 (CC) par 13 - <i>Masiya v Director of Public Prosecutions, Pretoria & Another (Centre for Applied Legal Studies & Another, Amici Curiae)</i> 2007 (5) SA 30 (CC) par 47-57 <p>3.3. Interdicts, interim orders and supervisory orders</p> <ul style="list-style-type: none"> - <i>Black Sash Trust v Minister of Social Development and Others (Freedom Under Law NPC Intervening)</i> 2017 (3) SA 335 (CC) <p>3.4. Constitutional damages</p> <ul style="list-style-type: none"> - <i>Fose v Minister of Safety and Security</i> 1997 (3) SA 786 (CC) paras [60] and [67] - <i>Minister of Safety and Security & Another v Carmichele</i> 2004 (3) SA 305 (SCA) - <i>Minister of Safety and Security v Van Duivenboden</i> 2003 (1) SA 389 (SCA) para [21] - <i>President of the RSA & Another v Modderklip Boerdery (Pty) Ltd (Agri SA & Others, Amici Curiae)</i> 2005 (5) SA 3 (CC)
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CONSTITUTIONAL PRACTICE

INTRODUCTION SOURCED FROM THE NORMS AND STANDARDS

- You may access the Constitution and the Rules of the Constitutional Court at the following Uniform Resource Locators (URLs). Always use **https** protocols. Avoid http protocols.

Constitution of the Republic of South Africa, 1996:

https://www.saflii.org/content/Constitution-of-the-Republic-of-South-Africa_1996.html

Rules of the Constitutional Court, 2003:

https://www.saflii.org/za/legis/consol_reg/rotcc369/

Constitutional Court:

https://www.concourt.org.za/images/Practice_Direction_Dies_Non.pdf

GENERAL CONCEPTS FROM THE NORMS AND STANDARDS

The main purpose of the Norms and Standards is to provide a national approach to standardise and implement practical vocation training of candidate attorneys in terms of regulation 6(10). Five years of deliberation including two colloquiums and frequent publications of the syllabus have preceded the gazetting of the LPC syllabus on 28 March 2025. In future, the LPC syllabus will be updated and amended as required by circumstances in the legal profession.

The following concepts are introduced in the syllabus for constitutional practice. The concepts are dealt with first, then the reading list. It is important to understand that the concepts dealt with below also form part of the syllabus from which examiners may set exam questions.

The concepts are:

- A. What is the rule of law?
- B. How the Constitution is transformative in nature
- C. Eleven ways to the Constitutional Court.
- D. How to advise clients on the remedies the Constitutional Court may grant.
- E. For jurisdiction, rules, directives and standing (*locus standi*): **see the itemised reading list remarks** later.
- F. How to apply Chapter 2 (Bill of Rights and limitations clause): **see the itemised reading list remarks** later.
- G. How to apply the rest of the Constitution to advise clients on the other thirteen Chapters: **see the itemised reading list remarks** later.

A. THE RULE OF LAW

The rule of law is a founding value in section 1(c) of the Constitution.

What does the rule of law mean?

In *Democratic Alliance v President of the Republic of South Africa* 2012 (1) SA 417 (SCA) Navsa JA (Heher JA, Mhlantla JA, Majiedt JA and Plasket AJA concurring) said:

“[57] In order to fully appreciate the importance of the NPA and the NDPP in our constitutional democracy it is necessary, first, to bear in mind that the Constitution empowers those who govern and imposes limits on their power and, second, to consider the wider constitutional scheme in which both the institution and the individual are dealt with. A good starting place is an examination of the founding provisions of the Constitution. Section 1(c) of the Constitution states that the Republic of South Africa is one sovereign, democratic state founded, among other values, on the supremacy of the Constitution and the rule of law. Section 1(d) commits government to democracy and to accountability, responsiveness and openness. Section 2 of the Constitution reaffirms that the Constitution is the supreme law of the Republic and that law or conduct inconsistent with it is invalid and that the obligations imposed by it must be fulfilled. Thus, every citizen and every arm of government ought rightly to be concerned about constitutionalism and its preservation.”

There are two main meanings of the rule of law. The first is the traditional meaning and the second is the aspirational meaning linked to Human Rights and democracy. Both are correct at the same time. However, both the traditional and aspirational meanings are under menace at the moment.

Traditional meaning of the rule of law (all but principle 5 below)

In 2010 Tom Bingham wrote *The Rule of Law*.

References below are to the Penguin edition of Lord Bingham’s book published in 2011.

Lord Bingham postulated eight principles of the rule of law. He credited Professor AV Dicey for the expression *rule of law* in Dicey’s 1885 book *An Introduction to the Study of the Law of the Constitution*. Lord Bingham explains at pages 66 to 68 of the Penguin edition that Dicey would not have accepted principle 5 below. The disagreement on principle 5 compared to the other principles was, no doubt, a question raised during your LLB studies.

Here are the eight principles postulated by Lord Bingham.

- (1) The law must be accessible and so far as possible intelligible, clear and predictable: (pg 37).
- (2) Questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion: (pg 48).
- (3) The laws of the land should apply equally to all, save to the extent that objective differences justify differentiation: (pg 55).

- (4) Ministers and public officers at all levels must exercise the powers conferred on them in good faith, fairly, for the purpose for which the powers were conferred, without exceeding the limits of such powers and not unreasonably: (pg 60).
- (5) The law must afford adequate protection of fundamental human rights: (pg 66).
- (6) Means must be provided for resolving, without prohibitive cost or inordinate delay, *bona fide* civil disputes which the parties themselves are unable to resolve: (pg 85).
- (7) The adjudicative procedures provided by the state should be fair: (pg 90).
- (8) The rule of law requires compliance by the state with its obligations in international law as in national law: (pg 110).

In *De Lange v Smuts NO and Others* 1998 (3) SA 785 (CC) at para [46] Ackermann J quoted Mathews *Freedom, State Security and the Rule of Law* (Sweet and Maxwell, London, 1988) at 20 with approval.

Here is an extract of the quote: “Government according to the rule of law means that ... the relevant laws shall take the form of pre-announced, general, durable and reasonable precise rules administered by regular courts or similar independent tribunals according to fair procedures”.

- In short, that quote captures the traditional meaning of the rule of law. The aspirational meaning of the rule of law holds that the law itself must be just.
- Consequently, while the laws of the apartheid era in South Africa and the colonial era which preceded apartheid may have complied with the traditional meaning of the rule of law, those laws did not comply with the aspirational meaning of the rule of law.
- A useful source for the aspirational meaning of the rule of law is the Venice Commission and its recent update on 12 – 13 December 2025 of its rule of law checklist.
<https://www.coe.int/en/web/venice-commission/-/venice-commission-adopts-its-updated-rule-of-law-checklist>
- See also *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC) at para [49] to wit:
 “[49] The exercise of public power must therefore comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law. * The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the Constitution. ** It entails that both the Legislature and the Executive ‘are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law’. In this sense the Constitution entrenches the principle of legality and provides the foundation for the control of public power.”
 * [PMA of SA: *In re Ex parte President of the RSA* 2000 (2) SA 674 (CC) at para [20].]
 ** [*Fedsure Life Assurance Ltd v Greater Jhb TMC* 1999 (1) SA 374 (CC) at para [58].]
- Some of the cases in the reading list relate to rule of law issues. They are pointed out below.

Finally, there is a very thoughtful exposition of the rule of law in *Thistle Trust v CSARS* 2025 (1) SA 70 (CC) at para [67] and following. **The case is not in your reading list.** But the ideas expounded by Bilchitz AJ are worth considering especially when you are in practice as an attorney.

B. HOW THE CONSTITUTION IS TRANSFORMATIVE IN NATURE

In *S v Makwanyane and Another* 1995 (3) SA 391 (CC) Mahomed J said at para [262]:

“All Constitutions seek to articulate, with differing degrees of intensity and detail, the shared aspirations of a nation; the values which bind its people, and which discipline its government and its national institutions; the basic premises upon which judicial, legislative and executive power is to be wielded; the constitutional limits and the conditions upon which that power is to be exercised; the national ethos which defines and regulates that exercise; and the moral and ethical direction which that nation has identified for its future. In some countries the Constitution only formalises, in a legal instrument, a historical consensus of values and aspirations evolved incrementally from a stable and unbroken past to accommodate the needs of the future. The South African Constitution is different: it retains from the past only what is defensible and represents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive, and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos expressly articulated in the Constitution. The contrast between the past which it repudiates and the future to which it seeks to commit the nation is stark and dramatic.”

The transformative nature of our Constitution was explained by K Klare *Legal Culture and Transformative Constitutionalism* (1998) 14 SAJHR 146 – 188 thus:

“a basic assumption of the Constitution is that South Africa cannot progress toward a society based on human dignity, equality, and freedom with a legal system that rigs a transformative constitutional superstructure onto a common and customary law base inherited from the past and indelibly stained by apartheid.”

See <https://repository.library.northeastern.edu/files/neu:332935/fulltext.pdf>

In *SAPS v Solidarity obo Barnard (Popcru as Amicus Curiae)* 2014 (6) SA 123 (CC) Moseneke ACJ (Skweyiya ADCJ, Dambuza AJ, Jafta J, Khampepe J, Madlanga J and Zondo J concurring) said in para [33]:

“Our state must direct reasonable public resources to achieve substantive equality ‘for full and equal enjoyment of all rights and freedoms’. It must take reasonable, prompt and effective measures to realise the socio-economic needs of all, especially the vulnerable. In the words of our Preamble the state must help ‘improve the quality of life of all citizens and free the potential of each person’. That ideal would be within a grasp only through governance that is effective, transparent, accountable and responsive. Our public representatives will also do well to place a premium on an honest, efficient and economic use of public resources.”

In summary:

The South African Constitution is ‘transformative’ in nature. Geoff Budlender explains that “[o]ur Constitution differs from many others in a fundamental respect. Most Constitutions reflect the outcome of a change which has already taken place, and lay down the framework for the new society. A key theme of our Constitution is the change which is yet to come – the transformation which is yet to come.”

See *Transforming the Judiciary: The Politics of the Judiciary in a Democratic South Africa* (2005) 4 SALJ 715. See also Dr Solange Rosa <https://files01.core.ac.uk/download/pdf/188223973.pdf>

C. ELEVEN WAYS TO THE CONSTITUTIONAL COURT

Location of the Constitutional Court

The Constitutional Court is at 1 Hospital Street, Constitution Hill, Braamfontein, Johannesburg. As soon as you are able to do so, please visit the Constitutional Court. For candidate attorneys living far from Johannesburg here are the URLs for a virtual visit to the Constitutional Court.

Virtual visit

<https://ccac.concourtrust.org.za/virtual-walkthrough>

<https://my.3dtours.co.za/tour/constitutional-court-art-collection-2025>

There is a documentary published on 16 October 2013 entitled *Touring the Constitutional Court of South Africa with Justice Albie Sachs*. The documentary is 35 minutes long and is recommended to all candidate attorneys interested in the history and culture which underpin the Court. There is another documentary from 17 May 2020 entitled *Albie Sachs on designing the Constitutional Court of South Africa*. The documentary is 23 minutes long. It too is recommended for candidates interested in the history and culture which underpin the Court.

Documentaries

<https://www.youtube.com/watch?v=bSH7ToW1NsM>

<https://www.youtube.com/watch?v=-9EHPxbfpkY>

Audience before the Constitutional Court

As a general overview, there are at least eleven ways you may advise your clients on litigating in the Constitutional Court. See the Rules of the Constitutional Court:

https://www.saflii.org/za/legis/consol_reg/rotcc369/

1. An appeal on a constitutional issue from the SCA: **Rule 19**
2. An appeal on a non-constitutional issue from the SCA: **Rule 19**
3. In a confirmation of an order of constitutional invalidity: **Rule 16**
4. In the certification of a provincial constitution: **Rule 17**
5. In the referral of a Bill from the President or a Premier of a Province: **Rule 14**
6. Concerning the constitutionality of an Act: **Rule 15**

The matter may come from the National Assembly or a Provincial Legislature as your client.
7. An application for direct access to the Constitutional Court: **Rule 18**
8. An application for joinder by or against your client as an organ of state: **Rule 5**

The Uniform Rules of Court require joinder to be done under **Rule 10A** when a matter starts in the High Court.
9. An urgent application: **Rule 12**
10. An application to Intervene in a matter before the Constitutional Court: **Rule 8**

11. An application to be admitted as an *amicus curiae*: **Rule 10**
The Uniform Rules of Court require the application to be admitted as an *amicus curiae* to be done under **Rule 16A** when a matter starts in the High Court.
12. What other ways can litigants get their matters heard before the Constitutional Court?

For the requirements to file process see item 1.1. *Access to the Constitutional Court* below.

<https://www.concourt.org.za/index.php/28-role-of-the-constitutional-court/how-cases-reach-the-constitutional-court>

D. ADVISING CLIENTS ABOUT THEIR CONSTITUTIONAL RIGHTS, DUTIES AND OBLIGATIONS

The Court Cycle in all litigious matters

In general, the Court cycle starts with taking instructions, then drafting pleadings, then *litis contestatio* (close of pleadings), then proceeds to pretrial procedures and practice notes, the trial, the argument, the judgment and, if necessary, all the way to judgment at the final court of appeal.

Similarly, the court cycle in the motion court starts with taking instructions, then drafting affidavits, (founding, or answering, and replying) then proceeds to pre-hearing procedures of practice notes and heads of argument, the hearing, the argument, the judgment and, if necessary, all the way to judgment at the final court of appeal.

The Facts

All cases in litigation turn first – on the facts – and then perhaps, on the law. Once you have marshalled the facts, you will consider the law.

So, how do you get the facts?

Your client engages your services to solve a problem.

You need to understand the nature of the problem. You also need to know how the problem came about.

- So, at your first consultation when you receive your client's instructions, ask your client to recount what happened and to produce all documents, emails, WhatsApp messages and the like which both support your client's version **AND** which do not.
- Listen carefully and take notes before asking questions for clarification.
- Do not suggest facts, explanations or rationales for your client's conduct.
- Be aware to distinguish the facts of your client's version from any opinions by your client.
- The search for facts applies to constitutional law litigation just as it does in all other litigation, whether it be in civil or criminal law or alternative dispute resolution.

Find the facts

As far as possible, render the notes you take from your client's account into a chronology of events. Facts that fit snugly into a chronology tend to have an air of authenticity.

Sixfold fact test

Next, consider the facts from the perspective of a '**Sixfold Fact Test**'. Remember, you may develop your own system in practice to suit your approach to fact checking.

The sixfold fact test requires you to assess the facts presented to you under the following headings:

- **Possible**
- **Impossible**
- **Probable**
- **Improbable**
- **Plausible**
- **Implausible**

The reason you carry out the sixfold fact test while taking instructions is to protect the integrity of the Court process. You are not a hired gun for your client: you are an officer of the court.¹

You do not have to accept absurd instructions nor impossible, implausible or preposterous versions. You do not have to accept false '*facts*'.

Yet, at the same time, you *must* get all the relevant facts.

Remember, you are performing this exercise before you give advice and certainly before you commence drafting pleadings. In any event, you will never plead either in action or motion proceedings that: "*My client's instructions are*".

- Ideally, you need to avoid that turn of phrase ('*my client's instructions are*') for the rest of your career in law whether in court or while pleading or drafting affidavits or arguing your client's case in any forum anywhere.
- You are the legal practitioner.
- You have the agency to determine what you argue in writing or orally on behalf of your client.
- Never concede your agency as a legal practitioner to an insistent or unreasonable client.
- Keep your integrity and your professionalism.

Later you may, and certainly after pleadings have closed, you will engage in an exercise often referred to as the '**Good facts: Bad facts**' assessment.

See the table later in this text.

¹ See *The Ethics of the Hopeless Case* by Judge Owen Rogers in *The Advocate* – December 2017: <https://gbsa.co.za/law-journals/2017/december/2017-december-vol030-no3-pp46-51.pdf> See especially the summary on page 50 of the article.

Your assessment of the facts is vital.

There are two important considerations at the outset.

Your client needs to understand both considerations.

- **First**, our courts use the adversarial system. The adversarial system is designed – in civil law – to award the case to the party who succeeds on a balance of probabilities. Our courts do not search for truth. Our courts search for probabilities. ² If your client’s version is impossible, improbable or implausible, your client will lose the case.
- **Second**, if your client’s version is impossible, improbable or implausible, your client needs to consider settlement as an appropriate remedy. Phone the attorney representing your client’s adversary and seek a settlement of the matter.

REMEMBER

Your client engages your services to solve a problem. To solve *that* problem your client will need a remedy.

Of course, you remember the mantra **where there is a right, there is a remedy**. ³ The mantra comes from Roman-Dutch Law. It is a convenient way to consider how to solve the problem for which your client initially engaged your services.

Importantly: in the days **before Friday, 23 August 2013**, legal practitioners were obliged to focus on whether the problem could be solved without engaging a constitutional law issue. ⁴

Now your focus is to embrace constitutional issues

“Far from avoiding constitutional issues whenever possible, [the Constitutional 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. This affects how to approach them from the outset.” ⁵

Next you will consider whether there is any legislation that may assist your client’s case.

Finally, you will consider what remedy may be available.

² See *Stellenbosch Farmers’ Winery Group Ltd v Martell et Cie SA* 2003 (1) SA 11 (SCA) at para [5], especially the last sentence.

<https://www.saflii.org/za/cases/ZASCA/2002/98.html>

³ *Masemola v Special Pensions Appeal Board* 2020 (2) SA 1 (CC) at para [51].

⁴ *S v Mhlungu and Others* 1995 (3) SA 867 (CC) at para [59], page 895E Kentridge AJ said: “I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed.”

⁵ *Jordaan v Tshwane Metropolitan Municipality* 2017 (6) SA 287 (CC) at para [8].

The decision to litigate – it's about the remedy: Will the remedy be effective?

What are the remedies available? Of the eleven main categories of remedy, the desired remedy depends on the facts of the case, the law, the prayers in the pleadings as confirmed by your client's instructions and the ultimate decision by the apex court, or the last High Court to decide the matter. You must canvass five critical points with your client: a remedy includes a reasonable settlement.

First, settlement.

Second, constitutional issues must be raised as soon as possible in the pleadings. ⁶

Third, all relevant parties must be joined, especially when legislation is under scrutiny. See Rule 10A of the Uniform Rules of Court and Rule 5 of the Constitutional Court. ⁷

Fourth, Courts determine matters on the pleadings, not on notions of justice outside the ambit of the pleadings. ⁸ So, plead accurately according to the ascertainable facts of your client's version.

Finally, consider what order the judge is likely to grant? ⁹

- Prepare your draft order with at least three considerations in mind
 - First, make sure the order is clear and easy to apply
 - Second, make sure the order does not require the judge to look stupid in making the order – when a judge makes an order he or she must maintain *gravitas*
 - Third, make sure the order conforms to our constitutional disposition – on that point as an attorney you may legitimately seek advice from expert jurists like academics, advocates with constitutional law expertise and any other expert professionals
- Remember: judicial officers are human beings
 - Treat judicial officers with the respect that a professional warrants
 - A useful measure of that respect lies in the African culture of respect for elders
 - Likewise in other cultures, respect for people with knowledge and wisdom
- Seek an order that solves the underlying dispute

⁶ *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC) at para [41].

⁷ *RAF v Mdeyide (Minister of Transport Intervening)* 2008 (1) SA 535 (CC) at para [27].

⁸ *Gcaba v Minister of Safety & Security* 2010 (1) SA 238 (CC) at para [75], cited with approval in *Booyesen v Minister of Safety and Security* 2018 (6) SA 1 (CC) at para [46].

⁹ *President of the RSA v Modderklip Boerdery (Pty) Ltd (Agri SA, Amici Curiae)* 2005 (5) SA 3 (CC) at paras [50] and [51] read with paras [65] and [66] and [68].
<https://www.saflii.org/za/cases/ZACC/2005/5.html>

ADVISING CLIENTS ON CONSTITUTIONAL COURT REMEDIES

Consider the following:

1. Declaration of invalidity
 - *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) at paras [61] to [64] and *SITA Soc Ltd v Gijima Holdings (Pty) Ltd* 2018 (2) SA 23 (CC) at paras [38] and [52] to [54].
2. Declaration of rights
 - See *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) at para [19] and *Minister of Health and Others v Treatment Action Campaign and Others (No 2)* 2002 (5) SA 721 (CC) at para [96].
3. Interdicts
 - See *Minister of Health and Others v Treatment Action Campaign (No 2)* 2002 (5) SA 721 (CC) at para [113].
4. Mandamus
 - See *Minister of Health and Others v Treatment Action Campaign (No 2)* 2002 (5) SA 721 (CC) at para [113].
5. Damages and constitutional damages in terms of s 172 of the Constitution
 - See *President of the RSA v Modderklip Boerdery (Pty) Ltd (Agri SA, Amici Curiae)* 2005 (5) SA 3 (CC) at paras [58] to [68] and
 - *Commando v City of Cape Town* 2025 (3) SA 1 (CC) at paras [72] to [75].
 - *Greater Tzaneen Mun v Bravospan* 2025 (1) SA 557 (CC) at paras [28] to [31].
 - *Minister of Police v Mboweni* 2014 (6) SA 256 (SCA) at para [4] where the Court states the caution required in claiming constitutional damages.
 - **Both the *Bravospan* and *Mboweni* cases are not in the reading list.** However, tag those cases for your practice once you have passed the attorneys' admission exams.
6. Contempt of court
 - See *Meadow Glen Home Owners Assoc v Tshwane City Metro Municipality* 2015 (2) SA 413 (SCA) at para [22].
7. Exclusion of evidence
 - See section 35(5) of the Constitution on illegally obtained evidence in criminal matters. See *Key v Attorney-General, CPD*, 1996 (4) SA 187 (CC) at para [14] and *Wingate-Pearse v CSARS* 2019 (6) SA 196 (GJ) at para [36].

8. Administrative law and labour remedies
 - See *KZN Joint Liaison Committee v MEC for Education*, KZN 2013 (4) SA 262 (CC) at paras [103] and [104].
9. Development of the common law
 - See *MEC for Health and Social Development, Gauteng v DZ obo WZ* 2018 (1) SA 335 (CC) at paras [27] to [38].
10. Costs awards in constitutional litigation
 - See *Biowatch Trust v Registrar, Genetic Resources, and Others* 2009 (6) SA 232 (CC) at paras [1], [7], [14], [15], [20], [21], [29] and [60].
11. Referral to Chapter 9 Institutions or other relevant authorities
 - See *Black Sash Trust v Minister of Social Development (Freedom Under Law NPC Intervening)* 2017 (3) SA 335 (CC) at paras [72] to [75].
12. Referral *re* Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000
 - See *Qwelane v SA Human Rights Commission and Another* 2021 (6) SA 579 (CC) at paras [78] to [101]
 - **The *Qwelane* case not in the reading list.** However, tag that case for your practice once you have passed the attorneys' admission exams.
 - **Remember:** High Courts and designated Magistrates' Courts are Equality Courts in terms of section 16 of Act 4 of 2000 (PEPUDA) and,
 - In terms of section 20 of PEPUDA proceedings may be instituted by:
 - (a) any person acting in their own interest;
 - (b) any person acting on behalf of another person who cannot act in their own name;
 - (c) any person acting as a member of, or in the interests of, a group or class of persons;
 - (d) any person acting in the public interest;
 - (e) any association acting in the interests of its members;
 - (f) the South African Human Rights Commission, or the Commission for Gender Equality.

TAKING INSTRUCTIONS on constitutional litigation

Step One: what are the facts?

Your client engages your services to solve a problem. Initially you will not know whether the matter involves constitutional law litigation or advice. Consultations are dynamic and your client is probably not aware of all the legal implications of the matter in the first place. Consequently, listen carefully to your client. Avoid absolutely concocting or suggesting a version for your client.

You need the facts supported by relevant documentation, if any exists, as mentioned above.

Ascertaining the facts

1. Draft a chronology of events.
2. Apply the **Sixfold Fact Test** to your client’s statement of the facts. Is the version:
 - **Possible**
 - **Impossible**
 - **Probable**
 - **Improbable**
 - **Plausible**
 - **Implausible ?**
3. Commence your own first draft of the **Good facts: Bad facts** assessment.

Remember: your assessment must view the facts from the perspective of all the litigants

Parties	Good facts	Bad facts
Applicant/Plaintiff	List the good facts	List the bad facts
Respondent/Defendant	List the good facts	List the bad facts

Good facts are those facts which support the version of a party. Bad facts are those facts which contradict the version of that party.

Your analysis of the good facts and bad facts can be done in consultation with your client on a screen or flip chart or similar method of presentation. If you do the analysis with your client you will achieve two very important results at the same time.

- First, your client will participate in your analysis of the facts
- Second, your client will gain confidence in the advice you give after completing the consultation

Pose as many pertinent questions as possible to satisfy yourself that you have grasped your client’s problem and version.

- The version must be at least plausible before you proceed to the next step.
- Ideally your client’s version should also be probable.

- Explain the adversarial system to your client, especially that the civil law system turns on a balance of probabilities not on the court seeking the truth of the events.
- See: *Stellenbosch Farmers' Winery Group Ltd v Martell et Cie* 2003 (1) SA 11 (SCA) at para [5]¹⁰

¹⁰ “[5] On the central issue, as to what the parties actually decided, there are two irreconcilable versions. So, too, on a number of peripheral areas of dispute which may have a bearing on the probabilities. The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on

- (a) the credibility of the various factual witnesses;
- (b) their reliability; and
- (c) the probabilities.

As to (a), the court’s finding on the credibility of a particular witness will depend on its impression about the veracity of the witness.

That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as

- (i) the witness’ candour and demeanour in the witness-box,
- (ii) his bias, latent and blatant,
- (iii) internal contradictions in his evidence,
- (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions,
- (v) the probability or improbability of particular aspects of his version,
- (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events.

As to (b), a witness’ reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof.

As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party’s version on each of the disputed issues.

In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it.

The hard case, which will doubtless be the rare one, occurs when a court’s credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. **But when all factors are equipoised probabilities prevail.”**

Step Two: what is the constitutional issue?

The Constitution is the supreme law of South Africa. Law or conduct inconsistent with the Constitution is invalid. Obligations imposed by the Constitution must be fulfilled.

The Constitutional Court has found that the following are constitutional matters (issues).¹¹

- (a) the interpretation, application or upholding of the Constitution itself, including issues concerning the status, powers or functions of an organ of State and disputes between organs of State;
- (b) the development of (or the failure to develop) the common law in accordance with the spirit, purport and objects of the Bill of Rights;
- (c) a statute that conflicts with a requirement or restriction imposed by the Constitution;
- (d) the interpretation of a statute in accordance with the spirit, purport and objects of the Bill of Rights (or the failure to do so);
- (e) the erroneous interpretation or application of legislation that has been enacted to give effect to a constitutional right or in compliance with the Legislature's constitutional responsibilities; or
- (f) executive or administrative action that conflicts with a requirement or restriction imposed by the Constitution.

The Constitutional Court has also ruled that the following are not accepted as constitutional issues or matters:¹²

- Appeals that challenge only factual findings;
- Appeals that challenge an incorrect application of the law by lower courts;¹³
- Setting aside arbitration awards.¹⁴
- The question of sentence will generally not be a constitutional matter and the Court will not ordinarily entertain an appeal on sentence merely because there was an irregularity. What must be shown is that there is also be a failure of justice.¹⁵

It is also clear that the determination whether a matter raises a constitutional issue is difficult and spawns many dissenting judgments even in the Constitutional Court.¹⁶

Note for candidate attorneys: the cases in footnotes 11 to 20 below are not in the reading list.

The footnotes are for your use in practice when you are admitted as attorneys. You simply need to know what are constitutional issues and what are not constitutional issues.

¹¹ *Fraser v Absa Bank Ltd (NDPP as Amicus Curiae)* 2007 (3) SA 484 (CC) at para [38].

¹² *Makanyi v AngloGold Ashanti Ltd* 2011 (3) SA 237 (CC) *per* Khampepe J at para [12].

¹³ *Buffalo City v Metgovis* [2019] ZACC 9 at paras [31] and [35].

¹⁴ *Lufuno Mphaphuli & Assoc (Pty) Ltd v Andrews* 2009 (4) SA 529 (CC) at para [237].

¹⁵ *Van der Walt v S* [2020] ZACC 19 para [18] *re S v Bogaards* 2013 (1) SACR 1 (CC) at para 42.

¹⁶ For example, *Booyesen v Minister of Safety and Security* 2018 (6) SA 1 (CC) at para [91], and *Swart v Starbuck* 2017 (5) SA 370 (CC) at para [75].

What is the nature of the problem raised by your client?

What does your client need as a remedy to solve that problem?

1. Does the complaint relate to an Act of Parliament, a regulation or provincial legislation or municipal by-law?

Legislation?

2. Does the complaint relate to an official of State who either performed a function or failed to perform a function resulting in adverse consequences to your client?

Administration or the Executive?

3. Does the complaint engage aspects of the Bill of Rights in Chapter 2 of the Constitution?

Fundamental rights?

4. Does the complaint engage aspects of other Chapters in the Constitution? ¹⁷

Other constitutional rights?

5. Does the complaint relate to the common law?

Common law?

Now you must decide which constitutional issue applies to the facts of your client's case. The fancy phrase is 'to contextualise the constitutional issue'. Inevitably, while you assess the nature of the constitutional issue your client is raising, your mind will drift towards possible remedies. Remember the observation of Justice Krieger that: "Our flexibility in providing remedies may affect our understanding of the right."¹⁸

¹⁷ Consider Navsa ADP's remarks about the National Prosecuting Authority at para [88] in *Nkabinde and Another v Judicial Service Commission and Another* 2016 (4) SA 1 (SCA) to wit:

"[88] It is now necessary to consider the constitutionality of s 24(1) of the [Judicial Service Commission Act 9 of 1994] JSCA. In this regard it is important to begin with a rejection of the notion that a prosecutor is to be regarded as part of the executive. This is evidenced first and foremost by the NPA's location within the constitutional framework. The NPA is established in terms of s 179 of the Constitution, which falls under ch 8, entitled 'Courts and the Administration of Justice'. This chapter also includes provisions relating to the judiciary and the courts. The executive, on the other hand, is dealt with under other chapters of the Constitution. For example, the President and the national executive are dealt with in ch 5, the provinces are dealt with in ch 6, and local government is dealt with in ch 7. The NPA is not even classified as a state institution supporting constitutional democracy (ch 9), but is treated as an integral part of the justice system."

¹⁸ *Sanderson v Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC) at para [27].

Step Three: what is the potential REMEDY?

Having heard your client, you will assess whether the problem to be solved stems from one of the five categories listed in Step Two. You will also be mulling over whether the matter should proceed to Court on motion or by way of action. And, you will focus on potential remedies.

Reminder of the eleven remedies listed above

1. Declaration of invalidity
2. Declaration of rights
3. Interdicts
4. Mandamus
5. Damages or constitutional damages
6. Contempt of court
7. Exclusion of evidence
8. Administrative law and labour remedies
9. Development of the common law
10. Costs awards
11. Referral to Chapter 9 Institutions or other relevant authorities – the Equality Courts
12. Any other remedy you may consider appropriate

To conduct a constitutional law case you need at least the following five ingredients

First, a plausible set of facts;

Second, admissible evidence to establish those facts on a balance of probabilities;

Remember, a fact is not a fact until the judge presiding over the case finds it to be a fact, **and**, the final appeal court agrees with that finding.

Third, you will need to base your client's case on sound legal principles;

Remember, our law is changing fast; make sure you are up to date with the latest decisions from the highest court to pronounce on matters relevant to your client's case.

Fourth, you will have to plead the case properly to establish your client's standing, the court's jurisdiction, a triable issue, relevant facts (and evidence in motion proceedings) and a prayer for obtainable relief;

Remember, you may attach a draft order, or draft orders in the alternative, of the relief/remedy – your client seeks.

Finally, you will need to comply with the rules of the court in which you commence proceedings.

Step Four: going to court Checklist for pleadings

First, constitutional issues must be raised as soon as possible in the pleadings. Constitutional issues cannot be raised for the first time on final appeal at the Constitutional Court.

Second, you must join all relevant parties: especially when legislation is under scrutiny. If the respondent or defendant is the state or an organ of state, consider the State Liability Act 20 of 1957 and the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 before you begin drafting pleadings.

Third, Courts determine matters on the pleadings, not on notions of justice outside the ambit of the pleadings. A useful way to structure your pleadings is to start by posing the question you will be answering to the judge:

“Ask how things appear to the well-informed, thoughtful and objective observer, rather than the hypersensitive, cynical, and suspicious person”, and plead accordingly. See *Van Rooyen v The State (GCB of SA Intervening)* 2002 (5) SA 246 (CC) at para [34].

Checklist for motion or action proceedings

Legal practitioners often worry whether to institute their clients’ case in motion proceedings. The risk relates to a foreseen – or foreseeable – dispute of fact which the court cannot resolve on the papers. However, since motion proceedings get to court faster than trial matters, the risk is sometimes worth taking.

- Cameron J, while in the SCA, set out the dilemma in the *Fakie* case thus:

“ [55] That conflicting affidavits are not a suitable means for determining disputes of fact has been doctrine in this court for more than 80 years. Yet motion proceedings are quicker and cheaper than trial proceedings, and in the interests of justice courts have been at pains not to permit unvirtuous respondents to shelter behind patently implausible affidavit versions or bald denials. More than 60 years ago, this court determined that a judge should not allow a respondent to raise fictitious disputes of fact to delay the hearing of the matter or to deny the applicant its order. There had to be a *bona fide* dispute of fact on a material matter. This means that an uncreditworthy denial, or a palpably implausible version, can be rejected out of hand, without recourse to oral evidence. In *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*, this court extended the ambit of uncreditworthy denials. They now encompassed not merely those that fail to raise a real, genuine or bona fide dispute of fact, but also allegations or denials that are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers.

[56] Practice in this regard has become considerably more robust, and rightly so. If it were otherwise, most of the busy motion courts in the country might cease functioning. But the limits remain, and however robust a court may be inclined to be, a respondent’s version can be rejected in motion proceedings only if it is fictitious or so far-fetched and clearly untenable that it can confidently be said, on the papers alone, that it is demonstrably and clearly unworthy of credence.”

Whatever strategy you adopt, there are important rules of court that apply to both motion and action proceedings

In the High Court you must join all the relevant parties especially when legislation is under scrutiny. So, you will use **Rule 10A** of the Uniform Rules of Court.

In the Constitutional Court the applicable joinder rule is **Rule 5**. Rule 5 in the Constitutional Court contains more practical detail on joinder than Rule 10A of the Uniform Rules. Rule 5 is especially important for appeals that are to be heard by the Constitutional Court.

A practical tip: when applying Rule 10A of the Uniform Rules at the start of your client's case, comply also with the requirements of the Constitutional Court Rule 5. In the olden days, that approach was named *ex abundanti cautela*. The Latin phrase is the fancy version of the English meaning, 'out of abundant caution' – which means **belt and braces**.

If you act for an *amicus curiae*, in the High Court you will use **Rule 16A**. If your client seeks to intervene in a Constitutional Court matter, you will employ the Constitutional Court **Rule 10**.

Yet again, a practical tip: when applying Rule 16A of the Uniform Rules at the start of your client's case, comply also with the requirements of the Constitutional Court **Rule 10**. Both rules, taken together set out a framework that, if applied, is easy to understand and to use.

There are many rules in the Uniform Rules of Court and the Constitutional Court rules that are similar. Indeed, the Constitutional Court rules adopt the Uniform Rules to bridge gaps in the Constitutional Court rules.

Constitutional Practice – HOW TO USE THE READING LIST

1. GENERAL

This module prepares candidate attorneys to understand the basic but essential principles, concepts and procedures of constitutional practice. Candidates must read each section of the Acts indicated in the reading list. Some of the salient issues are set out in the bullet points below.

The reason to read the references in the reading list is to prepare for your attorneys' admission exams. The examiners draw and draft exam questions from the syllabus. The syllabus includes the column **Curriculum and Course Content** and the column **Reading List** in the table above.

Questions based on matters not in the syllabus are allowed only where the statute, case or article being examined is added into the examination paper. In that event, you will be given an extra fifteen minutes to read and digest the question before writing your exam. This principle applies to all the modules in regulation 6(10) and for all your admission exams.

The reading list is repeated below with short bullet points to focus your grasp of the material and additional references to the SAFLII versions of the case law. You will be able to download the case law from SAFLII onto your mobile devices at any time and while in court.

Remember: the bullet points are designed to help you understand salient issues. The phrase: *Subject to your reading, the following points may be drawn from the case cited above* requires you to check whether the bullet points are indeed an accurate reflection of the case. Proactive candidates will develop their own bullet points for exam preparation and for use later in practice.

Note well: many candidate attorneys do not have access to the South African Law Reports nor the All South Africa reports published by LexisNexis. In this guide references to the URLs of SAFLII are included. This will assist all candidates to access the relevant case law, even when you are in court – of course – if the court has internet access and accessible WiFi.

The Department of Justice website also has up to date legislation and subordinate legislation.

See the following URLs:

<https://www.justice.gov.za/>

<https://www.justice.gov.za/constitution/index.html>

https://www.justice.gov.za/legislation/acts/acts_full.html

<https://www.justice.gov.za/legislation/rules/rules.htm>

1.1. Access to the Constitutional Court

Superior Courts Act 10 of 2013: https://www.saflii.org/za/legis/consol_act/sca2013224/
<https://www.concourt.org.za/images/constitutional-court-rules-2003-gn-r1675-2003.pdf>

Chapter 5 of the Superior Courts Act deals with orders of constitutional invalidity, appeals and settlement of conflicting decisions (ss 15-20)

Read sections 16 and 17 of the Superior Courts Act – the sections deal with appeals

Note well:

- In terms of 167(3) of the Constitution, the Constitutional Court is the highest court of the Republic of South Africa.
- The Constitutional Court decides constitutional matters, and any other matter, if it 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 it.
- The Constitutional Court makes the final decision whether a matter is within its jurisdiction.

- Constitutional Court Rule 19 deals with Appeals:

see https://www.saflii.org/za/legis/consol_reg/rotcc369/

What is a “constitutional matter”?

S v Boesak 2001 (1) SA 912 (CC) especially paras [10] to [15]

<https://www.saflii.org/za/cases/ZACC/2000/25.html>

[Note well: this case was decided on 1 December 2000, many years before 23 August 2013]

Subject to your reading, the following points may be drawn from the case cited above.

- A finding that a matter is a constitutional issue is not decisive.
- Leave to appeal may be refused if it is not in the interests of justice that the Court should hear the appeal.
- Constitutional matters include disputes as to whether any law or conduct is inconsistent with the Constitution,
- as well as issues concerning the:
 - status,
 - powers and
 - functions of an organ of State.
- Under s 167(7),
 - the interpretation,
 - application and
 - upholding of the Constitution are also constitutional matters.
- Under s 39(2),
 - is the question whether the interpretation of any legislation or
 - the development of the common law promotes the spirit, purport and objects of the Bill of Rights.

- If regard is had to this and
 - to the wide scope and application of the Bill of Rights, and
 - to the other detailed provisions of the Constitution,
 - such as the allocation of powers to various legislatures and structures of government,
 - the jurisdiction vested in the Constitutional Court to determine constitutional matters and issues connected with decisions on constitutional matters is clearly an extensive jurisdiction.
- It is neither necessary nor desirable in the present case to attempt to define the limits of that jurisdiction.

Since 23 August 2013 the jurisdiction of the Constitutional Court is extended by s 167(3)(b)(ii).

**Note well the effect of the
Constitution Seventeenth Amendment Act of 2012 (wef 23 August 2013)**

167 Constitutional Court

- (1) The Constitutional Court consists of the Chief Justice of South Africa, the Deputy Chief Justice and nine other judges.
- (2) A matter before the Constitutional Court must be heard by at least eight judges.
- (3) 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.
- (4) Only the Constitutional Court may-
 - (a) decide disputes between organs of state in the national or provincial sphere concerning the constitutional status, powers or functions of any of those organs of state;
 - (b) decide on the constitutionality of any parliamentary or provincial Bill, but may do so only in the circumstances anticipated in section 79 or 121;
 - (c) decide applications envisaged in section 80 or 122;
 - (d) decide on the constitutionality of any amendment to the Constitution;
 - (e) decide that Parliament or the President has failed to fulfil a constitutional obligation; or
 - (f) certify a provincial constitution in terms of section 144.
- (5) The Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, the High Court of South Africa, or a court of similar status, before that order has any force.
- (6) National legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court-
 - (a) to bring a matter directly to the Constitutional Court; or
 - (b) to appeal directly to the Constitutional Court from any other court.
- (7) A constitutional matter includes any issue involving the interpretation, protection or enforcement of the Constitution.

1.2. *The Bill of Rights, Constitutional matters & any other matter that raises an arguable point of law of general public importance which ought to be considered*

- Constitution, section 167(3)(b) & 167(6)(a) & (b) – please read the sections above.

University of Johannesburg v Auckland Park Theological Seminary 2021 (6) SA 1 (CC) at paras [39] to [52]

<https://www.saflii.org/za/cases/ZACC/2021/13.html>

Subject to your reading, the following points may be drawn from the case cited above.

- Although the Constitutional Court acts as a final appellate court that affords litigants the opportunity of a ‘super appeal’
 - this is not merely for the taking and
 - the Court has made it clear that ‘not all litigants who knock on this court’s door’ will be granted leave to appeal.
- For leave to be granted [*in the UJ case*], the matter must engage the Court’s jurisdiction under s 167(3)(b) of the Constitution and,
- Further, it must be in the interests of justice for leave to be granted.
- Reduced to bare essentials, s 167(3)(b)(ii) of the Constitution provides the Constitutional Court will grant leave if
 - (a) the matter raises an arguable point of law;
 - (b) that point is one of general public importance; and
 - (c) the point ought to be considered by the Court.
- The first element is a bifurcated requirement:
 - the point must be one of law and
 - it must be arguable.
- A point of law which is totally unmeritorious cannot be said to be arguable.
 - The notion that a point of law is arguable entails some degree of merit in the argument.
 - Although the argument need not be convincing at this stage, it must have a measure of plausibility.
- In simple terms, the test is that the point of law must have reasonable prospects of success.
- The final requirements for an arguable point of law to engage the Constitutional Court’s jurisdiction are:
 - it must be a point of general public importance that ought to be considered by the Court.
 - A point is of general public importance if its resolution transcends the interests of the parties to a particular litigation.
 - In other words, its resolution must benefit the general public.

Please read each rule listed in the Constitutional Court Rules, 2003

See: https://www.saflii.org/za/legis/consol_reg/rotcc369/

CC Rule 18: Direct access

CC Rule 19: Appeals

CC Rule 8: Intervention of Parties in the proceedings

CC Rule 16: Confirmation of an order of constitutional invalidity

Please read each section listed in the Constitution, 1996

See: <https://www.justice.gov.za/constitution/chp08.html>

Confirmation proceedings in the Constitutional Court: Section 167(5) of Constitution.

The exclusive jurisdiction of the Constitutional Court: Section 167(4) of Constitution

Content and limitation of rights: Chapter 2 of the Constitution, especially section 36.

NM and Others v Smith 2007 (5) SA 250 (CC) especially paras [33] to [45].

See: <https://www.saflii.org/za/cases/ZACC/2007/6.html>

Subject to your reading, the following points may be drawn from the case cited above.

- Privacy encompasses the right of a person to live his or her life as he or she pleases.
- Private facts are those matters the disclosure of which will cause mental distress and injury to anyone possessed of ordinary feelings and intelligence in the same circumstances and in respect of which there is a will (desire) to keep them private.
- Private and confidential medical information contains highly sensitive and personal information about individuals. The personal and intimate nature of an individual's health information, unlike other forms of documentation, reflects delicate decisions and choices relating to issues pertaining to bodily and psychological integrity and personal autonomy.
- The disclosure of an individual's HIV status, particularly within the South African context, deserves protection against indiscriminate disclosure due to the nature and negative social context the disease has as well as the potential intolerance and discrimination that result from its disclosure.

Notes to remember:

- The assumption that others are allowed access to private medical information once it has left the hands of authorised physicians and other personnel involved in the facilitation of medical care is fundamentally flawed.
- An individual does not automatically consent to or expect the release of any private medical information to others outside the administration of health care.
- Consent requires the active participation of the person granting consent.

Government of the Republic of South Africa and Others v Grootboom 2001 (1) SA 46 (CC)

See: <https://www.saflii.org/za/cases/ZACC/2000/19.html>

- Please read the entire headnote in the SALR case report in your nearest law library.
- Candidates need to compare the current situation in South Africa to that of 2001 and to be able to argue whether the current situation is the same, better or worse than in 2001 and why.

1.3. *Costs in Constitutional matters*

- *Biowatch Trust v Registrar Genetic Resources and Others* 2009 (6) SA 232 (CC) paras [16] and [20] to [24] and [56]. See <https://www.saflii.org/za/cases/ZACC/2009/14.html>

Subject to your reading, the following points may be drawn from the case cited above.

- The general point of departure in a matter where the State is shown to have failed to fulfil its constitutional and statutory obligations,
 - and where different private parties are affected, should be as follows:
 - the State should bear the costs of litigants who have been successful against it,
 - and ordinarily there should be no costs orders against any private litigants who have become involved.
- This approach locates the risk for costs at the correct door - at the end of the day, it was the State that had control over its [own] conduct.

2. SPECIFIC PROCEDURES

2.1. *Direct access applications*

- Constitutional Court Rule 18

- *Lesbian & Gay Equality Project v Minister of Home Affairs* 2006 (1) SA 524 (CC) at paras [39] to [42]. See: <https://www.saflii.org/za/cases/ZACC/2005/20.html>

Subject to your reading, the following points may be drawn from the case cited above.

- As a general rule the Constitutional Court does not act as a court of first and final instance;
- The importance and complexities of issues raised in an application for direct access weigh heavily against the Constitutional Court being a court of first and final instance.
- The jurisprudence of the Constitutional Court is enriched by being able to draw on the considered opinions of other courts;
 - Proper evidential foundations, where appropriate, can be laid;
 - Issues, both in relation to substantive law and appropriate orders to be made, are crystallised for focused research and attention.
- However, where a party can add to the deliberations of the Constitutional Court, that party might be afforded direct access as an *amicus curiae*.

Ashebo v Minister of Home Affairs and Others 2023 (5) SA 382 (CC); [2023] ZACC 16 at footnote 1 and paras [57] and [60]

<https://www.saflii.org/za/cases/ZACC/2023/16.html>

Subject to your reading, the following points may be drawn from the case cited above.

- The applicant mischaracterised the application as one for direct access in his notice of motion.
- Nothing turns on this technical error, as the threshold for the grant of applications for direct leave to appeal and direct access requires the exercise of discretion by the Constitutional Court in consideration of the same factors.
 - These include the importance of the constitutional issue
 - The desirability of obtaining an urgent ruling on the issue
 - Whether any dispute may arise in the matter
 - The possibility of obtaining relief in another court

- The time and costs that may be saved by coming directly to this court, and
 - The overarching interests of justice.
- The applicant's detention was authorised pursuant to s 49(1) of the Immigration Act read with the Criminal Procedure Act
 - The immigration officials' failure to facilitate his asylum application did not render his detention unlawful.
 - A just and equitable remedy under s 172(1)(b) is to compel the respondents to facilitate his application for asylum
 - failing which to release him from detention
 - unless he may lawfully be detained under the Criminal Procedure Act.
 - The applicant is entitled to an opportunity to be interviewed by an immigration officer to ascertain whether there are valid reasons why he is not in possession of an asylum transit visa.
 - Prior to being permitted to apply for asylum, he must show good cause for his illegal entry and stay in the country.
 - Once he passes that hurdle and an application for asylum is lodged, the entitlements and protections provided in ss 22 and 21(4) of the Refugees Act will be available to him.

See also: *Closing the doors of justice: An examination of the Constitutional Court's approach to direct access, 1995–2013*, 2015 SAJHR 112 by Prof. Jackie Dugard. **This article is not in the reading list. However, tag the article for your practice once you have passed the attorneys' admission exams.**

- *Mazibuko v Sisulu* 2013 (6) SA 249 (CC)

See: <https://www.saflii.org/za/cases/ZACC/2013/28.html>

Subject to your reading, the following points may be drawn from the case cited above.

- Direct access granted to argue that a motion of no confidence in the President takes priority over other parliamentary business;
- However, the Court simply confirmed that the assembly's authority to determine its own rules only required that matter be scheduled within a reasonable time.

- *SA Informal Traders Forum v City of Johannesburg; SA National Traders Retail Assoc. v City of Johannesburg* 2014 (4) SA 371 (CC)

See: <https://www.saflii.org/za/cases/ZACC/2014/8.html>

Subject to your reading, the following points may be drawn from the case cited above.

- Government should not by its disregard of the law be allowed to cause hardship to the vulnerable;
- The traders were entitled to trade from the stalls the city had allocated to them, and had been doing so for years;
- The city's conduct was, on the other hand, contrary to its own bylaws and plainly harmful;
- The harm faced by the traders was imminent and irreparable;
- In the circumstances the Court granted leave to appeal an interim order, direct access and an interdict from interfering with the trading of the applicant traders.

UDM v Speaker, NA 2017 (5) SA 300 (CC) (2017) (8) BCLR 1061; [2017] ZACC 21) at para [23]
<https://www.saflii.org/za/cases/ZACC/2017/21.html>

Subject to your reading, the following point may be drawn from the case cited above.

- The requirements for leave to bring an application or an appeal directly to this court are fundamentally similar.
- When in the case of a direct appeal the interests of justice requirement would be satisfied for purposes of granting leave when certain factors exist, similar factors ought to redound to the success of an application for direct access.
 - But direct access or direct appeal is certainly not available for the asking.
 - Proof of exceptional circumstances
 - in the form of sufficient urgency or public importance, and
 - proof of prejudice to the public interest or
 - the ends of justice and good governance,
 - must demonstrably be established.

- Urgent applications: Constitutional Court Rule 12 – please read the rule

2.2. Declaration of constitutional invalidity

- Constitution, section 172(2)

- Constitutional Court Rules 15 and 16

- *Director of Public Prosecutions v Mohamed* 2003 (4) SA 1 (CC) at para [56]

See: <https://www.saflii.org/za/cases/ZACC/2003/4.html>

Subject to your reading, the following point may be drawn from the case cited above.

- When a Court comes to the conclusion that a law is inconsistent with the Constitution, it has no discretion; it ‘must declare’ such law to be ‘invalid to the extent of its inconsistency’.

Arena Holdings (Pty) Ltd t/a Financial Mail and Others v South African Revenue Service and Others [2023] ZACC 13; 2023 (8) BCLR 905 (CC) especially at paras [141], [147], [158] and [193] to [195]

<https://www.saflii.org/za/cases/ZACC/2023/13.html>

Subject to your reading, the following point may be drawn from the case cited above.

- In a rule-based society, serious criminality undermines the values of the Constitution
 - just as a serious and imminent environmental or health risk
 - poses a high level of threat to the populace.
- These considerations are, objectively, sufficiently serious in the public interest to warrant lifting the cloak of confidentiality that otherwise vests in information worthy of protection.
- Taxpayer records generally contain personal information submitted to the tax authorities as part of compliance with the tax obligations imposed by law.
- That information is ordinarily of no concern or interest to the public at large, is correctly characterised as confidential and warrants the mandatory protection from disclosure that PAIA affords it.
- This case is about the limitation of the right of access to information under PAIA, and the prohibition that is referred to can only be the prohibition in s 35(1) of PAIA.
- Section 32 of the Constitution and PAIA, which is the national legislation contemplated in s 32, are concerned with the right which ‘everyone’, that is, the public at large to information held by the state.

- The Court concluded that the limitation in s 35(1) is absolute and cannot be said to be reasonable and justifiable in an open and democratic society.
- It followed that ss 35(1) and 46 of PAIA, as well as ss 67(4) and 69(2) of the Tax Administration Act, are unconstitutional.

2.3. *Amicus curiae* and joinder applications

Please read the following rules carefully and summarise the rules for your own understanding of their importance

- Constitutional amicus interventions in the High Court: Uniform Rule 16A.
- Constitutional *amicus* interventions in the the SCA: SCA Rule 16.
- Constitutional Court Rules 5, 8 and 10

Ex parte Institute for Security Studies: In re S v Basson 2006 (6) SA 195 (CC) especially at paras [5] to [11]

<https://www.saflii.org/za/cases/ZACC/2005/4.html>

Subject to your reading, the following point may be drawn from the case cited above.

- Applications for admission of *amici curiae* are governed by Rule 10
- The Constitutional Court exercises a discretion to admit an *amicus*
- To be admitted as an *amicus curiae* the applicant must establish at least the following that:
- The submissions sought to be advanced are relevant to the issues before the Court
 - will be useful to the Court and
 - are different from those of the other parties
- The Constitutional Court is not bound to admit a person who has obtained written consent of all the parties.
 - consent contemplated in Rule 10(1) is a factor to be taken into consideration
- Rule 10(6)(c) requires an application for admission as an *amicus curiae* to set out”
 - the submissions to be advanced,
 - their relevance to the proceedings, and
 - the reasons for believing that the submissions would be useful to the Court and
 - different from those of the other parties to the proceedings.
- The application for admission as an *amicus* must ordinarily also be accompanied by a summary of the written submissions sought to be advanced

3. CONSTITUTIONAL REMEDIES

Minister of Health and Others v Treatment Action Campaign (No 2) 2002 (5) SA 721 (CC) especially paras [96] to [106] and [113] to [114].

See: <https://www.saflii.org/za/cases/ZACC/2002/15.html>

Subject to your reading, the following points may be drawn from the case cited above.

- Where the State has failed to abide by the Constitution, a superior court may issue a declaratory or mandatory order against the errant institution;
- The order may have supervisory conditions;
- Pay particular attention to paras [99] to [106];
- Remember, government policy is and should be flexible;
- And, insofar as socio-economic rights are concerned:

- The State is required to take reasonable legislative and other measures to realise such rights:
- While legislation and policy formulation are an important step;
- Implementation of the legislation and policy is required.

Mwelase v Director General, Department of Rural Development & Land Reform 2019 (6) SA 597 (CC) at para [51].

See: <https://www.saflii.org/za/cases/ZACC/2019/30.html>

Subject to your reading, the following points may be drawn from the case cited above.

- Courts have never sought to supplant government in its task of implementing legislative and other programmes;
- Courts step in only when persuaded by argument and evidence that they have to correct erroneous interpretations of the law, or intervene to protect rights infringed by insufficient and unreasonable conduct in social and economic programmes;
- The doctrine of separation of power is important in our constitutional democracy;
 - But it cannot be used to avoid the obligation of a court to prevent the violation of the Constitution.
 - The right and the duty of a superior court to protect the Constitution are derived from the Constitution itself, and the Constitutional Court cannot shirk from that duty.

3.1. Declaration of invalidity, reading down, reading in & severance

- Hierarchy of remedies

Van Rooyen v The State 2002 (5) SA 246 (CC) at paras [87], [88], [99] to [101] and [208] to [210]

See: <https://www.saflii.org/za/cases/ZACC/2002/8.html>

Subject to your reading, the following points may be drawn from the case cited above.

- Legislation must be construed consistently with the Constitution;
- If held to be unconstitutional, the appropriate remedy ought, if possible:
 - to be in the form of a notional or actual severance, or
 - reading in,
 - so as to bring the law within acceptable constitutional standards.
- Only if this is not possible, must a declaration of complete invalidity of the section or subsection be made.

○ *S v Makwanyane* 1995 (3) SA 391 (CC) at para [151]

<https://www.saflii.org/za/cases/ZACC/1995/3.html>

Subject to your reading, the following points may be drawn from the case cited above.

- The death penalty declared unconstitutional
- This case fluctuates from the right to life as a reason to end the death penalty, the fact that a death penalty is cruel and unusual, to the fallibility of the judicial process to determine the factual guilt of an accused and
- Most importantly, the arbitrariness of sentencing depending on the predilections of the judicial officer – some implacably opposed to the death sentence with others in favour

o *National Coalition for Gay and Lesbian Equality & Others v Minister of Home Affairs & Others* 2000 (2) SA 1 (CC) at paras [73] to [76]

See: <https://www.saflii.org/za/cases/ZACC/1999/17.html>

- Reading down & Severance

Subject to your reading, the following points may be drawn from the case cited above.

- In deciding whether words should be severed or whether words should be read into a legislative provision, a Court pays careful attention:
 - **first**, to the need to ensure that the provision which results from severance or reading words into a statute is consistent with the Constitution and its fundamental values
 - **secondly**, that the result achieved would interfere with the laws adopted by the Legislature as little as possible.
- Ultimately, the legislature may undo the changes made by the Court if the legislature follows the correct constitutional route to do so.

o *Investigating Directorate: Serious Economic Offences & Others v Hyundai Motor Distributors (Pty) Ltd & Others: In re Hyundai Motor Distributors (Pty) Ltd v Smit NO & Others* 2001 (1) SA 545 (CC)

See: <https://www.saflii.org/za/cases/ZACC/2000/12.html>

Subject to your reading, the following points may be drawn from the case cited above.

- The proper interpretation of s 29(5) of the National Prosecuting Authority Act 32 of 1998 permitted a judicial officer to issue a search warrant for a preparatory investigation:
 - only when he or she was satisfied that there existed a reasonable suspicion
 - a specified offence had been committed.
- The warrant could be issued only where the judicial officer had concluded there were reasonable grounds for believing that objects connected with an investigation into that suspected offence could be found on the relevant premises and,
 - In the exercise of his or her discretion,
 - the judicial officer considered it appropriate to issue a search warrant.
- These were considerable safeguards protecting the right to privacy of individuals.
- The declaration of invalidity not confirmed.

o *Lawyers for Human Rights v Minister of Home Affairs* 2004 (4) SA 125 (CC)

See: <https://www.saflii.org/za/cases/ZACC/2004/12.html>

Subject to your reading, the following points may be drawn from the case cited above.

- High Court found s 34(8) of the Immigration Act 13 of 2002 arbitrary and constitutionally invalid;
- Held, it was not arbitrary to cause the detention of a person who had just arrived at a port of entry in South Africa, and who was reasonably suspected by an immigration officer on duty at the port of entry to be an illegal foreigner;
- Reasonable suspicion by an immigration officer constituted just cause for the detention.
- Appeal allowed.

o *Coetzee v Government of the Republic of South Africa; Matiso & Others v Commanding Officer, Port Elizabeth Prison, & Others* 1995 (4) SA 631 (CC)

See: <https://www.saflii.org/za/cases/ZACC/1995/7.html>

Subject to your reading, the following points may be drawn from the case cited above.

- At para [51] where Sachs J said:

“In deciding whether or not sending people to jail for not paying their debts is justifiable in an open and democratic society based on freedom and equality we need to locate ourselves in the mainstream of international democratic practice.”

- In *Coetzee*, the Constitutional Court held that the provisions of ss 65A-65M of Magistrates’ Courts Act 32 of 1944 which provided for the imprisonment of judgment debtors in certain circumstances inconsistent with right to personal freedom provided for in section 11(1) in chapter 3 of the *Interim Constitution*.
- The Interim Constitution was the Constitution of the Republic of South Africa Act 200 of 1993.

o *Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO) & Others* 2005 (3) SA 280 (CC) at paras [33] to [38]

See: <https://www.saflii.org/za/cases/ZACC/2004/10.html>

Subject to your reading, the following points may be drawn from the case cited above.

- The question in the section 36 proportionality analysis is one of degree to be assessed in the concrete legislative and social setting of the measure,
 - paying due regard to the means which are realistically available in our country at this stage,
 - but without losing sight of the ultimate values to be protected;
- In a justification analysis facts and policy are often intertwined;
- A legislative choice is not always subject to courtroom fact-finding and may be based on reasonable inferences unsupported by empirical data;
- Where justification depends on factual material, the party relying on justification must establish the facts on which the justification depends;
- Ultimately what is involved in a limitation analysis is the balancing of means and ends.

o *National Coalition for Gay and Lesbian Equality & Others v Minister of Home Affairs & Others* 2000 (2) SA 1 (CC) at paras [63] and [64]

See: <https://www.saflii.org/za/cases/ZACC/1999/17.html>

Subject to your reading, the following points may be drawn from the case cited above.

- An omission cannot, notionally, be cured by severance.
- The only logical equivalent to severance, in the case of invalidity caused by omission, is the device of reading in.

- Reading In

o *National Coalition for Gay and Lesbian Equality & Others v Minister of Home Affairs & Others* 2000 (2) SA 1 (CC) paras [67] and [68]

See: <https://www.saflii.org/za/cases/ZACC/1999/17.html>

Subject to your reading, the following points may be drawn from the case cited above.

- Whether, and to what extent, a Court interferes with the language of a statute depends on the correct construction to be placed on the Constitution as applied to the legislation and facts involved in each case;
- In principle there is no difference between a Court rendering a statutory provision constitutional by removing the offending part by actual or notional severance, or by reading words into a statutory provision.

o *Khosa & Others v Minister of Social Development & Others; Mahlaule v Minister of Social Development* 2004 (6) SA 505 (CC) at paras [48], [49], [56], [68] to [72], [90] and [91]

See: <https://www.saflii.org/za/cases/ZACC/2004/11.html>

Subject to your reading, the following points may be drawn from the case cited above.

- A court considering the reasonableness of legislative or other measures taken by the State will not enquire into whether other more desirable or favourable measures could have been adopted;
- In dealing with the issue of reasonableness, context is all-important;
- The Constitution properly interpreted provides that a permanent resident need not be a citizen in order to qualify for access to social security;
- Please read para [74] of the judgment carefully;
- A Bill assented to and signed by the President becomes an Act of Parliament and takes effect **when published in the Gazette OR on a date determined in the Act;**
- In the case of a duly enacted provision of an Act of Parliament, even before it has not come into effect, the Constitutional Court has the power in s 172 to read words into such a provision so that it complies with the Constitution;
- The just and equitable order is to read the words ‘or permanent resident’ into the section so as to make the grants available to permanent residents.

o *Bhe & Others v Magistrate, Khayelitsha & Others; Shibi v Sithole & Others; SA Human Rights Commission & Another v President of the RSA & Another* 2005 (1) SA 580 (CC)

See: <https://www.saflii.org/za/cases/ZACC/2004/17.html>

Subject to your reading, the following points may be drawn from the case cited above.

- Constitutional Court could grant direct access in exceptional circumstances only;
- For the customary law, see the *Bhe* decision below;
- **Remedy:** the Legislature is the appropriate forum to make the adjustments needed to rectify the defects identified in the customary law of succession;
- The Court ordered an interim remedy pending the required legislative adjustments, based on the Intestate Succession Act, with the inclusion of polygamous unions.

3.2. Retrospectivity and suspension of invalidity

- *Nyathi v MEC of the Department of Health & Another* 2008 (5) SA 94 (CC)

See: <https://www.saflii.org/za/cases/ZACC/2008/8.html>

Subject to your reading, the following points may be drawn from the case cited above.

- Section 3 of the State Liability Act 20 of 1957 did not afford a judgment creditor who had secured judgment against the State the same protection and benefit afforded to a judgment creditor who had secured judgment against a private litigant;
- The High Court had declared section 3 invalid and unconstitutional;
- The order of constitutional invalidity of the court *a quo* had to be confirmed and the declaration of invalidity suspended for a period of 12 months to enable Parliament to pass legislation providing for the effective enforcement of court orders.

Merafong City v AngloGold Ashanti Ltd 2017 (2) SA 211 (CC)

See: <https://www.saflii.org/za/cases/ZACC/2016/35.html>

Subject to your reading, the following points may be drawn from the case cited above.

- The import of *Oudekraal* and *Kirland* was that government cannot simply ignore an apparently binding ruling or decision on the basis that it is invalid;
- The validity of the decision has to be tested in appropriate proceedings;
- The sole power to pronounce that the decision is defective, and therefore invalid, lies with the courts;
- Government itself has no authority to invalidate or ignore the decision;
- It remains legally effective until properly set aside.
- Nonetheless, allegedly unlawful action needs to be challenged by the right actor in the right proceedings;
- Until that happens, for rule-of-law reasons, the decision stands.
- It is a fundamental principle that the state be exemplary in its compliance with constitutional principles that proscribe self-help; (**proscribe** means to prohibit or to forbid).

- *Matatiele Municipality & Others v President of the Republic of South Africa & Others* 2007 (1) BCLR 47 (CC) at para [96]

See: <https://www.saflii.org/za/cases/ZACC/2006/12.html>

Subject to your reading, the following point may be drawn from the case cited above.

- For a remedy designed to avoid unnecessary elections, please read paragraph [96] of the judgment carefully.

- *Ex Parte Women's Legal Centre: In re Moise v Greater Germiston TLC* 2001 (4) SA 1288 (CC) at para [13]

See: <https://www.saflii.org/za/cases/ZACC/2001/2.html>

Subject to your reading, the following points may be drawn from the case cited above.

- Under the interim Constitution, the Court had to decide whether to make its order declaring law or conduct retrospective;
- Under the current Constitution, an order is automatically retrospective to 27 April 1994, unless otherwise ordered.

- *Masiya v Director of Public Prosecutions, Pretoria & Another (Centre for Applied Legal Studies & Another, Amici Curiae)* 2007 (5) SA 30 (CC) paras [47] to [57]

See: <https://www.saflii.org/za/cases/ZACC/2007/9.html>

Subject to your reading, the following points may be drawn from the case cited above.

- A development necessary to clarify the law should not be to the detriment of the accused person concerned unless he was aware of the nature of the criminality of his act.
- In this case, the new definition of rape was not applied retrospectively to the accused.

3.3. Interdicts, interim orders and supervisory orders

- *Black Sash Trust v Minister of Social Development and Others (Freedom Under Law NPC Intervening)* 2017 (3) SA 335 (CC)

See: <https://www.saflii.org/za/cases/ZACC/2017/8.html>

Subject to your reading, the following points may be drawn from the case cited above.

- The complex supervisory order is sent out in the footnote.
- Please read it.¹⁹

¹⁹ *Black Sash Trust v Minister of Social Development and Others (Freedom Under Law NPC Intervening)* 2017 (3) SA 335 (CC)

Order

1. The Black Sash Trust is granted direct access to bring this application.
2. Freedom Under Law NPC is granted leave to intervene.
3. Corruption Watch NPC (RF) and the South African Post Office Soc Ltd are admitted as friends of the court.
4. It is declared that the South African Social Security Agency (Sassa) and Cash Paymaster Services (Pty) Ltd (CPS) are under a constitutional obligation to ensure payment of social grants to grant beneficiaries from 1 April 2017 until an entity other than CPS is able to do so and that a failure to do so will infringe upon grant beneficiaries' rights of access to social assistance under s 27(1)(c) of the Constitution.
5. The declaration of invalidity of the contract is further suspended for the 12-month period from 1 April 2017.
6. Sassa and CPS are directed to ensure payment of social grants to grant beneficiaries from 1 April 2017, for a period of 12 months, on the same terms and conditions as those in the current contract between them that will expire on 31 March 2017, subject to these further conditions:
 - 6.1 The terms and conditions shall:
 - (a) contain adequate safeguards to ensure that personal data obtained in the payment process remains private and may not be used for any purpose other than payment of the grants or any other purpose sanctioned by the Minister in terms of s 20(3) and (4) of the Social Assistance Act 13 of 2004; and
 - (b) preclude anyone from inviting beneficiaries to 'opt-in' to the sharing of confidential information for the marketing of goods and services.
 - 6.2 CPS may in writing request National Treasury during the 12-month period to investigate and make a recommendation regarding the price in the contract.

3.4. Constitutional damages

- *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) at paras [60] and [67]

See: <https://www.saflii.org/za/cases/ZACC/1997/6.html>

Subject to your reading, the following points may be drawn from the case cited above.

- Constitutional Court held there is no reason in principle why ‘appropriate relief’ should not include an award of damages;
- It will depend on the breach of the legislation and the facts of the case.

- *Minister of Safety and Security & Another v Carmichele* 2004 (3) SA 305 (SCA)

See: <https://www.saflii.org/za/cases/ZASCA/2003/117.html>

Subject to your reading, the following points may be drawn from the case cited above.

- In terms of State liability for a private law breach, the position of prosecutors was in principle no different from that of the police;
- The general principle: the State is liable for its failure to comply with its Constitutional duty to protect the plaintiff;
- The SCA set out in detail how wrongfulness, negligence and factual causation were established. Please read the headnote in the SALR in your nearest law library.

6.3 National Treasury must file a report with this court within 21 days of receipt of the request setting out its recommendation.

6.4 Within 30 days of the completion of the period of the contract, CPS must file with this court an audited statement of the expenses incurred, the income received and the net profit earned under the contract.

6.5 Sassa must thereafter obtain an independent audited verification of the details provided by CPS under para 6.4.

6.6 The audit verification must be approved by National Treasury and the audited verification must be filed by Sassa with this court within 60 days.

6.7 CPS must permit the auditors appointed by Sassa to have unfettered access to its financial information for this purpose.

7. The Minister and Sassa must file reports on affidavit with this court every three months, commencing on the date of this order, setting out how they plan to ensure the payment of social grants after the expiry of the 12-month period, what steps they have taken in that regard, what further steps they will take, and when they will take each future step, so as to ensure that the payment of all social grants is made when they fall due after the expiry of the 12-month period.

8. The reports filed by the Minister and Sassa as contemplated in para 7 must include, but are not limited to, the applicable time-frames for the various deliverables which form part of the plan, whether the time frames have been complied with, and if not, why that is the case and what will be done to remedy the situation.

- *Minister of Safety and Security v Van Duivenboden* 2003 (1) SA 389 (SCA) at para [21]

See: <https://www.saflii.org/za/cases/ZASCA/2002/132.html>

Subject to your reading, the following points may be drawn from the case cited above.

- The recognition of a legal duty to control police will not disrupt the efficient functioning of the police;
- As such, our law does not follow the English law approach.

- *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd (Agri SA and Others, Amici Curiae)* 2005 (5) SA 3 (CC)

See: <https://www.saflii.org/za/cases/ZACC/2005/5.html>

Subject to your reading, the following points may be drawn from the case cited above.

- The State had failed to provide an appropriate mechanism to give effect to the eviction order of the Johannesburg High Court;
- The failure infringed the respondent's rights under s 34 of the Constitution;
- The respondent was entitled to payment of compensation by the Department of Agriculture and Land Affairs in respect of the land occupied calculated in terms of s 12(1) of the Expropriation Act;
- The residents were entitled to occupy the land until alternative land was made available to them by the State or the provincial or local authority.

Affordable Medicines Trust v Minister of Health 2006 (3) SA 247 (CC) at para [49]

See: <https://www.saflii.org/za/cases/ZACC/2005/3.html>

Subject to your reading, the following points may be drawn from the case cited above.

- The Constitution entrenches the principle of legality and;
- provides the foundation for the control of public power.

Barkhuizen v Napier 2007 (5) SA 323 (CC) at para [39]

See: <https://www.saflii.org/za/cases/ZACC/2007/5.html>

The case is not in your reading list. But the ideas expounded are worth considering especially when you are in practice as an attorney. **Subject to your reading, the following points may be drawn from the case cited above.**

- The mere fact a point of law is raised for the first time on appeal is not sufficient reason for refusing to consider it;
- If the point is covered by the pleadings, and
- If its consideration on appeal involves no unfairness to the other party against whom it is directed,
- The Court may in the exercise of its discretion consider the point.

Central Energy Fund v Venus Rays Trade 2022 (5) SA 56 (SCA) at paras [39] to [42]

See: <https://www.saflii.org/za/cases/ZASCA/2022/54.html>

The case is not in your reading list. But the ideas expounded are worth considering especially when you are in practice as an attorney. **Subject to your reading, the following points may be drawn from the case cited above.**

- The two guiding principles for crafting an appropriate remedy in cases to set aside an invalid contract:
 - the corrective principle, which is aligned with the rule of restitution in contract, namely that neither contracting party should unduly benefit from what has been performed under a contract that no longer exists.
 - the ‘no-profit-no-loss’ principle, which does not allow a party to suffer loss or gain profit when an invalid contract is set aside.
- The law draws a distinction between parties who are complicit in maladministration, impropriety, or corruption on the one hand, and
- Those who are not, on the other.

HOD, Mpumalanga DoE v Hoërskool Ermelo 2010 (2) SA 415 (CC) at paras [96] and [97]

See: <https://www.saflii.org/za/cases/ZACC/2009/32.html>

The case is not in your reading list. But the ideas expounded are worth considering especially when you are in practice as an attorney. **Subject to your reading, the following points may be drawn from the case cited above.**

- Section 172(1)(b) confers wide remedial powers on a competent court adjudicating a constitutional matter;
- A just and equitable order may be made even in instances where the outcome of a constitutional dispute does not hinge on constitutional invalidity of legislation or conduct.

MEC for Health, Gauteng v 3P Consulting (Pty) Ltd 2012 (2) SA 542 (SCA)

See: <https://www.saflii.org/za/cases/ZASCA/2010/156.html>

Subject to your reading, the following points may be drawn from the case cited above.

- The agreement provided for a renewal period of two years. Three years were then agreed.
- The SCA found that no new services were procured, consequently a new competitive public bidding process was not necessary.

Public Protector v CSARS 2022 (1) SA 340 (CC) at para [31]

See: <https://www.saflii.org/za/cases/ZACC/2020/28.html>

Subject to your reading, the following points may be drawn from the case cited above.

- Where a court is granted wide decision making powers with a number of options or variables,
- An appellate court may not interfere;
- Unless it is clear that the choice the court has preferred is at odds with the law.

Steenkamp NO v Provincial Tender Board, EC 2007 (3) SA 121 (CC), paras [19] to [22] and [29]

See: <https://www.saflii.org/za/cases/ZACC/2006/16.html>

Subject to your reading, the following points may be drawn from the case cited above.

- The exercise and control of public power is always a constitutional matter;
- Every improper performance of an administrative function implicates the Constitution;
- And entitles the aggrieved party to appropriate relief;
- The remedy must be fair to those affected and vindicate effectively the right violated.

SITA Soc Ltd v Gijima Holdings (Pty) Ltd 2018 (2) SA 23 (CC) at paras [38] and [52] to [54]

See: <https://www.saflii.org/za/cases/ZACC/2017/40.html>

Subject to your reading, the following points may be drawn from the case cited above.

- A court deciding a constitutional matter has a wide remedial power;
- It is empowered to make ‘any order that is just and equitable’;
- So wide is that power that it is bounded only by considerations of justice and equity.

Wilkinson v Crawford NO and Others 2021 (4) SA 323 (CC) at para [31]

See: <https://www.saflii.org/za/cases/ZACC/2021/8.html>

Subject to your reading, the following points may be drawn from the case cited above.

- When determining issues on appeal, it is imperative to consider the pleadings.
- A litigant’s case must be pleaded in the founding papers
- And NOT for the first time in argument

SPECIAL MATTERS TO CONSIDER IN THE LIGHT OF SECTIONS 39 AND 211 OF THE CONSTITUTION, 1996

1. GENERAL

1.1. Historical approach to customary law

- Law of Evidence Amendment Act 45 of 1988 s 1(1), (2) – please read the Amendment Act

1.2. Customary law under the constitution

- The Constitution, sections 30, 31, 39, 211

o *Alexkor Ltd and Another v Richtersveld Community and Others* 2004 (5) SA 460 (CC) at para [51]

<https://www.saflii.org/za/cases/ZACC/2003/18.html>

Subject to your reading, the following points may be drawn from the case cited above.

- In the past indigenous law was seen through the common-law lens, it must now be seen as an integral part of our law
- Like all law it depends for its ultimate force and validity on the Constitution
- Its validity must now be determined by reference not to common law, but to the Constitution
- The courts are obliged by s 211(3) of the Constitution to apply customary law when it is applicable, subject to the Constitution and any legislation that deals with customary law
- The Constitution acknowledges the originality and distinctiveness of indigenous law as an independent source of norms within the legal system
- Furthermore, like the common law, indigenous law is subject to any legislation, consistent with the Constitution, that specifically deals with it

o *Bhe and Others v Magistrate, Khayelitsha and Others; Shibi v Sithole and Others; SA Human Rights Commission and Another v President of the RSA and Another* 2005 (1) SA 580 (CC)

<https://www.saflii.org/za/cases/ZACC/2004/17.html>

Subject to your reading, the following points may be drawn from the case cited above.

- Constitutional Court could grant direct access in exceptional circumstances only.
- Customary law has to be interpreted to answer to constitutional requirements.
- The exclusion of women from inheritance on the grounds of gender is violates s 9(3) of the Constitution
- In denying female and extra-marital children the ability and the opportunity to inherit from their deceased fathers, the application of the principle of primogeniture violates s 9(3) of the Constitution.
- Remedy: the legislature is the appropriate forum to make the adjustments needed to rectify the defects identified in the customary law of succession.
- An interim remedy pending the legislature making the required adjustments, based on the Intestate Succession Act, with the inclusion of polygamous unions, was ordered.

o Shilubana and Others v Nwamitwa and Others 2009 (2) SA 66 (CC)

<https://www.saflii.org/za/cases/ZACC/2008/9.html>

Subject to your reading, the following points may be drawn from the case cited above.

- Where there was a dispute over the legal position under customary law, both the traditions and the present practice of the community had to be considered.
- Section 211(2) of the Constitution provided that customary law had to be allowed to develop
- Customary-law norms could not depend simply on their having been consistently applied in the past
- Under that test any new development fail
- The community had to be empowered to act so as to bring its customs into line with the norms and values of the Constitution

Finally, read the **Citation of Constitutional Laws Act 5 of 2005**

https://www.saflii.org/za/legis/num_act/cocla2005352.pdf



LEGAL PRACTICE
COUNCIL

4. **RECAPITULATION QUESTIONS:** exam style questions to consider

Constitutional practice assessments of your comprehension of the above guide

1. South Africa is a constitutional state. Yet we retain a distinction between constitutional and non-constitutional issues. How would you explain to your client the difference between a constitutional issue and a non-constitutional issue? **[10 marks]**
2. In what circumstances are the remedies of a *declaration of invalidity*, *reading down*, *reading in* and *severability* applied in our constitutional law? Briefly explain the differences between those four remedies. **[10 marks]**
3. Section 167 (4) of the Constitution of the Republic of South Africa, 1996 reserves exclusive jurisdiction to the Constitutional Court on six matters. Name at least three of the categories of exclusive jurisdiction. **[3 marks]**
4. In deciding whether or not to grant leave to appeal, the Constitutional Court has held that the interests of justice remain fundamental. What factors may be taken into account to determine the interests of justice and how do you explain that to your client? **[12 marks]**
5. A High Court has declared a regulation to a statute unconstitutional. Must that declaration of invalidity be confirmed by the Constitutional Court? Motivate your answer. **[3 marks]**
6. Under what circumstances will the Constitutional Court grant a party direct access? Set out your answer as you would explain the law to your client. **[12 marks]**
7. You read the law reports. In many cases the Constitutional Court has stated it will grant leave to appeal if it is "*in the interests of justice*". Your client thinks that phrase is just magic, like abracadabra. Sometimes it works and sometimes it does not. Explain to your client what "*in the interests of justice*" means in law. **[10 marks]**
8. Under what **circumstances** will the Constitutional Court grant direct access to a litigant? Set out your answer as you would explain the law to your client. **[5 marks]**
9. What are the **principles** that inform a successful application to the Constitutional Court for direct access under rule 18 of the Constitutional Court Rules as contemplated in section 167(6)(a) of the Constitution of the Republic of South Africa, 1996? Take note of the difference between this question and the previous question. **[10 marks]**
10. The Constitutional Court can grant an array of remedies. List the remedies you can advise your attorney to consider in any case. You may accept you have briefs private individuals as well as the State Attorney. **[10 marks]**

11. Sometimes the Constitutional Court does not sit *en banc*, that is with all eleven judges. What happens to the appellant's case if the Constitutional Court sits ten judges or eight judges and half of the Court upholds the appeal and the other half dismisses the appeal ? What is the ultimate effect on the appellant's case ? Motivate your answer so you can explain the result to your client. **[5 marks]**
12. This question requires a statement of the principles you would explain to an attorney. It is not necessary to cite the case law. **[10 marks]**
13. The Constitutional Court has the power to grant remedies under a vast range of circumstances as long as those remedies are constitutionally validly, properly sought and substantiated by the facts of the case. List at least ten remedies the Constitutional Court may grant and explain each remedy to your client. **[10 marks]**
14. Read the case of *BP SA (Pty) Ltd v Mega Burst Oils & Fuels (Pty) Ltd & A Similar Matter* 2022 (1) SA 162 (GJ) and explain its significance to your client. Your client has just succeeded in a High Court case and successfully opposed an application for leave to appeal. Now your client is being threatened with an application for leave to appeal to the SCA and told that any execution of the judgment is stayed before papers are lodged in the SCA and an interdict is threatened to stay execution pending the "petition process". **[40 marks]**
See <https://www.saflii.org/za/cases/ZAGPJHC/2020/56.html>

Nicholas J. Tee
January/February 2026

LEGAL PRACTICE
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