THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Case no: 640/2002
REPORTABLE

In the matter between:

Michiel de KOCK, NO First Appellant

DIRECTOR OF PUBLIC PROSECUTIONS, TRANSVAAL
Second Appellant

MINISTER OF JUSTICE & CONSTITUTIONAL DEVELOPMENT
Third Appellant

and

Thomas Frederick van ROOYEN Respondent

Before: Howie P, Scott JA, Cameron JA, Cloete JA and Ponnan AJA
Appeal: 5 March 2004
Judgment: 15 March 2004

Magistrate – Security of tenure – Unconstitutionally insecure appointment – Appropriate order in light of existing Constitutional Court decision – Effect of suspension of declaration of invalidity – Application of higher courts' decisions by high courts – Constitutional issues not to be decided unnecessarily

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JUDGMENT

CAMERON JA:

[1] The Minister of Justice and Constitutional Development and the Director of Public Prosecutions, Transvaal (DPP) appeal against a judgment of the Pretoria High Court which set aside a criminal trial as 'null and void and of no legal force and effect'. The proceedings were impugned because the regional magistrate who convicted and sentenced Mr van Rooyen had retired and been re-appointed in an acting capacity on a contract the State could terminate on fourteen days' notice. The Constitutional Court found against contracts of this sort in proceedings in which van Rooyen challenged on other grounds the competence of another magistrate to convict and sentence him in a different trial[1] (*van Rooyen (1)*). But it suspended for a year the order of legislative invalidity it granted, and refused to set aside that conviction and sentence. Despite referring to this judgment the High Court – just

[1] *Van Rooyen and others v The State and others (General Council of the Bar of South Africa intervening)* 2002 (5) SA 246 (CC).

four months after the Constitutional Court – ruled the trial in these proceedings invalid. This appeal tests that conclusion and finds it wrong.

[2] The proceedings originate in a burglary at a house near Hartebeespoort Dam, Pretoria in April 1997. Van Rooyen was arrested on the day of the break-in. Three months later he was charged in the Pretoria Regional Court on charges of housebreaking with intent to steal and theft. The trial court convicted van Rooyen as charged, and in October 1997 sentenced him to six years' imprisonment. Van Rooyen first lodged an appeal. But later he launched review proceedings attacking the regional magistrate's competence to convict and sentence him at all.

[3] The regional magistrate, Mr de Kock ('the magistrate'), is nominally the first appellant, though from the outset he has played no active part in the proceedings and abides their outcome. The DPP and the Minister, the second and third appellants, appeal with the leave of the court below (Bosielo J and Claassen AJ).

We were told during argument that van Rooyen was released on parole last year, presumably in respect of the sentence he contested unsuccessfully in *van Rooyen (1)*. But because of the way the High Court dealt with the matter, van Rooyen's appeal against this conviction and sentence is still pending. The magistrate's acting appointment came to an end in December 1999, more than four years ago, but the High Court judgment imperils other criminal trials from the pre-*van Rooyen (1)* period during which retired magistrates who were re-appointed on contract presided. So the matter has considerable currency.

[4] The nub of van Rooyen's complaint was the magistrate's acting appointment. Van Rooyen claimed that the magistrate's contract with the Department of Justice made him subject to civil service conditions incompatible with judicial independence and hence that his trial was a nullity. To assess the implications of this claim in the light of *van Rooyen (1)* we must examine the magistrate's career.

The Magistrate's appointment

[5] Mr de Kock became a magistrate in 1970. He was appointed under s 9 of the Magistrates' Courts Act 32 of 1944, which at the time vested the power to appoint magistrates in the Minister of Justice. In November 1978 he became a regional magistrate. He served in this capacity for nearly sixteen years until retirement age in February 1994. (He did not hold office under the Magistrates Act 90 of 1993, which created the Magistrates' Commission to advise the Minister in appointing magistrates, but which applies only to permanent magistrates.[2]) On 28 February 1994 he retired on pension. But the Department of Justice re-appointed him immediately. The next morning he returned to his office in Pretoria and to court 9, where he had always presided.

[6] After the interim Constitution came into effect in April 1994, the magistrate took an oath to uphold and protect the Constitution and its fundamental rights. Otherwise he continued hearing cases as before. But now he held office under a contract with the Department of Justice. From April 1996, this contract was for an indefinite period. The Department of Justice furnished van

[2] Magistrates Act 90 of 1993 s 2. Section 1 excludes from its definition of magistrate 'any person

Rooyen with the contract in force at the time of his trial. Apart from matters like leave, subsistence and travel claims, it provides that the magistrate makes his services available to the State as a regional magistrate for an indefinite period at Pretoria or elsewhere, subject to the Public Service Act of 1994 and its regulations. The contract provided that notwithstanding these particular provisions –

'either party to this Agreement may at any time during its period of currency terminate it by giving 14 working days' notice in advance to the other party'.[3]

[7] Van Rooyen focused his attack on this part of the agreement. He claimed it made the magistrate a civil servant subject to the orders of the Department of Justice. He could therefore not sit as a proper court under the Constitution. This complaint the High Court upheld. It found that the terms of the magistrate's appointment 'directly conflicted with the core principle and notion of judicial independence enshrined in the Constitution', and that it was 'patently inimical to the core constitutional values of judicial

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occupying that office in an acting or temporary capacity'.

[3] 'Ondanks andersluidende bepalings in klousules 1 en 4 hiervan, kan enigeen van die twee partye by hierdie Ooreenkoms dit te eniger tyd gedurende die geldigheidstermyn daarvan opsê deur skriftelik 14 werksdae vooraf kennis daarvan aan die ander party te gee.'

independence and impartiality'.[4] Absence of contractual security of tenure, the High Court said, created a reasonable suspicion that as a public servant the magistrate 'may be influenced advertently or inadvertently, perceptibly or imperceptibly, by some extraneous factors to pass judgment intended to please his master for the sole purpose of safeguarding his position'.[5]

[8] The substance of this conclusion is not surprising. The high authority of *van Rooyen (1)* establishes it. But the critical question before the High Court was not whether the magistrate's appointment was unconstitutionally insecure. That *van Rooyen (1)* had made clear. The real question was what relief, if any, van Rooyen was entitled to. It is this question the High Court's order did not address correctly.

The decision of the Constitutional Court in Van Rooyen (1)

[9] In *van Rooyen (1)* the presiding magistrate had not retired. So the complaint was not about an acting or contract appointment. The case concerned the appointment and tenure of permanently

[4] *Van Rooyen v De Kock NO and others* 2003 (2) SA 317 (T) paras 12.1 and 12.3.

appointed magistrates under the Magistrates' Courts Act 32 of 1944 and the Magistrates Act 90 of 1993. But in dealing with this the Constitutional Court gave comprehensive consideration to the entire statutory regime governing magistrates' appointments. It concluded that certain provisions of both Acts and of the Regulations for Judicial Officers in the Lower Courts fell short of what was required to ensure the institutional independence of magistrates' courts. The unconstitutional provisions included s 9(4) of the Magistrates' Courts Act. But in order to ensure that the structures and functioning of the courts were not affected, the Constitutional Court made its orders prospective – and in the case of s 9(4) it in addition suspended its order of invalidity so as to permit temporary magistrates to be appointed if necessary pending an appropriate amendment to the section.[6]

[10] Although the magistrate's contract in this case does not expressly say so, it is clear, and the High Court rightly found,[7] that

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[5] 2003 (2) SA 317 para 12.3.
[6] 2002 (5) SA 246 paras 269, 272. Subsections 9(3), (4) and (5) of the Magistrates' Courts Act have now been substituted in the light of the Constitutional Court's decision: see s 1 of the Judicial Officers (Amendment of Conditions of Service) Act 28 of 2003, promulgated on 13 October 2003 (GG 25650). These provisions are not at issue in this appeal.
[7] 2003 (2) SA 317 para 6.2.

the magistrate was re-appointed under the provisions of s 9(4).[8] The suggestion pressed by van Rooyen's counsel that he was appointed merely as a civil servant under the Public Service Act is clearly untenable. It asks us to ignore the sole and obvious basis for the magistrate's re-appointment, which was s 9(4). So *van Rooyen (1)* is directly applicable. There the Constitutional Court gave two reasons for finding s 9(4) unconstitutional. First, the temporary appointments the section envisaged were not for a fixed or determinate period. To appoint a magistrate to hold office at the discretion of the State is inconsistent with security of tenure that is essential to judicial independence.[9] Second, the provision authorised acting appointments of non-magistrates to hear particular cases. While there could be no objection to appointing any 'competent person' (including a non-magistrate) temporarily to act generally in a particular court, to appoint a person who

[8] Until 1996 s 9(4) read (the square-bracketed words in bold were added by s 3(b) of Act 104 of 1996): 'The Minister or an officer in the Department of Justice [**or a magistrate at the head of a regional division or a person occupying the office of chief magistrate, including an acting chief magistrate**] authorized thereto in writing by the Minister, may appoint temporarily any competent person to act either generally or in a particular matter as magistrate of a regional division in addition to any magistrate or acting magistrate of that division or as additional or assistant magistrate for any district or sub-district in addition to the magistrate or any other additional or assistant magistrate.' Section 3 (c) of Act 66 of 1998 further amended the provision in ways not now material.

[9] 2002 (5) 246 (CC) SA 246 (CC) para 247.

neither is a magistrate nor has security of tenure to hear a particular case would be inconsistent with judicial independence.[10]

[11] In view of the High Court's order, it must be emphasised what *van Rooyen (1)* did not decide. It did not find that the appointment of acting magistrates was in principle unconstitutional. Nor did it find that the re-appointment of a retired magistrate in an acting capacity was unacceptable. It did not find that a retired magistrate (or any competent person) could not be appointed to act generally in a particular court – provided such an appointment was for a fixed or determinate period. The court did not disapprove the practice of appointing permanent magistrates temporarily to another division to hear a particular case. As long as the temporary appointee (or transferee) has security of tenure, this is not constitutionally objectionable.

Application of van Rooyen (1) to the present case

[12] The particular features of the present case (re-appointment to act indefinitely, though subject to termination on fourteen days'

[10] para 248.

notice) were not before the Constitutional Court. The finding that an appointment to hold office at the discretion of the State was unacceptable concerned a particular standard form contract the Constitutional Court considered. That contract gave the State the power in the event of breach to terminate the magistrate's services 'summarily or after notice of less than one month as it may deem expedient'.[11] In the present case, the State did not have the power of summary termination. But the contract nevertheless had the same vice, which s 9(4) at the time permitted, in that it failed to grant its temporary incumbent a fixed or determinate period of office, instead making him vulnerable to unilateral termination (albeit on fourteen days' notice) at the State's instance.

[13] So when the magistrate presided at van Rooyen's trial his appointment was constitutionally flawed. But was the High Court correct to nullify the proceedings? The High Court noted that in *van Rooyen (1)* the Constitutional Court suspended its order

[11] 2002 (5) SA 246 (CC) para 247.

declaring s 9(4) unconstitutional.[12] But it proceeded without further analysis to quash van Rooyen's conviction and sentence. This was wrong. The Constitutional Court's order declaring s 9(4) unconstitutional was suspended when the High Court gave judgment. Section 9(4) as it then read, together with acting appointments under it, consequently remained constitutional, although the section was under notice of imminent invalidity.

[14] The reasoning the Constitutional Court employed in *van Rooyen (1)* was directly applicable to the critical question of remedy the High Court had to consider. Although s 9(4) and certain other statutory provisions were inconsistent with magistrates' institutional independence, Chaskalson CJ stated –

> 'That does not mean … that magistrates' courts must stop functioning, that all decisions taken by magistrates must now be set aside as nullities, and that the persons convicted by magistrates of criminal offences must be released from jail'.[13]

In *van Rooyen (1)* the High Court had refused to set aside the convictions and sentences. Chaskalson CJ agreed:

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[12] 2003 (2) SA 317 para 13.
[13] Van Rooyen (1) 2002 (5) SA 246 para 260.

‘It is clearly in the interests of justice that the magistrates' courts and the regional courts should continue to function. There is no reason to believe that the magistrates presiding in those courts will not administer justice, as they have done in the past, impartially, independently and in accordance with the law. Their oath of office and the Constitution, by which they are bound, requires no less.’[14]

The court went on to state:

The provisions of the Act and the regulations that have been found to be inconsistent with the Constitution do not detract from the core values of judicial independence and do not affect the capacity of the overwhelming majority of judicial officers ordinarily presiding in these cases to conduct fair trials.’[15]

Finally, the court stated the purpose with which it made certain orders of invalidity prospective: this was ‘so that completed matters are not affected’. In addition, the order invalidating s 9(4) had to be suspended ‘to permit temporary magistrates to be appointed when that is necessary pending an appropriate amendment to the section’.[16]

[14] Para 262.
[15] Para 266; see also para 269.
[16] Para 272.

[15] All this was directly applicable to what the High Court had to decide. The Constitutional Court did not find that acting magistrates were an inherent evil under the Constitution, to be eradicated without delay or, worse, retrospectively. All it required was that, in accordance with our deepening understanding of what the concept of judicial independence requires,[17] acting magistrates' contracts should henceforth afford security of tenure for a specified or determinable period of office; and in future only permanently appointed magistrates should be transferred temporarily to hear specific cases in other divisions. That is the nub of *van Rooyen (1)*, and it governed the result that should have been reached in this case.

[16] What is more, there was no reason to suppose outside the record – which the High Court did not scrutinise – that the magistrate here had not administered justice impartially, independently and in accordance with the law. His oath under the Constitution, by which he was bound, required this. In the absence of particular complaint – and van Rooyen made none –

[17] See paras 75 and 249.

there was no reason to believe that the unconstitutional insecurity in the magistrate's contract detracted from his fairness and impartiality. Yet the order granted wrongly indicated the opposite.

[17] In its judgment granting leave to appeal, the High Court (per Claassen AJ) belatedly sought to justify its omission to apply *van Rooyen (1)* by declaring that the Constitutional Court referred to acting magistrates 'only in passing and obiter'. This compounds the error. An 'obiter' pronouncement is a judicial observation made in passing: one not necessary for the decision of the case.[18] It is a stated thought that does not advance the reasoning by which the outcome is reached.[19] But in *van Rooyen (1)* the Constitutional Court was seized of the constitutionality of all statutory provisions relating to the appointment and tenure of magistrates. This included s 9(4) and acting magistrates appointed under it. Its reasoning on these questions was integral to its decision, and what it had to say in coming to its conclusions was constitutionally binding on all courts. The High Court applied that very reasoning in condemning the magistrate's contract as

[18] *R v Nkwali* 1925 AD 578 (Innes CJ).

unconstitutionally insecure. So its omission to apply the further aspect of the decision – suspending the invalidity of s 9(4) – was both paradoxical and incorrect.

[18] In *ex parte Minister of Safety and Security and others: in re S v Walters and another*[20] the Constitutional Court found it necessary in a different context to emphasise how important it is that courts follow and apply the decisions of higher courts. It is necessary to repeat the admonition. Consistency, coherence, certainty and predictability in our new constitutional order require the due application of the decisions of higher courts. Disregarding them wastes precious resources. It also imperils public understanding of the Constitution and its implications by creating an impression of incoherence, irrationality and unpredictability. The order granted here, so soon after that in *van Rooyen (1)*, can only have created an impression of a dissonant judicial system at variance with itself, with consequent detriment to public faith in constitutional processes.

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[19] See *R v Crause* 1959 (1) SA 272 (A) 281B-C (Schreiner ACJ).

[19] In addition, sparse Legal Aid Board funds were expended. Van Rooyen was represented by two counsel and attendant attorneys, both local and correspondent, while the DPP and the Minister took the due precaution of briefing senior counsel from the Bar, together with a senior member of the DPP's staff, who were accompanied by a member of the State Attorney's staff. These resources could have been applied productively elsewhere.

Steyn, Danster and the doctrine of objective invalidity

[20] It is necessary to deal with a further issue arising from the decision in *van Rooyen (1)*. I indicated earlier (para 13) that because of the order suspending the declaration of invalidity, s 9(4) remained in force at the time the High Court gave its judgment. But the suspension envisaged legislative intervention within a year to correct s 9(4). That did not occur. Parliament failed to act within the time given. The amendment was promulgated only in October 2003, four months after the year expired.[21]

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[20] 2002 (4) SA 613 (CC) paras 55-61.
[21] Judicial Officers (Amendment of Conditions of Service) Act 28 of 2003, promulgated on 13 October 2003 (GG 25650), s 1, substituting subsections (3), (4) and (5) of s 9 of the Magistrates' Courts Act 32 of 1944.

[21] Does that affect the conclusions reached earlier? This question has arisen regarding the Constitutional Court's decision in *S v Steyn*.[22] There the court declared unconstitutional the requirement, introduced in 1999, that an accused must obtain leave to appeal from a magistrate's decision in a criminal case. The court gave Parliament six months from the date of its order to remedy the situation (or to apply for a further extension),[23] but Parliament failed to act within that time. The result was that the leave to appeal provisions became invalid. But from when? And what was the position of appellants convicted and sentenced before 29 May 2001 (when the order suspending the declaration of invalidity lapsed) but whose appeals had not yet run their course? High Courts have delivered conflicting judgments on this question. Some have held that because *Steyn* suspended the order of invalidity, the leave to appeal provision became unconstitutional only at the end of the period of suspension – even though Parliament did not act in time – with the result that appeals pending from pre-expiry convictions and sentences fell to

[22] 2001 (1) SA 1146 (CC). See too *Minister of Justice v Ntuli* 1997 (3) SA 772 (CC).

be dealt with under the leave to appeal requirement.[24] Others held that because Parliament failed to act, the provision became unconstitutional from the date of its enactment, with the result that appellants whose appeals had not been completed gained an untrammelled right of appeal. Some of the decisions are referred to in *S v Danster, S v Nqido*,[25] where a full court of the Cape High Court endorsed the latter approach.

[22] The question, which has a bearing on this case, arises from the decision of the Constitutional Court in *Ferreira v Levin NO and others; Vryenhoek and others v Powell NO and others*,[26] where Ackermann J, speaking on this matter for the whole court, held that an order declaring a law in conflict with the Constitution 'does not invalidate the law; it merely declares it to be invalid'. Laws pre-dating the Constitution either remained valid or became invalid when the interim Constitution came into operation: 'In this sense laws are objectively valid or invalid depending on whether

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[23] paras 38-53.
[24] *S v Jaars; S v Williams; S v Jantjies* 2002 (1) SACR 546 (C) (Thring and Erasmus JJ), following *Xhosa v The State* (unreported judgment of Stafford DJP); *Ndlovu v Director of Public Prosecutions, KwaZulu Natal and another* 2003 (1) SACR 216 (N) (Hurt J and Kruger AJ). On the pre-*Steyn* position, see *S v Ramakgopola and others* 2000 (2) SACR 213 (T) (Southwood J and Legodi AJ).
[25] 2002 (2) SACR 178 (C) (Davis J, Nel and Conradie JJ concurring).

they are or are not inconsistent with the Constitution'.[27] It was for this reason, Ackermann J stated, that the interim Constitution (which was at issue in *Ferreira*), specially provided that a declaration of invalidity affecting a pre-constitutional law did not invalidate 'anything done or permitted to be done … before the coming into effect of such declaration of invalidity'.[28]

[23] In *National Coalition for Gay and Lesbian Equality and another v Minister of Justice and others*,[29] applying this exposition, Ackermann J pointed out that the 1996 Constitution deals differently with the consequences of invalidity: in the absence of a contrary order, nothing more is provided than that the declaration of invalidity has retrospective effect.[30] Under the Constitution, a competent court may make any order that is just and equitable, including 'an order limiting the retrospective effect of the declaration of invalidity'.[31]

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[26] 1996 (1) SA 984 (CC).
[27] para 27.
[28] Interim Constitution, Act 200 of 1993, s 98(6)(a).
[29] 1999 (1) SA 6 (CC).
[30] para 84(a). Section 172(1) of the Constitution provides that when deciding a constitutional matter within its power, a court – '(b) may make any order that is just and equitable, including –
(i) an order limiting the retrospective effect of the declaration of invalidity; and
(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.'
[31] s 172(1)(b)(i).

[24] Does the doctrine of objective invalidity mean that if Parliament fails to act before the suspension of a declaration of invalidity expires, the provision becomes invalid from the moment of its enactment, without any suspension at all? In *Danster* the Cape full court answered with an unqualified 'yes':

> 'A suspension of invalidity does not destroy the doctrine of objective invalidity. Were it to do so there would be no point in specifying a time limit for the suspension of an order which declared a provision to be unconstitutional, as an order given in terms of s 172(1) of the Constitution to suspend the declaration of invalidity would then render the doctrine of objective invalidity ineffective. Such an approach runs contrary to the purpose of s 172(1), which is to temper possibly harsh effects of the doctrine of objective invalidity by ensuring that, during a specified period as contained in such order, Parliament would be afforded the opportunity to cure the constitutional defect. In the present case the Ministry of Justice did not prepare any such legislation for Parliament. Accordingly the order of suspension lapses and the doctrine of objective constitutional invalidity dictates that the legislation is rendered unconstitutional from the day on which such legislation became operative.'[32]

[32] 2002 (2) SA SACR 178 (C) 182*g–i*.

[25] The result in *Danster* was that the appellants, whose appeal processes were pending when the *Steyn* period expired, were held exempt from the invalid provisions. Both the reasoning and the result in *Danster* seem to me to be incorrect. The reasons given for the conclusion are expressed in terms that are both too absolute and too general. They suppose that a declaration of invalidity is suspended for only one purpose, namely to allow the legislature to intervene, and that in the absence of legislative intervention the benefit of the suspension must be undone. This cannot be right. A declaration of invalidity may be suspended for a range of just and equitable considerations. This may include giving the legislature time to intervene. But many other reasons arising from the administration of justice may also require suspension. Both *Steyn* and *van Rooyen (1)* illustrate this.

[26] It therefore cannot be right to suggest that the objective theory of constitutional invalidity dictates any particular outcome. Section 172(1) gives competent courts not only the power to suspend a declaration of invalidity for any period to allow the competent authority to correct the defect, but to do so ‘on any

conditions'. In addition, the provision gives courts wide and seemingly unqualified power to limit the retrospective effect of a declaration of invalidity. Read separately and together, these provisions do not suggest that any particular outcome is inexorable when a court suspends a declaration of invalidity and Parliament fails to act timeously.

[27] The effect of a declaration of invalidity must rather depend on the terms and context of the order the court – in the case of statutory invalidity, always the Constitutional Court – issues. The court may order (or its order on a proper construction may mean) that if Parliament does not intervene timeously the declaration of invalidity takes effect retrospectively. That does not seem to me to have been the intention or the effect of the order in *Steyn*. There the court expressly stated that 'upon the expiry of [the period of suspension] automatic appeals will be restored'.[33] In addition, it gave a range of further reasons for suspension. It therefore seems to me that *Danster* was incorrectly decided and

[33] 2001 (1) SA 1146 (CC) para 51.

must be overruled.[34] It follows that those decisions in which it was held that appellants convicted and sentenced in the magistrates' courts before 29 May 2001 who had at that date not yet exhausted their rights to appeal were covered by the leave to appeal provisions at issue in *Steyn*, are correct.

[28] The effect of the order in *van Rooyen (1)* is even clearer than in *Steyn*. That order did not envisage retrospective undoing of concluded trials, even where appeals were still pending. When the suspension of the declaration of invalidity lapsed on 11 June 2003 without Parliament intervening, trials in which temporary magistrates presided, whose appointments fell short of the evolving constitutional standard of judicial independence, did not become null and void. The passages from the judgment of Chaskalson CJ set out earlier (para 14) show this unequivocally. Section 9(4) remained valid during the period of suspension, as did acting appointments made under it. The provision as it then was and appointments stemming from it became invalid only on

[34] The correctness of *Danster* was left open in *S v Zulu* 2003 (2) SACR 22 (SCA) para 3 n2. In *Khoasasa v S* 2002 [4] All SA 635 (SCA) (a matter decided after the *Steyn* suspension expired), the Court indicated that the sections remained valid for six months after the decision (para 6), but the question in *Danster* was not directly at issue.

11 June 2003. Trials concluded before that date were not affected. This included van Rooyen's. This result seems to me to be 'just and equitable' in the terms the Constitution contemplates in s 172(1). Even though van Rooyen's appeal was still pending, the result also accords with what O'Regan J on behalf of the court expressed as a general principle in *S v Bhulwana, S v Gwadiso*,[35] that –

'an order of invalidity should have no effect on cases which have been finalised prior to the date of the order'.

Reaching constitutional questions without first dealing with non-constitutional issues

[29] In conclusion it is necessary to remark on the way the High Court dealt with the appeal and review before it. The High Court decided to address the constitutional issue only. Hence it gave no consideration to van Rooyen's appeal against conviction and sentence. It did so for what it called 'reasons of convenience and pragmatism',[36] but I cannot conceive of any. Convenience and pragmatism required the opposite. Van Rooyen's appeal should

[35] 1996 (1) SA 388 (CC) para 32.
[36] 2003 (2) SA 317 (T) para 3.

first have been disposed of before any constitutional issues were addressed. Once again I invoke Kriegler J in *Walters*,[37] where he regretted the 'unfortunate' result of a trial court's decision to deal with a constitutional issue, without first resolving factual and non-constitutional questions. He approved the general principle set out in the judgment of Kentridge AJ in *S v Mhlungu and others*,[38] that –

'where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course that should be followed.'

This course should also have been followed here. If it had been, van Rooyen's appeal on the merits would have been dealt with, and it would not have been necessary, nearly seven years after the burglary at Hartebeespoort Dam, for us to remit the conviction and sentence arising from it to the High Court for determination.

Costs

[30] Counsel for the Minister and the DPP asked for a costs order against van Rooyen in both courts, including those of two counsel in this court. At the hearing Van Rooyen's counsel did not oppose

[37] 2002 (4) SA 613 (CC) paras 62-67.
[38] 1995 (3) SA 867 (CC) para 59.

this. Since then the question has arisen whether a different approach is not applicable. This is the principle the Constitutional Court takes into account in awarding costs, namely that bona fide and reasonable litigants who raise genuine constitutional questions of broad concern should not be discouraged from asserting their constitutional rights by having to pay the costs of the governmental adversaries.[39] This has particular application to challenges that relate directly to criminal proceedings,[40] a principle applied in *van Rooyen (1)*. Since this question was not raised at the appeal, it will be appropriate to issue no costs order now, and to permit the Minister and the DPP to make representations if so minded.

[31] The order is as follows:

1. The appeal succeeds.
2. The order of the court below is set aside.
3. In its place there is substituted the following:
   'The review application is dismissed.'

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[39] See *Oranje Vrystaatse Vereniging vir Staatsondersteunde Skole and another v Premier, Province of the Free State and others* 1998 (3) SA 692 (CC) para 4; *African National Congress and another v Minister of Local Government and Housing, KwaZulu-Natal and others* 1998 (3) SA 1 (CC) para 34.

[40] *Sanderson v Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC) para 44.

4. The appeal against conviction and sentence are remitted to the High Court for determination.
5. There is no order as to costs.
6. The appellants may if so advised within ten days of delivery of this judgment submit representations concerning the award of costs in this Court and the Court below.
7. Pursuant to any submissions envisaged in para 6, the respondent may within ten days if so advised submit representations.

E CAMERON
JUDGE OF APPEAL

HOWIE P	)	
SCOTT JA	)	CONCUR
CLOETE JA	)	
PONNAN AJA	)	