



WHEN COURTS REBUKE COURTS:

Lessons from the Constitutional Court's criticism of the SCA in *Makate II*

by VUYANI NGALWANA SC

Criticism by higher courts of lower court judgments is not new. But seldom is such criticism as sharp as the Constitutional Court's recent censure of the Supreme Court of Appeal (SCA) in *Vodacom (Pty) Ltd v Makate and Another*.¹

First, an orientation on the two courts.

CONSTITUTIONAL COURT AND SCA ON SA COURT LANDSCAPE

The Constitutional Court is the highest court in South Africa. It currently has nine permanent justices and two acting justices. It sits *en-banc* for the hearing of each case with a quorum of eight. Its jurisdiction, as determined by the Constitution of the Republic of South Africa, is confined to (1) hearing and deciding constitutional matters and (2) hearing and deciding matters that

raise arguable points of law of general public importance and in respect of which the Constitutional Court has granted leave to appeal to it. What constitutes a "constitutional matter" and an "arguable point of law of general public importance" is not always clear. But that is a topic for another paper.

The SCA is the second highest court of general appellate jurisdiction in South Africa. According to its website it presently has 24 permanent justices and five acting justices. It sits in panels usually of five justices (sometimes three) for the hearing of appeals, with three appeals being heard in one of three courtrooms on any given day during term. The SCA exercises general appellate jurisdiction, except in respect of labour and competition matters which are the domain of the Labour Appeal Court and the Competition Appeal Court, respectively, whose judgments can only be appealed to the Constitutional Court.

BRIEF LITIGATION BACKGROUND TO THE DISPUTE

This case marks the second time the Constitutional Court has ruled on the long-running dispute between Vodacom and Mr Nkosana Makate over reasonable compensation for the "Please Call Me" idea. In its 2016 judgment in *Makate v Vodacom (Pty) Ltd* ("Makate I"),² the Constitutional Court ordered Vodacom to negotiate compensation in good faith, with any deadlock to be resolved by its CEO. When negotiations broke down, the CEO offered R47 million. Mr Makate challenged this determination, and the matter has since wound through the High Court, the SCA, and now back to the Constitutional Court nearly a decade later.

SUMMARY OF THE CONSTITUTIONAL COURT'S REBUKE

In a unanimous decision, the Constitutional Court has delivered unusually sharp criticism of the SCA majority judgment. While it refrains from using words like "incompetence" or "dereliction", its language leaves little doubt about its concern on this. Expressions such as "thinly reasoned", "astounding", "inexplicable" and "confusing reasoning" reflect the depth of its disapproval.

Among the Constitutional Court's specific criticisms are:

- **Misattribution of findings:** The SCA is said to have ascribed to the Constitutional Court a finding that the Constitutional Court says it never made in *Makate I*.
- **Confusion over legal principles:** The SCA is said to have been confused about the facts to which the *Plascon-Evans* rule applied. The rule guides how factual disputes are resolved in motion proceedings.
- **Misattributed concessions:** The SCA is said to have attributed to Vodacom's counsel a concession that was central to his client's case – something the Constitutional Court found implausible.
- **Failure to pronounce on key issues:** The SCA is said to have summarised submissions but failed to decide the most crucial question – whether the CEO's compensation determination was equitable or reasonable.
- **Failure to assess evidence:** The Constitutional Court pointed out that significant portions of evidence were either disregarded or seemingly overlooked by the SCA majority.
- **Granting relief not sought:** The SCA is said to have granted Makate orders he had not requested through cross-appeal.
- **Adopting pleadings wholesale:** The SCA is said to have copied directly from Makate's Notice of Motion, resulting in imprecise relief with huge financial implications.

The detail on each of these findings is discussed below. In short, the Constitutional Court has concluded that "the real appeal was not decided", amounting to a failure of justice.

Lest the purpose of this paper is misunderstood, and hopefully in order to avoid unintended consequences, I should explain my purpose.

PURPOSE OF THIS PAPER

The purpose in this short paper is neither to agree nor disagree with the Constitutional Court's assessment of the SCA's approach. To do that in a fair and meaningful way would require a reading and digestion of the entire record that was before it. That is beyond the scope of this short analysis. Instead, my purpose is to highlight the Constitutional Court's points of criticism and then point to what I believe are the lessons that emerge from this Constitutional Court judgment.

THE DETAIL OF THE CONSTITUTIONAL COURT'S FINDINGS

I have limited this analysis to eight points of criticism of the SCA majority by the Constitutional Court. They range from alleged failures in the treatment of evidence to confusion in reasoning, to a faulty recollection of counsel's submissions, to confusion on the application of the *Plascon-Evans* rule in motion proceedings, to a failure to decide the core issues on appeal.

The rebuke begins in earnest in paragraph 68 of the judgment. There, the Constitutional Court says:

"Unfortunately, I cannot but say that the judgment is thinly reasoned. At times it is characterised by confusing reasoning. At other times it is characterised by statements that evince a disregard for or lack of awareness of the facts and issues."

Then follows what the Constitutional Court says are "examples" of its concerns.

FIRST REBUKE: MISATTRIBUTION OF A FINDING THE CONSTITUTIONAL COURT NEVER MADE

The first rebuke is expressed as follows:

"The judgment says that Vodacom was not happy with the fact that in its 2016 judgment this Court 'finally dealt with the matter on the 5% of 'revenue generated' basis'. This Court never determined a percentage. Mr Makate pushed for a 15% revenue share. This Court declined to award that. Instead, it held that reasonable compensation had to be arrived at through negotiation between Vodacom and Mr Makate, failing which it had to be determined by the CEO."³

Further, the Constitutional Court says:

"The Supreme Court of Appeal went on to say that 'when the CEO considered the computation, he instinctively or by design ... fell back to Vodacom's original stance of sharing on a 5% profit basis, contrary to the operative order' (i.e., this Court's 2016 order). The 5% revenue share was, in fact, agreed by the parties; that is common cause. It is unsurprising that the CEO applied it. It passes more than strange that the Supreme Court of Appeal referred to the 5% as this Court's stipulation and, in the same breath, as Vodacom's 'original stance'. But the confusion relates to the source: was the source this Court's order or Vodacom's original stance? More strange is that later the Supreme Court of Appeal does recognise that the parties had agreed on the 5% share of revenue."⁴

If this assessment by the Constitutional Court of the SCA's approach on the question of the percentage of revenue is correct, then this suggests that the SCA majority may not have understood the issues that were decided by the Constitutional Court in *Makate I*. This has troubling implications because such an oversight may undermine confidence in the court.

Some people may say it is one thing for an acting judge in the High Court to misconstrue a judgment of the higher court as he or she may be set right on appeal; it is quite another for the second highest court to do so on an issue so fundamental. This is because damage may be considerable – and irreversible – if the case in the SCA raises no constitutional issue or arguable point of law of general public importance such that there is no further recourse by the aggrieved party to the Constitutional Court.

SECOND REBUKE: CONFUSION ON APPLICABILITY OF THE PLASCON-EVANS RULE

The second rebuke involves the application of the *Plascon-Evans* rule in motion proceedings. This is a subject that has tripped up many a candidate for judicial appointment at the Judicial Service Commission interviews, although in this instance the question is not so much the *how* as the *when* the rule is to be applied.

The rule derives eponymously from a 1984 judgment of the Appellate Division of the Supreme Court (as the SCA was then known). Essentially, it is a tool by which the motion court seeks to resolve material factual disputes when they arise. For non-lawyers, motion court is a court where legal disputes are decided without the aid of oral evidence (opposite of a trial court) and is intended to resolve those legal disputes based on facts that are not in dispute between the litigants and are contained in court papers filed by the litigants. The essence of the rule is that it is like a referee deciding whose version of events counts when players disagree, unless one side's story is plainly unbelievable.

The application of the rule presupposes that there are factual disputes that are material to the resolution of the legal question in issue. On this question, the Constitutional Court says of the SCA majority's approach:

"The majority was totally confused as to the issue or issues to which the application of the rule related. It held that the applicability of the rule did not arise at all in the appeal because the parties were agreed on the issue in respect of which the rule was raised. That issue, according to the majority, was the percentage on which the revenue share was to be pegged. That was wrong. The *Plascon-Evans* rule was raised in totally different contexts. That much is clear from the minority's engagement with the subject. Indeed, it would not have made sense for Vodacom to invoke *Plascon-Evans* in the context of the agreed percentage at which revenue was to be shared. As a result of its confusion on the applicability of the *Plascon-Evans* rule, the majority failed altogether to address and decide important questions to which the applicability of the rule related. That constituted a breach of the duty of proper consideration."⁵

This raises a serious concern and may affect negatively public confidence in the rule of law and the courts. At the SCA level – particularly if the issues raised in a given case do not engage the

Constitutional Court's jurisdiction and therefore the SCA is the final arbiter on those issues – failure by the court to appreciate the issues to which the applicability of the *Plascon-Evans* rule relate can be catastrophic.

THIRD REBUKE: MISATTRIBUTED CONCESSION

The Constitutional Court points to a misattributed concession. It says:

"Yet another instance of confusion is a statement by the Supreme Court of Appeal that Vodacom's counsel conceded that the CEO's determination was not reasonable. One need not have been at the Supreme Court of Appeal to realise that such a concession would have been senseless. In context, that was a key question in the contest at the Supreme Court of Appeal: was the CEO's determination reasonable? The parties adopted opposite sides on this question, with Vodacom defending the determination and Mr Makate challenging it."⁶

It is difficult to understand how the SCA would attribute a concession to counsel that is dispositive of his own client's case, and on an evidential issue that is central to the appeal. However, one should note that it is not uncommon for counsel to make concessions in oral argument where making a concession is the right thing to do. After all, counsel's duty is to assist the court, not to win a case by any means necessary. But such concessions are generally on legal points not evidentiary issues (unless the evidence is undisputed) because counsel is not a witness.

From the Constitutional Court's judgment, it appears that the reasonableness of the CEO's determination was a heavily contested issue that was central to the determination of the appeal before the SCA. It is therefore unclear how experienced counsel would concede the very evidentiary issue that his client was vehemently defending. The question is why the SCA majority attributed such a concession to counsel for Vodacom if he did not make it. This may negatively affect confidence in the rule of law.

FOURTH REBUKE: FAILURE TO PRONOUNCE ON THE ISSUE BEFORE IT

Continuing on that theme, the Constitutional Court says the SCA simply highlighted the parties' submissions on the most crucial aspect of the appeal – the Chief Executive's determination of what is reasonable compensation for Mr Makate – without pronouncing on them. It says:

"[W]hat was crucial to the Supreme Court of Appeal's determination against Vodacom was the question whether the R47 million awarded by the CEO was inequitable ... The Supreme Court of Appeal obviously asked this question because it was key to Vodacom's appeal. Vodacom was supporting the CEO's determination in the sum of R47 million. It was thus arguing that the amount was equitable. An answer that said the amount was inequitable meant that Vodacom's appeal had to fail. That is how crucial the question was. Crucial though the question was to the determination of the appeal, all that the Supreme Court of Appeal did was to set out the parties' arguments in this regard without pronouncing on them ... It was not enough merely to

highlight the parties' submissions. A shortcoming of this nature on so crucial an issue constitutes a breach of the duty of proper consideration."⁷

The Constitutional Court continues:

"The matters of confusion on the part of the Supreme Court of Appeal are not mundane. They are symptomatic of a Court that did not appreciate the facts and issues it had to determine. That goes to the important question whether the Supreme Court of Appeal considered and decided all issues that were germane to the dispute before it, a matter that is fundamental to the duty of proper consideration."⁸

This raises a serious concern that goes to public confidence in the rule of law and how it is applied by the courts. Had Vodacom not had recourse to the Constitutional Court, it might have suffered an enormous injustice at the hands of the SCA which, save for a possible reconsideration application, it could not redress as that would have been the final decision.

FIFTH REBUKE: FAILURE TO ASSESS EVIDENCE

The Constitutional Court also criticises the SCA for what it says was failure to assess evidence or of being unaware of evidence that it ought to have assessed. The substance of the criticism is this:

"[I]n paragraphs 6.1-6.8 of his determination, the CEO dealt with evidence on 'PCM revenue in the context of Vodacom's voice revenue'. He dealt with the evidence extensively. As part of this, he referred to calculations of voice revenue in one of Mr Makate's models and said those calculations or estimates 'need to be carefully examined'. The Supreme Court of Appeal said that this word of caution or conclusion was expressed 'without saying why'. The truth is that in the same sentence in which this quote appears, the CEO continued and said that this is so 'because if [the estimates] are inconsistent with the publicly available financial data, the model would be discredited'. The CEO did not end there. He proceeded to deal with the subject and to explain himself fairly extensively in paragraphs 6.4-6.14.

He concluded that – on Mr Makate's calculations – PCM revenue made up more than 80% of Vodacom's total mobile voice revenue, and in five of those years, more than 90%. In paragraph 6.5 the CEO said that Mr Makate's figures thus suggested that an overwhelming percentage of Vodacom's voice revenue was generated as a direct result of PCM. This, according to the CEO, ignored many other variables which went into generating revenue for a telecommunication operator, namely: investment into the network; other products and services offered by Vodacom; growth in customer numbers; and growth in spend by existing customers. He concluded that the numbers in the model used by Mr Makate were unrealistic and on this ground alone no reliance could be placed on the model. In paragraphs 6.6-6.14 he proceeded to do an in-depth analysis of Mr Makate's model, identifying where, in his view, it had gone seriously wrong.



Mr Makate contested Vodacom's voice revenue figures that the CEO used in the analysis set out above, and a great deal of evidence from the parties was adduced on this aspect. In his explanatory affidavit the CEO substantiated his reasons for rejecting Mr Makate's models in no fewer than 27 paragraphs.

With all this in mind, it is difficult to comprehend how the Supreme Court of Appeal came to the conclusion that what the CEO had said was unexplained. The Supreme Court of Appeal was either not aware of the CEO's explanation or disregarded it. Whatever the position, its conclusion is inexplicable."⁹

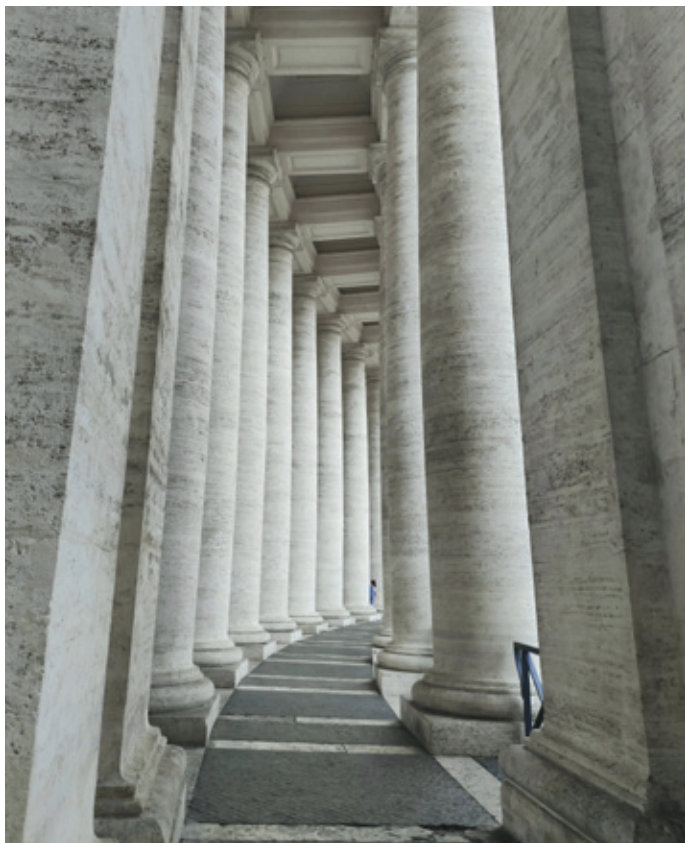
This has troubling implications for public confidence in the rule of law and our courts.

SIXTH REBUKE: DISREGARD FOR AND LACKING AWARENESS OF EVIDENCE

The Constitutional Court says the following on this score:

"I say disregarding when, in fact, it may well not even have been aware of the evidence. The Supreme Court of Appeal said that it could find no objection by Vodacom to Mr Makate's models on compensation similar to that of a third-party service provider. In similar vein, the Supreme Court of Appeal said that 'absent any evidence that Mr Makate's computation is wrong ... I can find no reason why Mr Makate's computation should not be accepted as correct'. This is astounding.

First, Mr Makate's models, which the Supreme Court of Appeal says were not objected to by Vodacom, concerned the hotly contested issue of the computation



of compensation. Why would Vodacom have appealed at all if it was not contesting Mr Makate's models? Unsurprisingly, Vodacom submits that '[t]he entire debate in [the Supreme Court of Appeal] turned on the question whether the models presented by Mr Makate or those of the CEO should be preferred'. In what is a clear demonstration that Mr Makate's models were at issue, the minority engages with this debate at great length in paragraphs 62-202.

Second, with all this in mind, how could the Supreme Court of Appeal say that evidence that Mr Makate's computation was wrong was absent? In argument before us, Vodacom cites examples of the issues that it addressed countering Mr Makate's models and, therefore, computation. It does so with reference to the CEO's determination. These examples were: PCM volumes; incremental revenue; call duration; effective call rate; duration of the contract; and mora interest and the time value of money.

How – in the face of all of this – the Supreme Court of Appeal held that it could find no objection to Mr Makate's models and that there was no evidence that his computation was wrong escapes me. This is a very fundamental issue because the computation is what the entire litigation was about. This means the Supreme Court of Appeal was unaware of or disregarded evidence on what the entire case was about. If that is not a total failure in the performance of the duty of proper consideration, I do not know what is."¹⁰

This has serious implications for sustained confidence in the court and the rule of law.

SEVENTH REBUKE: GRANTING RELIEF NOT SOUGHT

The Constitutional Court rebukes the SCA for its "apparent readiness ... to accept whatever Mr Makate said" and going as far as granting him relief he did not seek. In this regard, the Constitutional Court says:

"I cannot conceive of any basis on which Mr Makate was – as the Supreme Court of Appeal seems to suggest – automatically entitled to whatever he asked for. The Supreme Court of Appeal makes this bald statement without explaining it. It also seems to have given no consideration to the fact that, in granting Mr Makate what he wanted – under paragraph 2(b) of its order – it was granting an order which had not been sought by way of cross-appeal and was thus not properly before it ... It may well be that in the end Mr Makate will get what he is asking for. But that is a conclusion which must be reached after a proper consideration of the issues."¹¹

The Constitutional Court then says:

"It is at variance with a fair hearing for a court to decide an issue that has not been pleaded and which the affected party was not called upon to answer.

...

By deciding a case that was not before it, the Supreme Court of Appeal deprived Vodacom of the opportunity to make submissions on whatever issue it might have been minded to on the possibility of a substituted order."¹²

This raises a serious concern with implications for the public's confidence in the rule of law and the court.

Let us take a step back to reflect on the Constitutional Court's own conduct in this regard. I do so not as criticism but as a reminder that this is an important adjudicative issue that our courts across the hierarchy spectrum need to address.

In *Tasima*,¹³ Justice Zondo was critical of the majority both for failing to follow precedent (*stare decisis*) and for granting an order that was not sought. In his concurring judgment, he felt it necessary to express himself as follows:

"In *Maphango*¹⁴ I pointed out in my minority judgment that the majority judgment was granting the applicant relief that it had not asked for. In *Bel Porto*,¹⁵ a decision of this Court, Chaskalson CJ, writing for the majority, had made it clear that it was not permissible to grant a party relief that it had not asked for. I highlighted this in my judgment. The majority went ahead and granted the applicants relief that they had not asked for and, in this way, did not follow *Bel Porto*. Mogoeng CJ and Jafta J concurred in my judgment...

In *KwaZulu-Natal Joint Liaison Committee*¹⁶ the majority decided the matter in favour of the applicant on a basis that was not part of the applicant's case as set out in its founding affidavit. They did this despite the fact that, during the hearing, Counsel for the applicant had repeatedly disavowed any reliance on the basis relied upon by the majority judgment to grant the applicant relief. Deciding the matter on a basis that fell outside the applicant's founding affidavit went against the rule of practice that in motion proceedings a party stands or falls

by its papers. In my minority judgment I highlighted the fact that there were a number of decisions of this Court that had affirmed this rule of practice. Mogoeng CJ and Jafta J concurred in my judgment.

The majority judgment went against those decisions. On that occasion ... neither the majority judgment nor the separate judgment advanced any of the grounds recognised in law as justifying not following a precedent. There may be more cases to add here but it is not necessary to do so. Both in Maphango and KwaZulu-Natal Joint Liaison Committee the result would have been different if, in the case of Maphango, Bel Porto had been followed and, in the case of KwaZulu-Natal Joint Liaison Committee, Bel Porto and other decisions of this Court had been followed."¹⁷

The point is that the tendency of our courts to grant orders that have not been sought, and to disregard precedent, seems to have plagued even the highest court and needs to be addressed and rooted out. The question is by what means this can be done when the apex court itself is not immune to this temptation which, according to the Constitutional Court, evinces a failure of justice.

EIGHTH REBUKE: UNCRITICAL COPYING OF NOTICE OF MOTION INTO COURT ORDER

Before highlighting the Constitutional Court's criticism of the SCA majority's copying of Mr Makate's notice of motion into its order, I wish to highlight another growing practice of courts simply adopting large swathes of the heads of argument filed on behalf of one party and present that as the judgment. This is not judging. It is a failure to fulfil a judicial function. The Constitutional Court has criticised this approach – albeit mildly – in, for example, *Stuttafords v Salt of the Earth Creations*.¹⁸ It said:

"On analysis, it appears that the judgment consists of approximately 1890 lines of typing of which, apart from a summary of the relief sought and the terms of the order, only approximately 32 lines are the judge's original writing. The rest consists of words taken exactly from Salt's counsel's heads of argument, sometimes even without taking out phrases like 'it is submitted', and emotive comments on The Gap and Stuttafords' contentions and actions. There is no direct independent reference in the main judgment to The Gap and Stuttafords' heads of argument, except for references carried over from Salt's heads of argument.

...

While some reliance on and invocation of counsel's heads of argument may not be improper, it would have been better if the judgment had been in the judge's own words [because]

'[t]he true test of a correct decision is when one is able to formulate convincing reasons (and reasons which convince oneself) justifying it. And there is no better discipline for a judge than writing (or giving orally) such reasons. It is only when one does so that it becomes clear whether all the necessary links in a chain of reasoning are present; whether inferences drawn ... are properly drawn; whether the relevant



principles of law are what you thought them to be; whether or not counsel's argument is as well founded as it appeared to be at the hearing (or the converse); and so on.

The very act of having to summarise in one's own words what a witness has said, or what is stated in an affidavit or what a document says or provides, is in itself a very good discipline and is conducive to a better and more accurate understanding of the case.'

These remarks were made by a former Chief Justice, Corbett CJ, in an address at the first orientation course for new judges under the new constitutional dispensation. We have deliberately refrained from dealing with case law on the issue whether the extensive use of counsel's heads could lead to a perception of bias, because it is not a question we need to decide here. Suffice to state, however, that if these wise words are heeded by judges the necessity of deciding the issue in the future should not arise."¹⁹

The practice of a court's wholesale adoption of one party's heads of argument and presenting that as its own judgment is to be sternly discouraged. The Constitutional Court's mild criticism of this practice does little to discourage this troubling abdication of judicial responsibility.

This practice appears to have emerged again in this *Makate II* case. This time, says the Constitutional Court, the SCA "simply copied paragraph 2 of Mr Makate's High Court notice of motion verbatim, thus incorporating the revenue-sharing range of 5%-7.5% and the two alternative forms of interest." The Constitutional Court continues:

"If the Supreme Court of Appeal had properly

considered the relief, it would have realised that – although a litigant can claim relief across a range or in the alternative – a court has to fix the relief with precision. As previously mentioned, the range and alternatives resulted in huge monetary differences.”²⁰

CONSTITUTIONAL COURT'S CONCLUSION

The Constitutional Court's conclusion is biting and raises serious concerns that may affect confidence in the courts and the rule of law:

“To conclude, the evidentiary matters and legal questions highlighted above and which the Supreme Court of Appeal disregarded or of which it was unaware or on which it was confused were key to the determination of the contest between the disputants. The confusion or disregard or lack of awareness of the evidence and arguments led to the Supreme Court of Appeal not assessing and deciding on central issues and crucial evidence. As indicated above, it cannot do that. To put it bluntly, the real appeal was not decided. That constituted a total failure of justice in breach of the rule of law and the fair hearing right protected in section 34 of the Constitution.”²¹

So, what lessons can we learn from this Constitutional Court judgment?

LESSONS

The criticisms levelled by the Constitutional Court on the SCA majority in *Makate II* raise serious concerns. As noted, the Constitutional Court has itself been criticised by at least one of its own for not following precedent and granting relief based on an unpleaded case. In my view, some of the lessons that arise from this case include the following:

1. **Judicial fallibility:** Judges are human and therefore prone to error. However, mistakes at appellate level can cause immense harm, especially when no further appeal is possible. The human element can also involve judges infusing their judgments with their own world outlook or personal convictions on specific issues. While it is impossible to tell merely from reading a judgment (unless the judge expressly says so or there are sufficient indicators of this in the judgment), allowing one's personal convictions to dictate the outcome of a case is a human frailty of which judges must be aware, confront and remove from their adjudication process, not deny.
2. **Accountability:** South Africa lacks a mechanism for compensating litigants harmed by judicial errors or judicial abdication, especially at appellate level. This is an area that may require some exploration.
3. **Duty of proper reasoning:** Courts must decide the issues before them and explain their reasoning. Wholesale adoption of one party's submissions or granting relief not sought undermines confidence in judicial independence.
4. **Consistency and precedent:** The tendency of courts to depart from precedent or grant unpleaded relief has drawn criticism even within the Constitutional

Court itself. Strengthening judicial discipline in this area is vital.

5. **Bias and perception:** While allegations of bias are difficult to prove, judgments that appear to uncritically accept one party's position risk creating perceptions of partiality that can erode trust in the judiciary. Also, judging through or under the influence of personal convictions and preferences on socio-economic, sociopolitical or moral issues is a betrayal of the oath of office that all judges take or swear when appointed. By that oath, all judges swear “*that, as a Judge . . . I will be faithful to the Republic of South Africa, will uphold and protect the Constitution and the human rights entrenched in it, and will administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law*”. However objectively noble or popular a judge's personal convictions or world outlook or preference of the outcome of a case, his or her duty as a judge – paying fealty only to the Constitution and his or her oath of office – is to render a judgment that is rooted in the undisputed (or proven) facts and application of the current law to those facts. Some may say that judging through the lens of personal conviction or socio-political or moral or socioeconomic preferences renders one fit for politics and the NGO “pressure group” space, not the judiciary.

CONCLUSION

The Constitutional Court's sharp rebuke of the SCA in *Makate II* is unprecedented in tone and seriousness. It is also an opportunity to reflect on judicial accountability, transparency, and the importance of careful reasoning in protecting the rule of law. While courts must retain independence, they must also remain alert to how lapses in judgment or process affect litigants, public confidence, and the legitimacy of the judiciary itself. **A**

Notes

- 1 (CCT 51/24) [2025] ZACC 13 (31 July 2025).
- 2 (CCT52/15) [2016] ZACC 13; 2016 (6) BCLR 709 (CC); 2016 (4) SA 121 (CC).
- 3 Para 68.
- 4 Para 69.
- 5 Para 70.
- 6 Para 71.
- 7 Para 68.
- 8 Para 72.
- 9 Paras 74-77.
- 10 Paras 83-86.
- 11 Para 88.
- 12 Para 100-102.
- 13 (CCT5/16) [2016] ZACC 39; 2017 (1) BCLR 1 (CC); 2017 (2) SA 622 (CC) (9 November 2016).
- 14 (CCT57/11) (CC) [2012] ZACC 2; 2012 (3) SA 531 (CC); 2012 (5) BCLR 449 (CC) (13 March 2012).
- 15 (CCT58/00) [2002] ZACC 2; 2002 (3) SA 265; 2002 (9) BCLR 891 (21 February 2002).
- 16 (CCT 60/12) [2013] ZACC 10; 2013 (6) BCLR 615 (CC); 2013 (4) SA 262 (CC) (25 April 2013).
- 17 Paras 221-223.
- 18 (CCT 59/10) [2010] ZACC 14; 2011 (1) SA 267 (CC); 2010 (11) BCLR 1134 (CC) (2 September 2010).
- 19 Paras 9-12.
- 20 Para 89.
- 21 Para 93.