

# The *Mighty Solution*: Tools practitioners may use to assist Courts in developing the common law

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## Introduction

Judges are the custodians of the common law and the architects of its development. They are “protectors and expounders” of the common law and all share an inherent jurisdiction to “refashion and develop the common law in order to reflect the changing social, moral and economic make-up of society”.<sup>1</sup> But judges cannot do so in isolation; practitioners, as officers of the court in an adversarial system, play a pivotal role in assisting the court in fulfilling this constitutional imperative.<sup>2</sup>

There are two instances a practitioner could plead for the development of the common law:

*“The first would be when a rule of the common law is inconsistent with a constitutional provision. Repugnancy of this kind would compel an adaptation of the common law to resolve the inconsistency. The second possibility arises even when a rule of the common law is not inconsistent with a specific constitutional provision but may fall short of its spirit, purport and objects. Then, the common law must be adapted so that it grows in harmony with the ‘objective normative value system’ found in the Constitution.”*<sup>3</sup>

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<sup>1</sup> *Thebus and Another v S* 2003 (6) SA 505 (CC) at para 31. See also section 172 of the Constitution.

<sup>2</sup> See in this regard sections 8, 39 and 173 of the Constitution.

<sup>3</sup> *Thebus and Another v S* 2003 (6) SA 505 (CC) at para 28.

But how do practitioners know when a development in the common law is ripe? When is it best to bring this issue to the attention of a court? And how does a Court measure when a development ought to occur?

In order to answer these questions, this paper seeks to unpack and apply, in a practical manner, the steps van der Westhuizen J sets out in *Mighty Solutions CC t/a Orlando Service Station v Engen Petroleum Ltd and Another*<sup>4</sup> on the questions practitioners ought to ask themselves when seeking to call for the courts to develop the common law.

Woolman argues, after analysing a string of Constitutional Court judgments on the development of the common law, that:

*“... readers of a judgment [of the Constitutional Court are] at a loss as to how the Bill of Rights might operate in some future matter. An approach to constitutional adjudication that makes it difficult for lower court judges, lawyers, government officials and citizens to discern, with some degree of certainty, how the basic law is going to be applied, and to know, with some degree of certainty, that the basic law is going to be applied equally, constitutes a paradigmatic violation of the rule of law.”*<sup>5</sup>

While this critique was offered within the context of the author’s challenge to the inconsistency of the Constitutional Court’s jurisprudence on the application of section 39(2), we seek to risk our reputation in attempting to offer our assistance in overcoming this frustration.

The aim is to provide a toolkit on how the Constitutional Court deals with developing the common law and how we, as practitioners, can use these guidelines when bring such issues to courts’ attention.

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<sup>4</sup> 2016 (1) SA 621 (CC) (*Mighty Solutions (CC)*).

<sup>5</sup> Woolman S, “*The Amazing, Vanishing Bill of Rights*”, SALJ 7 at 762.

## **Overview and Background of Mighty Solutions (CC)**

The facts giving rise to the case were, on the face of it at least, standard commercial fare for the courts. Engen Petroleum Limited (Engen), a licensed wholesaler and distributor of petroleum product., leased a commercial property purportedly from the registered owner to Mighty Solutions CC, trading as Orlando Service Station (Mighty Solutions), a licensed petroleum retailer in terms of the Petroleum Products Act. The property was operated as a petrol station.

Engen invested its capital on the property, developing it into a branded service station. Once the lease expired in March 2008, Engine and Mighty Solutions continued the contract on a month-to-month basis until it was validly cancelled on July 2009. Regardless of this cancellation, Mighty Solutions held over and continued to use Engen's equipment without paying any compensation to Engen or the registered owner of the property.

Engen thereafter sought to evict Mighty Solutions. Mighty Solutions opposed the application to evict on the basis that (a) Engen had no lawful title to the lease as it was not the registered owner and (b) the Petroleum Act superseded the common law. The High Court found that Engen had a common law right to evict Mighty Solutions and that this right was not suspended by the Petroleum Act.

It based its judgment on a trite principle of the common law of lease enunciated in the then Appellate Division in *Boomporet Investments (Pty) Ltd and Another v Paardekraal Concession Store (Pty) Ltd*:<sup>6</sup>

*“It is, of course, true that in general a lessee is bound by the terms of the lease even if the lessor has no title to the property. It is also clear that when sued for ejectment at the termination of the lease it does not avail the lessee to show that the lessor has no right to occupy the property.”*

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<sup>6</sup> 1990 (1) SA 347 (A).

Mighty Solutions sought leave to the Supreme Court of Appeal against this ruling. It was dismissed. It then sought leave to appeal to the Constitutional Court of South Africa. Although ultimately unsuccessful, one of the arguments raised by Mighty Solutions was issue of whether a lessor has title to the property is relevant when considering whether an eviction ought to be granted. Mighty Solutions submitted that this ought to be a question that the Constitution Court raises under its obligation to “develop the common law to give effect to the rights of persons and entities that hold retailers’ licences”.<sup>7</sup> Effectively, the common law position of “it does not lie in the mouth of the lessee to question the title of his landlord” was being called for development.<sup>8</sup>

While there were other arguments raised in this matter, they are irrelevant for the purposes of the focus and analysis of this paper. The arguments of Mighty Solutions for why the common law ought to be developed will be set out and thereafter the ratio of van der Westhuizen J.

### **Arguments and ratio decidendi**

Mighty Solutions argued that the concealment of a fact such as the title of the lessor or head- lessor from courts and the hinderance to establish “the truth” is detrimental to lessees. This prejudice is contrary to the values of an open and democratic society, in which “countervailing interests need to be balanced”.<sup>9</sup> Since a post-Apartheid era calls for “the truth to be uncovered”, transparency or the right of access to courts becomes a central value when developing the common law.

In an acknowledgment of the tension between the interpretation common law and constitutional jurisprudence, the court noted:

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<sup>7</sup> Paragraph 17.

<sup>8</sup> *Kala Singh v Germiston Municipality* 1912 TPD 155.

<sup>9</sup> Paragraph 43.

*“Our common law evolved from an ancient society in which slavery was lawful, through centuries of feudalism, colonialism, discrimination, sexism and exploitation. Furthermore, apartheid laws and practices permeated and to some extent delegitimised much of the pre-1994 South African legal system. Courts have a duty to develop the common law – like customary law – to accord with the Bill of Rights.*

*Caution is called for though. It is tempting to regard precedents from the pre democratic era with suspicion. This may be more so when language is used, which some may regard as archaic and reminiscent of a patriarchal feudal era, as when the Court in Kala Singh said that “it does not lie in the mouth of a lessee to question the title of his landlord”. However, the mere fact that common law principles are sourced from pre-constitutional case law is not always relevant. Age is not necessarily a reason to change. Some of the lessons gained from human experience over the ages are timeless and have passed the logical and moral tests of time. The Constitution indeed recognises the existing common law and customary law. ... Furthermore, legal certainty is essential for the rule of law – a constitutional value.”<sup>10</sup>*

The Court then laid out a summation of guidelines courts ought to consider before developing the common law. What we will argue is that these principles, together with the principles developed through post-1994 jurisprudence, provides practitioners with guidelines on how to detect a constitutional issue and how to use these principles to assist courts in fulfilling its obligation to developing the common law to align itself with the constitution and ultimately, uphold the rule of law.

*Mighty Solutions (CC)* laid out the following principle a court must decide:

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<sup>10</sup> Paragraphs 36 – 7.

*“Before a court proceeds to develop the common law, it must (a) determine exactly what the common law position is; (b) then consider the underlying reasons for it; and (c) enquire whether the rule offends the spirit, purport and object of the Bill of Rights and thus requires development. Furthermore, it must (d) consider precisely how the common law could be amended; and (e) take into account the wider consequences of the proposed change on that area of law.”*

### **The Obligation to Develop the Common law**

Section 2 of the Constitution, also known as the supremacy clause, states that:

*“The Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.”*

The reference in section 2 to “law” includes law that is derived from legislation, customary law and the common law; and conduct covers not only conduct of public officials, but also private individuals.<sup>11</sup> This means that the Constitution does not only affect litigation within realm of public law but, as we have seen in the developing jurisprudence over the years, the Constitution has had significant influences in the field of private law.<sup>12</sup>

The impact of the Constitution on private law was pondered by a dissenting judgment by the Constitutional Court in *De Lange v Presiding Bishop of the Methodist Church of Southern Africa for the time being and Another*.<sup>13</sup> In that matter, Van der Westhuizen J in a concurring judgment questioned:

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<sup>11</sup> *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC).

<sup>12</sup> See *Barkhuizen v Napier* 2007 (5) SA 323 (CC); *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC) and *Paulsen and Another v Slip Knot Investments 777 (Pty) Limited* 2015 (3) SA 479 (CC) as examples among many others.

<sup>13</sup> 2016 (2) SA 1 (CC).

*“How far do the Constitution and its interpretation and enforcement by Courts reach into our private and social lives? Is there, somewhere in our churches, temples, mosques and synagogues – or for that matter our kitchens and bedrooms – a ‘Constitution free’ zone?”<sup>14</sup>*

There is no such realm in which the Constitution is excluded from application. Indeed, the Constitution has been referred to as the “autobiography of a nation”, the “window to a nation’s soul” or the “mirror in which a society views itself”.<sup>15</sup> But at what point does this obligation to walk the pathway of the private arise?

In *Carmichele v Minister of Safety and Security*,<sup>16</sup> in an instance where this issue was not raised in the High Court or Supreme Court of Appeal,<sup>17</sup> Carmichele called for the development of the common law of delict to be extended to include the duty of members of the South African Police Services and prosecutors to protect her rights.

In detailing the obligation to develop the common law, the Constitutional Court noted that the bill of rights applied to all law and item 2 of schedule 6 of the Constitution enforced that all law that was in force before the constitution would still be in effect so long as it is consistent with the constitution.<sup>18</sup> The obligation to develop the common law further stems from section 7 of the constitution which places a duty on the State to respect, protect, promote and fulfill the rights in the bill of rights while section 8 bound the judiciary to the promotion of the bill of rights in instances where legislation does not protect such rights.<sup>19</sup>

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<sup>14</sup> At para 70. These debates are, of course, not new. There is a significant body of jurisprudence dealing with the intrusion of fundamental legal norms into the private lives of citizens, perhaps most famously encapsulated in the exchanges between Professor HLA Hart and Lord Devlin.

<sup>15</sup> *De Lange v Presiding Bishop of the Methodist Church of Southern Africa for the time being and Another* 2016 (2) SA 1 (CC) at fn 58

<sup>16</sup> 2001 (4) SA 938 (CC) (*Carmichele*).

<sup>17</sup> This is an issue we deal with later.

<sup>18</sup> See also *Thebus and Another v S* 2003 (6) SA 505 (CC) at para 24.

<sup>19</sup> Section 8:

“(3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court –

(a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right...”

All this is hinged on how the Constitutional Court either applied section 8 of the Constitution or offended the interpretation of section 39(2) of the Constitution which states that “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.”. When interpreting the bill of rights, section 39(1) places a duty on the Courts to “promote the values that underlie an open and democratic society based on human dignity, equality and freedom.”

The effect of these provisions, according to *Carmichele*, are that where “the common law deviates from the spirit, purport and objects of the Bill of Rights the courts have an obligation to develop it by removing that deviation.” Since it is not discretionary, a litigator when bringing an argument on the development of the common law before a Court, places a Court in the position of having the duty to fulfill a constitutional obligation.

Thus, while the Constitution does not place an unequivocal obligation on courts to develop the common law, the obligation lies in its implicit interpretation. This position was a shift from that of the interim constitution which placed an obligation on the then Supreme Courts and Appellate Division to develop the common law:

*“The constitutional considerations which were canvassed by the judge led him to formulate new principles of common law, and to apply them to the case before him. ... the development and application of the common law and customary law is the task of the Supreme Court, including the Appellate Division. As pointed out in para 63 of that judgment “the application and development of the common law and customary law” is not a matter which falls within the jurisdiction of the Constitutional Court under section 98(2) of the Constitution, and is therefore not excluded from the jurisdiction of the Appellate Division under section 101(5). The present case demonstrates why that must be so. A court which has regard to the dictates of section 35(3)*



*does not merely develop the common law in abstracto: it must apply the law as found to the case before it.*<sup>20</sup>

Academic commentators have critiqued the tension between the Constitutional Court's jurisprudence on sections 8 and 39 of the Constitution.<sup>21</sup>

Ultimately, the Constitution has impacted on almost every aspect of the common law and has consequentially impacted the manner law is practiced.

### **Impact of the Constitution on the Common Law**

The impact the Constitution has on the common law is three-fold: The first is that where the common law is consistent with the Constitution, is rational and justifiable, the tradition of the common law and legislation remains in its traditional form. This was recently noted in *Mighty Solutions*.

The second impact is where the common law or legislation is inconsistent with the Constitution, it must be struck down.<sup>22</sup> This caters for Moseneke J's "first instance" in *Thebus*.

The third impact is where legislation or the common law does not adequately give effect to a right in the Bill of rights, the courts are obliged to develop the common law to accord with those constitutional imperatives.

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<sup>20</sup> *Gardener v Whitaker* 1996 (4) SA 337 at para 16.

<sup>21</sup> See *Constitutional Law of South Africa*, Chapter 31 by Woolman with reference to further commentators.

<sup>22</sup> Section 172(1)(a) of the Constitution.

There is an opportunity for litigators to invoke this third point, and to raise constitutional consideration of the issues even in private law matters, to encourage the courts to develop the common law. Such issues may be raised either proactively or reactively.

Proactive litigation is litigation generally in the form of a head-on constitutional challenge, either in a High Court or in a direct access application to the Constitutional Court. Such challenge may be to the constitutionality of legislation, regulations or conduct, and may aim to seek declaratory or interdictory relief to enforce specific governmental obligations.

An example of this, although in the form of a legislative challenge, is the case of *My Vote Counts MPC v Speaker of the National Assembly and Others*<sup>23</sup> which dealt with the question of whether Parliament had an obligation to enact legislation that placed an obligation on political parties to disclose information on private funders.

As is often the case in proactive litigations, the applicant (My Vote Counts) is a civil society organisation, with a specific mandate to campaign for the improvement in the accountability, transparency and inclusiveness of elections and politics within South Africa. This form of litigation is not the focus of this article but forms an important and strategic piece in the democratic puzzle.

Reactive litigation, on the other hand, is more likely to result in the incremental development of the common law through the constitutional prism. In reactive litigation, the mandate of the legal representative is to further the particular interests of its (usually private) client, by enforcing, protecting, asserting or vindicating the client's rights through the litigation process.

Through fulfilling this mandate the natural process of litigation then entails engaging the Constitution through a claim or a defence. It is through this process that the opportunity to spot a Constitutional issue becomes apparent.

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<sup>23</sup> 2016 (1) SA 132 (CC).

Having identified the need and desirability for common law development, the next question is how to structure the argument before the courts.

*Carmichele* placed a two-stage enquiry in the development of the common law:

*“The first stage is to consider whether the existing common law, having regard to the section 39(2) objectives, requires development in accordance with these objectives. This inquiry requires a reconsideration of the common law in the light of section 39(2). If this inquiry leads to a positive answer, the second stage concerns itself with how such development is to take place in order to meet the section 39(2) objectives.”*

The requirement on the practitioner to bring a case that seeks to develop the common law is two-fold. The first is that, the litigant must bring the issue to the attention of court,<sup>24</sup> however, there may be circumstances where the court may develop the common law *mero motu*.<sup>25</sup>

The reason the onus is placed on litigants and practitioners is because it is not the duty of the court to “in each and every case where the common law is involved, embark on an independent exercise as to whether the common law is in need of development and, if so, how it is to be developed under section 39(2)”.<sup>26</sup> But when this issue is brought before a court, then such obligation arises. This is why the Constitutional Court termed it a “general obligation”.

The second is to bring it to attention of the court of first instance or at the earliest opportunity. Ideally, as *Carmichele*, highlights, this issue should be raised at the beginning of the litigation, although the late raising of the issue (even on appeal) is not necessarily a bar to the court’s consideration of the issue. This will be fleshed out below as it deals with the practical implications.

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<sup>24</sup> *Phumelela Gaming and Leisure Limited v Gründlingh and Others* (CCT31/05) [2006] ZACC 6; 2006 (8) BCLR 883 (CC) at para 25.

<sup>25</sup> *Carmichele* at para 39.

<sup>26</sup> *Carmichele* at para 39.

*Carmichele* also calls for a sensitivity to “the Constitution and its objective, normative value system, but also a proper understanding of the common law” because of the Constitution being a normative system of values as opposed to merely a formal legal document.<sup>27</sup>

*Khumalo and Others v Holomisa*<sup>28</sup> dealt with the question of whether the common law should be developed to acknowledge that a plaintiff in a defamation action pleading that a defamatory statement is false in any circumstances unjustifiably limits the right to freedom of expression.

In the case, the Court set out a two-leg test to test this unjustifiable limitation:

*“The first question we need then to determine is whether the common law of defamation unjustifiably limits [the right to freedom of expression]. If it does, it will be necessary to develop the common law in the manner contemplated by section 8(3) of the Constitution.*

*The next question is whether, to the extent that the common law does not require as an element of the delict of defamation in any circumstances that a defamatory statement be false, and leaves the question of truth to be raised only as an aspect of a defence, it is inconsistent with the Bill of Rights as directly applicable.”*<sup>29</sup>

In an aim to balance freedom of expression on the one hand and the right to dignity on the other, the court found that burdening the plaintiff with the requirement of proving that defamatory statements made against her are false, or a requirement that the defendant prove the truth of the statements (outside of pleading such as a defence) is one way or the other “impossible” and, therefore “results in a zero-sum game”.<sup>30</sup> After all, dignity and *fama* cannot be pleaded if you also have to plead that the statements are false. And since the Supreme Court

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<sup>27</sup> Id at paras 54 – 5. See also *K v Minister of Safety and Security* 2005 (6) SA 419 (CC) and *Pharmaceutical Manufacturers Association of SA and Another; In Re Ex Parte Application of the President of RSA and Others* 2000 (2) SA 674 (CC) at para 49.

<sup>28</sup> 2002 (5) SA 401 (*Khumalo*).

<sup>29</sup> *Khumalo* at paras 34 – 5.

<sup>30</sup> *Khumalo* at para 42.

of Appeal developed the common law defences to defamation to include reasonableness, it protected publishers where the defence of truth failed.

As a result, the court found that there was no need to develop the common law because there was no unjustifiable limitation to the freedom of expression nor the right to dignity. Thus, our jurisprudence have taken an introspective approach in developing the common law where the law need not be developed.

### **Points of Caution**

#### Deference to legislation

*Carmichele* warned that judges should be mindful that the legislature is the “major engine of law reform” and not the judiciary. This principle is well maintained within the separation of powers doctrine and not the subject of this paper. However, as noted in *Mighty Solutions*, the common law when developed by the judiciary for the purposes of reform, ought to be incremental.<sup>31</sup> This was also noted by Kentridge AJ in *Du Plessis*:

*“Judges can and should adapt the common law to reflect the changing social, moral and economic fabric of the country. Judges should not be quick to perpetuate rules whose social foundation has long since disappeared. Nonetheless there are significant constraints on the power of the judiciary to change the law. . . . In a constitutional democracy such as ours it is the Legislature and not the courts which has the major responsibility for law reform. . . . The judiciary should confine itself to those incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society.”*<sup>32</sup>

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<sup>31</sup> See also *K v Minister of Safety and Security* 2005 (6) SA 419 (CC) at para 17 and *Masiya v Director of Public Prosecutions Pretoria (The State) and Another* 2007 (5) SA 30 (CC) at para 31.

<sup>32</sup> *Du Plessis and Others v De Klerk and Another* 1996 (3) SA 850 at para 61.

This factor is also inherent in the Constitution as section 8(2) places an obligation on courts to develop the common law to protect the rights of persons in instances and to the extent where legislation does not give effect to that right. Thus, there is an inherent deference to the legislature that the Constitution asks of the courts.<sup>33</sup>

*Stare decisis* also plays a role in why the common law ought to be developed incrementally. In *K v Minister of Safety and Security* explains the difference between using precedent to apply to a set of facts and extending or developing the law when faced with a new or novel set of facts:

*“More commonly, however, courts decide cases within the framework of an existing rule. There are at least two possibilities in such cases: firstly, a court may merely have to apply the rule to a set of facts which it is clear fall within the terms of the rule or existing authority. The rule is then not developed but merely applied to facts bound by the rule. Secondly, however, a court may have to determine whether a new set of facts falls within or beyond the scope of an existing rule. The precise ambit of each rule is therefore clarified in relation to each new set of facts. A court faced with a new set of facts, not on all fours with any set of facts previously adjudicated, must decide whether a common-law rule applies to this new factual situation or not. If it holds that the new set of facts falls within the rule, the ambit of the rule is extended. If it holds that it does not, the ambit of the rule is restricted, not extended.”*

#### Alerting the courts at the earliest instance

There is also an obligation on litigants to bring the issue of the development of the common law at the earliest stage possible. The purpose of this is so that ultimately, if the matter elevates

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<sup>33</sup> See also *Khumalo* at para 31.

to an appeal court, the higher courts have the benefit being assisted with the opinions of courts *a quo*.<sup>34</sup> This principle was streamlined in a dissenting judgment by Jafta J in *Fick*.<sup>35</sup>

*“... the jurisprudence of [the Constitutional Court] illustrates that the Supreme Court of Appeal has the expertise and that it and the High Courts are best placed when it come to the development of the common law. This is demonstrated by the following principles. First, the development of the common law must be pleaded or requested at the earliest possible stage. Ordinarily where the development has not occurred in the Supreme Court of Appeal and the High Court, this Court remits the case to those courts. Except in special circumstances, this Court refuses to develop the common law as a court of first and last instance. The views of the other courts on the development of the common law are highly valued by this Court. This Court defers to the Supreme Court of Appeal and the High Court to determine whether the common law needs to be developed to meet the objects of section 39(2) of the Constitution and if so, the form that development should take.”*

Thus, is it at the High Court level that this issue should first be brought. And once it is conceptualized at this stage, this guideline may apply. (Of course, this rule is not absolute and there may be exceptions where the need for development of the common law is raised for the first time at a later stage, even on appeal or in instances where courts use its inherent jurisdiction to develop the common law *mero motu*).

## **Guideline**

At the level of the high courts and after assessing the jurisprudential landscape, we are of the view that the following questions may assist in determining whether a constitutional issue may

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<sup>34</sup> *Carmichele* at para 41. See also *S v Bequinot* 1997 (2) SA 887 (CC); *Lane and Fey NNO v Dabelstein and Others* 2001 (2) SA 1187 (CC) at para 5 (which stated that unless special circumstances arise, a Court should not consider the development of the common law); *Phumelela Gaming and Leisure Limited v Gründlingh and Others* 2006 (8) BCLR 883 (CC) at para 25; and *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC) at para 52.

<sup>35</sup> *Government of the Republic of Zimbabwe v Fick and Others* 2013 (5) SA 325 (CC) at para 104.

be invoked to assist in the vindication of rights and ultimately the development of the common law:

- What is the issue of law or a dispute of fact?
- Are there any rights involved that are traced to the Bill of Rights?
- What is the right that is involved?
- Does the common law or legislation give effect to this right?
- What is the purpose of that right?
- Is the purpose of this right a rational and justifiable one?
- Could there be a further development of the common law to give effect to a right in the Bill of Rights?
- What development may be made in order to align the issue of law with the spirit, purport and object of the Bill of Rights?

Issues of fact are generally tried in the normal course of litigation. However, the finding of facts which determine the issue of law may be determined through constitutional scrutiny. As indicated above, the common law, customary law and legislation all give effect to rights and if those legal instruments are not rationally connected to the principles of the Constitution then there is room to challenge and ultimately develop the law. This is because all rights stem from the common law, customary law or legislation and each of those are to be consistent with and ultimately be derived from the Constitution.

Thus, when analysing a claim or a defence, what is called for is a move towards a more purposive approach to the interpretation of common law rights, claims and defences rather than a literal one. A call to understand the Bill of Rights as a normative system of values than a formalistic legal document geared towards public interest litigation.

Two procedural examples are considered: that of interdicts and claims for restitution of property. In the realm of interdicts, the first requirement for both interim and final relief is a *prima facie* or clear right to the relief sought, and the actual or potential infringement of such right. Since the supremacy clause claims that all law or conduct inconsistent with the Constitution is invalid and all law includes both the common law and legislation, a reasonable



inference that may be drawn that reliance on rights particularly in the Bill of Rights are an opportunity to test a constitutional issue within the realm of interdicts. An interdict against the sale of immovable property may, for example, be viewed through the prism of the right to housing in section 26 of the Constitution. And the application of this law ought to be determined through the spirit, purport and objectives of the Bill of Rights.

Secondly, in claims for restitution, there is not only a common law right at stake, but equally the section 25(1) right not to be arbitrarily deprived of property. It is accordingly appropriate to peg the claim to a constitutional right, and, to the extent that the common law does not adequately promote and protect that right, to call on a court hearing the issue to develop the common law to accommodate the growing jurisprudence of a constitutional interpretation of property rights.

## **Conclusion**

A Constitutional issue is best dealt with when raised as early as possible and when this issue is raised, for example in the high court, rule 16A of the Uniform Rules places a duty on the litigant to give notice to the Registrar of the intention to raise a Constitutional issue. The law requires an incremental approach to its development. But it needs an early warning that it is going to experience growing pains, and an awareness from practitioners of the opportunities that this development holds for both public and private law litigation.