

THE DOCTRINE OF PRECEDENT IN SOUTH AFRICA

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SUMMARY

A certain degree of ambivalence and inconsistency is inherent in the nature and operation of the doctrine of precedent, which is an intrinsic part of our common law and in terms of the Constitution continues in force in our new jurisprudential dispensation. We have inherited it from English law and it continues to operate, although there is nothing in the Supreme Court Act to indicate explicitly that judges are bound to follow precedents. Nor is there anything expressly to this effect in the Constitution. This article endeavours to demonstrate, by examining the relevant case law, exactly how in the new dispensation, members of the judiciary observe the *stare decisis* rule. They do so because firstly, it has over the years, become customary to do so, and secondly, at present, it has certain important advantages for our jurisprudence.

1 INTRODUCTION

In his epic poem “Aylmer’s Field”,¹ Alfred Lord Tennyson wrote ambivalently about the phenomenon of precedent in English law. In one part of the poem he states:

“The lawless science of our law,
That codeless myriad of precedent,
That wilderness of single instances.”

Yet in another he declares:

“Where freedom slowly broadens down
From precedent to precedent.”

The idea of a certain degree of ambivalence is not entirely inappropriate to describe the nature and operation of the doctrine of precedent, which is an intrinsic part of our common law and in terms of section 2(1) of Schedule 6 of the Constitution of the Republic of South Africa, 1996 (hereinafter “the Constitution”) “continues in force” in the new constitutional dispensation that followed the inception of the Interim Constitution in South Africa. We have inherited it from English law and there is nothing in the Supreme Court Act,²

¹ As quoted by Allen *Law in the Making* (1964) 163.

² 59 of 1959.

which governs the operation of the high courts, to indicate explicitly that judges are bound to follow precedents.³ Nor is there anything expressly to this effect in the Constitution.

Hahlo and Kahn⁴ explain that “(s)ome time after the passing of the First Charter of Justice of 1827, ... the principle began to be invoked”. The doctrine and practice of precedent, as applied in South Africa, was not part of our inherited Roman-Dutch law. So, for instance, the courts in Holland in the seventeenth and eighteenth centuries regarded “past decisions merely as an aid in deciding cases before them. In other words, they looked upon those previous decisions as a persuasive source of law.”⁵

In the evolution of the South African legal system the rule of *stare decisis*, derived from English law and jurisprudence,⁶ effected an entirely new approach to precedent. It required that a legal rule or principle encapsulated in a previous judgment of a higher court should be perceived as authoritative and therefore binding, and not merely as persuasive. This idea is clearly reflected in the Latin maxim *stare decisis et non quieta movere* which means to stand by decisions and not to disturb settled law. However, as Hosten *et al*⁷ observe, the Latin terminology should not induce one to the conclusion that the modern idea of *stare decisis* was found in acknowledged Roman law sources. Therefore, although, the *lex Cornelia* of 67 BC⁸ “enjoined the Praetor to abide by his edict ... it is the imperial constitution of Justinian that really provides the ‘official’ view of precedent, namely *non exemplis sed legibus iudicandum est*.”⁹ The latter means that decisions should be based on laws and not on precedents. It is therefore clear that the idea of *stare decisis* has its exclusive genesis in English common law. Centlivres CJ in a *locus classicus*, in *Fellner v Minister of the Interior*,¹⁰ stated that “[w]e have adopted the rule from English law”. In his judgment he referred to the leading article by Sir John Kotzé,¹¹ who in his capacity as Kotzé JP of the Eastern Districts Court of the Cape Province, had relied on the rule of *stare decisis* in *Whyte v Anderson*¹² and in this regard commented that “[t]hese decisions [two previous decisions of the Cape Supreme Court] are binding on us. And I with respect, cannot accede to later decisions departing from a correct rule”. This view was echoed by De Villiers CJ when referring to a previous

³ However, s 333 of the Criminal Procedure Act 51 of 1977 and s 23 of the Supreme Court Act 59 of 1959 provide, *inter alia*, that rulings of the appellate division, on disputed questions of law, shall form precedents for all other courts.

⁴ *The South African Legal System and Its Background* (1968) 240.

⁵ Hosten, Edwards, Bosman and Church *Introduction to South African Law and Theory* (1995) 386.

⁶ In English law the doctrine is ancient. For instance quoted in Kotzé (“Judicial Precedent” 1917 *SALJ* 280 291), Sir Frederick Pollack wrote in *Essays on Jurisprudence and Ethics* 215: “The appeal to precedent, which is the foundation of our modern jurisprudence, is evident in records of a date soon after the Conquest.”

⁷ 387.

⁸ Chapter 3 par 2.4.2.

⁹ Hosten *et al* 387.

¹⁰ 1954 4 SA 523 (A).

¹¹ Kotzé 280.

¹² (1909) EDC 28 32.

authoritative decision of the Appellate Division stating that “until reversed by this court [it] is, according to well established practice, binding upon all courts of the Union”.¹³

Hahlo and Kahn¹⁴ set out the rules relating to precedent as follows:

- “(a) [A] court is absolutely bound by the ratio of the decision of a higher or larger court on its own level in the hierarchy, in that order, unless the decision was rendered *per incuriam*, (for instance, a governing enactment was overlooked), or there was subsequent overriding legislation. In the above circumstances the precedent is deemed to be absolute.
- (b) a court will follow its own past decision unless satisfied it is wrong, when it will refuse to abide by it and so in effect overrule it.”¹⁵

It is important to distinguish between absolute and conditional precedents. Furthermore, the decision of a local or provincial division of a high court of a given province has only persuasive authority in all other provinces: and so likewise has the decision of a judge of a provincial division sitting alone.¹⁶ Hahlo and Khan advance the following reasons for the doctrine: “the need for legal certainty, the protection of vested rights, the satisfaction of legitimate expectations and the upholding of the dignity of the court”.¹⁷

Hosten observes that the traditional English approach to precedent that we have inherited is premised on the operation of the courts as “past-orientated”.¹⁸ This approach was endorsed when in 1898 the House of Lords applied “the self-limitation rule, that is, it would not depart from the reasoning of one of its previous decisions even where it considered that reasoning to be wrong”.¹⁹ Although this excessively rigid, and indeed irrational, approach to precedent has been abandoned,²⁰ it most certainly had a noticeable influence on curial practice in South Africa.

In sharp contrast, in America, with its rigid constitution and bill of rights, there has been a “shift from a precedential past orientated approach to emphasis on policy-orientated considerations”.²¹ This means that the *stare decisis* rule has been reformulated and made responsive to “the demands of justice and an ordered process of growth”. In the words of an American Supreme Court judge: “Precedent speaks for the past; policy for the present and future”.²² This is obviously crucially relevant for South Africa, bearing in mind the paradigmatic jurisprudential change that has occurred in our

¹³ *Collett v Priest* 1931 AD 290 301. See also *Harris v Minister of the Interior* 1952 2 SA 428 (A) 452; *Fellner v Minister of the Interior supra*; and *R v Sibiyi* 1955 4 SA 247 (A) 265.

¹⁴ 243.

¹⁵ This means that in these circumstances precedent is conditional.

¹⁶ Kotzé 310.

¹⁷ *Ibid.*

¹⁸ Hosten *et al* 511.

¹⁹ See *London Tramways v London County Council* [1898] AC 375. Note that a *volte-face* occurred in 1966 as far as the House of Lords is concerned. See Hahlo and Kahn 243.

²⁰ See Practice Direction [1966] 3 All ER 77, set out in Lloyd *Introduction to Jurisprudence* (1979) 885.

²¹ Hosten *et al* 513.

²² Schaefer “Precedent and Policy” 1966 (3) *University of Chicago Law Review* 3 24.

constitutional dispensation, now involving a supreme constitution, declared in section 2 of the Constitution, and an innovative purposive/value based method of interpretation, encapsulating the universal values of *inter alia*, human dignity, equality and liberty, set out in section 1 of the Constitution.

2 THE PROS AND CONS OF THE DOCTRINE OF PRECEDENT²³

Critics of the doctrine, in its orthodox binding manifestation, assert that its application has given rise to “perpetuations of the ignorance and prejudice of individuals in the past”.²⁴ This was in relation to particular precedents which “recognise[d] ethnic background or race as a factor that should be taken into account in punishment”.²⁵ The British origin has also resulted in some negative and uninformed comment. So, for instance, Maduna has declared that the doctrine is rooted “in the capitalist mode of production”.²⁶ In regard to the South African form of the doctrine, he has commented that it was an instrument “to protect apartheid and its interest of the ruling class ...”²⁷

The erudite exponent of Roman-Dutch law, Prof JC de Wet, attacked the doctrine, by declaring that it was “die verderflikste leer wat ons howe hier by ons ingevoer het” (the most pernicious doctrine imported into our curial practice).²⁸

The most important advantages of the adoption of the modified doctrine of precedent are:²⁹

- (1) Stability. The doctrine facilitates legal and social continuity, and equality within the community as far as relationships are concerned.
- (2) Protection of justified expectation. It allows persons to protect their interests because of the legal certainty and stability that it creates.
- (3) The efficient administration of justice. Since new cases do not have to be dealt with *de novo*, and precedent can be relied on, it conserves legal energy and workload.
- (4) Equality of treatment. The treatment of like cases in like manner gives expression to equality before the law, which is a powerful jurisprudential and legal value, *a fortiori* in the new South African dispensation, taking into account section 9 of the Constitution, encapsulating equality. Explained in a different way, the basic reason for following precedent is

²³ See Hosten *et al* 507 *et seq.*

²⁴ Cloete “Codification and *Stare Decisis* in a New South African Legal Order” 1991 *TRW* 59 68.

²⁵ Hosten *et al* 507.

²⁶ Hosten *et al* 508.

²⁷ *Ibid.*

²⁸ De Wet “Gemene Reg of Wetgewing” 1948 *THRHR* 15, as quoted by Hosten *et al* 508. *Cf R v Sibiyi supra* 265, where Steyn CJ, a strong advocate of adherence to Roman-Dutch law, nevertheless endorsed the “principle of *stare decisis*”.

²⁹ Hosten *et al* 508-509.

the principle of “universibility”.³⁰ This principle requires that like cases be treated alike. This is the technique traditionally employed by the courts to afford certainty which requires respect for precedent, as a matter of principle, while at the same time it nevertheless allows “exceptions subject to imposing the burden of argument on anyone who proposes to make an exception”.³¹ In this regard the principle of *inertia*,³² which requires that a decision may only be altered if sufficiently good reasons can be adduced for doing so, is applicable. It is based on the rationale that “to take the same course as has been taken previously, or as has usually been adopted in the past not only confers the advantage of accumulated experience of the past but also saves the effort of having to think out a problem anew each time it arises”.³³

- (5) Enforcement of justice. It creates the perception of impartiality and justice, and that the legal system does not deal with issues to be adjudicated in a purely casuistic manner.

It is clear that a degree of flexibility is essential for the doctrine to operate rationally and in a manner that does justice to the adjudication of all the diverse legal conflicts that occur in our dynamic society, regulated by a supreme Constitution and entrenched values.

In theory the “use of precedent in judicial reasoning should not bind the judge”³⁴, however, in practice it does mean that legal reasoning does not depend exclusively on the principles of logic, but also on pragmatic considerations. If a particular provision of a statute has previously been interpreted after 1994, with the inception of the Interim Constitution, by a higher court, this interpretation is, as a general rule, binding upon all lower courts, unless there is a jurisprudentially sound and convincing reason why this should not be the case.

A South African court will regard itself as bound by a previous decision of its own, unless satisfied that such a previous case was manifestly wrongly decided, or that there has been some material change justifying a departure. Although the courts are understandably reluctant to depart from previous decisions because this causes uncertainty and therefore violates the principle of finality,³⁵ a flexible and jurisprudentially sound doctrine of precedent does not furnish absolute certainty and there is of necessity a degree of ambivalence in its application. Therefore, in this regard, it is “[b]etter to speak of predictability, for some outcomes might be more predictable than others yet still be far from certain”, and accept “the value of the ability to predict with reasonable confidence what the future might

³⁰ Alexy *A Theory of Legal Argumentation* (1989) 275.

³¹ *Ibid.*

³² Devenish *Interpretation of Statutes* (1992) 273.

³³ Lloyd *Introduction* (1985) 1100-1101.

³⁴ Hosten *et al* 509.

³⁵ Sneath “A Note on Precedent and Statutory Interpretation” 1986 (7) *Statute LR* 49-53.

bring”.³⁶ In this regard Lord Atkin’s *dictum* that “[f]inality is a good thing, but justice is better”³⁷ is apposite.

In addressing the problems inherent in the application of the doctrine of precedent, it is necessary to bear in mind the quality of legal reasoning found in a written judgment of a court of law. A written judgment is, *inter alia*, intended to furnish a convincing argument aimed at persuading both the public and a more specialised legal audience of fellow judges and scholars, to accept the merit of the court’s argument. In the civilian systems where codes prevail, precedent plays an insignificant role and decisions are reached on the basis of legal principles and reasoning, whereas in the common law precedential systems, legal precedents play a significant role together with legal reasoning. In both systems, the decisions reached, and the methods used in reaching them, must be legitimate. Although there are differences between the two systems, these should not be exaggerated, and they have a great deal in common in their use of legal reasoning. In practice, it is more a difference of emphasis, rather than substance, bearing in mind that precedent is observed with flexibility in common law systems, and in civilian systems, precedents do exert a subliminal but certainly not negligible influence.

Cardozo,³⁸ the great American legal philosopher, explained his method of legal reasoning as being structured on four models, namely, using the idea of analogy found in philosophy, the method of historical development, the method of tradition or custom relevant to the country concerned, and the sociological method which takes into account justice, moral and social welfare, that is, deontic reasoning. This approach is most certainly applicable to the South African legal system, and presents us with a holistic approach to legal reasoning, from which it is apparent that legal precedent is “but one of the techniques which is used in judicial reasoning”.³⁹

Indeed, the doctrine of precedent and legal reasoning are complementary and not mutually exclusive. Allen explains the relationship between the binding nature of precedent and the role of legal reasoning as follows:

“For underneath the whole elaborate structure of precedents in our Courts lies a permanent foundation of fundamental legal doctrine.”⁴⁰

The net result of this is that:

“Throughout the whole application of the law, the principles are primary and the precedents are secondary, and if we lose sight of this fact precedents become a bad master instead of a good servant.”⁴¹

³⁶ See Schauer “Precedent” 1987 (39) *Stanford LR* 571 597 fn 53, as quoted by Hosten *et al* 509. See also Aldisert “Precedent: What it is and What it Isn’t; When do we Kiss it and When Do we Kill it” 1990 (17) *Pepperdine LR* 605 627.

³⁷ *Ras Behari Lal v King-Emperor* 60 IA (1933) 361.

³⁸ *The Nature of Legal Reasoning* 5ed (1921) 1952.

³⁹ Hosten *et al* 510.

⁴⁰ Allen 293.

⁴¹ Allen 285.

The application of the doctrine of *stare decisis* should therefore not be mechanical, but requires a judicious weighing of all the relevant factors. Allen comments further that the judge:

“[H]as to decide whether the case cited to him is truly apposite to the circumstances in question and whether it accurately embodies the principle which he is seeking.”⁴²

Such a subtle approach to precedent allows the sound principles of our Roman-Dutch common law, as well as the libertarian values enshrined in the Constitution, to be applied in a creative and rational way. This applies to the interpretation of both common and statute law.

3 THE OPERATION OF THE DOCTRINE OF PRECEDENT

In each and every case the judge must decide whether a previous set of circumstances and facts that gave rise to a decision by another court is “sufficiently similar to the present facts before him [or her] to justify the assimilation of the two events”,⁴³ or whether indeed they may be legitimately distinguished. Although a judgment has to be exercised, this depends on both “time and culture”.⁴⁴ It must be borne in mind that circumstances change and that socio-economic and cultural conditions also change over time. This is illustrated by the discussion below of the facts and the judgment of Steenkamp J in *Van der Merwe v Munisipaliteit van Warrenton*,⁴⁵ which dealt with the question of municipal immunity. As will be explained below, the need for municipal immunity has greatly changed in South Africa, with the vast expansion of our economy from an essentially agrarian one to an industrialized and urbanised one,⁴⁶ together with the changes brought about by the new constitutional dispensation.

4 THE FUNDAMENTAL IMPORTANCE OF PRECEDENT

Hahlo and Kahn⁴⁷ explain the position as follows:

“The maintenance of certainty of the law and equality before it, the satisfaction of legitimate expectations, entail a general duty of judges to follow the legal rulings in previous judicial decisions. The individual litigant would feel himself unjustly treated if a past ruling applicable to his case were not followed where the material facts were the same.”

In similar vein, this justification for precedent was cogently spelled out by

⁴² Allen 290.

⁴³ Hosten *et al* 510.

⁴⁴ *Ibid.*

⁴⁵ 1987 1 SA 899 (A).

⁴⁶ This also applies in relation to the facts and circumstances in the judgment of *Essa v Divaris* 1947 1 SA 753 (A), as pointed out by Hosten *et al* 510.

⁴⁷ 214.

Coetzee J in *Trade Fairs & Promotions (Pty) Ltd v Thomson*,⁴⁸ in which he observed that:

“[O]rderly administration of justice is wholly impossible without it. Chaos would reign ... if it were to be abolished or even cut down. ... It is often more important that the law should be certain than it should be ideally perfect.”

However, in practice a court that is reluctant to follow a previous decision that is formally binding on it, may distinguish it, or pronounce the relevant passage of the judgment to be *obiter*. This *modus operandi* of ingeniously distinguishing apparently binding precedents is undoubtedly sometimes highly artificial and is not always conducive to clarity or legal certainty, but it does allow the courts to permit reason and justice to triumph over dogma and is often the lesser of two evils. The courts may therefore pursue an outflanking strategy by “various stratagems”,⁴⁹ or alternatively boldly declare the previous decision to be wrong, where conditional precedents are involved, as Goldstone J did in *Vorster v AA Mutual Insurance Association Ltd*⁵⁰ where he declared “[t]he *stare decisis* rule, by which I am bound, requires me to follow the earlier decision unless I am satisfied that such a decision is clearly wrong. I am so satisfied”.⁵¹ This has also occurred on rare occasions, as will be explained, where an absolute precedent is involved. This is obviously far more problematic. Therefore, in the process of legal reasoning, our courts have devised ingenious stratagems to avoid the binding nature of precedent where jurisprudential considerations and justice requires this. These include “fine-honing the *ratio decidendi*, making exceptions by way of *obiter dicta*; and ... the art of distinguishing a case”.⁵²

Considerable persuasive value is, furthermore, attached to the judgments of courts of co-ordinate jurisdiction, for example, by one provincial division to decisions of another. The rules of precedent apply not only to previous decisions on the interpretation of the same statute but also to statutes *in pari materia*. But, apart from this, where a particular form of words is used that has also been used in previous different statutes to express the same idea or concept as that expressed in the statute the court is interpreting, there is scope for the application of the rules stated by Blackburn J in *Mersey Docks v Cameron*,⁵³ quoted in *Ex parte Minister of Justice: In re R v Bolon*⁵⁴ as follows:

⁴⁸ 1984 4 SA 177 (W) 186 H-I.

⁴⁹ See Cameron and Van Zyl Smit “The Administration of Justice, Law Reform and Jurisprudence” 1982 *Annual Survey of SA Law* 518.

⁵⁰ 1982 1 SA 145 (T). See also *Union & SWA Insurance Co Ltd v Hoosein* 1982 2 SA 481 (W) 483-485; *Quality Machine Builder v MI Thermocouples (Pty) Ltd* 1982 4 SA 591 (W) 59-66; *Liquidator, Mr Spares (Pty) Ltd v Goldies Motor Supplies (Pty) Ltd* 1982 4 SA 607 (W) 611-613; *Smit v Shongwe* 1982 4 SA 699 (T) 700-701; *Naboomspruit Munisipaliteit v Malati Park (Edms) Bpk* 1982 2 SA 127 (T); *Nkadia v Mahlazi* 1982 2 SA 441 (T); and *Andrade v Andrade* 1982 4 SA 854 (O) 856.

⁵¹ *Vorster v AA Mutual Insurance Association Ltd supra* 155B-C.

⁵² *Hosten et al* 512.

⁵³ 11 *HLC* (1864) 443 480.

⁵⁴ 1941 AD 345 359 as per Tindall JA.

“When a particular form of legislative enactment which has received authoritative interpretation, whether by judicial decision or by a long course of practice, is adopted in framing a later statute, it is a sound rule of construction to hold that the words so adopted were intended by the Legislature to bear the meaning which has been so put upon them.”

Tindall JA, after having quoted this passage, added:

“In *Barras v Aberdeen Steam Trawling & Fishing Co* ([1933] AC 402) Lord MacMillan stated that rule of interpretation afforded only a valuable presumption as to the meaning of the language employed in a statute. Before it can be applied one of the requisites is that the judicial interpretation must be well settled and well recognised.”⁵⁵

It is important to note that the practice of the doctrine of precedent does not negate the need for the courts to reach decisions on the basis of sound legal reasoning and value judgments. This produces a tension in the application of the doctrine and a degree of ambivalence. Judges deal with this situation in different ways. As will be illustrated below, some tend to be authoritarian, while other are libertarian.

5 RECENT DEVELOPMENTS

A more flexible approach to the practice of precedent has developed in recent decades. So for instance in *S v Ndhlovu*⁵⁶ Beadle AJ observed that “[t]he doctrine of *stare decisis* is such an easy haven in which to take refuge that it often stultifies any attempt to reconsider an old established principle which may be wrong. ... I would prefer to consider (counsel’s) ... argument on its merits, and if, in the circumstances, I was persuaded that his argument was right, I would think this Court should have no hesitation but to adopt it, notwithstanding the vast body of opinion against his argument”. Also, Botha J noted in *National Chemsearch (SA) (Pty) Ltd v Borrowman*⁵⁷ that “[i]n functioning under a ‘virile, living system of law’, a judge must not be faint-hearted, and when he is morally convinced that justice requires a departure from precedent he will not hesitate to do so; but on the other hand he must guard carefully against being over-bold in substituting his own opinion for those of others, lest there be too much chopping and changing and uncertainty in the law”.

Also in this regard, there is an exemplary judgment of Steenkamp J in *Van der Merwe Burger v Munisipaliteit van Warrenton*,⁵⁸ referred to above, which dealt with the question of municipal immunity. In this case, the Appellate Division authority as set out in *Halliwell v Johannesburg Municipal Council*,⁵⁹ although an absolute precedent was involved, was considered to be jurisprudentially obsolete and was consequently not followed by the Northern Cape Division of the Supreme Court. In disregarding the principle of *stare*

⁵⁵ *Ex parte Minister of Justice: In re R v Bolon supra* 359-360.

⁵⁶ 1979 4 SA 208 (ZR) 215.

⁵⁷ 1979 3 SA 1092 (T) 1101.

⁵⁸ *Supra*.

⁵⁹ 1912 AD 659.

decisis Steenkamp J and Erasmus AJ preferred “pragmatism to precedent and in so doing ... played a significant part in liberating the South African legal system from the archaic doctrine out of step with both principle and practicality”.⁶⁰

In this judgment reason triumphed over dogma. A flexible approach has also been taken by the courts in regard to the application of the doctrine of precedent to previous judgments of the courts involving international law. This occurs when a court is confronted with a judicial precedent which reflects obsolete international law and thus conflicts with contemporary international law. In this regard Lord Denning observed with characteristic judicial perception that:

“[A] decision of this court, as to what was the ruling of international law 50 or 60 years ago, is not binding on this court today. International law knows no rule of *stare decisis*”.⁶¹

This view was followed by Margo J in *Inter-Science Research and Development Services (Pty) Ltd v Republica Popular De Mocambique*⁶² and illustrates that circumstances may indeed arise when a court will feel obliged for good reason to disregard an absolute judicial precedent established by a higher court in regard to the interpretation of a provision of a statute. Obviously this will occur, by its very nature, very infrequently, but in the light of the judgments in the *Van der Merwe Burger* and *Inter-Science Research* cases it is most certainly not inconceivable. These cases indicate clearly that in exceptional circumstances there may be sound and legitimate reasons for a court to depart from a hierarchically binding decision of a higher court and this should not be perceived as judicial heresy or apostasy but indeed as part of the flexible doctrine of precedent. Furthermore, the exceptions mentioned in this article are not intended to be a *numerus clausus*. Other exceptions are likely to occur in a dynamic legal system and are essential to render the doctrine and practice of *stare decisis* jurisprudentially legitimate and defensible. This would produce a flexible doctrine of *stare decisis* flowing from “softening” as pointed by Woolman and Brand.⁶³

Cameron and Marcus⁶⁴ observe that the converse of the above may also apply and a court may regard itself as bound by a previous judgment of a court in another province or erstwhile colony, hierarchically of equal jurisdiction and thus strictly speaking not binding on the said court, as was the position in *Moodley v Reddy*,⁶⁵ where the Durban and Coast Local Division apparently regarded itself as bound by the *ratio decidendi* of Innes

⁶⁰ Dendy “Municipal Immunity for Non-repair of Street – Overruling the Appellate Division” 1988 *SALJ* 177 186.

⁶¹ *Trendtex Trading Corporation v Central Bank of Nigeria* [1977] QB 529 (CA) 554.

⁶² 1980 2 SA 111 (T) 122G-H.

⁶³ “Is there a Constitution in this Courtroom? Constitutional Jurisdiction after *Afrox* and *Walters*” 2003 *SA Public Law* 37 71.

⁶⁴ “The Administration of Justice, Law Reform and Jurisprudence” 1985 *Annual Survey of SA Law* 576; and see also Cameron and Van Zyl Smit 1982 *Annual Survey of SA Law* 519.

⁶⁵ 1985 1 SA 76 (D).

CJ in *Schuurman v Davey*,⁶⁶ a decision of a Chief Justice of the erstwhile Transvaal Colony because:

“Precedent in practice sometimes has little to do with precedent as represented in the textbooks and ... the precedency of a prior decision depends at least as much on the authority of the judge who gave it and on the acceptability to the later court of the inherent persuasive force of its reasoning as on its hierarchical status.”⁶⁷

6 **STARE DECISIS AND THE NEW CONSTITUTIONAL DISPENSATION**

Although, as indicated above, the doctrine of precedent is part of our common law and in terms of section 2(1) of Schedule 6 of the Constitution “continues in force”, the new constitutional dispensation with its entrenched Bill of Rights, must of necessity impact on the way precedent operates in our law. In this regard, the following considerations must be taken into account. Section 39 of the Constitution has introduced a new method of interpretation. The old method of literal interpretation has been replaced by a different method, as explained by Botha.⁶⁸ He observes that there are three basic and kindred principles that apply to the contemporary process of statutory interpretation. These are:

- (1) Interpretation must take into account that South Africa has a supreme constitution with a justiciable bill of rights that constitutes the corner stone of the new legal order, of which interpretation is an integral part;
- (2) As a result of this the most important principle of interpretation is to determine and apply the purpose of the legislation in the light of the Bill of Rights and the values it encapsulates; and
- (3) This requires that the interpreter must study the legislative text to ascertain its initial meaning, and while bearing in mind the presumptions of interpretation and the values in the Constitution, construe the text by striking a balance between the text and context of the legislation.

In effect this means that our law must make use of a purposive/value based method of interpretation. It is submitted that this of necessity requires a far more flexible method of applying the doctrine of precedent. Furthermore, section 39(2) of the Constitution stipulates that when interpreting any legislation every court, tribunal or forum must “promote the spirit, purport and objects of the Bill of Rights ... in a manner that gives effect to the values of our constitutional democracy”. This gives rise to the indirect application of the values reflected in the Bill of Rights.

⁶⁶ 1908 TS 664 672.

⁶⁷ Cameron and Marcus 1985 *Annual Survey of SA Law* 576; and Cameron and Van Zyl Smit “The Administration of Justice, Law Reform and Jurisprudence” 1983 *Annual Survey of SA Law* 533.

⁶⁸ *Statutory Interpretation* (2005) 66.

In this regard, Froneman J's judgment in *Kate v MEC for the Department of Welfare, Eastern Cape*⁶⁹ is a superb piece of jurisprudential craftsmanship, as far as precedent is concerned, and it is submitted, reflects a more flexible and subtle approach to precedent, ushered in by the new constitutional dispensation. Froneman J deals adroitly with a precedent of the Supreme Court of Appeal (SCA) that is *prima facie* binding on him, as a judge sitting in the South-Eastern Cape Local Division, and which could be construed as adverse to the interpretation of the law that he finds himself compelled by virtue of reason and justice to adopt in the interest of justice and constitutional values, as required by the new constitutional dispensation.

The applicant in this judgment was a 62-year-old woman who suffered from arthritis. She had applied for a social grant under the Social Assistance Act 59 of 1992. The application was approved some three years later and she commenced receiving regular payments. She received an amount of R6 000 for what was described as "back pay". She discovered, on consulting her attorneys, that she was entitled to an amount of R19 120 in back pay. Her attorneys demanded the difference, that is R13 120, but met with no response. They then brought an application in which they sought payment of the amount of R13 120. The relief sought by the applicant was, *inter alia*, firstly payment of R13 120 and secondly interest on arrears.

The respondent eventually paid the amount of R13 015 in December 2003, but refused to pay any interest or the applicant's costs. In considering the merits, the court had to examine the implications and the effect of the judgment of the Supreme Court of Appeal in *Jayiya v Member of the Executive Council for Welfare, Eastern Cape*,⁷⁰ relied on by the respondent as a precedent, who contended that the Promotion of Administrative Justice Act 3 of 2000 did not allow for the applicant's claims for back pay and interest.

Froneman J had to decide how the *Jayiya* judgment of the SCA had to be interpreted and how it should be treated as a precedent. He pointed out that Conradie J's comments in *Jayiya* about relief in the form of back pay and interest were, in his own words, "[m]ade without the benefit of argument and thus 'brief' and 'tentative'". Accordingly, he stated they were not binding, but merely merited serious attention by a lower court.⁷¹ Nevertheless he conceded at the outset of judgment that the judgment of Conradie J could have "a chilling effect on the efforts by the High Court in this province to ensure compliance on the part of provincial government with its constitutional duties of efficient and accountable public administration".⁷²

In this regard he stated:⁷³

"The conclusion that I have come to is that the decision in *Jayiya* must be read with special care with an attention to its particular facts. Read in this

⁶⁹ 2005 1 SA 141 (SE).

⁷⁰ 2004 2 SA (SCA) 611.

⁷¹ *Kate v MEC for the Department of Welfare, Eastern Cape supra* par 20.

⁷² *Kate v MEC for the Department of Welfare, Eastern Cape supra* par 1.

⁷³ *Kate v MEC for the Department of Welfare, Eastern Cape supra* par 23.

manner all that it bindingly decided was that in that case, the wrong orders were sought against the wrong representatives, and that the state functionaries cannot be found guilty of the crime of contempt of court for non-compliance with a money judgment.”

He continues with his argument as follows:⁷⁴

“I am aware that this interpretation of *Jayiya* might appear rather strained if some of the statements in that decision are not read strictly in relation to its particular facts. If, however, the decision in *Jayiya* is not capable of this kind of interpretation, and the decision purports to lay down the law as set out in par [15] above, I am constrained, with respect, to state that I do not consider the decision binding.”

In par 26 he concludes this argument by stating unequivocally:

“In formal terms I would then consider the decision to have been taken *per incuriam* ...”

Froneman J is to be commended for the bold and pragmatic approach he has taken to precedent. He did not, as he could quite easily have done, artificially distinguish an apparently binding precedent. This would have been expedient, but undoubtedly highly artificial and is not, it is submitted, conducive to clarity or legal certainty. Instead he boldly declares the *Jayiya* decision would be wrong, if he were not justified in adopting the interpretation of it, he suggests and deems is most apposite.

7 IMPORTANT CASES IMPACTING ON PRECEDENT AND INVOLVING THE ETHOS OF THE NEW CONSTITUTIONAL DISPENSATION⁷⁵

As indicated above, the way in which the doctrine of precedent must operate at present has been conditioned by the new constitutional dispensation. In particular it is influenced to a significant degree by section 39(2), which states that:

“When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.”

This gives rise to what is known as the indirect application of the Bill of Rights, which can take the form of the so-called interpretive mechanism of reading down.⁷⁶ This mechanism requires that legislation must be interpreted in such a way that as far as is plausible and reasonable, statutes must be construed in conformity with the Bill of Rights and its values and not in conflict with them.

⁷⁴ *Kate v MEC for the Department of Welfare, Eastern Cape supra* par 24.

⁷⁵ The analysis and explanation set out below is based on that of Currie “Bill of Rights Jurisprudence” 2002 *Annual Survey of SA Law* 36 45-48; and that of Currie and De Waal *Bill of Rights Handbook* (2005) 70-72.

⁷⁶ See Devenish *The South African Constitution* (2005) 207; and Currie and De Waal 204.

In *Govender v Minister of Safety and Security*⁷⁷ the SCA, using the mechanism of reading down, decided that section 49(1)(b) of the Criminal Procedure Act,⁷⁸ which permitted the use of force to arrest a resisting or fleeing suspect, was not unconstitutional.⁷⁹ However, in a subsequent decision in *S v Walters*⁸⁰ the Transkei High Court held that it was not bound by this precedent.

According to Jafta AJP, SCA decisions on the constitutional validity of legislation “rank in the same level” as High Court decisions.⁸¹ This was certainly an innovative, very unusual and indeed provocative jurisprudence, the reason being that both decisions had no force of law, unless confirmed by the Constitutional Court.⁸² Furthermore, since, according to Jafta AJP, the SCA’s decision on section 49(1)(b) in *Govender* was manifestly erroneous,⁸³ it did not have to be followed by the High Court and the subsection was struck down to the extent that it allowed the use of force to prevent a suspect from fleeing.

Although the High Court’s approach per Jafta AJP is most certainly not without merit and, it is submitted, reflects lateral thinking⁸⁴ on the issue of precedent as it operates in the hierarchy of courts and their constitutional jurisdiction in South Africa, it precipitated an unequivocal and unsympathetic reproach from the Constitutional Court in its decision of confirmation to the effect that:

“[T]he trial court in the instant matter was bound by the interpretation put on section 49 by the SCA in *Govender*. The judge was obliged to approach the case before him on the basis that such interpretation was correct, however much he may personally have had misgivings about it. High courts are obliged to follow legal interpretations of the SCA, whether they relate to constitutional issues or to other issues and remain so obliged unless and until the SCA itself decides otherwise or ... [the Constitutional Court] does so in respect of a constitutional issue.”⁸⁵

This, it is submitted, is a gut response from the Constitutional Court, which approached the matter from the viewpoint of maintaining authority, by invoking the conventional strict doctrine of precedent in relation to what it

⁷⁷ 2001 4 SA 273 (SCA).

⁷⁸ 55 of 1977.

⁷⁹ This subsection permitted the use of force to affect the arrest of a resisting or fleeing suspect. It should be noted that s 49(2), which permitted the homicide of certain suspects who resisted arrest, was declared invalid by the Constitutional Court in *Ex parte Minister of Safety and Security: In re S v Walters* 2002 4 SA 613 (CC); and 2002 7 BCLR 663.

⁸⁰ 2001 2 SACR 471 (Tk).

⁸¹ *S v Walters supra* par 19.

⁸² *Ibid.*

⁸³ It could be argued that as such it falls within the ambit of being rendered *per incuriam*. This would require a wide interpretation being given to the concept of *per incuriam*. Allen (146) says: “*Incuria* means literally ‘carelessness’ which apparently is considered less uncomplimentary than *ignorantia*; but in practice *per incuriam* appears to mean *per ignorantia*”. At its widest that an authority can be rejected if the court is of the opinion that “all relevant considerations were not before the court” (147). See also in this regard Kahn “Judgments *per Incuriam* and the Doctrine of Precedent” 1955 *SALJ* 404.

⁸⁴ See De Bono *The Use of Lateral Thinking* (1967).

⁸⁵ *Ex parte Minister of Safety and Security: In re S v Walters supra* par 61.

perceived as an “insubordinate stand”,⁸⁶ rather than by virtue of a culture of justification and from the point of view of jurisprudential innovation and inherent merit necessitated by post-1994 constitutional jurisprudence or by exploring the possibility that the decision of the SCA was rendered *per incuriam*. However, what is regrettable is the unqualified nature of the reproach, which it is submitted must inevitably have a decidedly chilling effect on the constitutional jurisdiction of the High Courts.⁸⁷ Such a qualification would have been both jurisprudentially accurate and expedient by reflecting a doctrine of precedent based on a culture of justification, rather than one based on blind authority.

Nevertheless, this holding, Kriegler J stressed, applied only to *ratio decidendi* of higher tribunals “delivered after the advent of the constitutional regime and in compliance with the requirements of section 39 of the Constitution”.⁸⁸ This to a small extent mitigates the severity of the Constitutional Court’s somewhat rigid reproach. Greater flexibility in the application of the doctrine of precedent could flow from giving the “*per incuriam*”, criterion, referred to above, a wider or more flexible definition. The “*per incuriam*” criterion applies where, for instance, a mistake had been made, such as relevant legislation overlooked.⁸⁹ The use of the “*per incuriam*” criterion is implied in the judgment of Jafta AJP. What was not decided in this case, thereby creating a lacuna, was the extent of the application of *stare decisis* to pre-1994 decisions and to the direct applications of the Constitution.

Although legislative changes⁹⁰ have made the Constitutional Court’s holding on the said section 49(2), which permitted the killing of certain suspects resisting arrest, obsolete, its decision in *Ex parte Minister of Safety and Security: In re S v Walters*,⁹¹ invalidating the section, has “some important and enduring things to say about the effect of the doctrine of *stare decisis*”.⁹²

It is also important to note that the subsequent decision of the SCA in *Afrox Health Care Bpk v Strydom*⁹³ fills the lacuna referred to above. Therefore the *Afrox* and *Walters* judgments, need to be read together to obtain a holistic picture of the state of our law in relation to the application of *stare decisis* at present. In relation to the binding effect of pre-constitutional

⁸⁶ Currie 2002 *Annual Survey of SA Law* 46.

⁸⁷ Woolman and Brand 2003 *SA Public Law* 38.

⁸⁸ *Ibid.* Note that Kotze (310) points out that “*dicta*, the statements of approved text writers and the opinions of *Jurisperiti* are classed as being of quasi authority”.

⁸⁹ Hahlo and Kahn 243.

⁹⁰ S 49(1)(b) and 49(2) were repealed and replaced by s 7 of the Judicial Matters Second Amendment Act 122 of 1988. The former permitted the use of force to arrest a resistant or fleeing suspect, and the latter permitted the killing of certain suspects resisting arrest. The replacement s 49 allows killing or the infliction of grievous bodily harm to effect an arrest only when necessary to protect the arrestor or someone else from death or grievous bodily harm.

⁹¹ *Supra.*

⁹² See Currie 2002 *Annual Survey of SA Law* 45.

⁹³ 2002 6 SA 21 (SCA).

decisions of the appeal court, there are three distinct situations that can arise:⁹⁴

- (1) Direct application of the Constitution to the common law. In such situations if the High Court is convinced that the relevant rule of the common law is in conflict with a provision of the Constitution then obviously pre-constitutional authority is not binding on the High Court.⁹⁵
- (2) Pre-constitutional decisions of the appeal court based on open-ended considerations such as *boni mores* or public interest. In such situations Currie and de Waal explain⁹⁶ that the High Court can justifiably depart from earlier authority if convinced, taking into account the values of the constitution, that it no longer reflects the *boni mores* or the public interest.⁹⁷ In this regard, they⁹⁸ comment further that the SCA presumably had cases like that of *Carmichele*⁹⁹ in mind.
- (3) The third situation is that of an indirect application of the Constitution to the common law, by virtue of section 39(2). In this regard, even if convinced that the rule must be developed to promote the spirit, purport and objects of the Bill of Rights, a High Court is obliged to follow the authority of pre-constitutional decisions of the appeal court.¹⁰⁰ This view, flowing from the *Afrox* judgment, is clearly wrong in principle and jurisprudentially indefensible. Brand JA's argument in this regard is not convincing.¹⁰¹

Combining the information provided by the *Afrox* and *Walters* judgments, the following conclusions in relation to the question of precedent are arrived at:¹⁰²

- (1) Post-constitutional decisions of higher courts are binding, whether they relate to constitutional matters or not; and
- (2) Pre-1994 decisions of higher courts on the common law are binding, except in those cases of direct conflict with the Constitution or in cases involving the development of open-ended standards such as *boni mores*.¹⁰³

The latter is, as indicated above, unsatisfactory and wrong from the point of view of principle, to the extent "that it reflects consent to the continued primacy of apartheid-era jurisdiction",¹⁰⁴ and indeed jurisprudence, such as for instance literal interpretation based on the sovereignty of parliament, as

⁹⁴ Currie and de Waal 70.

⁹⁵ *Afrox Healthcare Bpk v Strydom supra* par 27. Translation provided by Currie and de Waal 70.

⁹⁶ *Currie and de Waal* 70-71.

⁹⁷ *Afrox Healthcare Bpk v Strydom supra* par 28.

⁹⁸ *Ibid.*

⁹⁹ 2001 10 BCLR 995 (CC).

¹⁰⁰ *Afrox Healthcare Bpk v Strydom supra* 29.

¹⁰¹ *Ibid.*

¹⁰² Currie and de Waal 71.

¹⁰³ See *Kalla v The Master* 1994 4 BCLR 79 (T).

¹⁰⁴ Woolman and Brand 2003 *SA Public Law* 54.

opposed to purposive/value-based interpretation premised on constitutional supremacy. It should be noted that the distinction between direct and indirect application of the provisions of the Constitution is therefore crucial to the impact of the *Afrox* decision. The SCA holds that section 39(2) of the Constitution does not in general authorize lower courts to depart from higher authority, whether pre- or post-constitutional. This decision, although clearly wrong, in effect overrules the meritorious judgment in *Holomisa v Argus Newspapers*¹⁰⁵ in which Cameron J held that the equivalent of the interpretive section 39(2) of the 1996 Constitution in section 35(3) of the interim Constitution, requires “the fundamental reconsideration of any common law rule that trenches on a fundamental rights guarantee”.¹⁰⁶ It is submitted that in this regard Cameron J in *Holomisa* was correct, and Brand JA in *Afrox* was not. Furthermore, as Woolman and Brand point out, the distinction between direct and indirect application of the constitution is inexplicable.¹⁰⁷

Bearing this in mind, it must be noted that the *Afrox* and *Walters* decisions have been severely criticized, justifiably it is submitted. In this regard Woolman and Brand comment that the two decisions “limit severely the constitutional jurisdiction of the High Courts” and “could have a deleterious effect on the development of our constitutional jurisprudence”.¹⁰⁸ This is indeed, it is submitted, the position, as far as the doctrine of precedent is concerned, if it is to operate in accordance with the libertarian ethos of the new constitutional dispensation, requiring both flexibility and sensitivity, which is necessary to ensure the integrity of legal reasoning and that the “principles are primary and the precedents are secondary, and if we lose sight of this fact precedents become a bad master instead of a good servant”.¹⁰⁹

Section 39(2) of the Constitution must be read with section 173, which deals with the inherent power of the High Courts to develop the common law. Although, as Currie and De Waal point out, “the power has always been constrained by the doctrine of *stare decisis*”¹¹⁰ they also observe, as explained above, that the *Afrox* and *Walters* judgments have been subject to justifiable criticism¹¹¹ and also that there is a significant omission from the *Afrox* decision. In this regard, it must be noted that the indirect application in terms of section 39(2) of the Constitution involves not only the development of the common law, but also statutory interpretation taking into account the spirit, purport and objects of the Bill of Rights, bearing in mind that pre-constitutional statutory interpretation was considerably influenced by the tenets of literalism, based on a qualified contextual approach, as well as the

¹⁰⁵ 1996 2 SA 588 (W).

¹⁰⁶ *Holomisa v Argus Newspapers Ltd supra* 603H-I.

¹⁰⁷ Woolman and Brand 2003 *SA Public Law* 64.

¹⁰⁸ Woolman and Brand 2003 *SA Public Law* 38.

¹⁰⁹ Allen 285.

¹¹⁰ Currie and De Waal 71.

¹¹¹ See Woolman and Brand 2003 *SA Public Law* 37.

underlying jurisprudence of positivism.¹¹²

Bearing this in mind, the SCA in the *Afrox* judgment appeared to confine itself to the first type of indirect application only. This appears to mean that “post-*Afrox* High Courts still possess the jurisdiction to depart from pre-constitutional statutory interpretations of the AD”.¹¹³ Because the jurisprudential nature of statutory and constitutional interpretation has changed, as indicated above, and there has been a paradigmatic shift in the nature of our jurisprudence away from positivism to something akin to natural law, this is indeed, it is submitted, the correct approach.¹¹⁴

8 GUIDANCE FROM FOREIGN LAW

As far as precedent and the Constitutional Court is concerned, the latter, as the highest court in the land, should abide by its own past decision, unless it is satisfied that it is wrong. In this regard guidance can be sought from American law, taking into account section 39(1) of the Constitution, which stipulates that “[w]hen interpreting the Bill of Rights, a court, tribunal or forum, *inter alia*, may consider foreign law”. In this regard Rycroft has written an informative article¹¹⁵ in which he points out that in a controversial judgment of *Adarard Constructors v Pena*¹¹⁶ the United States Supreme Court reversed its earlier ruling in *Metro Broadcasting v FCC*.¹¹⁷ Although the relevance of the decision for South Africa is not direct, what is of importance is that “the judgments deal also with the appropriate way to treat precedent in constitutional cases”.¹¹⁸ In relation to the question of precedent in the United States there are conflicting Supreme Court judgments in relation to that of *Adarard* case, referred to above, and the 1992 abortion case, *Planned Parenthood of Southeastern Pennsylvania v Casey*.¹¹⁹ These two judgments are of interest because in the first one the majority deems that a departure from precedent is justified, whereas in the second one the opposite view is taken.

The importance of precedent is clearly spelled out by Justice O’Connor in *Casey* with the comment: “[T]he very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is by definition, indispensable”.¹²⁰ This should be contrasted with

¹¹² See Devenish 100 *et seq.*

¹¹³ *Currie and de Waal* 71.

¹¹⁴ See Devenish (2005) 432, in which the author states: “In effect a significant transformation has occurred in our jurisprudence from the techniques of essentially literal interpretation and positivism to a values-based interpretation against the background of a new jurisprudence having manifest elements of, *inter alia*, a sociological nature and those of natural law. The former minimises framers’ intents, literalism of language, the uses of history and judicial precedents.”

¹¹⁵ Rycroft “The Doctrine of *Stare Decisis* in Constitutional Court Cases” 1995 *SAJHR* 587.

¹¹⁶ 515 US 200 115 Sct 2067 (1995).

¹¹⁷ US 547 (1990).

¹¹⁸ Rycroft 587.

¹¹⁹ 120 L ed 2d 674: 112 S Ct 2791.

¹²⁰ *Planned Parenthood of Southeastern Pennsylvania v Casey supra* 700.

the opposite view taken by Chief Justice Rehnquist who cautions against judicial error which can be perpetuated by the rigid application of precedent in his comment that “Erroneous decisions in such constitutional cases are uniquely durable, because corrections through legislative action, save for constitutional amendment, is impossible. It is therefore our duty to reconsider constitutional interpretations that ‘depart from a proper understanding’ of the Constitution”.¹²¹ Bearing in mind that the Constitution is a dynamic document, the latter approach is preferable, being less constrained by positivism.¹²² This is in accordance with Justice Black’s dictum in *Green v US*:

“The court has a special responsibility where questions of constitutional law are concerned to review its decisions from time to time and where compelling reasons present themselves to refuse to follow precedents; otherwise its mistakes in interpreting the Constitution are extremely difficult to alleviate and needlessly so.”¹²³

In this regard note should also be taken that the Supreme Court of Canada has stated that although it should normally adhere to its own decisions, it is not absolutely bound to do so.¹²⁴ The High Court of Australia has adopted a similar approach.¹²⁵

9 CONCLUSION

From the discussion above, it is clear that in the new constitutional dispensation, members of the judiciary observe the *stare decisis* rule, although most certainly not inflexibly, but with a measure of inconsistency, *inter alia*, because it has over the years become customary to do so, and also that it has certain important jurisprudential advantages.

It is submitted that as far as the doctrine of precedent is concerned, ordinary courts should only be bound by the ratio of a higher or larger court in relation to pre-1994 judgments provided that they are compatible with both the letter and spirit of the constitution and the new purposive/value-based methodology of interpretation, mandated by it in section 39. This should also be the case taking into account indirect application of the Bill of Rights and its values. Furthermore, *a fortiori*, lower courts should not be bound by decisions of higher courts which have applied an obsolete and hence different body of law.

In relation to post-1994 judgments, these must in general be regarded as binding, unless such a judgment was rendered *per incuriam*. Although this is indeed the conventional theory, in practice from time to time greater flexibility in its application may occur in the interest of both rationality and justice, by

¹²¹ *Planned Parenthood of Southeastern Pennsylvania v Casey supra* 766.

¹²² Rycroft 589 *et seq* also sets out certain checks established in American law that are used before overruling a prior decision, which could also be gainfully employed in South Africa.

¹²³ (1958) 356 US 537.

¹²⁴ *Eg, Re Bill 30 (Ontario Separate School Funding* [1978] SCR 489; *Clarke v CNR* [1988] 2 SCR 536 547.

¹²⁵ *Cole v Whitfield* (1988) 165 CLR.

judges who are jurisprudentially bold rather than timid, and are not motivated by positivism but by a new jurisprudential theory inherent in the Constitution, akin to natural law.¹²⁶

In this regard Cameron and van Zyl Smit comment:

“Orthodox doctrine on the rules of precedent holds that judicial precedent, unless distinguishable, are followed by judges if they are hierarchically binding. Orthodoxy here does not follow practice, where the courts, ... tend to follow decisions delivered and points of view expressed by judges on the basis of their hierarchical status than on their intrinsic persuasive force.”¹²⁷

So for example, Froneman J in his judgment in *Kate v MEC for the Department of Welfare, Eastern Cape* discussed above, is to be commended for the bold, insightful and unconventional approach he has taken to precedent. He did not, as explained above, as he could quite easily have done, distinguish an apparently binding precedent. This would have been expedient, but undoubtedly highly artificial and is not, it is submitted, conducive to clarity or legal certainty. Instead he categorically declares the *Jayiya* decision would be wrong, if he were not justified in adopting the interpretation he suggests is most apposite. In this regard he has done, as Goldstone J did in *Vorster v AA Mutual Insurance Association Ltd*,¹²⁸ where he in an unconventional way declared a previous, apparently binding, decision to be wrong. As indicated above, the unconventional and provocative approach adopted by Jafta AJP in *S v Walters*,¹²⁹ although categorically rejected by the Constitutional Court, reflects the kind of boldness required to render the application of the doctrine flexible, it is submitted, for rational and just reasons. The extent of this flexibility needs to be tested by lower courts, even if their efforts are categorically rejected as occurred in the *Afrox* judgment above. *Afrox*, it is submitted, is not only wrong from a legal and constitutional point of view, it is wrong from a policy perspective and greatly limits the constitutional jurisdiction and jurisprudence of the High Courts, which needs to “percolate”¹³⁰ upwards for the benefit of an emerging jurisprudence premised on a culture of justification that is taking root to a greater or lesser degree in both the SCA and the Constitutional Court.

Nevertheless, despite everything said above in relation to the need for greater flexibility in the application of the doctrine of precedent, it remains of inordinate importance. This was stressed by Cameron JA in his recent judgment in *De Kock v Van Rooyen*¹³¹ In this regard he comments that:

“Consistency, coherence, certainty and predictability in our constitutional order require the due application of the decisions of higher courts. Disregarding them wastes precious resources. It imperils public understanding of the Constitution and its implications by creating the impression of incoherence,

¹²⁶ Devenish (2005) 432.

¹²⁷ Cameron and Van Zyl Smit 1983 *Annual Survey of SA Law* 533.

¹²⁸ *Supra*.

¹²⁹ *Supra*.

¹³⁰ Woolman and Brand 2003 *SA Public Law* 55 *et seq*.

¹³¹ 2005 1 SA 1 (SCA) par 18.

irrationality and unpredictability.”

Of crucial importance, it is submitted, precedent should never be applied in a purely mechanical way, but with the exemplary jurisprudential insight displayed by Froneman J in *Kate v MEC for the Department of Welfare, Eastern Cape*.¹³² Such an approach is both pragmatic and jurisprudentially sound. It is submitted that departures from precedent will be infrequent, and obviously must be justified jurisprudentially, in the manner, *inter alia*, that Froneman J demonstrates so admirably. This reflects a legal culture of justification, rather than one of authority.¹³³ A flexible doctrine of *stare decisis* is essential for creating a new jurisprudence reflecting a culture of justification and the application of a process of interpretation based on a purposive/value-based theory and an unqualified contextual methodology.¹³⁴ A rigid doctrine along the lines reflected in the *Afrox* judgment would have the opposite effect. Furthermore, such a flexible doctrine will by its very nature have inherent in it a measure of ambivalence, which, it is submitted, is acceptable, bearing in mind that law is a social, rather than a natural science. What is more, the present state of the law in relation to precedent and the vacillation of the courts between a rigid and a flexible doctrine also creates a degree of ambivalence.

As a result of Froneman’s J bold and jurisprudentially sound approach to precedent, the application for review was granted and the applicant was entitled to payment of her social grant from the deemed date of its approval as well interest on the amount and costs. Justice was therefore done, in accordance with the spirit of the Constitution, to a 62-year-old woman of limited financial means, who suffered from arthritis.¹³⁵ The *Kate* judgment illustrates that the courts should not be obstructed by formal or technical considerations or indeed a rigid approach to precedent, at conflict with the ethos and spirit of the new constitutional dispensation, in dispensing justice, which requires, according to section 39 of the Constitution, that “[w]hen interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport, and objects of the Bill of Rights”. Furthermore, it is submitted that Cameron J’s view in *Holomisa v Argus Newspapers Ltd*,¹³⁶ to the effect that section 39 requires “the fundamental reconsideration of any common law rule that trenches on a fundamental rights guarantee”¹³⁷ has considerable jurisprudential merit and a flexible doctrine of precedent should be based, *inter alia*, on it. Furthermore, such a flexible approach would not result in a destabilisation of our system of precedent, since a departure from precedent

¹³² *Supra*.

¹³³ Woolman and Brand 2003 *SA Public Law* 69 and 75.

¹³⁴ Devenish 143.

¹³⁵ Froneman J is known for his bold and innovative jurisprudence. In this regard his judgment in *Matiso v The Commanding Officer, Port Elizabeth Prison* 1994 3 BCLR 80 (SE) dealing with imprisonment for debt, is exemplary (cf *Bux v The Officer Commanding the Pietermaritzburg Prison* 1994 4 BCLR 10 (N)).

¹³⁶ *Supra*.

¹³⁷ *Holomisa v Argus Newspapers Ltd supra* 603.

would have to be supported by convincing jurisprudential justification.¹³⁸ Although technically overruled, Cameron J's approach is not unlike the influence of a dissenting judgment concerning which it has been said that it is "an appeal to the brooding spirit of the law, the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed".¹³⁹ Nearly 90 years ago Sir John Kotze accurately summed up the position of the flexible but nevertheless ambivalent nature of precedent, in terms of which the courts are bound by it, and yet have some discretion to depart from it, as follows:¹⁴⁰

"[W]ithout an adherence to precedent, judge-made law cannot very well exist as a scientific system: and the better system is that which does not lightly depart from what has once, after due deliberation, been solemnly established and declared to be the law."

¹³⁸ Woolman and Brand 2003 *SA Public Law* 76.

¹³⁹ United States Chief Justice Hughes *The Supreme Court of the United States* (1928) 68.

¹⁴⁰ Kotzé 315.