CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 31/99

THE PHARMACEUTICAL MANUFACTURERS ASSOCIATION OF SOUTH AFRICA (ASSOCIATION INCORPORATED IN TERMS OF SECTION 21)	First Appellant
THE CROP PROTECTION AND ANIMAL HEALTH ASSOCIATION (ASSOCIATION INCORPORATED IN TERMS OF SECTION 21)	Second Appellant

IN RE: THE EX PARTE APPLICATION OF:

THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First Applicant
THE MINISTER OF HEALTH	Second Applicant
THE REGISTRAR OF MEDICINES	Third Applicant
THE CHAIRPERSON, MEDICINES CONTROL COUNCIL	Fourth Applicant
THE MINISTER OF AGRICULTURE	Fifth Applicant
THE REGISTRAR OF FERTILIZERS, FARM FEEDS, AGRICULTURAL REMEDIES AND STOCK REMEDIES	Sixth Applicant
THE PHARMACEUTICAL MANUFACTURERS ASSOCIATION OF SOUTH AFRICA (ASSOCIATION INCORPORATED IN TERMS OF SECTION 21)	Seventh Applicant
THE CROP PROTECTION AND ANIMAL HEALTH ASSOCIATION (ASSOCIATION INCORPORATED IN TERMS OF SECTION 21)	Eighth Applicant

Heard on : 11 November 1999

Decided on : 25 February 2000

JUDGMENT

CHASKALSON P:

Introduction

[1] This case raises the question whether a court has the power to review and set aside a decision by the President of this country to bring an Act of Parliament into force. It began as an application to the Transvaal High Court by the President of the Republic of South Africa, the Minister of Health, the Minister of Agriculture, certain functionaries in the Departments of Health and Agriculture, the Pharmaceutical Manufacturers Association of South Africa and the Crop Protection and Animal Health Association for the setting aside of Proclamation R49 of 1999[1] and Government Notice R567 of 1999.[2] Proclamation R49 was issued by the President and purported to bring into operation the South African Medicines and Medical Devices Regulatory Authority Act, 132 of 1998 (the Act).[3] Government Notice R567 was issued by the Minister of Health and purported to provide schedules to the Act in terms of section 31 read with section 54 of the Act.

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1 *Government Gazette* 20024, Proc R49, 30 April 1999.

2 *Government Gazette* 20025, GN R567, 7 May 1999.

3 This was done in terms of s 55 of the Act, which provides that the Act shall come "into operation on a date determined by the President by proclamation in the *Gazette*."

[2] The circumstances in which the application was brought were as follows. Before the passing of the Act, the registration and control of medicine for human and animal use were governed by the Medicines and Related Substances Control Act, 101 of 1965 (the 1965 Act). The registration and control of agricultural substances and stock remedies were governed by the Fertilizers, Farm Feeds, Agricultural Remedies and Stock Remedies Act, 36 of 1947 (the Stock Remedies Act). The Act repealed all but a few provisions of the 1965 Act,[4] and made material amendments to the Stock Remedies Act.[5]

4 This is in terms of s 50(1)(a) read with schedule 1 of the Act. The saved provisions of the 1965 Act are ss 1, 15B, 18, 22B, 24, 34A and 40.

5 This is in terms of s 50(1)(b) read with schedule 2 of the Act.

[3] The Act provides that the manufacture, sale and possession of medicines for human and animal use be controlled through a system of scheduling substances and regulating the manufacture, the sale and possession of substances in the various schedules. The scheduling of medicines for human and animal use and the making of other regulations is an essential component of the regulatory system established by the Act. Schedules 1 to 9 identify regulated substances. Transitional provisions retain regulations made and schedules determined in terms of the 1965 Act and the Stock Remedies Act, but schedules 1 to 9 of the 1965 Act are specifically repealed.[6] The Act makes provision for the determining of new schedules and the making of regulations by the Minister.[7] It establishes the South African Medicines and Medical Devices Regulatory Authority (the Authority)[8] which is to be governed by a board appointed by the Minister in accordance with the provisions of the

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6 S 53 of the Act provides:

> "(1) Subject to this Act, all Regulations made in terms of the Medicines [and Related Substances Control] Act and any Schedules of substances which had been determined in terms of the Medicines Act remain, subject to any repeal or amendment by a competent authority, in force.
>
> (2) Subject to this Act, all Regulations made in terms of the Stock Remedies Act and any Schedules determined in terms of the Stock Remedies Act in respect of stock remedies remain, subject to any repeal or amendment by a competent authority, in force.
>
> (3) Despite subsection (1), but subject to subsection (4), Schedules 1 up to and including Schedule 9 of the Medicines Act, are hereby repealed.
>
> (4) Any reference in any law or document to any medicine or substance referred to in any Schedule to the Medicines Act prior to the date of commencement of this Act, must be construed from that date as a reference to the corresponding medicine or other substance prescribed by the Minister under section 31."

7 In terms of s 48(2) of the Act the Minister must, not less than three months before making regulations, publish them in the *Gazette* for comment.

8 S 2.

Act.[9] Pending the appointment of the board, the Medicines Control Council established under the 1965 Act may perform the board's functions.[10]

[4] The Act was promulgated on 18 December 1998 and provides that it "comes into operation on a date [to be] determined by the President".[11] Proclamation R49, purporting to bring the Act into force, was published in the *Gazette* on 30 April 1999. If the Proclamation is valid, the repeal of the 1965 Act and schedules 1 to 9 of that Act was effective from that date.

[5] In the founding affidavit filed on behalf of the President and the other applicants in the High Court on 21 May 1999 by the acting Director-General of Health, Dr Pretorius, it was said:

> "The scheduling status of Medicines is a fundamental aspect of both the 1965 Act and Act 132 of 1998 and the regulations published in terms of these two Act[s], and must

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9 S 6 of the Act provides that the Minister must appoint the board within six months of the commencement of the Act.

10 S 50(4).

11 Above n 3.

> appear on all sales packs. It determines the manner in which the product may be marketed and sold."

According to the affidavit, the regulatory base necessary for the operation of the Act was not in place when Proclamation R49 was published because schedules had not been made to replace the repealed schedules of the 1965 Act, and other essential regulations contemplated by the Act had not been made.

[6] On 7 May 1999 the Minister issued Government Notice R567 which reads as follows:

> "The Minister of Health has, in terms of section 31 read together with section 54 of the South African Medicines and Medical Devices Regulatory Authority Act, 1998 (Act No. 132 of 1998) on the recommendation of the South African Medicines and Medical Devices Regulatory Authority made the schedules in the Schedule"[12]

It is alleged in the founding affidavit that regulations necessary to give effect to other provisions of the Act were not made. It is also alleged that the Government Notice purporting to publish the schedules was invalid.

[7] According to Dr Pretorius the effect of the absence of schedules and regulations would be that

> ". . . the entire regulatory structure relating to medicines . . . and the control of such medicines, has been rendered unworkable by the promulgation of Act 132 of 1998 in this manner."

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12 Above n 2.

This, he said, had not been appreciated by the Department of Health when it requested the President to bring the Act into operation. According to Dr Pretorius the request would not have been made, and the Act would not have been brought into force, but for this error.

[8] Concerned to avoid the consequences of bringing the Act into force prematurely, the applicants applied to the High Court as a matter of urgency for an order declaring that the Proclamation and the Government Notice were invalid.

The Proceedings in the High Court

[9] The application was dismissed by Fabricius AJ who held that the President had acted within his powers and in good faith. The fact that he had done so on the basis of incorrect advice, and that as a result the Act had been brought into force prematurely, was held not to be sufficient cause for reviewing the President's decision.

[10] The seventh and eighth applicants sought leave from Fabricius AJ to appeal against his decision. That, too, was dismissed. They then applied for, and were granted, leave by the Supreme Court of Appeal to appeal to the Full Bench of the Transvaal High Court (the Full Bench).

[11] The first six applicants did not participate in the appeal which was pursued only by the seventh and eighth applicants. The Full Bench, Ngoepe JP and Swart and Nugent JJ, reversed the decision of Fabricius AJ, and held that Proclamation R49 was null and void and of no force or

effect.[13]

[12] In its judgment the Full Bench referred to the nature of the power exercised by the President in bringing an Act into operation, saying:

> "Often, as in the present case, administrative preparations are required to be made as a prerequisite to bringing the legislation into effect and it is best left to the executive branch of government to determine when the appropriate time has arrived. In the constitutional structure of this country it is the President, as the head of the executive branch of government, who is the appropriate person to whom to delegate that power. However, the power that he exercises in that regard is one that is delegated to him by Parliament and not one that is conferred upon him by the Constitution. *In casu*, such delegation was done through s 55 of Act 132 of 1998.

13 The judgment is reported as *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others* 1999 (4) SA 788 (T).

> It is well established that delegated powers must be exercised within the limits of the authority that was conferred. If not, the purported exercise of the power is unlawful and a Court is quite entitled to set it aside as it would set aside the unlawful act of any other functionary who has acted outside the powers conferred upon him by the Legislature."[14]

[13] After citing from the judgments of Lord Sumner in the House of Lords in *Roberts v Hopwood and Others*[15] and Schreiner JA in the Appellate Division in *Mustapha and Another v Receiver of Revenue, Lichtenburg and Others*[16] as authority for the proposition that the President derived his power in the present case from the terms of the statute and had to act within the scope of such powers and any limitations imposed by them, the judgment concludes:

> "In our view what is plain beyond doubt is that the legislature could not have intended the President to exercise any such discretion at least until such time as the Act was capable of being given effect to. That was manifestly not the case in regard to the Act that is now under consideration. We think it is clearly implied in s 55 that such discretion as it conferred upon the President would not be exercised before the necessary steps had been taken to ensure that the Act could be implemented once it had been put into effect. Indeed, in our view, that was the very purpose for which the legislature delegated the relevant power to the President. The fact that the President was *bona fide* in the action that he took seems to us to be quite irrelevant. Insofar as he purported to exercise any discretion that was conferred upon him by the legislature, he did so

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14 Id at 797 A-D.

15 [1925] AC 578 (HL) at 602.

16 1958 (3) SA 343 (A) at 347 F-G.

> prematurely and without yet having the authority to do so. His act was accordingly of no force or effect. It follows that the Act was never validly brought into effect and accordingly the earlier legislation has not yet been lawfully repealed."[17]

The referral to the Constitutional Court

[14] The Chief Registrar of the High Court was directed by the Judge President of that court to bring the Full Bench's decision to the attention of this Court, in case the order made in that decision fell within the terms of section 172(2)(a) of the Constitution, and had accordingly to be confirmed by this Court. Section 172(2)(a) provides:

> "The Supreme Court of Appeal, a High Court or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court."

17 Above n 13 at 797 I - 798 B.

[15] On 8 September 1999, the order of the Full Bench was lodged with the Registrar of this Court pursuant to the direction that had been given by the Judge President of the High Court. Directions were then given in terms of rule 15 of the Constitutional Court Rules inviting argument on two questions; whether this case falls within section 172(2)(a) of the Constitution and, if it does, whether the Full Bench's order should be confirmed. The directions permitted any of the eight applicants to make representations to this court concerning these two questions. The attention of the applicants was drawn to the decisions of this Court in the cases of *Fedsure Life Assurance Ltd & Others v Greater Johannesburg Transitional Metropolitan Council & Others*[18] and *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*[19] (*Sarfu 1*).[20] I refer later to the relevance of these decisions.

[16] The applicants all notified the Registrar of this Court that they would make representations concerning these issues. The seventh and the eighth applicants contended that the order was not subject to confirmation, but if it was, they asked that it be confirmed. The President and the other applicants contended that the order declaring the Proclamation to be invalid was subject to confirmation. They agreed, however, that it should be confirmed. The matter was set down for hearing on these two issues.

Does the application raise a constitutional matter?

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18 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC).

19 1999 (2) SA 14 (CC); 1999 (2) BCLR 175 (CC).

20 There are three reported judgments of this Court dealing with the *President of the Republic of South Africa and Others v South African Rugby Football Union and Others.* In this judgment I refer to two of them which, for convenience, I refer to as "*Sarfu 1*" and "*Sarfu 3*".

[17] In *Fedsure* this Court held that the doctrine of legality, an incident of the rule of law, was an implied provision of the interim Constitution.[21] It stated:

> "It seems central to the conception of our constitutional order that the Legislature and Executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law. At least in this sense, then, the principle of legality is implied within the terms of the interim Constitution."[22]

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21 Above n 18 at paras 56-59.

22 Above n 18 at para 58.

This was reaffirmed in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*[23] (*Sarfu 3*) where this Court outlined different ways in which the exercise of public power is regulated by the Constitution. One of the constitutional controls referred to is that flowing from the doctrine of legality.[24] Although *Fedsure* was decided under the interim Constitution, the decision is applicable to the exercise of public power under the 1996 Constitution, which in specific terms now declares that the rule of law is one of the foundational values of the Constitution.[25]

[18] In effect the finding of the Full Bench was that the President had acted unlawfully in bringing the Act into force and that his decision to do so should accordingly be set aside. The first question, which the Full Bench was not called upon to decide, is whether this is a finding on a constitutional matter. There can be no doubt that it is.

[19] Section 2 of the Constitution lays the foundation for the control of public power. It provides:

> "This Constitution is the supreme law of the Republic; law or conduct inconsistent with it

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23 2000 (1) SA 1 (CC); 1999 (10) BCLR 1059 (CC).

24 Id at para 148.

25 S 1(c) of the 1996 Constitution.

> is invalid, and the obligations imposed by it must be fulfilled."

Consistent with this, section 44(4) of the Constitution provides that in the exercise of its legislative authority Parliament "must act in accordance with, and within the limits of, the Constitution." The same applies to members of the Cabinet who are accountable collectively and individually to Parliament for the exercise of their powers and the performance of their functions.[26] They too are required to act in accordance with the Constitution.[27]

[20] The exercise of all public power must comply with the Constitution which is the supreme law, and the doctrine of legality which is part of that law. The question whether the President acted intra vires or ultra vires in bringing the Act into force when he did, is accordingly a constitutional matter. The finding that he acted ultra vires is a finding that he acted in a manner that was inconsistent with the Constitution.

[21] Mr Bertelsmann, on behalf of the seventh and eighth applicants, acknowledged this. He contended, however, that the question whether the President acted ultra vires also raised an issue under the common law, that the finding of the Full Bench was a finding made in terms of the common law, and that it was accordingly not a finding of constitutional invalidity within the meaning of section 172(2)(a) of the Constitution. In support of this argument he placed reliance on the decision of the Supreme Court of Appeal (SCA) in *Commissioner of Customs and Excise v*

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26 Section 92(2) of the Constitution.

27 Section 92(3)(a) of the Constitution.

Container Logistics (Pty) Ltd.[28]

[28] *Commissioner of Customs and Excise v Container Logistics (Pty) Ltd; Commissioner of Customs and Excise v Rennies Group Ltd t/a Renfreight* 1999 (3) SA 771 (SCA).

[22] The *Container Logistics* case was concerned with the validity of an administrative decision taken at the time when the interim Constitution was in force. Prior to its decision in the *Container Logistics* case, the SCA had held on three occasions that where the grounds for review would constitute an infringement of section 24 of the interim Constitution,[29] it was doubtful whether it retained a parallel jurisdiction under the common law to determine whether administrative action was valid or not. The three cases were *Rudolph and Another v Commissioner for Inland Revenue and Others,*[30] *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others*[31] and *Premier, Provinsie van Mpumalanga en 'n Ander v Hoofbestuurder van die Vereniging van Bestuursliggame van Staatsondersteunde Skole, Oos-Transvaal*.[32] In each of these three cases it also held that the question whether or not such parallel jurisdiction existed depended upon the interpretation of the interim Constitution. This was a matter beyond

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29 See below n 78.

30 1996 (2) SA 886 (A) at 891 B-C.

31 1998 (2) SA 1115 (SCA) at 1124 C-D; 1998 (6) BCLR 671 (SCA).

32 1998 (8) BCLR 968 (SCA).at 973 I - 975 D.

its jurisdiction and within the exclusive jurisdiction of the Constitutional Court. It accordingly referred each of those cases to this Court in terms of section 102(6) of the interim Constitution.[33]

[33] Section 102(6) provided:

> "If it is necessary for the purposes of disposing of the said appeal for the constitutional issue to be decided, the Appellate Division shall refer such issue to the Constitutional Court for its decision."

[23] In *Rudolph's* case, this Court held that the interim Constitution was not applicable to the disputed action because it had taken place before the interim Constitution was in force. It accordingly did not deal with the question whether the SCA had a common law jurisdiction to deal with the validity of administrative decisions.[34]

[24] In *Fedsure,* the question of the SCA's jurisdiction to deal with administrative decisions taken during the currency of the interim Constitution was raised before the SCA in a matter set down for hearing at a time when the 1996 Constitution was already in force. The SCA declined to deal with the matter for the following reasons given by Mahomed CJ:

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[34] *Rudolph and Another v Commissioner for Inland Revenue and Others* 1996 (4) SA 552 (CC); 1996 (7) BCLR 889 (CC) at paras 15-16 (footnote omitted).

"It could conceivably be argued that the interim Constitution did not exclude the jurisdiction of the Appellate Division to adjudicate on the cogency of any attack on administrative actions where such attacks are based on common-law grounds, and that the Appellate Division continues to enjoy some kind of parallel jurisdiction with the Constitutional Court where the relevant attack is founded on common-law grounds. I have some doubt as to whether this would be a sound argument. But in any event this would also involve an interpretation of the relevant provisions of the interim Constitution. This falls within the jurisdiction of the Constitutional Court and for that reason outside the jurisdiction of the Appellate Division in terms of the provisions of s 101(5). This was indeed the approach which commended itself to this Court in the case of *Rudolph and Another v Commissioner for Inland Revenue and Others* 1996 (2) (SA) 886 (A) at 891 B-C in which this Court accordingly referred the matter to the Constitutional Court for adjudication."[35]

[25] In the result two questions were referred by the SCA to this Court for its decision:

"(a) whether or not the administrative actions constituted by the resolutions identified and impugned in the notice of motion were consistent with the interim Constitution, and

(b) if they were, whether or not the interim Constitution preserved for the predecessor of the Supreme Court of Appeal any residual or concurrent jurisdiction to adjudicate upon any attack made by the appellants on the administrative actions referred to in subpara (*a*) above on the grounds that such administrative actions fell to be set aside, reviewed or corrected at common law."[36]

[26] When, pursuant to this referral, the matter was subsequently dealt with by this

35 Above n 31 at 1124 B-D.

36 Above n 31 at 1127 E-F.

Court, it held that the disputed resolutions in *Fedsure* were legislative acts which did not constitute administrative action within the meaning of section 24 of the interim Constitution.[37] It had jurisdiction to deal with the dispute, however, because the contention that the resolutions were ultra vires the local authority raised an issue of legality, which is a constitutional issue.[38] It accordingly dealt with the matter.

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37 Above n 18 at paras 21-42.

38 Above n 18 at paras 53-60.

[27] Although the Court was divided on the outcome of the appeal, there was agreement concerning the jurisdictional question. The questions that had been referred to this Court by the SCA were construed as covering a challenge on the grounds of "legality" as well as a challenge to the validity of what had been alleged to be administrative action. The SCA's jurisdiction under the interim Constitution to deal with the challenges to the disputed resolutions was considered, and the answer given to the question was that the SCA had no residual jurisdiction to adjudicate upon the lawfulness of the impugned resolutions. It is clear from the judgment as a whole that this ruling applied not only to the review of the legislative action, but also to the review of administrative action. It was in fact so applied in *Mpumalanga*,[39] a case concerning the validity of administrative action where this Court followed its decision in *Fedsure*.

39 *Premier, Mpumalanga v Executive Committee, Association of State-Aided Schools, Eastern Transvaal* 1999 (2) SA 91 (CC); 1999 (2) BCLR 151 (CC) at paras 5-6.

[28] The 1996 Constitution makes provision for a different jurisdictional scheme from the interim Constitution. The SCA is the highest court of appeal except in constitutional matters.[40] It has jurisdiction in respect of all constitutional matters other than those referred to in section 167(4),[41] though orders made by it in respect of matters referred to in section 172(2)(a) have no

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40 S 168(3) provides:

> "The Supreme Court of Appeal may decide appeals in any matter. It is the highest court of appeal except in constitutional matters, and may decide only - (a) appeals;
> (b) issues connected with appeals; and
> (c) any other matter that may be referred to it in circumstances defined by an Act of Parliament."

41 S 167(4) provides:

> "Only the Constitutional Court may —
> (a) decide disputes between organs of state in the national or provincial sphere concerning the constitutional status, powers or functions of any of those organs of state;
> (b) decide on the constitutionality of any parliamentary or provincial Bill, but may do so only in the circumstances anticipated in section 79 or 121;

force unless confirmed by the Constitutional Court. The Constitutional Court remains the highest court in respect of all constitutional matters,[42] and decisions of the SCA on constitutional matters within its jurisdiction are accordingly subject to appeal to the Constitutional Court.[43]

(c) decide applications envisaged in section 80 or 122;
(d) decide on the constitutionality of any amendment to the Constitution;
(e) decide that Parliament or the President has failed to fulfil a constitutional obligation; or
(f) certify a provincial constitution in terms of section 144."

42 S 167(3)(a). See below n 83.

43 *S v Pennington and Another* 1997 (4) SA 1076 (CC); 1997 (10) BCLR 1413 (CC) at para 10.

[29] The Constitution provides that pending matters should be dealt with in accordance with the provisions of the interim Constitution, unless it is in the interests of justice to apply the provisions of the 1996 Constitution.[44] In its judgment in *Fedsure,* this Court held that in order to avoid situations such as those that had arisen in *Rudolph*, *Fedsure* and *Mpumalanga*, it would be in the interests of justice for the SCA to exercise its jurisdiction under the 1996 Constitution in respect of disputed administrative decisions taken at a time when the interim Constitution was in force. In accordance with the decision of this Court in *Du Plessis and Others v De Klerk and Another*,[45] the lawfulness or unlawfulness of such decisions would fall to be determined in accordance with the law in force at the time the decisions were taken.[46]

[30] In the *Container Logistics* case, the SCA held that the finding of this Court in *Fedsure* that it would be in the interests of justice for matters falling within the purview of section 24 of the interim Constitution to be dealt with by the SCA in terms of its jurisdiction under the 1996 Constitution, was obiter.[47] Hefer JA, writing for the Court, held that no general rule could be laid down, since what the interests of justice require depends on the facts of each case. He went on to hold, however, that the interests of justice in that case required the SCA to deal with the case in terms of its jurisdiction under the 1996 Constitution. Exercising

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44 Item 17 of the sixth schedule to the 1996 Constitution.

45 1996 (3) SA 850 (CC); 1996 (5) BCLR 658 (CC).

46 *Fedsure,* above n 18 at para 112.

47 Above n 28 at paras 4 and 5. It is not necessary for the purposes of this case to decide whether this finding in *Fedsure* concerning the interests of justice was obiter.

that jurisdiction, it had to decide the case in accordance with the law in force at the time the disputed decision was taken. The exercise of that jurisdiction conformed with the judgment of this Court in *Fedsure*.[48] It is, indeed, difficult to contemplate circumstances in which it would not be in the interests of justice for the SCA to assert its jurisdiction under the 1996 Constitution to deal with a "pending matter", in which the validity of administrative or executive action taken during the currency of the interim Constitution has to be determined.[49]

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48 See above para 29.

49 In *Mpumalanga,* above n 39 at para 6, it was held that in the light of the decision of this Court in *Fedsure*, it was in the interests of justice within the meaning of item 17 of the sixth schedule for the appeals in that matter to be dealt with under the 1996 Constitution. See also the reasons given by Hefer JA the *Container Logistics* judgment, above n 28 at para 6.

[31] In *Fedsure* this Court expressed "grave doubts" as to whether it was possible "to seal hermetically the jurisdiction" of the Constitutional Court and the SCA.[50] It said:

> "there can be no doubt . . . that persons denied lawful or procedurally fair administrative action can look to the courts to enforce rights vested in them by section 24, and that in terms of the Constitution this Court is the court of final instance in respect of any such dispute. Whether the direct application of the provisions of section 24 of the interim Constitution means that the common law must meet the requirements of the section or that the section, grounds a cause of action independent of the common law need not be decided. In either event the direct application of the interim Constitution is a matter over which this Court has jurisdiction. If that is so, it is hard to avoid the conclusion that has been reached by the Appellate Division, that under the interim Constitution it has no jurisdiction over matters concerning 'administrative action' as contemplated by section 24 of the interim Constitution. Similarly in this case, in the light of the conclusions to which we have come, section 101(5) of the interim Constitution would effectively have deprived the SCA of jurisdiction to determine the legality of the disputed resolutions."[51]

[32] In the *Container Logistics* case, the SCA considered whether the decision of the Commissioner of Customs was open to challenge under the common law, or whether the matter had to be dealt with in accordance with section 24 of the interim Constitution. It held that the common law grounds for review, in so far as they were not inconsistent with the interim

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50 Above n 18 at para 111.

51 Above n 18 at para 105 (footnote omitted).

Constitution, remained intact, and that the decision of the Commissioner of Customs in that case was liable to be set aside under the common law. It was not necessary, therefore, to consider whether the decision also infringed section 24 of the interim Constitution.

[33] In holding that there was no need to consider section 24 of the interim Constitution in that case, Hefer JA said:

> "Judicial review under the Constitution and under the common law are different concepts. In the field of administrative law constitutional review is concerned with the constitutional legality of administrative action, the question in each case being whether it is or is not consistent with the Constitution and the only criterion being the Constitution itself. Judicial review under the common law is essentially also concerned with the legality of administrative action, but the question in each case is whether the action under consideration is in accordance with the behests of the empowering statute and the requirements of natural justice."[52]

I take a different view. The control of public power by the courts through judicial review is and always has been a constitutional matter. Prior to the adoption of the interim Constitution this control was exercised by the courts through the application of common law constitutional principles. Since the adoption of the interim Constitution such control has been regulated by the Constitution which contains express provisions dealing with these matters. The common law principles that previously provided the grounds for

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[52] Above n 28 at 785 I to 786 A.

judicial review of public power have been subsumed under the Constitution, and in so far as they might continue to be relevant to judicial review, they gain their force from the Constitution. In the judicial review of public power, the two are intertwined and do not constitute separate concepts. I deal more fully with this below.

[34] The South Africa Act[53] under which the Union of South Africa was constituted as a unitary state with four provinces did not deal specifically with the power of the courts to review administrative and other decisions of the executive. It dealt with the formal structures of government, made provision for the manner and form in which legislation was to be passed, and entrenched provisions protecting language and franchise rights. Powers and functions that had previously vested in structures of the four colonies that became the Union were transferred to newly created structures. Some executive functions were transferred to the Governor-General and others to the Governor-General in Council and to the Provincial Administrators and Executive Councils. A Supreme Court of South Africa was established with appellate and provincial divisions, and existing colonial laws were continued. The Supreme Court was to have the jurisdiction previously vested in the corresponding courts of the four colonies as well as jurisdiction in respect of cases where the validity of a provincial ordinance was questioned.[54] Substantive constitutional law

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53 South Africa Act, 1909.

54 S 98(3) of the South Africa Act, 1909.

principles governing the relationship between the various arms of government, however, were not expressly included in this Act.

[35] However, as had been the case under colonial law, silences in the constitutional order that were not covered by the South Africa Act or by other legislation continued to be regulated by common law constitutional principles. The most important of these were the rule of law, the supremacy of Parliament and the prerogative.

[36] The prerogative is a doctrine of English law and, as the Appellate Division pointed out in *Sachs v Donges N.O.*,[55] questions concerning the prerogative were governed in South Africa by principles of English law. Lord Denning has described the prerogative as:

> "a discretionary power exercisable by the executive government for the public good, in certain spheres of governmental activity for which the law has made no provision . . . The law does not interfere with the proper exercise of the discretion by the executive in those situations: but it can set limits by defining the bounds of the activity: and it can intervene if the discretion is exercised improperly or mistakenly. That is a fundamental principle of our constitution."[56]

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55 1950 (2) SA 265 (A) at 288.

56 *Laker Airways Ltd. v Department of Trade* [1977] 1 QB 643 at 705 B-C.

[37] The exercise of public power was regulated by the courts through the judicial review of legislative and executive action. This was done by applying constitutional principles of the common law, including the supremacy of Parliament and the rule of law. The latter had a substantive as well as a procedural content that gave rise to what courts referred to as fundamental rights,[57] but because of the countervailing constitutional principle of the supremacy of Parliament, the fundamental rights could be, and frequently were, eroded or excluded by legislation.

[38] Judicial review served the purpose of enabling courts, whilst recognising the supremacy of Parliament, to place constraints upon the exercise of public power. It was a power asserted by the English courts as part of their common law jurisdiction. Our courts did the same,[58] and the development of administrative law in South Africa was much

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57 See para 39 below. See also *R v Slabbert and Another* 1956 (4) SA 18 (T) at 21 G; *R v Heyns and Others* 1959 (3) SA 634 (A) at 637 D-E; *Mandela v Minister of Prisons* 1983 (1) SA 938 (A) at 959 G-H; *Omar and Others v Minister of Law and Order and Others; Fani and Others v Minister of Law and Order and Others; State President and Others v Bill* 1987 (3) SA 859 (A) at 893 E-F; *Attorney-General, Eastern Cape v Blom and Another* 1988 (4) SA 645 (A) at 662 F-G.

58 *Johannesburg Consolidated Investments Co. v Johannesburg Town Council* 1903 TS 111 at 115.

influenced by the developments in England. As a result our courts have frequently sought guidance from English law on this subject.[59]

[39] According to de Smith, Woolf and Jowell:

> "[T]he standards applied by the courts in judicial review must ultimately be justified by constitutional principles, which govern the proper exercise of public power in any democracy. This is so irrespective of whether the principles are set out in a formal, written document. The sovereignty or supremacy of Parliament is one such principle, which accords primacy to laws enacted by the elected legislature. The rule of law is another such principle of the greatest importance. It acts as a constraint upon the exercise of all power. The scope of the rule of law is broad. It has managed to justify —albeit not always explicitly— a great deal of the specific content of judicial review, such as the requirements that laws as enacted by Parliament be faithfully executed by officials; that orders of court should be obeyed; that individuals wishing to enforce the law should have reasonable access to the courts; that no person should be condemned unheard, and that power should not be arbitrarily exercised. In addition, the rule of law embraces some internal qualities of all public law: that it should be certain, that is, ascertainable in advance so as to be predictable and not retrospective in its operation; and that it be applied equally, without unjustifiable differentiation.
>
> Other constitutional principles are perhaps less clearly identified but nevertheless involve features inherent in a democratic state. These include the requirements of political participation, equality of treatment and freedom of expression.

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59 See the comments of Corbett CJ in *Du Preez and Another v Truth and Reconciliation Commission* 1997 (3) SA 204 (A) from 231 H.

> A constitutional principle achieves practical effect as a constraint upon the exercise of all public power. Where the principle is violated it is enforced by the courts which define and articulate its precise content."[60]

To the same effect, Boulle, Harris and Hoexter state that:

> "The basic justification for judicial review of administrative action originates in the constitution. In the constitutional state there are, by definition, legal limits to power, and the courts are bestowed with judicial authority, which incorporates the competence to determine the legality of various activities, including those of public authorities."[61]

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60 De Smith, Woolf & Jowell *Judicial Review of Administrative Action* 5 ed (Sweet & Maxwell, London 1995) at 14-15 (footnotes omitted).

61 Boulle, Harris and Hoexter *Constitutional and Administrative Law: Basic Principles* (Juta, Cape Town 1989) at 98. See also Baxter *Administrative Law* (Juta, Cape Town 1984) at 51.

[40] This method of controlling public power was not affected by the Constitutions of 1961 and 1983. The 1961 Constitution provided in specific terms that Parliament was supreme and that no court had jurisdiction to enquire into or pronounce upon the validity of an Act of Parliament, other than one relating to the entrenched language rights.[62] The 1983 Constitution also entrenched the supremacy of Parliament, though it made provision for courts to have jurisdiction in respect of questions relating to the specific requirements of the Constitution.[63] This, however, has been fundamentally changed by our new constitutional order. We now have a detailed written Constitution. It expressly rejects the doctrine of the supremacy of Parliament, but incorporates other common law constitutional principles, and gives them greater substance than they previously had. The rule of law is specifically declared to be one of the foundational values of the constitutional order,[64] fundamental rights are identified and entrenched,[65] and provision is

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62 S 59 of the Republic of South Africa Constitution Act, 32 of 1961.

63 S 34(2)(a) and s 34(3) of the Republic of South Africa Constitution Act, 110 of 1983.

64 S 1(c) of the Constitution.

65 Chapter 2 of the Constitution.

made for the control of public power including judicial review of all legislation and conduct inconsistent with the Constitution.[66]

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[66] S 172(1) of the Constitution provides:

> "When deciding a constitutional matter within its power, a court ─
> (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; . . ."

[41] Powers that were previously regulated by the common law under the prerogative and the principles developed by the courts to control the exercise of public power are now regulated by the Constitution. Thus, in *President of the Republic of South Africa and Another v Hugo*[67] the power of the President to pardon or reprieve offenders had to be dealt with under section 82(1) of the interim Constitution, and not under the prerogative of the common law. In *Fedsure*, the question of legality had to be dealt with under the Constitution and not under the common law principle of ultra vires.[68] In *Sarfu 3* the President's power to appoint a commission and the exercise of that power had to be dealt with under section 84(2) of the 1996 Constitution and the doctrine of legality, and not under the common law principles of prerogative and administrative law.[69]

[42] In the *Container Logistics* case it was said:

> "No doubt administrative action which is not in accordance with the behests of the empowering legislation is unlawful and therefore unconstitutional, and action which does not meet the requirements of natural justice is procedurally unfair and therefore equally unconstitutional. But, although it is difficult to conceive of a case where the question of *legality* cannot ultimately be reduced to a question of *constitutionality*, it does not follow

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67 1997 (4) SA 1 (CC); 1997 (6) BCLR 708 (CC).

68 Above n 18.

69 Above n 23.

> that the common-law grounds for review have ceased to exist. What is lawful and procedurally fair within the purview of s 24 is for the Courts to decide and I have little doubt that, to the extent that there is no inconsistency with the Constitution, the common law grounds for review were intended to remain intact."[70]

[43] Mr Bertelsmann, relying on this decision, contended that common law grounds of review can be relied upon by a litigant, and if this is done, the matter must then be treated as a common law matter and not a constitutional matter. That, it was submitted, is what happened in the present case, and the order made by the Full Bench consequently does not constitute an order of constitutional invalidity within the meaning of section 172(2)(a) of the Constitution.

[44] I cannot accept this contention which treats the common law as a body of law separate and distinct from the Constitution. There are not two systems of law, each dealing with the same subject matter, each having similar requirements, each operating in its own field with its own highest court. 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 control.

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70 Per Hefer JA, above n 28 at para 20 D-E.

[45] Whilst there is no bright line between public and private law, administrative law, which forms the core of public law, occupies a special place in our jurisprudence. It is an incident of the separation of powers under which courts regulate and control the exercise of public power by the other branches of government. It is built on constitutional principles which define the authority of each branch of government, their inter-relationship and the boundaries between them. Prior to the coming into force of the interim Constitution, the common law was "the main crucible" for the development of these principles of constitutional law.[71] The interim Constitution which came into force in April 1994 was a legal watershed. It shifted constitutionalism, and with it all aspects of public law, from the realm of common law to the prescripts of a written constitution which is the supreme law. That is not to say that the principles of common law have ceased to be material to the development of public law. These well-established principles will continue to inform the content of administrative law and other aspects of public law, and will contribute to their future development. But there has been a fundamental change. Courts no longer have to claim space and push boundaries to find means of controlling public power. That control is vested in them under the Constitution which defines the role of the courts, their powers in relation to other arms of government, and the constraints subject to which public power has to be exercised. Whereas previously constitutional law formed part of and was developed consistently with the common law, the roles have been reversed. The written Constitution articulates and gives effect to the governing principles of constitutional law. Even if the common law constitutional principles continue to have application in matters not expressly dealt with by the Constitution, (and that need not be decided

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71 See the discussion of this by Sedley in "The Sound of Silence: Constitutional Law Without a Constitution" (1994) 110 *The Law Quarterly Review* 270 especially at 291.

in this case)[72] the Constitution is the supreme law and the common law, in so far as it has any application, must be developed consistently with it, and subject to constitutional control.

[72] The application and development of the common law in so far as it might be applicable would be a constitutional matter within the jurisdiction of this Court. See below paras 46 and 49.

[46] In terms of section 173 of the Constitution, the Constitutional Court has the power "to develop the common law" in constitutional matters within its jurisdiction.[73] The power of this Court to develop the common law is also implicit in section 8(3) of the Constitution which deals with the application of the bill of rights to natural or juristic persons (clearly a constitutional matter) and provides that a court "must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right", and "may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1)."[74]

[47] In the *Container Logistics* case Hefer JA drew attention to section 35(3) of the interim Constitution which provided that:

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73 S 173 provides:

> "The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice."

74 S 36(1) makes provision for the limitation of rights. The limitation must be by way of law of general application and only "to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom . . ."

"In the interpretation of any law and the application and development of the common law and customary law, a court shall have due regard to the spirit, purport and objects of this Chapter."[75]

[75] A similar provision is contained in s 39(2) of the 1996 Constitution. S 39(2) provides:
"When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

[48] Commenting on this section and section 33(3)[76] he said:

> "There is no indication in the interim Constitution of an intention to bring about a situation in which, once a Court finds that administrative action was not in accordance with the empowering legislation or the requirements of natural justice, interference is only permissible on constitutional grounds. On the contrary, s 35(3) is a strong indication that it was the intention, not to abolish any branch of the common law, but to leave it to the Courts to bring it into conformity with the spirit, purport and objects of the Bill of Rights. Section 33(3), which proclaims that the entrenchment of rights shall not

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76 S 33(3) of the interim Constitution provided:

> "The entrenchment of the rights in terms of this Chapter shall not be construed as denying the existence of any other rights or freedoms recognised or conferred by common law, customary law or legislation to the extent that they are not inconsistent with this Chapter."

S 39(3) of the 1996 Constitution is to the same effect. It provides:

> "The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill."

> be construed as denying the existence of any other rights conferred by common law which are not inconsistent with the Bill of Rights, points the same way."[77]

[49] What section 35(3) and section 33(3) of the interim Constitution make clear is that the Constitution was not intended to be an exhaustive code of all rights that exist under our law. The reference in section 33(3) of the interim Constitution and section 39(3) of the 1996 Constitution is to "other rights", and not to rights enshrined in the respective Constitutions themselves. That there are rights beyond those expressly mentioned in the Constitution does not mean that there are two systems of law. Nor would this follow from the reference in section 35(3) of the interim Constitution and section 39(2) of the 1996 Constitution to the development of the common law. The common law supplements the provisions of the written Constitution but derives its force from it. It must be developed to fulfil the purposes of the Constitution and the legal order that it proclaims ─ thus, the command that law be developed and interpreted by the courts to promote the "spirit, purport and objects of the Bill of Rights." This ensures that the common law will evolve within the framework of the Constitution consistently with the basic norms of the legal order that it establishes. There is, however, only one system of law and within that system the Constitution is the supreme law with which all other law must comply.

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77 Above n 28 at 786.

[50] What would have been ultra vires under the common law by reason of a functionary exceeding a statutory power is invalid under the Constitution according to the doctrine of legality. In this respect, at least, constitutional law and common law are intertwined and there can be no difference between them. The same is true of constitutional law and common law in respect of the validity of administrative decisions within the purview of section 24 of the interim Constitution.[78] What is "lawful administrative action," "procedurally fair administrative action" and administrative action "justifiable in relation to the reasons given for it," cannot mean one thing under the Constitution, and another thing under the common law.

[51] Although the common law remains relevant to this process, judicial review of the exercise of public power is a constitutional matter that takes place under the Constitution and in accordance with its provisions. Section 167(3)(c) of the Constitution provides that the Constitutional Court "makes the final decision whether a matter is a constitutional matter". This Court therefore has the power to protect its own jurisdiction, and is under a

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78 Section 24 provides:

> "Every person shall have the right to —
>
> (a) lawful administrative action where any of his or her rights or interests is affected or threatened;
>
> (b) procedurally fair administrative action where any of his or her rights or legitimate expectations is affected or threatened;
>
> (c) be furnished with reasons in writing for administrative action which affects any of his or her rights or interests unless the reasons for such action have been made public; and
>
> (d) administrative action which is justifiable in relation to the reasons given for it where any of his or her rights is affected or threatened."

This provision was retained in terms of item 23(2)(b) of schedule 6 to the 1996 Constitution as a transitional provision.

constitutional duty to do so. One of its duties is to determine finally whether public power has been exercised lawfully. It would be failing in its duty if it were to hold that an issue concerning the validity of the exercise of public power is beyond its jurisdiction.

[52] Mr Bertelsmann contended, however, that even if the question of the validity of the Proclamation did raise a constitutional issue, it was one that did not fall within the ambit of section 172(2)(a) of the Constitution. He argued that section 172(2)(a) of the Constitution should be construed narrowly so as to embrace only that conduct of the President expressly provided for in the Constitution.

[53] In order to construe section 172(2)(a) it is necessary to have regard to the reasons why the Constitutional Court was established, its place in the constitutional order, its powers under the Constitution, and the purpose that section 172(2)(a) serves.

[54] The new constitutional order introduced by the interim Constitution in 1994 and completed when the "final" Constitution was adopted by the Constitutional Assembly in 1996, made a complete break from the past. This was stated clearly and eloquently by Mahomed J in *S v Makwanyane and Another* as follows:

> "In some countries the Constitution only formalises, in a legal instrument, a historical consensus of values and aspirations evolved incrementally from a stable and unbroken past to accommodate the needs of the future. The South African Constitution is different: it retains from the past only what is defensible and represents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian,

insular, and repressive, and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos expressly articulated in the Constitution. The contrast between the past which it repudiates and the future to which it seeks to commit the nation is stark and dramatic."[79]

[79] 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 at para 262.

[55] The Constitutional Court occupies a special place in this new constitutional order. It was established as part of that order as a new court with no links to the past, to be the the highest court in respect of all constitutional matters, and as such, the guardian of our Constitution. It consists of eleven members and unlike other courts, sits en banc, which ensures that the views of all its members are taken into account when decisions are made. The Constitution contains special provisions dealing with the manner in which the judges of this Court are to be appointed[80] and their tenure[81] which are different to the provisions

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80 S 174 and s 175. Appointments of Constitutional Court judges are made by the President from a list prepared by the Judicial Service Commission. The list must contain three names more than the number of appointments to be made. Before making the appointment, the President must consult the President of the Constitutional Court and the leaders of parties represented in the National Assembly. Other judges are appointed on the advice of the Judicial Service Commission. Special provisions pertain to the appointment of the President and Deputy President of the Constitutional Court, the Chief Justice and Deputy Chief Justice and acting judges of the Constitutional Court.

81 S 176(1) and (2). A Constitutional Court judge is appointed for a non-renewable term of 12 years, but must retire at the age of 70. Other judges hold office until discharged from active service in terms of an Act of Parliament.

dealing with other judicial officers. It has exclusive jurisdiction in respect of certain constitutional matters,[82] and makes the final decision on those constitutional matters that are also within the jurisdiction of other courts.[83]

[56] This is the context within which section 172(2)(a) provides that an order made by the SCA, a High Court or a court of similar status "concerning the constitutional validity of an Act of

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82 S 167(4). See above n 41.

83 S 167 (3) provides:

> "The Constitutional Court -
> (a) is the highest court in all constitutional matters;
> (b) may decide only constitutional matters, and issues connected with decisions on constitutional matters; and
> (c) makes the final decision whether a matter is a constitutional matter or whether an issue is connected with a decision on a constitutional matter."

Parliament, a provincial Act or any conduct of the President" has no force unless confirmed by the Constitutional Court. The section is concerned with the law making acts of the legislatures at the two highest levels, and the conduct of the President, who as head of state and head of the executive is the highest functionary within the state. The use of the words "any conduct" of the President shows that the section is to be given a wide meaning as far as the conduct of the President is concerned. The apparent purpose of the section is to ensure that this Court, as the highest court in constitutional matters, should control declarations of constitutional invalidity made against the highest organs of state. That purpose would be defeated if an issue concerning the legality of conduct of the President, which raises a constitutional issue of considerable importance, could be characterised as not falling within section 172(2)(a), and thereby removed from the controlling power of this Court under that section.

[57] I am accordingly of the opinion that the submission made on behalf of the President is correct and that the decision of the Full Bench is subject to confirmation by this Court in terms of section 172(2)(a) of the Constitution.

The validity of the President's decision

[58] The Act places no express statutory constraints on the time within which the President should bring it into force, or the circumstances to be taken into account by the President in doing so. The Full Bench held that it was clearly implied that the authority that vested in the President to bring the Act into operation

> ". . . would not be exercised before the necessary steps had been taken to ensure that the

> Act could be implemented once it had been put into effect."[84]

The facts, so it was held, showed that this precondition had not been satisfied. The President's decision was accordingly invalid and had to be set aside.

[59] I agree, though for somewhat different reasons, with the order made by the Full Bench. I will deal with this below. But first, I consider it necessary to refer to the content of the Act itself as well as the content of the legislation it seeks to replace, the 1965 Act.

[60] According to its long title, the 1965 Act was intended

> "[t]o provide for the registration of medicines intended for human and for animal use, for the registration of medical devices, for the establishment of a Medicines Control Council, for the control of medicines, Scheduled substances and medical devices and for matters incidental thereto."

Apart from providing for the formation of the Medicines Control Council and for certain ancillary and procedural matters, the 1965 Act essentially regulates and controls medicines. It contains a detailed and complex set of provisions encapsulated in section 22A that regulates the possession, use, sale, manufacture, import, export, cultivation and/or collection of various scheduled substances.

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84 Above n 13 at 797-8; see also above para 13.

[61] The medicinal substances regulated are listed in schedules 1-9 of the 1965 Act which run over 30 pages. A significant number of substances are regulated in this way. The schedules include, for example, arsenic, belladonna alkaloids, codeine, fluorides, insulin, calcitriol, calcium dobesilate, strychnine and nicocodine. The schedules underpin the prohibition of the sale, possession or use of substances except in accordance with the conditions prescribed. The 1965 Act was essential to protect the welfare of the public and to prevent trading in dangerous substances in uncontrolled circumstances. As Kriegler AJA noted in *Administrator, Cape v Raats Röntgen & Vermeulen (Pty) Ltd*

> "Manifestly the Act was put on the statute book to protect the citizenry at large. Substances for the treatment of human ailments are as old as mankind itself; so are poisons and quacks. The technological explosion of the twentieth century brought in its wake a flood of pharmaceuticals unknown before and incomprehensible to most. The man in the street ― and indeed many medical practitioners ― could not cope with the cornucopian outpourings of the world-wide network of inventors and manufacturers of medicines. Moreover, the marvels of advertising, marketing and distribution brought such fruits within the grasp of the general public. Hence an Act designed, as the long title emphasises, to register and control medicines."[85]

[62] The Act which the President purported to bring into force by the Proclamation is intended to replace the 1965 Act. Its long title states that its aim is

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85 1992 (1) SA 245 (A) at 254 B-D. See also *Mistry v Interim National Medical and Dental Council of South Africa and Others* 1998 (4) SA 1127 (CC); 1998 (7) BCLR 880 (CC) at para 10.

> "[t]o provide for the regulation and registration of medicines intended for human and for animal use; for the regulation and registration of medical devices; for the establishment of the South African Medicines and Medical Devices Regulatory Authority; for the control of orthodox medicines, complementary medicines, veterinary medicines, scheduled substances and medical devices; for the control of persons who may compound and dispense orthodox medicines, complementary medicines and veterinary medicines; for the repeal of the Medicines and Related Substances Control Act, 1965; the amendment of the Fertilizers, Farm Feeds, Agricultural Remedies and Stock Remedies Act, 1947; and for matters incidental thereto."

[63] Subject to certain saving provisions, section 50 of the Act provides for the repeal of the 1965 Act simultaneously with the commencement of the Act. Proclamation R49, if valid, would therefore both bring the new Act into force and repeal the 1965 Act.

[64] The Act controls medicinal substances and medical devices. Section 31 (which is equivalent to section 22A of the 1965 Act) prohibits the sale, possession or manufacture of medicinal substances listed in the schedules except in accordance with the prescribed conditions. The prohibitions contained in section 31 therefore require the existence of schedules to be operative. Without such schedules, the criminal prohibitions are meaningless and ineffective.

[65] However, the schedules upon which the prohibitions are based are not part of the Act. Section 31(2)(b) empowers the Minister to prescribe schedules that she deems necessary upon the recommendation of the Authority. The Minister had not, at the time the Act came into force, brought the schedules into existence. The net result was that if the Act was bought into force by the President's Proclamation, and the 1965 Act simultaneously repealed, all potentially dangerous

substances described in schedules 1 - 9 of the 1965 Act would have become unregulated. That would have had very serious consequences. These are described in the affidavit made by the Director-General of Health in these proceedings as follows:

> "The absence of an effective regulatory system may create the opportunity for medicines to be traded freely, whatever their strength, content and effect. There is also the danger that drug peddlers, pushers and users would exploit the opportunity and interpret the situation as one which allows them to freely trade, deliver, sell and use medicines and other substances.
>
> . . . .
>
> The effectiveness of the Drugs and Drug Trafficking Act, 140 of 1992, will be seriously reduced because of the absence of Schedules in the medicine regulatory regime . . . There is also a possibility that the pharmaceutical industry will be left in an unregulated environment which may rapidly descend into chaos. The danger to South Africa as a whole can hardly be over-emphasised."

[66] It is not clear why the schedules were not put in place before the promulgation of the Act. This could have been done by the Minister prior to promulgation[86] under the provisions of section 14 of the Interpretation Act[87] which provides:

> "Where a law confers a power
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> . . . .
>
> (b) to make, grant or issue any instrument, order, warrant, scheme, letters patent, rules, regulations or by-laws; or

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86 See in this regard *R v Magana* 1961 (2) SA 654 (T).

87 Act 33 of 1957.

. . . .

(e) to do any other act or thing for the purpose of the law,

that power may, unless the contrary intention appears, be exercised at any time after the passing of the law so far as may be necessary for the purpose of bringing the law into operation at the commencement thereof . . ."

[67] The Act requires the schedules to be made by way of regulation.[88] It also requires the Minister, in prescribing the schedules, to act on the recommendation of the Authority, a new institution to be established under the Act. This provision would not, however, have prevented the Minister from prescribing schedules before the date the Act was brought into force. Section 50(4) of the Act makes it plain that the Medicines Control Council, a body established in terms of the 1965 Act, must perform the functions of the governing board of the Authority until the Authority itself is established. The Minister could therefore have made schedules upon the advice of the Medicines Control Council before the Act was brought into force. If this had been done, the gap in the regulatory regime would have been avoided.

[68] The decision to bring the Act into force before the regulatory framework was in place, viewed objectively, is explicable only on the grounds of error. There is no dispute about this. Although the President did not himself make an affidavit, this averment is made specifically in the founding affidavit lodged on behalf of the President and the other applicants. It is stated that as a result of an error made by officials in the Department of Health, the President and the

88 S 31 read with s 1 of the Act.

Minister were brought under the bona fide but mistaken belief that it would be appropriate to bring the Act into operation. They were unaware of the serious flaws that existed and became aware of them only after the Proclamation had been issued. It was stated that the President

> "would not have exercised his discretion to proclaim Act 132 of 1998 had he been aware of the administrative flaws which had occurred."

Neither the President nor the Minister sought to contradict this averment, which is the only reasonable explanation for what happened.

[69] The Full Bench's finding that the power vested in the President to bring the Act into operation had to be exercised within the limits of the authority conferred by the Act, and that the President had failed to do so, raises the issue of justiciability.

[70] Courts in other jurisdictions have shown a reluctance to review the exercise of such decisions since they are closely related to the legislative process. Thus, in *Re Criminal Law Amendment Act, 1968-69* the majority judgment of the Supreme Court of Canada said:

> "if we accept, as I do, that s. 120 gives the Privy Council the power to proclaim or not to proclaim various subsections . . ., then that is the end of the matter; this Court cannot

examine the way in which this power is exercised."[89]

89 (1970) 10 DLR (3d) 699 (SCC) at 712. There were dissents in this case, but they were on the question whether sub-sections could be brought into force piecemeal.

[71] In *R v Secretary of State for the Home Department ex parte Fire Brigade Union & Others*,[90] Parliament had enacted legislation making provision for a statutory compensation scheme, and empowered the Home Secretary to bring it into force on a day as he "may . . . appoint". Instead of bringing the legislation into force the Home Secretary established a non-statutory scheme that could not coexist with the statutory scheme. In this decision, referred to by the Full Bench in its judgment, the House of Lords had to decide whether the conduct of the Home Secretary that in effect prevented him from bringing legislation into force was unlawful and subject to judicial review. This question was considered by ten judges in the three courts through which the case passed. Five of the judges were unwilling to review the conduct of the Home Secretary. But five, including three in the House of Lords, held that there were grounds on which the conduct preventing the Home Secretary from exercising the power conferred on him should be declared to be unlawful and in abuse of his power.

[72] Lord Keith, one of the dissenting judges in that case, described a provision empowering the Secretary of State to determine when legislation should be brought into force, as calling for a political decision that gave rise to a duty to Parliament but not to the public at large. He was of the opinion that for a court to intervene in any circumstances in a matter concerning the exercise of such power

90 [1995] 2 AC 513 (HL).

> "would represent an unwarrantable intrusion by the court into the political field and a usurpation of the power of Parliament."[91]

[73] The majority of the House of Lords, however, took a different view, holding that in the special circumstances of that case the conduct of the Home Secretary was open to review on the grounds that he had acted unlawfully in putting in place measures that would prevent him from exercising the statutory power that had been vested in him by Parliament.

[74] Lord Browne-Wilkinson, one of the majority, was careful to confine the decision to the facts of the case. He said that a Court would not ordinarily direct a Minister to bring an Act into force.

> "[I]t would be most undesirable that . . . the court should intervene in the legislative process by requiring an Act of Parliament to be brought into effect. That would be for the courts to tread dangerously close to the area over which parliament enjoys exclusive jurisdiction, namely the making of legislation. In the absence of clear statutory words imposing a clear statutory duty, in my judgment the court should hesitate long before holding that such a provision . . . imposes a legally enforceable duty on the Secretary of State."[92]

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91 Id at 546 D. See also similar views expressed by Lord Mustill at 562 D-G.

[92] Id at 550 G-H.

[75] In *AK Roy v Union of India*[93] various amendments to the Constitution had been passed by the Parliament of India subject to the condition that they would be brought into force at a date to be determined by the government. The government brought some but not all of the amendments into force. One that had not been brought into force was of considerable importance and an order was sought to compel the government to bring that amendment into force. The case came before the Supreme Court of India two and a half years after the amendments had been passed by Parliament. The majority of the court declined to order the government to bring the amendment into force. Writing for the majority Chandrachud CJ said:

> "The Parliament having left to the unfettered judgment of the Central Government the question as regards the time for bringing the provisions of the 44th Amendment into force, it is not for the court to compel the government to do that which, according to the mandate of the Parliament, lies in its discretion to do when it considers it opportune to do it."[94]

The judgment goes on to state that in the absence of objective norms prescribed by the

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93 (1982) 1 SCC 271.

94 Id at para 51. The facts in *Roy* are closer to the facts in the *Fire Brigade* case than to the facts of the present case. In the dissenting judgements, a minority of the court said that constitutional amendments had to be brought into force within a reasonable time, and that a reasonable time for doing so had elapsed.

legislation for the exercise of the power to bring the amendment into force, a court would not ordinarily substitute its judgment for that of the government.

[76] The fact that objective norms are not expressly prescribed in an Act for the exercise of such a power by the President, and that a court will not ordinarily substitute its judgment for that of the President in such cases, does not, however, mean that a decision by the President to bring the Act into force can never be subject to review by a court. Powers are not conferred in the abstract. They are intended to serve a particular purpose. That purpose can be discerned from the legislation that is the source of the power and this ordinarily places limits upon the manner in which it is to be exercised.[95] If those limits are transgressed a court is entitled to intervene and set the decision aside. I deal later in more detail with the purpose for which the power to decide when the Act should be brought into force was given to the President. At this stage it is sufficient to say that in my view that purpose was to bring the Act into force when the President considered it appropriate to do so. That called for a political judgment by the President that had to be made consistently with that purpose and the requirements of the Constitution.

[77] In *Russell v The Queen*[96] the Privy Council had to consider a provision of an Act of the Parliament of Canada that provided that it would be applicable only in those counties or cities in Canada where a majority of the electorate gave their approval to the Act. A contention that this

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95 Cf *S v Manelis* 1965 (1) SA 748 (A) at 755 H.

96 [1882] AC 829 (PC).

amounted to a delegation of legislative power to the electors of the cities and counties concerned was rejected. It was held:

> "The short answer to this objection is that the Act does not delegate any legislative powers whatever. It contains within itself the whole legislation on the matters with which it deals. The provision that certain parts of the Act shall come into operation only on the petition of a majority of electors does not confer on these persons power to legislate. Parliament itself enacts the condition and everything which is to follow upon the condition being fulfilled."[97]

[78] The same applies to the decision of the President in the present case. The Act was inchoate in the sense that it would come into operation only when the President so determined. In bringing the law into operation the President exercised a power conferred upon him by Parliament that had the consequence, if validly exercised, of fulfilling the condition to which the Act was subject. In *Sarfu 3*, this Court said:

> "Determining whether an action should be characterised as the implementation of legislation or the formulation of policy may be difficult. It will, as we have said above, depend primarily upon the nature of the power. A series of considerations may be relevant to deciding on which side of the line a particular action falls. The source of the power, though not necessarily decisive, is a relevant factor. So too is the nature of the power, its subject matter, whether it involves the exercise of a public duty, and how closely it is related on the one hand to policy matters, which are not administrative, and on the other to the implementation of legislation, which is. While the subject matter of a power is not relevant to determine whether constitutional review is appropriate, it is relevant to determine whether the exercise of the power constitutes administrative action for the purposes of section 33. Difficult boundaries may have to be drawn in deciding what should and what should not be characterised as administrative action for the

97 Id at 835.

purposes of section 33. These will need to be drawn carefully in the light of the provisions of the Constitution and the overall constitutional purpose of an efficient, equitable and ethical public administration. This can best be done on a case by case basis."[98]

[98] Above n 23 at para 143 (footnotes omitted).

[79] This is one of those difficult cases. The power is derived from legislation and is close to the administrative process. In my view, however, the decision to bring the law into operation did not constitute administrative action. When he purported to exercise the power the President was neither making the law, nor administering it. Parliament had made the law, and the executive would administer it once it had been brought into force. The power vested in the President thus lies between the law making process and the administrative process. The exercise of that power requires a political judgment as to when the legislation should be brought into force, a decision that is necessarily antecedent to the implementation of the legislation which comes into force only when the power is exercised. In substance the exercise of the power is closer to the legislative process than the administrative process. If regard is had to the nature and subject matter of the power, and the considerations referred to above,[99] it would be wrong to characterise the President's decision to bring the law into operation as administrative action within the meaning of item 23(2)(b) of the sixth schedule of the Constitution. It was, however, the exercise of public power which had to be carried out lawfully and consistently with the provisions of the Constitution in so far as they may be applicable to the exercise of such power.

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99 Above from para 70.

[80] In providing that the Act would only come into force on a date to be determined by the President, Parliament indicated that it considered that it might be inappropriate to bring the Act into force immediately. It vested in the President the power to determine the appropriate time for this to be done. Where no criteria have expressly been set for such a decision, I agree with the view expressed by Sir Thomas Bingham in his judgment in the Court of Appeal in the *Fire Brigades Union* case,[100] that the power to bring legislation into force is one that imposes a duty

> ". . . to bring the provisions into force as soon as he might properly judge it to be appropriate to do so. In making that judgment he would be entitled to have regard to all relevant factors. These would plainly include the time needed to make preparations and prepare subordinate legislation [and other matters relevant to the coming into force of that legislation]."

[81] The factors relevant to this decision do not in themselves become jurisdictional facts on which the exercise of the President's decision depends. It is for the President to decide which factors are relevant, and in the light of those factors to make the political judgment as to whether it is appropriate to bring the Act into force. The difficulty in the present case is that the President was wrongly advised and mistakenly thought it was appropriate to bring the Act into force.

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100 Above n 90 at 520 H.

[82] That raises the question whether a court can interfere with a decision made in good faith by the President in the exercise of such a power. A discussion of this question in South Africa prior to the enactment of the interim Constitution usually began with a reference to the much quoted statement from the judgment of Innes ACJ in *Shidiack v Union Government (Minister of the Interior)*[101] where it was said:

> "Now it is settled law that where a matter is left to the discretion or the determination of a public officer, and where his discretion has been *bona fide* exercised or his judgment *bona fide* expressed, the Court will not interfere with the result. Not being a judicial functionary, no appeal or review in the ordinary sense would lie; and if he has duly and honestly applied himself to the question which has been left to his discretion, it is impossible for a Court of Law either to make him change his mind or to substitute its conclusion for his own."[102]

The judgment goes on to hold that there are circumstances in which

> "interference would be possible and right. If for instance such an officer had acted *mala fide* or from ulterior and improper motives, if he had not applied his mind to the matter or exercised his discretion at all, or if he had disregarded the express provisions of a statute - in such cases the Court might grant relief. But it would be unable to interfere with a due and honest exercise of discretion, even if it considered the decision inequitable or wrong."[103]

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101 1912 AD 642.

102 Id at 651.

103 Id at 651-652.

[83] To the extent that *Shidiack* requires public officials to exercise their powers in good faith and in accordance with the other requirements mentioned by Innes ACJ, it is consistent with the foundational principle of the rule of law enshrined in our Constitution. The Constitution, however, requires more; it places further significant constraints upon the exercise of public power through the bill of rights and the founding principle enshrining the rule of law.[104]

[84] In *S v Makwanyane*,[105] Ackermann J characterised the new constitutional order in the following terms:

> "We have moved from a past characterised by much which was arbitrary and unequal in the operation of the law to a present and a future in a constitutional State where State action must be such that it is capable of being analysed and justified rationally. The idea of the constitutional State presupposes a system whose operation can be rationally tested against or in terms of the law. Arbitrariness, by its very nature, is dissonant with these core concepts of our new constitutional order."

Similarly, in *Prinsloo v van der Linde and another,*[106] this Court held that when Parliament enacts legislation that differentiates between groups or individuals, it is required to act in a rational manner:

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104 See *Hugo*, above n 67 at para 28; *Sarfu 3*, above n 23 at para 148.

105 Above n 79 at para 156.

106 1997 (3) SA 1012 (CC); 1997 (6) BCLR 759 (CC) at para 25.

> "In regard to mere differentiation the constitutional state is expected to act in a rational manner. It should not regulate in an arbitrary manner or manifest 'naked preferences' that serve no legitimate governmental purpose, for that would be inconsistent with the rule of law and the fundamental premises of the constitutional state."

[85] It is a requirement of the rule of law that the exercise of public power by the executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the executive and other functionaries must, at least, comply with this requirement.[107] If it does not, it falls short of the standards demanded by our Constitution for such action.

[86] The question whether a decision is rationally related to the purpose for which the power was given calls for an objective enquiry. Otherwise a decision that, viewed objectively, is in fact irrational, might pass muster simply because the person who took it mistakenly and in good faith believed it to be rational. Such a conclusion would place form above substance, and undermine an important constitutional principle.

[87] In the present case, the Act was not brought into force with the appropriate regulatory infrastructure in existence or ready to be put in place. On the contrary, the founding affidavit asserts that the necessary schedules had not been determined and that the Act was brought into

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107 This is an incident of the "culture of justification" described by Mureinik in "A Bridge to Where? Introducing the Interim Bill of Rights" (1994) 10 *SAJHR* 32, which is referred to in *Prinsloo,* above n 106.

force in error.

[88] The Director-General of Health also alleges in his affidavit that:

> "For the purposes of the present application, it is sufficient to state that the entire regulatory structure relating to medicines, including veterinary medicines (now intended to include stock remedies) and the control of such medicines, has been rendered unworkable by the promulgation of Act 132 of 1998 in this manner. Inasmuch as any of the regulations may still have some formal validity they are not workable. Act 132 of 1998 is a completely new Act with unique and innovative provisions, which were not previously dealt with in the 1965 Act, even as amended, and the regulations passed in respect of that Act. The regulations which are intended to be published in terms of Act 132 of 1998, and made in terms of the provisions of Section 48 of that Act, would serve an essential purpose in fulfilling the objectives intended by Act 132 of 1998."

It is not necessary to decide whether this averment is correct, for the absence of the schedules was fundamental.

[89] The President's decision to bring the Act into operation in such circumstances cannot be found to be objectively rational on any basis whatsoever. The fact that the President mistakenly believed that it was appropriate to bring the Act into force, and acted in good faith in doing so, does not put the matter beyond the reach of the Court's powers of review. What the Constitution requires is that public power vested in the executive and other functionaries be exercised in an objectively rational manner. This the President manifestly, though through no fault of his own, failed to do.

[90] Rationality in this sense is a minimum threshold requirement applicable to the exercise of

all public power by members of the executive and other functionaries. Action that fails to pass this threshold is inconsistent with the requirements of our Constitution, and therefore unlawful. The setting of this standard does not mean that the courts can or should substitute their opinions as to what is appropriate, for the opinions of those in whom the power has been vested. As long as the purpose sought to be achieved by the exercise of public power is within the authority of the functionary, and as long as the functionary's decision, viewed objectively, is rational, a court cannot interfere with the decision simply because it disagrees with it, or considers that the power was exercised inappropriately.[108] A decision that is objectively irrational is likely to be made only rarely but if this does occur, a court has the power to intervene and set aside the irrational decision. This is such a case. Indeed, no rational basis for the decision was suggested. On the contrary, the President himself approached the court urgently, with the support of the Minister of Health and the professional associations most directly affected by the Act, contending that a fundamental error had been made, and that the entire regulatory structure relating to medicines and the control of medicines had as a result been rendered unworkable. In such circumstances, it would be strange indeed if a court did not have the power to set aside a decision that is so clearly irrational.

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108 See *Prinsloo* above n 106 at para 36 where in a different context it was held that "[a]s long as there is a rational relationship between the method and object it is irrelevant that the object could have been achieved in a different way."

[91] The President is answerable to Parliament, and Parliament has the power to correct the decision. But Parliament was not in session at the time because of the pending general election, and considerable cost and inconvenience would have been occasioned by calling Parliament together on the eve of the election for the sole purpose of reversing the President's decision. The fact that another course might possibly have been open to the applicants in the present case does not mean that the President's decision was not justiciable. There might be cases in which a court would decline to intervene in matters that are properly matters to be dealt with by the legislature, but this is not such a case.

[92] On 7 May 1999, an attempt was made by the Minister of Health to salvage the situation by purporting to make the schedules that were published in Government Notice R567.[109] The validity of that action is questioned in the founding affidavit on various grounds. In the view that I take of the matter, it is not necessary to consider the issues raised in this regard. It is sufficient to say that the Full Bench held that the schedules made by the Minister were invalid. There has been no appeal against that part of the order, which is not subject to confirmation by this court in terms of Section 172(2)(a) of the Constitution.

[93] There may possibly be cases where the making of regulations necessary to give effect to an Act of Parliament is so closely related in time and circumstance to the promulgation of the Proclamation bringing the Act into force, that they can be treated as being part of a single process by which the Act is brought into force rationally and consistently with the requirements of the Constitution. But this is not such a case, and no one has suggested that this is the explanation for

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109 See above para 6.

the Proclamation having been made prior to the necessary regulatory infrastructure being in place.

[94] The applicants acted promptly in coming to court and there is nothing to suggest that any legitimate interest of any member of the public has been prejudiced by the order made by the Full Bench.[110] On the contrary, a failure to confirm the order would have serious consequences for the control of medicines and could invalidate actions taken to that end in terms of the Act since the order was made. There are good reasons for intervention in the present case and in my view the order made by the Full Bench concerning the invalidity of the Proclamation was correct and should be confirmed.

[95] The order made by the Full Bench is accordingly confirmed.

Langa DP, Ackermann J, Madala J, Mokgoro J, Ngcobo J, O'Regan J, Sachs J, Yacoob J and Cameron AJ concur in the judgment of Chaskalson P.

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110 In an appropriate case, prejudice could be addressed through the courts' powers under section 172 (1) of the Constitution to control a declaration of invalidity by suspending the order, limiting its retrospective effect, or otherwise making an order that would be just and equitable.

CHASKALSON P

For the first and second appellants / seventh and eighth applicants:	E Bertelsmann SC and J Moorcroft instructed by D M Kisch Inc.
For the first to sixth applicants:	P Coppen instructed by the State Attorney, Pretoria.