

# COURT OF FIRST INSTANCE? TOWARDS A PRO-POOR JURISDICTION FOR THE SOUTH AFRICAN CONSTITUTIONAL COURT

JACKIE DUGARD\*

Despite being premised on a transformative constitution, the South African Constitutional Court has not always functioned as an institutional voice for the poor. This is apparent in the relatively low number of cases brought by poor people, as a percentage of the total number of cases in which decisions are handed down by the Court. This article examines the extent to which the Court can in fact be said to have a pro-poor jurisdiction. In particular, it considers whether the Court's practice regarding direct access applications adequately facilitates the uptake of issues affecting the fundamental rights of poor people. The Court's record indicates that it has failed to utilise the direct access mechanism to allow constitutional matters to be brought directly to it by poor people who have been unable to secure legal representation. In so doing, the Court has failed to live up to its transformative promise. Two recent decisions of the Court — *Mnguni v Minister of Correctional Services* and *De Kock v Minister of Water Affairs and Forestry* — indicate how the Court might pursue a different modus operandi to develop a pro-poor jurisdiction.

## I INTRODUCTION

South Africa's Constitutional Court was established in 1994 out of the process of the democratic transition. Crafted in the shadow of a discredited legal order and judiciary, the Court was designed to reflect and to promote a post-apartheid vision of South Africa founded on the values of dignity, equality, non-racialism, non-sexism, the supremacy of the constitution and the rule of law.<sup>1</sup> The 'highest court in all constitutional matters',<sup>2</sup> it derives its legitimacy, authority and functions directly from the Constitution.<sup>3</sup>

\* Senior Researcher, Centre for Applied Legal Studies, University of the Witwatersrand. I would like to thank the Chr Michelsen Institute (Bergen, Norway) for financing the conference 'Courts and the Marginalised: Comparative Experiences' (Santiago de Chile, 1–2 December 2005), at which I received constructive suggestions, particularly from Malcolm Feeley, on an early version of this article. I would also like to thank the Royal Netherlands Embassy (RNE) South Africa for funding my research on this article. I am grateful for the assistance of CALS volunteer, Meetal Jain, who collated comparative and international articles on the jurisdiction of constitutional courts, and helped me with archival research at the Constitutional Court. Many thanks go to Cathi Albertyn, Beth Goldblatt, Shereen Mills and Faranaaz Veriava for their useful comments and ideas.

1 Section 1(a)–(c) of the Constitution of the Republic of South Africa, 1996.

2 Section 167(3)(a) of the Constitution.

3 Chapter 8 of the Constitution, which deals with Courts and Administration of Justice.

A hybrid of decentralised and centralised systems,<sup>4</sup> the Constitutional Court has characteristics of a final court of appeal as well as characteristics of a court of constitutional review. Overlapping and, to an extent, usurping the jurisdiction of the former Appellate Division of the Supreme Court, it has, from the outset, occupied a somewhat unclear position in the overall judicial structure. Perhaps, given the imperative to create a new, democratically representative judicial institution<sup>5</sup> alongside the existing one, some tension over jurisdiction and function was inevitable during the early years of the Court's existence. However, despite a degree of clarification in the 1996 Constitution, the Court has not yet appropriately forged a specific role for itself as an institutional voice for the poor. This flaw is most evident in the Court's failure to utilise its direct access mechanism in the interests of poor people.<sup>6</sup> And, as I outline below, in the absence of a definitive right to legal assistance, direct access is often the only hope poor people have of accessing the justice system at all.

## II JURISDICTION AND FUNCTION: SEARCHING FOR A UNIQUE CONSTITUTIONAL ROLE

Under the interim Constitution<sup>7</sup> the Constitutional Court was inserted into the existing judicial structure at the same hierarchical level as the Appellate Division, both as apex courts of the Supreme Court. This meant that neither court was able to hear appeals from the other and, in practice, the Constitutional Court enjoyed parallel jurisdiction with the Appellate Division.<sup>8</sup> Among the unsatisfactory aspects of this arrangement was the consequence that if a constitutional issue was raised during adjudication in the Appellate Division and if a decision on that issue was necessary for disposing of the appeal, the case was suspended mid-stream and the constitutional issue referred to the Constitutional Court for argument *de novo*.<sup>9</sup>

4 In jurisdictions with decentralised judicial review, such as exists in the United States, Japan, India and Australia, constitutional review is incorporated into the existing judicial hierarchy, with a single Supreme Court at the apex. In jurisdictions with centralised judicial review, such as in France, Germany, the former Eastern European states, Indonesia and South Africa, constitutional review is undertaken by a separate, specialised, constitutional court.

5 See R Spitz & M Chaskalson *The Politics of Transition: A Hidden History of South Africa's Negotiated Settlement* (2001) 191 who argue that one of the fundamental reasons for deciding on a centralised model of constitutional review and on the establishment of a new, separate and representative, Constitutional Court was an implicit recognition of the need to 'bypass' the existing Appellate Division, which lacked the political legitimacy and demographic representivity to assume the role of court of final appeal on constitutional matters.

6 This article uses the term 'poor' to describe people who are objectively socio-economically disadvantaged and who do not have the requisite resources and/or capacity to employ lawyers to represent them throughout the legal system to the Constitutional Court.

7 The interim Constitution (Constitution of the Republic of South Africa Act 200 of 1993) was in force between 27 April 1994 and 6 February 1997, when it was repealed by the 1996 Constitution.

8 I Currie & J de Waal *The Bill of Rights Handbook* 5 ed (2005) 99–100.

9 Section 102(6) of the interim Constitution.

In order to remedy the resulting jurisdictional problems and to streamline the judicial system, the 1996 Constitution established a new hierarchy of courts, in which the Constitutional Court became the court of final instance for all constitutional matters, including appeals on constitutional matters from the newly-named Supreme Court of Appeal (the former Appellate Division). In turn, the Supreme Court of Appeal (SCA) became a judicial entity in its own right rather than, as previously, a division of the Supreme Court. Under this system, which operates currently, both the Constitutional Court and the SCA have Republic-wide jurisdiction and both are appeal courts: 'the Constitutional Court hears constitutional appeals while the SCA may hear all appeals, including appeals in which both constitutional and non-constitutional issues are raised.'<sup>10</sup>

In addition to its concurrent appeals function shared with the SCA (which is discussed further below), the Constitutional Court has non-appellate jurisdiction in three areas. First, the Constitutional Court is required to confirm any order of invalidity of an Act of Parliament, a provincial Act or conduct of the President 'made by the Supreme Court of Appeal, a High Court, or a court of similar status, before that order has any force.'<sup>11</sup> Second, in terms of s 167(4) of the Constitution, the Constitutional Court has exclusive jurisdiction over the following: disputes between national or provincial spheres of government concerning the constitutional status, powers or functions of these organs of state; the constitutionality of parliamentary or provincial Bills, as well as the constitutionality of amendments to the Constitution;<sup>12</sup> determinations as to whether the President or Parliament has failed to fulfil a constitutional obligation, and certification of provincial constitutions.

Third, and most importantly for this article, s 167(6)(a) of the Constitution empowers the Constitutional Court to function as the court of first instance by allowing direct access 'when it is in the interests of justice and with leave of the Constitutional Court'. It is in respect of this exclusive direct access function — which is elaborated in the remainder of the article — that the Court's practice has been most wanting.

#### **(a) Blurred lines**

Although its jurisdiction, together with its function, has, to some extent, been clarified in the 1996 Constitution, the Constitutional Court still occupies a blurred position in the judicial system. This is particularly so regarding the concurrent jurisdiction exercised by the High Courts, the

<sup>10</sup> Ibid 102.

<sup>11</sup> Section 167(5) of the Constitution.

<sup>12</sup> The Constitutional Court clarified in *United Democratic Movement v President of the Republic of South Africa (No 2)* 2003 (1) SA 495 (CC) paras 12–13 that its jurisdiction in this regard is confined to *procedural challenges* to constitutional amendments.

SCA and the Constitutional Court in respect of appeals. Currently, in the usual sequence, a dispute is first heard in the High Court, following which appeals go to the SCA or to the Constitutional Court or to both.<sup>13</sup> A problem, however, arises in delineating ‘constitutional matters’ since, while the SCA is empowered to hear any appeal, the Constitutional Court may decide ‘only constitutional matters’.<sup>14</sup> The task of disaggregating constitutional matters from other legal matters has been significantly complicated by the Constitutional Court’s jurisdictionally inclusive jurisprudence, developed in landmark decisions such as that in the *Pharmaceutical Manufacturers* case.<sup>15</sup> In this case Chaskalson P, delivering the unanimous judgement of the Court, stated:

There is only one system of law. It is shaped by the Constitution, which is the supreme law, and all law, including the common law, derives its force from the constitution and is subject to constitutional law.<sup>16</sup>

13 As currently formulated, the Constitution envisages that appeals raising only constitutional matters will proceed directly from the High Court to the Constitutional Court, which may decide ‘only constitutional matters’ (s 167(3)(b), and that for all appeals raising only non-constitutional issues the SCA will be the court of final instance (ss 167(6)(b) and 168(3)). Because the SCA ‘may decide appeals in any matter’ (s 168(3)), appeals raising constitutional as well as non-constitutional matters may be heard by the SCA and, regarding the constitutional component, appealed to the Constitutional Court, as court of final instance. It is unclear exactly how the appeals system will operate if the amendments proposed in the Republic of South Africa Constitution Fourteenth Amendment Bill (discussed in note immediately below) are accepted.

14 Section 167(3)(b) of the Constitution. At the time of writing, a proposed constitutional amendment had been tabled, which — perhaps in recognition of the difficulty of discerning ‘constitutional’ from other matters — proposes to alter the wording of s 167(3)(a) to establish the Constitutional Court as the ‘highest court of the Republic’ (the words ‘in all constitutional matters’ have been omitted). The Republic of South Africa Constitution Fourteenth Amendment Bill thereby proposes to formally recognise the de facto situation of the Constitutional Court operating as an apex court within an integrated constitutional order in which there can be no sensible divorce between constitutional and other matters. In the proposed text, s 167(3)(b) stipulates that the Constitutional Court may decide — (i) constitutional matters — (aa) on appeal; (bb) directly, in accordance with subsection (6); or (cc) referred to it as contemplated in s 172(2)(c) [‘National legislation must provide for the referral of an order of constitutional invalidity to the Constitutional Court’] or in terms of an Act of Parliament’. The proposed text goes on in 167(b)(ii) to add that the court may decide ‘any other matter, if the Constitutional Court grants leave to appeal that matter on the grounds that the interests of justice require that the matter be decided by the Constitutional Court’. As argued in this article, the Court has, in effect, been dealing with appeals on ‘any matter’ for some time and, as I briefly outline below, it has always been able to ‘cherry-pick’ the appeals it is interested in. The proposed amendments can consequently be said to be bringing the Constitution in line with this practice. In terms of other jurisdictional issues, the amendment bill does not substantively change the court’s direct access jurisdiction, other than to infer (somewhat inexplicably given the thrust of the other proposed changes) that direct access applications should relate to ‘constitutional matters’ (s 167(3)(b)(i)(bb)). This added reference to constitutional matters does not alter the fact that, notwithstanding proposed changes, direct access will still be governed by s 167(6), which allows a person, ‘when it is in the interests of justice and with leave of the Constitutional Court’ — (a) to bring a matter directly to the Constitutional Court’ (my emphasis). Nor, I suggest, will the proposed amendments to s 167 go very far towards resolving the blurred lines of the Constitutional Court’s concurrent appellate jurisdiction shared with the SCA.

15 *Pharmaceutical Manufacturers Association of SA: In re: ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC).

16 Ibid paras 44–45.

Having established, apparently conclusively, that there is only one system of law and that all law is constitutional law in *Pharmaceutical Manufacturers*, the Court has subsequently struggled to define what is *not* a constitutional matter, ie when does the Constitutional Court *not* have jurisdiction or, to put it differently, why do we need a both a Constitutional Court and a SCA? It has been suggested that subsequent attempts by the Court to narrow down the Court's appellate jurisdiction to a 'subset of all possible appeals'<sup>17</sup> has not been entirely successful.<sup>18</sup>

In a recent article Carole Lewis, a judge of the SCA, argues that the Constitutional Court has failed to clarify 'constitutional matters' in a way that, convincingly, would provide a separate appellate role for itself as distinct from the SCA.<sup>19</sup> Lewis refers to the Constitutional Court's decision in *S v Boesak*<sup>20</sup> to the effect that any 'failure to develop a common-law rule by the SCA may be a constitutional matter',<sup>21</sup> as the point 'where the imagined seal between the jurisdiction of the respective appellate courts becomes suspect'.<sup>22</sup> This is because — as Lewis demonstrates through analysing the Court's somewhat schizoid treatment of the common-law doctrine of vicarious liability across *Phoebus Apollo Aviation CC v Minister of Safety and Security*<sup>23</sup> (vicarious liability of the state for the larcenous acts of police officers) and *K v Minister of Safety and Security*<sup>24</sup> (vicarious liability of the state for a rape and assault committed by police officers) — in some cases where the SCA failed to develop a common-law rule the Constitutional Court has found jurisdiction (*K*) and in others (*Phoebus Apollo*) it has not. Such incoherence about its own jurisdiction has led Frank Michelman to comment:

When the Constitutional Court dismisses an appeal such as that in *Phoebus Apollo Aviation*, pleading want of jurisdiction, it seems we must understand the Court as confessing to a temporary shortfall in its comprehension of that objective normative value system whose inhabitation of the Final Constitution it posits. (We don't know yet.)<sup>25</sup>

But in fairness to the Court, if it remains a rather undefined entity in

17 F Michelman 'The Rule of Law, Legality and the Supremacy of the Constitution' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* 2 ed (2005) 11/1, 11/10.

18 If the above-mentioned Republic of South Africa Constitution Fourteenth Amendment Bill as currently worded is passed, it will be interesting to see whether the Court's attempts to define a role for itself vis-à-vis appeals in the 'interests of justice' will be more coherent than have been its attempts to define a role in respect of 'constitutional matters'.

19 C Lewis 'Reaching the Pinnacle: Principles, Policies and People for a Single Apex Court in South Africa' (2005) 21 *SAJHR* 509.

20 2001 (1) SA 912 (CC).

21 *Ibid* para 15. According to s 39(2) of the Constitution, when developing the common law every court 'must promote the spirit, purport and objects of the Bill of Rights.'

22 Lewis (note above) 6.

23 2002 (5) SA 475 (SCA); 2003 (2) SA 34 (CC).

24 2005 (3) SA 179 (SCA); 2005 (6) SA 419 (CC).

25 Michelman (note above) 11/41.

respect of its shared appellate jurisdiction with the SCA, this is largely a reflection of the Court's desire to infuse constitutional values throughout the entire legal system — a legal system that still operates in the shadow of its apartheid past — without being overwhelmed by assuming responsibility as a supra-appeal court in all matters. Nevertheless, notwithstanding some confusion over its concurrent jurisdiction, it is the Court's failure to develop its exclusive direct access jurisdiction that has most disappointingly robbed it of a unique, pro-poor, jurisdiction and role.

In the remainder of the article I develop my argument that the Court's failure to forge a specific role for itself is most stark and most damaging in the arena of direct access. As I outline below, the Court's record over the past ten years reveals a practice of restricting, rather than expanding, the conditions of direct access. I surmise that this has been to the detriment of the Court's ability to act as an institutional voice for the poor as, increasingly, only empowered individuals and groups<sup>26</sup> have the resources to bring litigation through the judicial system to the Constitutional Court.

### III RULES AND PRACTICE: HOW HAS THE CONSTITUTIONAL COURT DEALT WITH THE CHALLENGE OF ACCESS?

The first hurdle a poor person must overcome in any justice system is accessing that system. In South Africa the usual difficulties of accessing justice are exacerbated by gross socio-economic inequalities and the remoteness of law from most peoples' lives. In the absence of legal aid for constitutional matters, poor people are largely unable to take cases through the normal judicial process, which is both lengthy and costly. Given this reality, what does the Constitutional Court's record reveal about its efforts to address such access-related obstacles in the interest of poor people?

In the eleven years of its existence, between February 1995 and January 2006, the Constitutional Court has delivered 254 written judgements, averaging 23 per year (with a low of 14 in 1995 and a high of 34 in 2002). The total number of cases registered as applications averages 50 per year, and has never been more than 80.<sup>27</sup> The Court therefore hands down a written judgement in roughly half of the cases it registers. The remaining cases are decided by the judges privately in chambers. These figures indicate that, on the one hand, the Court has a low caseload compared with constitutional courts elsewhere in the world but that, on the other

<sup>26</sup> I define 'empowered individuals and groups' as those applicants who have access to the considerable socio-economic resources and capacity required to take litigation all the way through the judicial system to the Constitutional Court.

<sup>27</sup> These figures are based on a hand search of the Court's register. The Court refers to the cases it registers as 'applications', whether decided in chambers or afforded a full hearing.

hand, it hands down written judgements in a comparatively high proportion of the registered applications.<sup>28</sup>

Such data, which on their own suggest a cautious Court that maintains an uncrowded roll<sup>29</sup> with a high 'success rate',<sup>30</sup> belie the true scale of the Court's gate-keeping. Indeed, it is not possible to track the total number of attempts to access the Court from the Register, because the Court neither registers nor monitors the progress of the high volume of 'complaints' the Court's Registry receives directly from (mainly socio-economically disempowered) members of the public. Most of these 'complaints' come from people who do not have the money to consult lawyers and have failed to secure legal assistance elsewhere. The 'complaints' sometimes contain constitutional aspects and sometimes they do not but, because the complainants are invariably unrepresented by lawyers, they are typically sent away with a copy of the Court's rules.<sup>31</sup> The Court's practice of restricting its roll rather than actively expanding its jurisdiction to facilitate access by the poor, evident in the low number of judgements it hands down each year, is the Court's Achilles heel. It raises a question that is the crux of this article: should a constitutional court actively facilitate access by the poor who, by and large, cannot afford legal representation and, thereby, expose itself to becoming a court of first instance?

A prior question enquires whether this conundrum can best be solved by affording direct access or by affording legal representation. In many respects, securing an effective state-funded legal representation system is

28 By contrast, the Russian Constitutional Court, for example, received about 15 000 petitions from 1994-95, of which 98 per cent were declined by the Secretariat of the Court. Of the remaining two per cent (300 petitions), 39 were decided on their merits (L Epstein, J Knight & O Shvetsova 'The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government' (2001) 35 *Law & Society R* 117, 122). And the German Constitutional Court has handed down rulings in around 141 000 cases between its inception in March 1951 and December 2002; 125 000 of these were in the form of individual petitions, however only 3 360 of the total number of cases over this period were upheld, <<http://www.tatsachen-ueber-deutschland.de/741.0.html>>. This translates into an average of approximately 2 800 cases per year, of which an average of 66 are upheld each year.

29 Consider the fact that the SCA hands down over 200 judgements each year.

30 T Ginsburg 'Economic Analysis and Design of Constitutional Courts' (2002) 3 *Theoretical Inquiries in Law* 49, 56-57. According to Ginsburg, 'success rate' is defined by the number of meritorious/non-spurious cases versus the number of non-meritorious/spurious ones, and there is usually an inverse relationship between access and 'success rates'. That is to say, the more access a court allows, the lower the number of meritorious cases as a proportion of the total number of applications. Ginsburg further uses economic theory to propose an 'optimal access' model that compares the French Conseil Constitutionnel (where access is limited to politicians), with a success rate of 52.1 per cent, the United States Supreme Court (where claimants must incur significant litigation costs to get to the Court), with a success rate of 29.4 per cent, and the German Federal Constitutional Court (where the individual petition mechanism allows large numbers of claims to be filed), with a success rate of around four per cent. I attempt to justify a greater-access-lower-success-rate model for South Africa in part IV, below.

31 I observed this practice while spending two weeks in the Registry conducting archival research, January-February 2005.

a more desirable way to facilitate poor peoples' access to justice than relying on a direct access mechanism because it allows poor people to be integrated into the normal judicial hierarchy and their cases to be aired throughout the system. However, given the de facto absence of comprehensive legal assistance for poor people,<sup>32</sup> and the likelihood that this problem will not be alleviated in the near future, I argue that in the meantime the Court must do all that it can to facilitate access by the poor ie the Court must actively utilise the direct access mechanism to the benefit of poor people.

Nevertheless, because legal representation is intrinsically linked with the access problem, I first outline how the Court has approached the question of the right to legal representation at state expense, before turning to the Court's practice of dealing with direct access applications to date. In this section I indicate how the Court's failure to define the scope of the right to legal representation at state expense has contributed to a reality in which the direct access mechanism remains the only hope for many people who cannot afford legal fees.

#### **(a) The right to legal representation at state expense<sup>33</sup>**

In recognition of the fact that legal representation lies at the core of access to justice and that poor people are unlikely to be able to afford lawyers' fees, s 35(3)(g) of the 1996 Constitution gives accused persons the right to a legal practitioner at state expense, 'if substantial injustice would otherwise result'. With the exception of children,<sup>34</sup> however, there is no general right to legal representation at state expense in civil, as well as in non-criminal constitutional matters.<sup>35</sup>

The fourth judgement ever handed down by the Constitutional Court, *S v Vermaas*,<sup>36</sup> took the form of a consolidated referral of two criminal

32 There are no statistics on unrepresented prospective or actual litigants. While further research is necessary to determine how many people are adversely affected by the absence of an effective legal aid system (the South African Legal Aid Board has only recently emerged from financial collapse and, by and large, it only provides cover for criminal cases), anecdotal evidence from informal settlement and township communities suggests that many litigants, in both civil and criminal cases, are unrepresented. By the same token, in civil and/or constitutional matters, many more prospective litigants fail to even access the legal system simply because they are unable to afford legal fees.

33 This section and section III(b) below draw on an earlier analysis of access to the Constitutional Court which is due to be published as J Dugard & T Roux 'The Record of the South African Constitutional Court in Providing an Institutional Voice for the Poor: 1995–2004' in R Gargarella, P Domingo & T Roux (eds) *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?* (forthcoming 2006) 107, 109–113.

34 See s 28(1)(h) of the Constitution.

35 See Dugard & Roux (note above) endnote 9, which points to the deduction in *Nkuzi Development Association v Government of the Republic of South Africa* 2002 (2) SA 733 (LCC) that there is 'a right to legal representation at state expense in certain civil matters from the right of access to courts in s 34 of the 1996 Constitution'. This article does not examine the extent to which the qualified right to legal representation is actually implemented. However, again, it is clear from anecdotal evidence that, for the most part, poor people are not afforded legal representation at state expense in civil and/or constitutional matters.

36 1995 (3) SA 292 (CC).

cases from the Transvaal Provincial Division of the High Court in which the accused both ran out of money in the course of the proceedings and sought to rely on the right to legal representation at state expense in s 25(3)(e) of the interim Constitution.<sup>37</sup> The two trial judges independently decided that the accused were not entitled to rely on s 25(3)(e) because the trials had commenced prior to the interim Constitution taking effect. Nevertheless, both judges suspended the trials and referred the possible application of the right to legal representation at state expense to the Constitutional Court in case it might take a different view.

In the event, the Constitutional Court did not take a different view, holding that the interpretation of s 25(3)(e)'s qualification — 'where substantial injustice would otherwise result' — was within the concurrent jurisdiction of the Appellate Division and, as such, incorrectly referred to the Constitutional Court.<sup>38</sup> The Court furthermore declined to 'venture' to answer the substantive question put to it, remitting the two cases back to their respective trial courts.<sup>39</sup> Through its failure to address the critical point of law the *Vermaas* case illustrates the perils facing a constitutional court with a relatively low caseload and a reluctance to push the envelope regarding its jurisdiction; having arisen in the fourth case presented to it, the issue of the nature and scope of the right to legal representation has not again arisen for decision before the Court.<sup>40</sup> A probable reason for this is the Catch-22 reality that, by and large, only applicants with legal representation are in a position to access the Court. As a consequence of the failure of the Court to make the kind of comprehensive statement on the subject that one might have hoped for from a pro-poor court, several passing remarks<sup>41</sup> in *Vermaas* constitute the Court's only contribution to the case law on the issue of legal representation at state expense. And yet, given that the two High Court cases were in formal terms incompetently referred to it, 'the doctrinal and policy considerations that the

37 Like the qualification in ss 35(2)(c) and 35(3)(g) of the 1996 Constitution, the right to legal representation in the interim Constitution, too, was qualified by the phrase, 'where substantial injustice would otherwise result' (s 25(3)(e) of the interim Constitution).

38 *Vermaas* (note above) para 12.

39 The intermediate question whether the rights in the 1993 Constitution applied to pending cases was settled in *S v Mhlungu* 1995 (3) SA 867 (CC), a decision handed down in between the referral of the two High Court cases to the Constitutional Court and its decision in *Vermaas* (ibid).

40 Dugard & Roux (note above) 110.

41 In remitting the two cases back to their trial courts, the Constitutional Court in the *Vermaas* judgment (note above) did venture to establish some guidelines for trial courts considering whether to order the state to pay for an accused person's defence. These include the need to assess 'the accused person's aptitude or ineptitude to fend for himself or herself', as well as to reference being made to the 'ramifications [of the decision to grant legal representation] and their complexity or simplicity . . . how grave the consequences of a conviction may look, and any other factor that needs to be evaluated in the determination of the likelihood or unlikelihood that, if the trial were to proceed without a lawyer for the defence, the result would be 'substantial injustice' (para 15). The Court further expressed its concern about the steps that the state had thus far taken to put in place 'mechanisms that are adequate for the enforcement of the right [to legal representation]' (para 16).

Constitutional Court took into account in *Vermaas* were sound'.<sup>42</sup> But could the Court have decided the *Vermaas* case any differently?

As argued by Dugard & Roux, the answer to this question depends on one's attitude to what one might call the Court's style of adjudication:

All courts develop over time certain internal rules about how much they are prepared to say when deciding legal questions put to them. Although it was not necessarily the case at the beginning of its life, the South African Constitutional Court has settled into an adjudicative style that Iain Currie (following Cass Sunstein) has described as one of 'judicious avoidance'. . . . The characteristic feature of this style is a reluctance on the part of the Court to pronounce on any issue that does not have to be decided for purposes of settling the case.<sup>43</sup>

Although formally sound, as the *Vermaas* case demonstrates, this approach of judicious avoidance inevitably limits the contribution that the Court is able to make to important areas of law. This is particularly the case regarding issues affecting the poor, which, due to the high costs litigation typically entails, may seldom arise. In such circumstances, the Court runs the risk that it may forgo its only opportunity in many years to establish a pro-poor legal principle to guide all courts in their interpretation of the Constitution.

In the *Vermaas* case, with the wisdom of hindsight and with a more activist adjudicative style, the Court might have done more to give the right to legal representation an expressly pro-poor inflection. Any concrete clarification by the Constitutional Court of the parameters of the right to legal representation at state expense would have gone a long way to develop the judiciary's understanding of the conditions and consequences of poor peoples' failure to secure legal representation. Moreover, notwithstanding the Court's reluctance thus far to define the core content of socio-economic rights, such clarification could have had the effect of requiring the state to develop policies and programmes towards the progressive realisation of the right.

### (b) Direct Access

Despite considerable interest in its decisions over the past decade, there has been almost no analysis of the Court's direct access jurisprudence.<sup>44</sup> Yet, in the absence of a definitive right to legal representation at state expense, direct access is often the only way for poor people to access the justice system. The issue of direct access therefore lies at the core of

42 Dugard & Roux (note above) 110.

43 Dugard & Roux (note 35 above) 110. Citing I Currie 'Judicious Avoidance' (1999) 15 SAJHR 138.

44 As far as I am aware, the only source of collated statistics on the jurisdictional bases (including direct access) of Constitutional Court judgments appears annually in the SAJHR. The most recent is 'Constitutional Court Statistic for the 2004 Term' (2005) 21 SAJHR 636. However, although it provides statistics on the number of direct access applications each year, this source does not outline which of the applications were successful and which were not. Nor does it provide a qualitative analysis of the nature of the complaint.

questions about whether the Court is functioning as an institutional voice for the poor.

After deciding in *Vermaas* that the two cases at issue had been incompetently referred to it, the Constitutional Court consoled the losing parties with the suggestion that an application for direct access could have been brought in this situation.<sup>45</sup> At that early stage of the Court's jurisprudence, these consolatory words found some support in the Court's decision in *S v Zuma*,<sup>46</sup> in which direct access had been granted in order to rectify a 'serious prejudice to the general administration of justice'<sup>47</sup> arising from a provision of the old-order Criminal Procedure Act.<sup>48</sup> The Court's subsequent jurisprudence on direct access, however, has not been as encouraging.

Section 167(6) of the 1996 Constitution, which replaced s 100(2) of the 1993 Constitution, provides that '[n]ational legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court—(a) to bring a matter directly to the Constitutional Court . . .'.<sup>49</sup> Because of the complexity, cost and time involved in taking a case through the ordinary courts, this provision potentially constitutes an important mechanism through which poor litigants may access the Constitutional Court. In some countries, constitutional courts have attempted to redress exclusion from the ordinary courts through creative interpretation of rules such as this. In India, for example, the large-scale human rights violations experienced under the internal state of emergency from 1975 — 77 were partly responsible in the post-emergency years for producing activist judges determined to restore public faith in the judiciary through 'achieving distributive justice'.<sup>50</sup> As perceived by the judiciary itself, one of the biggest constitutional problems in the eyes of the majority of Indians was the denial of access to justice, largely owing to the high costs of litigation and strict rules of standing, particularly in Supreme Court cases. In order to rectify this problem, a group of activist judges deliberately facilitated

45 *Vermaas* (note 38 above) paras 13–14.

46 1995 (2) SA 642 (CC).

47 *Ibid* para 11.

48 Section 217(1)(b)(ii) of the Criminal Procedure Act 51 of 1977 provided that where a confession was made to a magistrate or confirmed or reduced in writing before a magistrate, it should be admissible in evidence against the accused and should be presumed, unless the contrary was proved, to have been freely made. The presumption was held to be an unconstitutional violation of the right to presumption of innocence (*ibid* para 46).

49 After 1 December 2003 applications for direct access have been governed by rule 18 of the Constitutional Court's Rules (<<http://www.constitutionalcourt.org.za/site/thecourt/rulesofthecourt.htm>>), which were promulgated in terms of GN R1603 of 31 October 2003. Under previous Rules of the Constitutional Court (GN R5 of 6 January 1995 and GN R757 of 29 May 1998), rule 17 governed applications for direct access to the Constitutional Court. For a comparison of the current and 1995 rules, see note below.

50 PN Bhagwati 'Judicial Activism and Public Interest Litigation' (1985) 23 *Columbia J of Transnational Law* 561, 566.

public interest litigation by relaxing the rules of standing and procedure. The end result was that any individual or group could in theory bring a Supreme Court action for themselves or on behalf of others, even by posting a complaint on a postcard.<sup>51</sup>

Despite the existence of rules of standing theoretically favourable to public interest litigation,<sup>52</sup> the South African experience has been to some extent the opposite of that in India. Although the Constitutional Court's direct access rules are premised on an inclusive public interest ideal, in practice (as I explain below) the Court has interpreted these rules very restrictively. Based on the number of cases involving poor people decided by it, and taking into account the vast difference in population-size between the two countries, the South African Constitutional Court is arguably a less accessible institution than the Indian Supreme Court, which is able to treat each letter or petition addressed to it as a writ initiating legal proceedings, allowing direct access by literally hundreds of poor litigants each year. Indeed, in India, the Supreme Court frequently 'actively invites (or induces)' cases to be brought to it as the court of first and last instance.<sup>53</sup>

Under its first set of direct-access rules,<sup>54</sup> which were applicable from 1995 until 2003, the South African Constitutional Court refused the vast majority of applications for direct access by finding non-compliance with one or more of the criteria set out in the then applicable rule 17(1) — 'exceptional circumstances', 'urgency' and 'public importance'.<sup>55</sup> Building on this jurisprudence in cases decided under rule 17's successor — rule 18 of 2003 — the Court has developed the principle that 'this Court should ordinarily not deal with matters as both a Court of first and as

51 See T Ngcukaitobi 'The Evolution of Standing Rules in South Africa and their Significance in Promoting Social Justice' (2002) 18 SAJHR 590, 600 — 601.

52 Section 38 of the 1996 Constitution provides that '(a) anyone acting in their own interest; (b) anyone acting on behalf of another person who cannot act in their own name; (c) anyone acting as a member of, or in the interest of, a group or class of persons; (d) anyone acting in the public interest; and (e) an association acting in the interest of its members' may 'approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened . . .'

53 M Dasgupta 'Social Action for Women? Public Interest Litigation in India's Supreme Court' (2002) 1 *Law, Social Justice & Global Development J* 1, 3.

54 Note above. Rule 17(1) of the 1995 Rules provided: 'The Court shall allow direct access in terms of s 100(2) of the Interim Constitution *in exceptional circumstances only*, which will ordinarily exist only where the *matter is of such urgency*, or otherwise of *such public importance*, that the delay necessitated by the use of the ordinary procedures would prejudice the public interest or prejudice the ends of justice and good government' (emphasis added). These 1995 rules pertained (with changes in 1998 to take account of the 1996 Constitution) until the adoption of new rules in 31 October 2003. See note above. Rule 18 of the new rules brought the Constitutional Court Rules into line with s 167(6) of the 1996 Constitution, in terms of which direct access was broadly contemplated when 'it is in the interests of justice'. Between the coming into force of the 1996 Constitution and the adoption of the new rules in 2003, the situation was not clarified as to whether, under the old rules but the 1996 Constitution, there were any circumstances beyond those contemplated by Rule 17 which would justify the granting of direct access under s 167(6) 'in the interests of justice'.

55 See for example *S v Makwanyane* 1995 (3) SA 391 (CC) paras 4, 6; *S v Dlamini* (heard with *S v Dladla*; *S v Joubert*; *S v Schietekat*) 1999 (4) SA 623 (CC) para 35; *Moseneke v The Master* 2001 (2) SA 18 (CC) para 19.

one of last resort'.<sup>56</sup> The Court has added two additional restrictive principles governing applications for direct access: first, that applicants for direct access should show that they have 'exhausted all other remedies or procedures';<sup>57</sup> and, second, that the applicant must have 'reasonable prospects of success' based on the 'substantive merits' of his or her case.<sup>58</sup>

Although clarifying the evolving principles in terms of which the Court refuses applications for direct access, a comparison of the total number of direct access applications against the total number of judgements in which direct access was granted would not necessarily reveal anything about the accessibility of the Court to the poor, for several reasons. First, any constitutional court must legitimately be able to exclude cases in which the merits are very weak. Secondly, as an overview of applications for direct access to the Court reveals, a substantial number of applications for direct access are repeat chancers, that is, applicants who attempt to have spurious applications heard under multiple guises.<sup>59</sup> Thirdly, it would be wrong simply to assume that the majority of applications for direct access (whether successful or not) are brought by poor applicants.

Notwithstanding such caution, I believe it does say something about the Court's formalistic style of adjudication that, since its inception, direct access has been granted 'in only a handful of cases'.<sup>60</sup> Indeed, apart from *Zuma* referred to above,<sup>61</sup> my research uncovered only eight direct access applications<sup>62</sup> in which direct access has been granted between February 1995 and December 2005.<sup>63</sup> Moreover, in most of these

56 *Brink v Kitshoff NO* 1996 (4) SA 197 (CC) para 14; *Transvaal Agricultural Union v Minister of Land Affairs* 1997 (2) SA 621 (CC) para 18; *Bruce v Fleecytex Johannesburg CC* 1998 (2) SA 1143 (CC) para 8; *Member of the Executive Council for Development Planning and Local Government, Gauteng v Democratic Party* 1998 (4) SA 1157 (CC) para 32; *Christian Education South Africa v The Minister of Education* 1999 (2) SA 83 (CC) para 12; *Van der Spuy v General Council of the Bar of South Africa* 2002 (5) SA 392 (CC) para 19; *National Gambling Board v Premier, KwaZulu-Natal* 2002 (2) SA 715 (CC) paras 29, 38; *Satchwell v President of the Republic of South Africa* 2003 (4) SA 266 (CC) para 6.

57 *Besserglik v Minister of Trade, Industry and Tourism* 1996 (4) SA 331 (CC) para 6.

58 *Dormehl v Minister of Justice* 2000 (2) SA 825 (CC) para 5; *MEC for Development Planning and Local Government in Gauteng v Democratic Party* 1998 (4) SA 1157 (CC) para 32.

59 The Constitutional Court register reflects three repeat applicants who have each attempted to bring an application in a number of guises on at least three different occasions.

60 Currie & de Waal (note above) 132.

61 Note above.

62 I exclude the kind of 'direct access' applications that are actually leave to appeal applications in disguise. These are relatively common.

63 First, *Brink v Kitshoff* (note above) in which direct access was granted in order to cure an incompetent referral. Second, *S v Dlamini* (note above) comprising four joined cases concerning the constitutional validity of various bail-related provisions in which, in circumstances similar to *Zuma*, the Court accepted the joinder of *S v Dladla* (CCT 22/98) as a case for direct access to remedy an incorrect referral. Third, *Moseneke v The Master* (note above) in which direct access was granted as an alternative application in order to avoid answering the question posed in the application for confirmation of invalidity of whether it is possible to infer an order of invalidity in circumstances where an express order has not been made. Fourth, *Satchwell v President of the Republic of South Africa* 2003 (4) SA 266 (CC) in which the issues were essentially the same as those raised in an earlier, successful,

instances, the granting of direct access appears to have been based more on the need to remedy some procedural defect in the circumstances around which the case came before the Court or to attach what serves as an essentially amicus-type intervention by a relevant interest group to an existing matter, than on a substantive consideration of whether, had the case been a genuine ‘off the street’ case, direct access would have been granted. As a consequence, the Court’s direct access jurisprudence throws more light on the kinds of situations in which direct access will *not* be granted than on what conditions will be construed to be sufficiently ‘in the interests of justice’ for direct access to be granted.

Mindful of such limitations, it proved to be more useful to examine the actual manner in which poor people are treated when they apply directly for assistance from the Court.<sup>64</sup> This research, which consisted of interviews with the officials concerned, as well as monitoring peoples’ attempts to access the Court off the street via the Registry, revealed that applications presented to the Court’s Registry Office by unrepresented applicants (most unrepresented applicants are poor, and are unrepresented precisely because they are too poor to afford legal fees) are typically turned away with the advice to seek legal support elsewhere.<sup>65</sup> More research is needed to ascertain what happens to constitutional

Constitutional Court case (*Satchwell v President of Republic of South Africa* 2002 (6) SA 1 (CC)) involving the same litigants but the relevant legislation had been repealed before the applicant could gain relief from the previous order. Fifth, *Minister of Home Affairs v National Institute for Crime Prevention and the Re-integration of Offenders (NICRO)* 2005 (3) SA 280 (CC) in which direct access was granted in order to deal with an urgent elections-related matter that had been pending in the High Court for over a month. Sixth, *Bhe and Others v Magistrate, Khayelitsha and Others* (heard together with *Shibi v Sithole and Others; South African Human Rights Commission and Another v President Republic of South Africa and Another*) 2005 (1) SA 580 (CC), which comprised three joined cases, the first two seeking confirmation of orders of constitutional invalidity made by two different High Courts and the third, a direct access application by the South African Human Rights Commission and the Women’s Legal Centre, dealing with the same issues but in the form of a class action application relating to all women and children in a similar situation to that of the applicants in the main two cases. Seventh, *Mkontwana v Nelson Mandela Metropolitan Municipality and Another* (heard together with *Biset and Others v Minister of Provincial Affairs and Constitutional Development; Transfer Rights Action Campaign and Others v MEC for Local Government and Housing in the Province of Gauteng and Others*) 2005 (1) SA 530 (CC), which also involved granting direct access to a third, joined, case that dealt with essentially the same issues that were raised in the first two cases, which were applications seeking confirmation of orders of constitutional invalidity. And eighth, *Minister of Home Affairs v Fourie and Another; Lesbian and Gay Equality Project and Eighteen Others v Minister of Home Affairs and Others* 2006 (1) SA 524 (CC), in which, in similar circumstances to *Bhe* (above), the Court granted direct access to a non-governmental organisation — in this case the Lesbian and Gay Equality Project — to be joined in a matter that was already before the Court and on which the organisation could offer substantive, almost amicus-like, additional information. Of these cases, *NICRO* comes the closest to a true direct access case, but none represents an ‘off the street’ complaint by a poor person.

64 Here direct access refers to direct access in the truest sense, that is, applications made to the Court directly ‘from the street’ as the court of first instance, as envisaged in s 167(6)(a) of the Constitution.

65 Applicants are usually advised to take their complaint to the South African Human Rights Commission or to the Legal Aid Board.

66 During 2005 the list of empowered litigants would include: Mrs Robinson (*Volks NO v*

complaints turned away in this manner, and it is of concern that the Constitutional Court does not monitor the outcomes of cases turned away due to lack of legal representation, but it seems from the limited number of cases brought to the Constitutional Court by institutions such as the South African Human Rights Commission (SAHRC) that the alternative avenues of redress recommended by the Court do not prove very useful.

Overall, my research on direct access reveals that the Court has been extremely reluctant to act as a court of first and last instance. When coupled with the lack of legal representation at state expense for most constitutional matters, this means that very few cases brought by poor litigants make it past the Registry Office window, regardless of whether they raise substantive constitutional matters or not.

An unanticipated consequence of the Court's conservative take on direct access is that the Court increasingly risks becoming an elite institution in stark contrast to its progressive premise and innovative architecture. This relates not only to the failure of poor people to access the Court, with its concomitant effect on attitudes towards law as a means of resolving conflict, but also to the shifting profile of litigants in favour of socio-economically empowered individuals and groups.<sup>66</sup>

It is obviously very difficult to ascertain from the Court record the percentage of socio-economically empowered versus poor applicants (not least because it would be nearly impossible to identify a credible poverty indicator that did not involve qualitative face-to-face research). Nevertheless, from discussions with clerks at the Constitutional Court, it appears that, of the total number of 24 cases in which judgements have been handed down in the course of 2005, the applicant was poor (in the sense used in this article) in only three cases: *Sibiya*,<sup>67</sup> *Zondi*<sup>68</sup> and

*Robinson* 2005 (5) BCLR 446 (CC)), *The Affordable Medicines Trust (Affordable Medicines Trust v Minister of Health of the Republic of South Africa* 2005 (6) BCLR 529 (CC)), the President of the Republic of South Africa (*President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC)), *Laugh It Off Promotions CC (Laugh It Off Promotions CC v SAB International (Finance) BV t/a Sabmark International* 2006 (1) SA 144 (CC)), *Mr Du Toit (Du Toit v Minister of Transport* 2006 (1) SA 297 (CC)), the State (*S v Basson* 2005 (1) SA 171 (CC)), the Minister of Health (*Minister of Health v New Clicks SA (Pty) Ltd* 2006 (2) SA 311 (CC)), the Minister of Home Affairs (*Minister of Home Affairs v Fourie* (note above)) and *Helicopter & Marine Services (Pty) Ltd (Helicopter & Marine Services (Pty) Ltd v V&A Waterfront Properties (Pty) Ltd* 2006 (3) BCLR 351 (CC)). I am not suggesting that such cases are not important for constitutional development, nor that empowered groups should not be granted access. Rather, I am arguing that, in addition, poor, unrepresented, applicants should be afforded access through the direct access mechanism since they are unable to bring cases by the usual process. I also suggest that, in deciding the inevitably larger number of cases that would result from widening direct access, the Court should always be driven by a general public importance motivation. But it can be argued, at least from a public interest perspective, that allocating more time to a greater number of cases affecting the poor is more effective than allocating less time to fewer cases.

67 *Sibiya v Director of Public Prosecutions, Johannesburg* 2005 (5) SA 315 (CC).

68 *Zondi v MEC for Traditional and Local Government Affairs* 2006 (3) SA 1 (CC).

*Veldman*.<sup>69</sup> The applicants in these cases did not have to run the direct access gauntlet because Sibiya and Veldman were defended on a pro bono basis, and *Zondi* was an unopposed application to vary and extend the period of suspension of the declaration of invalidity of the Court's previous Order handed down on 15 October 2004, in which case, the applicant, Mrs Zondi was represented by the Legal Resources Centre.<sup>70</sup>

This brings us to judgements in two recent cases (both handed down on 26 September 2005) — *Mnguni*<sup>71</sup> and *De Kock*<sup>72</sup> — in which, in a break from existing practice, the Court sought to remedy its dismissal of two unrepresented direct access applications by asking the registrar of the Court to draw the judgements to the attention of the Law Society of the relevant province. In these cases, one concerning an application for medical parole by a prisoner living with AIDS and one concerning systemic environmental degradation by ISCOR/Mittal Steel South Africa, the Court seems to have assumed a degree of responsibility over the trajectory of undefended cases that are in the public interest. By placing the ball in the Law Society's court, the Constitutional Court clearly hopes that its members might provide assistance to the applicants (presumably pro bono, since neither applicant is in a position to pay for legal representation) so that they can proceed through the normal judicial hierarchy.

However, despite going some distance towards facilitating access in the public interest, the referrals in *Mnguni* and *De Kock* do not go far enough, not least because there are no enforcement and monitoring mechanisms in the orders.<sup>73</sup> Indeed, it cannot be in the interests of justice to entrust constitutional complaints to the benevolence of the legal profession. Bearing in mind the constitutional imperative to bridge socio-economic inequality, surely more should be required of the Court in terms of fostering access by the poor? In this respect, it could be argued that allowing the direct access mechanism to be used as a bridge across socio-economic inequality is, extrinsically, in the public interest in a constitutional democracy such as our own. This is even more convincingly so when the matter at stake is intrinsically in the public interest ie where we can all benefit from the adjudication. In the last section of this article, I propose an alternative, pro-poor, jurisdiction for the Court and I use the facts of *Mnguni* and *De Kock* to show how direct access truly in the public interest might work in practice.

69 *Veldman v Director of Public Prosecutions (Witwatersrand Local Division)* CCT 19/05 (CC 5 December 2005, unreported).

70 *Zondi v MEC for Traditional and Local Government Affairs and Others* 2005 (3) SA 589 (CC).

71 *Mnguni v Minister of Correctional Services* 2005 (12) BCLR 1187 (CC).

72 *De Kock v Minister of Water Affairs and Forestry* 2005 (12) BCLR 1183 (CC).

73 An order, in each case, was made for the registrar to draw the judgement 'to the attention of the Law Society for the Northern Provinces' (*Mnguni* (note above) para 8(2); *De Kock* (note above) para 7(2)).

#### IV A PRO-POOR JURISDICTION FOR THE COURT: DIRECT ACCESS AS A DEFINING, TRANSFORMATIVE, FUNCTION

I have argued that, under the circumstance of no de facto right to legal representation at state expense (a circumstance that is likely to persist for some time), the Constitutional Court should, and indeed must, take an active role in facilitating access by the poor. The easiest way this can be achieved is through the direct access mechanism.

Before examining how the Court might develop a pro-poor jurisdiction, let us first consider the arguments against direct access. In reviewing the literature, two of the main arguments advanced against allowing widespread access to a court are the 'floodgates' issue and the reduced quality concern. Regarding the first argument, namely that if you open the gates a flood of applications will ensue, I suggest that the Court is currently not under threat of drowning in applications and that it probably could make the time to hand down decisions in more than the approximately 25 cases it currently does a year. In any event, allowing direct access does not mean that every application will have a full hearing. Rather, it means enabling meritorious claims to come to the Court's attention.<sup>74</sup> The Court should still be in a position to control its roll using existing criteria such as merit<sup>75</sup> and 'exhaustion of other remedies or procedures'.<sup>76</sup> However, it seems to me that other criteria such as 'urgency' and 'exceptional circumstances' are too limiting and should be replaced by a consideration of whether the issue is in the 'public interest'.<sup>77</sup>

Apart from the 'floodgates' fear, the other main argument against direct access is the concern that 'more open access will lead to more claims of lower average quality'.<sup>78</sup> The evidence does point to the validity of this argument in relative, economic theory, terms.<sup>79</sup> But this does not address the policy-related concern of maximising access in the hope of catching all possible meritorious claims. It would, presumably, result in a greater aggregate number of meritorious claims, but not as a proportion of all applications. I suggest that in South Africa it would better serve the interests of justice to lower the barriers to entry in the form of wide

74 The Court should consider employing trained lawyers or paralegals in the Registry to determine what constitute meritorious constitutional issues in the public interest. Such staff could also channel and monitor the progress of non-constitutional complaints appropriately.

75 However, regarding the merit requirement, it seems that the existing criterion of 'reasonable prospects of success' sets the bar too high to be in the public interest, and that a better test would be to determine that the complaint is neither vexatious nor frivolous.

76 I suggest that in determining whether an applicant has exhausted other remedies or procedures the Court should be guided by attempts to access such alternatives and not by failure to do so due to lack of resources.

77 The Court could develop existing jurisprudence regarding what constitutes public interest, perhaps focusing on issues of general application and fundamental importance and, particularly those affecting the fundamental rights of poor people.

78 Ginsburg (note above) 56.

79 See Ginsburg's economic theory of 'optimal access' (ibid).

access, than to limit access from the outset out of fear of attracting too many spurious claims. Naturally, the judges of the Constitutional Court need not entertain all applications themselves. A system of screening could be introduced (such as exists in Germany) whereby qualified legal assistants could sift spurious claims from meritorious ones, forwarding only genuine constitutional complaints to the judges.

Yet another argument against direct access concerns evidence. In terms of this argument, 'if constitutional matters could be brought directly to it as a matter of course, the Constitutional Court could be called upon to deal with disputed facts on which evidence might be necessary'.<sup>80</sup> This does not seem to me to be an insurmountable problem. Clearly, the Court is 'disinclined to hear oral evidence for the purpose of resolving disputes of fact'.<sup>81</sup> But the number of cases that might necessitate oral evidence on the facts is probably minimal. Many Constitutional Court applications already are more in the form of abstract than concrete reviews, both in terms of the way the issue is framed and the relief granted, and the Court could further minimise its exposure to oral evidence and factual disputes by explicitly limiting argument to matters of law and constitutional interpretation.<sup>82</sup>

Finally, there is the pervasive argument that it is 'not ordinarily in the interests of justice for a court to sit as a court of first and last instance, in which matters are decided without there being any possibility of appealing against the decision given'.<sup>83</sup> In some respects this is the hardest argument to counter, mainly because it is also the hardest argument to substantiate. It boils down to a matter of policy choices and balancing lesser harms. In the end, it might actually be the easiest argument to abandon if the Court pursued an alternative approach to its role and function. After all, the Court has been able to act as court of first and final instance regarding disputes between national or provincial spheres of government, determinations of whether the President or Parliament has failed to fulfil a constitutional obligation, and certification of provincial constitutions.<sup>84</sup>

### **(a) An alternative approach: Mnguni and De Kock revisited**

So how might a pro-poor direct access policy work in practice? In attempting to answer this question, I shall examine how the Court might adopt an alternative, pro-poor direct access approach using the concrete

<sup>80</sup> Currie & De Waal (note above) 133.

<sup>81</sup> Ibid 135.

<sup>82</sup> As it is, rule 18, which covers direct access applications, requires anyone applying for direct access to set out whether the matter 'can be dealt with by the Court without the hearing of oral evidence and, if it cannot, how such evidence should be adduced and conflicts of fact resolved (rule 18(2)(c)-(d)).

<sup>83</sup> See, for example, *Bruce v Fleecytex* (note above) para 8.

<sup>84</sup> These are areas of the Constitutional Court's exclusive jurisdiction as per s 167(4) of the Constitution.

examples of *Mnguni* and *De Kock*. I will use the ‘control’ criteria discussed above but, instead of adopting the Court’s adjudication style of judicious avoidance in all but ‘exceptional circumstances’, I will attempt to adjudicate the cases ‘in the public interest’ with a pro-poor leaning.<sup>85</sup> By way of background, in each case, the applicant did not have legal representation. In each case, although perhaps less drastically so in *De Kock*, the applicant was not represented due to a lack of financial resources either to retain a lawyer or to attempt to proceed through the normal judicial hierarchy.

As to the facts in *Mnguni*, the applicant was a prisoner serving 15 years at the Leeuwkop Medium ‘A’ Prison in Johannesburg. He sought an order requiring the Minister of Correctional Services and other respondents to reconsider his request for medical parole in terms of s 79 of the Correctional Services Act, 111 of 1998 (the Act). Mr Mnguni was diagnosed as living with HIV/AIDS while in prison during 1998, and in 2004 he was informed by his doctor that he had a CD4 blood count of below 200.<sup>86</sup> Under these circumstances he applied for medical parole, which, according to his application, was unsuccessful. He then applied to the Johannesburg High Court for relief and, on 8 June 2005, an order was made by that court in terms of which the prison’s Case Management Committee was to ‘have regard in favour of the Applicant’s case for placement on parole’, taking into consideration issues including ‘the applicant’s physical and mental state’.<sup>87</sup> Mr Mnguni was called before the Case Management Committee on 4 July 2005 and he was informed that ‘prisoners are no longer released on medical parole’. Suffering from AIDS without access to medication, Mr Mnguni approached the Constitutional Court, seeking an order requiring that this decision be reconsidered. Failing to find exceptional circumstances, the Court dismissed the application on the terms outlined at the end of part III.

In my alternative approach, using the Court’s findings that the ‘issues raised by the applicant are important and it may be that they require adjudication’,<sup>88</sup> I would tick the public interest and the merit boxes. Given that the applicant had tried to use the normal prison procedures, I would also tick the ‘exhaustion of other remedies and procedures box’. In short, with a pro-poor, public interest, focus, I cannot see how such an application, which goes to the heart of prison rights, the right to life, the right of access to healthcare, the rights to dignity, equality and

85 I shall accept for the purposes of the exercise that the applicants are poor. If it were to go down this path, the Court might try to identify indicators of poverty and disadvantage. Alternatively, given the notorious failure of means-testing in South Africa, it might decide to regard all unrepresented applicants as poor for the purposes of granting direct access and it might adopt other means, some of which I propose below, of discouraging empowered groups from clogging up the direct access mechanism to the detriment of the poor.

86 Note above, para 3. This indicates a severely compromised immune system.

87 Ibid para 4.

88 Ibid para 7.

administrative justice, would not be granted direct access. Indeed, in this case, even the ‘urgency’ criterion, which in my opinion should not have to be fulfilled, is met.<sup>89</sup>

Turning to *De Kock*,<sup>90</sup> briefly outlined the facts were that Mr De Kock applied to the Court for direct access to obtain uncertain relief from the respondents, including the Minister of Water Affairs and Forestry, for failing to contain pollution and to prosecute ISCOR<sup>91</sup> for causing the alleged widespread pollution and environmental degradation.<sup>92</sup> Although alleging the infringement of his environmental and property rights as a result of ISCOR’s factory-related activities in Vanderbijlpark, Mr De Kock’s application failed to comply with the formal requirements of rule 18(2). Sticking to the letter of the law, the Court dismissed the application on the basis that ‘most of these requirements have not been complied with in this case and for that reason, direct access is refused.’<sup>93</sup>

As with *Mnguni*, my alternative approach is based on the Court’s findings. These include the opinion that ‘Mr De Kock raises important yet difficult issues of environmental rights which may well require adjudication and to which the relevant authorities or bodies may need to provide appropriate responses’ and ‘the case raises issues which are of public interest’. I would therefore pass *De Kock* on public interest and merit. Moreover, as recognised by the Court, Mr De Kock had made ‘exhaustive efforts’ ‘to seek legal assistance’.<sup>94</sup> Consequently, in my approach, *De Kock* also passes the direct access threshold. As accepted by the Court, ‘the public interest, the illusive nature and importance of environmental law, the difficulties attendant upon bringing appropriate environmental law cases before a court’ all suggest that this is a case that should have been afforded direct access.<sup>95</sup> It will require more research to ascertain whether my proposed test is too broad to afford the Court any

89 My attempts to inquire about Mr Mnguni’s fate have not yet been successful. The month after the judgment, in October 2005, the Court received a letter from the Law Society of the Northern Province stating that it would ‘give effect’ to the Court’s directive. However, as of February 2006, the Court did not know whether Mr Mnguni has found a lawyer to represent him pro bono or, indeed, if Mr Mnguni is still alive.

90 Note above.

91 ISCOR is South Africa’s former parastatal iron and steel corporation. It is now known as Mittal Steel South Africa.

92 The environmental damage, which has been caused by ISCOR’s failure over decades to comply with environmental protection regulations, is evidently serious and includes widespread cancer among residents, loss of livestock, and loss of agricultural capacity on the affected ground.

93 *De Kock* (note above) para 4.

94 According to his application, Mr De Kock had tried, and failed, to obtain legal assistance from the Department of Labour, the President, the Emfuleni Local Council, the Director of Public Prosecutions, the Public Protector and the Human Rights Commission. He had also been refused legal aid.

95 In the event, Mr De Kock has been able to secure pro bono legal representation through the Law Society of the Northern Provinces and he must now launch his case, de novo, in an appropriate High Court. De Kock’s success in securing pro bono legal representation probably relates to the fact that, in relative terms, he is more empowered than most other unrepresented applicants.

control at all, but I suspect that it sets the bar at an appropriate level, allowing through matters in the public interest, but sifting out spurious and frivolous claims before they are entertained by the Court.

If we accept the alternative modus proposed in this article, there is one more issue to cover: what to do about legal representation? As I have already argued, in my view it is not enough to refer the case to the relevant provincial Law Society in the hope that a public-minded private lawyer will take on the case pro bono (and in any event, as pursued by the Constitutional Court in *Mnguni* and *De Kock*, attempting to secure pro bono representation was not about addressing the direct access question but rather about getting the matter heard in *another* court). Instead of pursuing this course, I suggest two alternative options. Option one, which perhaps is too radical for the legal profession to stomach, involves removing legal representation from the equation. That is to say, have all parties represent themselves as occurs in the Small Claims Court, with the Court adjudicating on the constitutional principles in each case. The main difficulty in this scenario, notwithstanding undermining the legal profession, is that it might be hard for the judges to adjudicate complicated issues on the basis of arguments from litigants who are not versed in law. Which brings me to the second option: in this scenario, the Court would raise funds to employ a pool of lawyers, who would defend direct access applicants. As a means of levelling the judicial playing fields, as well as a disincentive to rich litigants wishing to use the direct access mechanism as 'a quick judicial fix', all parties should be compelled to use the legal representative appointed by the Court from the pool of lawyers. In both scenarios I see an enhanced role for non-governmental organisations and the SAHRC in providing background research and socio-legal support to poor litigants.

Affording direct access to poor litigants in this manner would be a means of affording socio-economically disadvantaged people access to justice in a manner commensurate with the Constitution's guarantees to equality and access to justice. Such an approach would not only provide the Constitutional Court with a unique, pro-poor jurisdiction, but it would also foster the development of constitutionalism in the public interest. Given that we operate under one system of law, and that is constitutional law, if the Constitutional Court is to continue to operate as a separate court, what should distinguish it from the rest of the judiciary (apart from matters under its exclusive jurisdiction) is that it act as an institutional voice for the poor. In this approach, the Court would explicitly pick cases that would not otherwise be captured by the existing system, on the basis of disadvantage. If, in practical terms, this means acting as the court of first and last instance, the Court should develop mechanisms to deal with the problem, rather than passing the buck.

In the final analysis, in attempting to answer questions about whether the Court should allow direct access we should ultimately ask ourselves:

which is the lesser evil — having a Constitutional Court that acts as court of first and last instance, or denying poor people a constitutionally-enshrined right of access to justice?

## V CONCLUSION

I have argued that, through its practice of restricting rather than advancing direct access, South Africa's Constitutional Court has failed to develop a role for itself as an institutional voice for the poor. Premised on a transformative Constitution,<sup>96</sup> the Constitutional Court has explicitly defended its role as a transformative institution.<sup>97</sup> Yet, it is evident from the relatively low number of cases brought by poor people that the Court has not functioned optimally to advance equality of access. This has been particularly evident in the Court's formalistic interpretation and use of the direct access mechanism, as a means to remedy procedural defects rather than to advance substantive access to justice for poor people.

Affording direct access to poor litigants in the manner suggested in this article would be a means of advancing equality of access in South Africa. Such an approach would not only provide the Court with a unique, pro-poor jurisdiction, but it would also foster the development of constitutionalism in the public interest. In this approach, the Court would explicitly pick meritorious cases that would not otherwise be captured by the judicial hierarchy, on the basis of disadvantage. If, in practical terms, this means acting as the court of first and last instance, the Court should develop methodologies to deal with the problem, rather than avoiding the issue.

The Court's failure to develop a pro-poor jurisdiction impacts negatively not only on the ability of the poor to raise constitutional complaints to the public level, but also on the Court's own function and role in society. Without a direct access function, the Court's ability to engender faith in the supremacy of the constitution and the rule of law across socio-economic divides will remain limited.

96 See Michelman (note above) 11/24 for an outline of the difference between a preservative constitution, which aims to consolidate and memorialise the law, and a transformative constitution such as South Africa's, which aims to create 'a societal future that will differ starkly and dramatically from a decisively rejected past'.

97 'The Court', writes Michelman (ibid), 'has repeatedly conveyed . . . its understanding that it was brought into being for the particular purpose of ensuring that judicial applications of the new Constitution would not falter from the transformative commitment.'