

## **Role of the Constitutional Court**

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## **The Court's position in the justice system**

The Constitutional Court is South Africa's highest court on constitutional matters. So its jurisdiction - the scope of its authority to hear cases - is restricted to constitutional matters and issues connected with decisions on constitutional matters.

[Chapter 8](#) of the final Constitution, entitled "Courts and Administration of Justice", sets out the structure of South Africa's court system and defines the role of each court.

Section 165 says the judicial authority of South Africa is vested in the courts, which are independent and subject only to the Constitution and the law. And section 166 identifies these courts as:

- the Constitutional Court;
- the Supreme Court of Appeal;
- the High Courts;
- the Magistrates' Courts; and
- any other court established or recognised by an Act of parliament.

The Constitutional Court is the highest court in the country when it comes to the interpretation, protection and enforcement of the Constitution. It deals exclusively with constitutional matters - those cases that raise questions about the application or interpretation of the Constitution.

The Supreme Court of Appeal, which used to be known as the Appellate Division, sits in Bloemfontein and is the highest court in respect of all other matters. It can hear and decide an appeal against any decision of a High Court.

Decisions of the Supreme Court of Appeal are binding on all lesser courts and the decisions of the High Courts (which used to be known as the Supreme Courts) are binding on Magistrates' Courts within their areas. These decisions are an important source of law. A decision of a High Court in one division is not binding on another, but in practice has strong persuasive

force.

At the moment there are 10 High Courts: the Cape of Good Hope; Eastern Cape; Northern Cape; Free State; Kwa-Zulu Natal; Transvaal; Transkei; Ciskei; Venda and North-West. There are also three local divisions: the Witwatersrand Local Division, the Durban and Coast Local Division and South-eastern Cape Division.

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### **The main task of the Constitutional Court**

Section 167(3) of the Constitution says the Constitutional Court:

- is the highest court in all constitutional matters;
- may decide only constitutional matters and issues connected with decisions on constitutional matters; and
- makes the final decision whether a matter is a constitutional matter or whether an issue is connected with a decision on a constitutional matter.

Section 167(4) goes on to give the Constitutional Court exclusive jurisdiction in deciding disputes about the powers and constitutional status of branches of government. Only the Constitutional Court may:

- 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;
- decide on the constitutionality of any parliamentary or provincial Bill;
- decide on the constitutionality of any amendment to the Constitution; and
- decide that parliament or the president has failed to fulfil a constitutional obligation.

Of course, the duties that fall to the other courts are  borne by the Constitutional Court too. All courts in South Africa have to apply the Constitution and the law "without fear, favour or prejudice" - section 165. And section 39(2) of the Bill of Rights makes special mention of the judiciary's duty in interpreting and developing the law: it has to promote the spirit, purport and objects of the Bill of Rights.

In fact, the Constitutional Court, in the case of [Carmichele v Minister of Safety and Security and another](#), held that the courts are "under a general duty to develop the common law when it deviates from the objectives of the country's Bill of Rights".

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## How cases reach the Constitutional Court

A case can reach the Constitutional Court in a variety of ways:

- as the result of an appeal from a judgment of the High Court or the Supreme Court of Appeal;
- as a direct application to the Court, asking it to sit as a court of first and last instance because of the urgency of the matter;
- as the result of the court below declaring a piece of legislation invalid, which requires confirmation by the Constitutional Court; or
- as a Bill parliament asks the Court to review.

The Court has the discretion whether or not to hear a matter; an exception is where an Act has already been declared invalid and the Court is required to confirm the finding.

Typically, cases that reach the Constitutional Court start in the High Court, which has the power to grant various remedies and can declare legislation invalid. Any decision that invalidates provincial or parliamentary legislation or any conduct of the President must be confirmed by the Constitutional Court before it has any effect.

If the High Court rules against an application, the Constitutional Court may be approached on appeal. Since the Court may only hear constitutional matters, an applicant must show that the case concerns a constitutional matter.

The Constitutional Court judges will decide if an important principle relating to the interpretation of the Constitution has been raised and will consider whether there is a reasonable prospect that the appeal may succeed. But there is no automatic right of appeal.

If the Court decides to grant leave to appeal, or if it is unsure and wishes to hear argument on whether leave to appeal should be granted, the case is set down on a certain date so that argument from the parties can be heard. Each party submits written submissions before the date of argument so that the judges can familiarise themselves with the case and the position taken by each party.

Sometimes at this point other interested parties may ask to be joined in proceedings, or be admitted as an *amicus curiae* (friend of the court). They too will make written submissions and sometimes give oral argument if directed by the chief justice to do so.

As for direct access, section 167 of the Constitution allows a person, "when it is in the interests of justice and with leave of the Constitutional Court", to bring a matter directly to the Constitutional Court; or to appeal directly to the Constitutional Court from any other court. This procedure is ordinarily permitted only in exceptional circumstances.

The Constitutional Court deals with the matter of direct access to the court in the judgment handed down in [Dudley v City of Cape Town and Another](#).

The procedure in bringing a case is set out in the [rules of the Constitutional Court](#).

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### **How it decides cases**

The Constitution requires that a matter be heard by a quorum of at least eight judges. In ordinary practice, all 11 judges hear every case. If any judge is absent for a long period or a vacancy arises, an acting judge may be appointed.

The Court does not hear evidence or question witnesses. As a court that functions largely as a court of appeal, it considers the record of the evidence heard in the original court that heard the matter.

A result of this is that the Court works largely with written arguments presented to it. The hearings are intended to tackle difficult issues raised by these arguments.

Each judge sitting in a case must indicate his or her decision; the ruling is then determined by majority vote. The reasons are published in a written judgment.

Once a case has been set down, the chief justice will ask a particular judge to do special preparation and possibly write the judgment. Usually cases will be spread out so that each judge writes from time to time.

Once all parties have been heard, the judges meet to discuss the possible outcome of the case.

This is one of the central features of the Court: the judges act collegially and meet often to discuss important and controversial aspects of a case. A few days later, the writing judge will submit a memo to all the others, indicating where he or she stands. If there are disagreements about the decision or the route taken in reaching it, the judge who disagrees with the main writer will prepare to write a concurrence or dissent.

Writing a judgment is a long process. The judge prepares a first draft and circulates it. The judges then meet and submit comments or changes. If a dissenting judgment has been written, the justices will begin to indicate which judgment they will follow and why. Sometimes lengthy discussions take place.

Once consensus is reached, the judgments are thoroughly checked. The judgment is then handed down - released at a public sitting of the Court.  
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## **How the Court functions**

### *Hearings and hours*

The Court's hearings are open to the public. The sessions are: 1 February to 31 March; 1 to 31 May; 1 August to 30 September; and 1 to 30 November. The ordinary hours of argument are: 10am to 11:15am; 11:30am to 12:45pm; and 2:15pm to 4pm. It is during these periods that the Court has public hearings.

But the bulk of the judges' work consists of analysing documents and preparing judgments, done in the library, chambers and conference room. Each judge has two full-time researchers.

### *The media*

The Constitutional Court decides matters of great importance and interest to the public, so it strives to assist the media in reporting on its work.

The press may attend hearings and cameras in fixed positions are usually allowed in Court throughout a hearing. The Court prepares a media summary before argument and another for distribution after pronouncing its decision.

### *The law clerks and the library*

The Constitutional Court is unique in that the judges have the help of two clerks each - see the [law clerks page](#) for more. The judges also depend heavily on the [library](#), a major repository that is on its way to becoming a resource for the whole of Africa.

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## **Deadlines for filing documents with the Constitutional Court**

Deadlines or time limits are imposed by the [Court Rules](#). They vary

depending on the nature and stage of the proceedings involved. It is a litigant's responsibility to check the rules.

Please note also that all time limits are expressed in court days and that Saturdays, Sundays and public holidays are excluded when counting court days.

## **The main categories**

### *Urgent applications*

In terms of [rule 12](#), the Chief Justice may dispense with the usual requirements for applications, including deadlines. The need to do so must be motivated in the affidavit supporting the urgent application.

### *Applications for direct access to the Court*

[Rule 18](#) deals with these applications. They will only be considered by the Court if exceptional circumstances exist. Once such an application has been made, the following deadlines apply:

- Any party opposing the application must file notice of intention to oppose within 10 court days (court days running from Monday to Friday).
- After notice of intention to oppose has been received or the 10 days has expired, the Chief Justice shall issue directions concerning the matter - including setting deadlines for the filing of affidavits and written submissions, if necessary.

### *Applications for leave to appeal*

Applications for leave to appeal against the decision of any court are dealt with under [rule 19](#). The applicable deadlines are:

- The application must be brought within 15 court days of the date of the decision against which leave to appeal is sought.
- Within 10 court days of such application, the respondent(s) must indicate in writing whether they oppose the application and, if so, on what grounds.
- A respondent wishing to cross-appeal to the Court must file such application for leave to cross-appeal within 10 days of the filing of the application for leave to appeal.
- The Court will then decide how to deal with the matter, and directions imposing further deadlines may be issued.

### *Confirmation proceedings*

In terms of [rule 16](#), a registrar of a court making an order of constitutional invalidity must lodge a copy of that order with the registrar of this Court within 15 court days. However, any person entitled to do so may appeal against that order of invalidity within 15 court days of the making of such order. Similarly, a person may apply for the confirmation of an order of invalidity within 15 days of the making of the order.

### *Amici curiae*

Unless the Chief Justice has issued directions imposing deadlines for applications to be admitted as an amicus, [rule 10\(5\)](#) says that such applications must be made not later than five court days after the lodging of the respondent's written submissions. If consent to your admission as an amicus has been received from the parties in the matter, such written consent must be lodged with the registrar within five court days of it having been obtained.

### *Directions of the Court*

Once an application has been filed, the Chief Justice may issue directions in which further deadlines are imposed - for example, for the filing of written submissions and applications to be admitted as an amicus, and for the setting of dates for hearings.

### *Condonation of non-compliance with deadlines*

The Court has the power to condone non-compliance with the rules, including deadlines, in appropriate cases. Parties who fail to comply with deadlines must file an application for condonation, or include a prayer for condonation in their main application, in which the reason for failure to comply with the rules must be provided.