Do Women on South Africa's Courts Make a Difference?

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Women's presence on the bench in South Africa began in 1994 with the end of apartheid. As Justice Yvonne Mokgoro observes in the documentary *Courting Justice*, during the hundreds of preceding years " I guess there was no thought that women could also serve." More accurately, what kept women off the bench were the thoughts that women , unsuited by nature, could never serve. The post apartheid Constitution, setting forth a human rights- based constitutional democracy, dismissed these notions and mandated the consideration of women when making judicial appointments.

The appointments were to be made to what was now to be an independent judiciary. The apartheid judiciary had not been independent—its charge was to assure the validation of apartheid's legislation, executive regulations and official actions. Yet, these courts were to be retained, as were the judges and court personnel whose record was hostile to the very human rights which the judiciary was now charged to protect. The Constitution did create one new court ; i.e., the Constitutional Court . It was charged with and limited to considering cases in which constitutional issues were raised.

Given the continued engagement of the apartheid judges --all but two of whom were white males and almost all of whom were energetic in support of apartheid's oppressive and repressive laws and brutal actions, the transformation of the judiciary by race and gender was and continues to be verbally embraced as a high priority. Central to the transformation was to be the appointment of Africans, Coloureds, Asians and women.

In contrast to the assertions in the United States that judges function like baseball umpires, a frequently expressed and undisputed justification for the appointment of those previously excluded by racism and sexism was precisely so that they would provide perspectives previously absent— these perspectives were heralded as essential to advancing the Constitution's promises. In providing previously absent perspectives the African, Coloured, Asian and women judges were expected to add value -- they were expected to make a difference in the decisions rendered.

Since 1994 women have been appointed. Seven of them are featured in the documentary. *Courting Justice.* Frequently at screenings, the question is asked, "What difference have they made?"

The women have made a difference. They have inspired other women to aim for judicial appointments, they have raised the comfort level of women appearing in court, and they have -- through their extra- judicial volunteer commitments-- worked to increase access to justice. But, have they made a substantive difference; i.e., have they affected South Africa's jurisprudence?

The StudyReported Here

It is this question which the study reported here embarked on answering. The study should be understood as preliminary even to the first step in what will require many more before an answer can be definitive.

The study focuses only on the women Constitutional Court Justices. There were two among the first eleven Constitutional Court Justices appointed in 1994: Yvonne Mokgoro and Kate O'Regan. In 2005 they were joined by a third woman: Bess Nkabinde.

From 1994 – 2009 the Constitutional Court issued judgments in 356 cases. Trying to capture the Justices "voices," this study chose to scrutinize those cases in which one or more of the women "spoke" in a majority opinion, a concurring opinion or a dissenting opinion. This resulted in scrutinizing 130 cases—a little more than a third of the cases decided. In 59 or 58% of the 130 cases, one of the three women Justices wrote the court's opinion. In addition to the 59 majority opinions written by one of the women, they wrote 52 concurring opinions and 19 dissenting opinions.

The decision to focus on the Constitutional Court Justices, rather than the judges serving in other courts, perhaps impedes identifying the jurisprudential impact of women because of the special characteristic of all those appointed to this court: all of the judges had evidenced strong commitments to human rights before being considered for appointment; all are in accord that their assignment is to lay the foundation for this new democracy by creating a human rights jurisprudence.

Where "Women's Issues" are Involved

Even in this strong human rights environment, the women nevertheless differed from all but one of their male colleagues when cases involved issues clearly related to women's rights or to matters of particular relevance to women's experiences..

Three cases make this point:
S v. Jordan and Others [1]
Volks NO v. Robinson and Others [2] and
Masiya v. Director of Public Prosecutions Pretoria and Another.[3]

In *Jordan* the issues relate to the criminalization of prostitution and brothels ; in *Robinson* the issue involves the widow's benefit entitlement for a woman, not legally married, living in a life long relationship, and in *Masiya* the issue involves the definition of rape. In the *Jordan* and *Robinson* cases the women Justices were in dissent; in the *Masiya* case the three women were among the majority.

[1] *S v. Jordan and Others* [2002] ZACC 22, 2002 (6) SA 642 (CC).
[2] *Volks NO v. Robinson and Others* [2005] ZACC 2; 2005 (5) BCLR 446 (CC).
3 *Masiya v Director of Public Prosecutions Pretoria and Another* [2007] ZACC 9; 2007 (5) SA 30 (CC).

S v. Jordan and Others

The law criminalizing prostitution targets only the prostitutes and not their customers. The law also criminalizes brothels. Considered here is only the former and only some of the arguments made.

The majority held that in targeting the prostitutes and not also their customers, the law is not discriminatory. It held that the law is gender-neutral; that customers are liable to prosecution under separate statutes; that the state in targeting the supplier—i.e., the prostitute, is choosing an effective way to curb prostitution ; that the fact that the prostitutes are overwhelmingly female does not render the law discriminatory based on gender ; and that prostitutes have other economic options.

The dissent by O'Regan and Justice Albie Sachs acknowledged that prostitution has "an impact on the quality of life," and that the Legislature, therefore, can regulate prostitution "so long as it does not limit other fundamental rights in a way that would not be justifiable in an open and democratic society."[4] They then, point by point, develop their argument that the law is discriminatory.

They begin with a consideration of gender stereotypes.

> [T]he effect of making the prostitute the primary offender directly reinforces a pattern of sexual stereotyping which is itself in conflict with the principle of gender equality. The differential impact between prostitute and client is therefore directly linked to a pattern of gender disadvantage which our Constitution is committed to eradicating. In all these circumstances, we are satisfied that…this is a case where an apparently neutral differentiating criterion producing a markedly differential impact on a listed ground results in indirect discrimination on that ground.[5]
>
> This distinction [between the prostitute and the customer] is, indeed, one which for years has been espoused both as a matter of law and social practice. The female prostitute has been the social outcast, the male patron has been accepted or ignored…. The difference in social stigma tracks a pattern of applying different standards to the sexuality of men and women. [6]
>
> Although the difference may on its face appear to be a difference of form, it is in our view a difference of substance, that stems from and perpetuates gender stereotypes in a manner which causes discrimination…Such discrimination, therefore, has the potential to impair the fundamental dignity and personhood of women.[7]
>
> We see no reason why the plier of sex for money should be treated as more blameworthy than the client. If anything, the fact that the male customers will generally come from a class that is more economically powerful might suggest the reverse. To suggest, as the law (and Ngcobo J) do, that women may be targeted

[4] *Jordan* at para. 56.
[5] *Id.* at para. 60.
[6] *Id.* at para. 64.
[7] *Id.* at para. 65.

> for prosecution because they are merchants of sex and not patrons is to turn the real-life sociological situation upside-down[8].
>
> Parliament may decide to render criminal sexual intercourse where a reward is paid, but their decision to make only purveyors of sexual intercourse and not purchasers primarily liable, entrenches the deep patterns of gender inequality which exist in our society and which our Constitution is committed to eradicating.[9]
>
> It is no answer…to a constitutional complaint to say that the constitutional problem lies not in the law but in social values, when the law serves to foster those values. The law must be conscientiously developed to foster values consistent with our constitution."[10]

The dissent argues against the other conclusions contained in the majority opinion but the statements above are sufficient to indicate that O'Regan (and Sachs) offer a very different perspective.

Volks v. Robinson

The court's judgment finds the law providing widow benefits "incapable of being interpreted so as to include permanent life partners" [11] and goes on to distinguish between marriage and other cohabiting relationships. It references the argument in the dissenting opinion by Justice Sachs expressing "concern for the plight of vulnerable women in cohabitation relationships"[12] and, while expressing " a genuine concern for vulnerable women who …become victims of cohabitation relationships," [13] it asserts this is "part of a broader societal reality that must be corrected through the empowerment of women and social policies by the Legislature."[14]

The joint dissenting opinion by O'Regan and Mokgoro, instead of pointing to the differences between marriage and other cohabiting relationships, points to the commonalities. "[N]ot every family is founded on a marriage recognized as such in law. Yet members of such families often play the same roles as in families which are founded on marriage and provide companionship, support and security to one another." [15]

The dissent also points to the historical failure to recognize marriages solemnized by customary law and by the principles of Islam or Hinduism and asserts the "constitutional prescript that families that are established outside of civilly recognised marriages should not be subjected to unfair discrimination. [16]…. In our view, [the court's judgment] defeats the important constitutional purpose played by the prohibition of discrimination on the grounds of marital status." [17]

[8] *Id.* at para. 68 .
[9] *Id.* at para. 69.
[10] *Id.* at para. 72.
[11] *Volks* at para. 45.
[12] *Id.* at para. 64.
[13] *Id.* at para. 66.
[14] *Id.* at para.68.
[15] *Id.* at para. 106.
[16] *Id.* at para.107.
[17] *Id.* at para. 118.

Rather than dismissing women's vulnerability, they argue its relevance. They describe the status of cohabiting women under common law showing, they assert, "that cohabiting partners are a vulnerable group, and that in the absence of any other forms of legal regulation, the fact that they are excluded from the provisions of section 2(1) [the section of the Act under consideration] can have a grave impact on the interests of cohabiting partners."[18]

Under the circumstances in the case before them, where there is a permanent life partnership in which the parties had undertaken mutual duties of support and one in which the pattern of vulnerability and dependence had been established, where the surviving partner is in need, and there has been no equitable distribution to the surviving spouse from the estate of the deceased spouse exclusion from "the provision of section 2(1) can have a grave impact….It is our conclusion that, in the absence of any regulation in such circumstances, the effect of limiting the scope of section 2(1) to married spouses only will constitute unfair discrimination under section 9(3) of the Constitution. [19]

The cited section of the Constitution prohibits direct or indirect unfair discrimination based on marital status.[20]

> It is not clear why marriage only need be protected….To the extent that the purpose of providing legal protection to a surviving spouse but not to a surviving cohabitant might be to preserve the religious attributes of marriage, this cannot be an acceptable purpose in terms of our Constitution…. While marriage plays an important role in our society, and most religions cherish it, the Constitution does not permit rights to be limited solely to advance a particular religious perspective. [21]

Masiya v. Director of Public Prosecution Pretoria.

The facts in the case are that Masiya anally penetrated a 9-year old girl without her consent. He could not be charged with rape because the common law definition included only non-consensual vaginal penetration. Instead he was charged with indecent assault, an offence carrying a lesser penalty. The questions before the court were whether to broaden the definition of rape to include anal penetration, whether the definition should be gender neutral (that is.whether it should include males as well as females) and whether these matters properly belong in the courts rather than in the legislature.

Nkabinde wrote the majority opinion onto which both Mokgoro and O'Regan signed. She starts with an account of the changes in the understanding of laws regarding rape from its intent to protect the economic interests of the father, husband or guardian of the female ; to perpetuate stereotypes, male dominance and power; and to perceive females as objects." [22]

> With the advent of our constitutional dispensation based on democratic values of human dignity, equality and freedom, the social foundation of these rules has disappeared….[In South Africa now the] focus is on the breach of "a more specific right such as the right to bodily integrity" … and security of the person and

[18] *Id.* at para. 132.
[19] *Id.*
[20] S. AFR. CONST., Act 108 of 1996.
[21] *Volks* at para. 119.
[22] *Masiya* at para. 24.

> the right to be protected from degradation and abuse. The crime of rape should therefore be seen in that context. [23]

She sees no distinction between nonconsensual vaginal and anal penetration in that both constitute " a form of violence…equal in intensity and impact…. The object of the criminalisation of this act is to protect the dignity, sexual autonomy and privacy of women and young girls as being generally the most vulnerable group in line with the values enshrined in the Bill of Rights - a cornerstone of our democracy." [24]

She declines to consider whether rape should be defined as gender-neutral because the facts in the Masiya case do not deal with this. That issue will be dealt with, she asserts, either by the Legislature or by the courts "when the circumstances make it appropriate and necessary to do so."[25] It is inappropriate in this case for the court to rule because "the development of common law…is a power … always vested in our courts…exercised in an incremental fashion as the facts of each case require."[26]

Chief Justice Pius Langa concurs with the majority's extended definition of rape but dissents on their failure to extend the definition to include males. His dissent offers what I regard as a more strident feminist position than that written by Nkabinde.. His reasoning is that the problem is about gender and not about males and females.[27]

> [T]he groups of men who are most often the survivors of rape, young boys, prisoners and homosexuals, are, like women, also vulnerable groups in our society. Moreover, they, and most other male victims, are raped precisely because of the gendered nature of the crime. They are dominated in the same manner and for the same reason that women are dominated; because of a need for male gender-supremacy. That they lack a vagina does not make the crime of male rape any less gender-based.[28]

He argues that both male and female victims are similarly situated and should be treated alike.

> In my view, to do otherwise fails to give full effect to the constitutional values of dignity, equality and freedom: dignity through recognition of a violation; equality through equal recognition of that violation; and freedom as rape negates not only dignity, but bodily autonomy. All these concerns apply equally to men and women and necessitate a definition that is gender-neutral concerning victims.[29]

He further argues that failure to extend the definition harms women.

> The unintended effect is to enforce the subordinate social position of women which informed the very patriarchy we are committed to uproot. The social reality of women cannot be ignored, but we should be wary not to worsen it.[30]

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[23] *Id.* at para. 25.
[24] *Id.* at para. 37.
[25] *Id.* at para. 30.
[26] *Id.*
[27] *Id.* at para. 77.
[28] *Id.* at para.. 86.
[29] *Id.* at para. 80.
[30] *Id.* at para. 85.

He responds to Nkabinde's embrace of judicial restraint that

> although the particular survivor in this case was a female, the case is not about the sex of the victim but about gender and how we understand rape. Extending the definition to male survivors therefore goes no further than is absolutely necessary to cure the defect I have found in the common law. Even if this may be a slight departure from the facts of the case, it is not unusual for this Court to give orders, either when developing the common law or determining the validity of statutes that go beyond the exact facts but are necessitated by the underlying constitutional principles involved.[31]

Did the women make a difference?

How much difference did the women make in the *Jordan* and *Robinson* cases cannot be calculated based on this review. Perhaps they provided a weightier dissent for the record than would have occurred had they not been there or they expressed views that are there to be adopted at a later time. In *Van der Merwe,* a case considered below, the court's judgment cites the reasoning in a dissenting opinion, written by Mokgoro in another case, as dispositive of an issue before the court.

How much of a difference the women made in the *Masiya* case, where they were in the majority and where the court's opinion was even written by one of the women justices, also cannot be calculated from this study. It is worth noting that the women declined to extend the definition of rape to include males while the Chief Justice offered a "feminist" argument that it should.

Disagreement Among the Women Justices

While agreeing in cases in which women's issues or concerns are raised, the women Justices did not always speak in unison on other matters. In five of the 129 cases examined, there was disagreement on the outcome. In another ten cases they agreed on the outcome but not on the reasoning. The issues considered were wide ranging, as a scan of the cases below reveals.

The five cases are:

S v. Manamela and Another (Director-General of Justice Intervening) [32] considered whether a criminal procedure provision was consistent with the right to a fair trial. Mokgoro signed onto a concurring opinion and O'Regan dissented.

New National Party of South Africa v. Government of RSA[33] considered whether a bar-coded identity document could be required as a prerequisite for voter registration. Mokgoro signed onto a concurring opinion and O'Regan dissented.

Lufano Mphaphuli and Associates (Pty) Ltd. v. Andrews and Another [34] considered whether the constitution applied to private arbitration. Nkabinde signed onto the court's judgment, while O'Regan wrote the dissent , signed onto by Mokgoro.

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[31] *Id.* at para. 90.

[32] *S v. Manamela and Another* [2000] ZACC 5; 2000 (3) SA 1 (CC).

[33] *New National Party v. Government of Republic of South Africa and Others* [1999] ZACC 5; 1999 (3) SA 191 (CC).

Van der Merwe and Another v. Taylor and Others [35]dealt with the arbitrary confiscation of property. Nkabinde co- wrote the majority opinion, O'Regan and Mokgoro wrote separate dissenting opinions.

Bertie Van Zyl (Pty)Ltd and Another v. Minister for Safety and Security and Others.[36] Mokgoro wrote the majority opinion and O'Regan dissented. The issue was the constitutionality of the Private Security Industry Regulation Act.

The ten cases in which they agreed on the outcome but disagreed on the reasoning are:

Premier of the Province of the Western Cape v. The Electoral commission and Another [37] considered the number of seats to which the Western Cape was entitled. Mokgoro wrote the majority opinion, O'Regan wrote a concurring opinion.

Beinash and Another v. Ernst & Young and Others[38] considered whether a court order should be required before vexatious litigants can proceed with their claims. Mokgoro wrote the majority opinion, O'Regan wrote a concurring opinion.

African National Congress v. Minister of Local Government and Housing, Kwazulu-Natal [39] considered whether provisions establishing regional councils complied with the interim constitution. O'Regan wrote the court's judgment, Mokgoro wrote a concurring opinion.

Harksen v. Lane NO and Others [40] considered the constitutionality of vesting the property of a solvent spouse in the Master or trustee where the other spouse was insolvent. Mokgoro concurred while O'Regan dissented.

Masibuko v. City of Johannesburg[41] considered disputes over the lawfulness of a project addressing non-payment for water services by requiring advance payment. O'Regan wrote the majority opinion ,Nkabinde concurred separately.

Koyabe v. Minister of Home Affairs [42]considered whether immigrants facing deportation need to exhaust internal remedies before a court can review an administrative decision. Mokoro wrote the majority opinion, Nkabinde and O'Regan separately concurred.

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[34] *Lufuno Mphaphuli & Associates (Pty) Ltd. V. Andrews and Another* [2009] ZACC 6; 2009 (4) SA 529 (CC).
[35] *Van der Merwe and Another v. Taylor NO and Others* [2007] ZACC 16; 2008 (1) SA 1 (CC).
[36] *Bertie Van Zyl (Pty) Ltd and Another v. Minister for Safety and Security and Others* [2009] ZACC 11; 2010 (2) SA 181 (CC).
[37] *Premier of the Western Cape v. The Electoral Commission and Another* [1999] ZACC 6; 1999 (11) BCLR 1209 (CC).
[38] *Beinash and Another v. Ernst & Young and Others* [1998] ZACC 19; 1999 (2) SA 91 (CC).
[39] *African National Congress v. Minister of Local Government and Housing, Kwazulu-Natal and Others* [1998] ZACC 2; 1998 (3) SA 1 (CC).
[40] *Harksen v. Lane NO and Others* [1997] ZACC 12; 1998 (1) SA 30 (CC).
[41] *Mazibuko and Others v. City of Johannesburg and Others* [2009] ZACC 28; 2010 (4) SA 1 (CC).
[42] *Koyabe and Others v. Minister for Home Affairs and Others* [2009] ZACC 23; 2010 (4) SA 327 (CC).

Ferreira v. Levin NO and Others and Vryenhoek [43] considered whether the accused had to divulge self-incriminating information in an administrative procedure/ Mokgoto and O'Regan wrote separate concurring opinions.

S v. Coetze and Others [44] considered the constitutionality of two criminal procedure provisions that presumed guilt under certain circumstances. Mokgoro and O'Regan wrote separate concurring opinions.

President of the Republic of South Africa and Another v. Hugo [45]considered whether a presidential pardon that pardoned women with children under 12 but did not pardon fathers was discriminatory. Mokgoro and ORegan each wrote a concurring opinion.

De Lange v. Smuts NO andOthers [46] considered the constitutionality of act permitting and an officer to imprison an uncooperative witness at a meeting of creditors. Mokgoro & O'Regan wrote separate concurring opinions.

Voices of Disagreement

To hear the Justices' "voices" where they disagreed, the following cases are offered as examples.

Van der Merwe and Another v. Taylor and Others[47] considerd whether currency seizure constituted arbitrary deprivation of property. Nkabinde wrote the majority opinion, O'Regan wrote a concurring opinion and Mokgoro dissented.

Lufano Mphaphuli and Associates (Pty) Ltd. v. Andrews and Another[48] considered whether the constitutional right to a fair trial and impartial hearing applies to private arbitrations. Nkabinde signed onto the court judgment and O'Regan wrote a dissenting opinion, signed onto by Mokgoro .

Van der Merwe and Another v. Taylor and Others

As in most of the cases considered in this study, *Van der Merwe* poses a number of issues. They all relate to the seizure of money found in Van der Merwe's luggage and his subsequent arrest.

Van der Merwe was about to leave the country to join his family and friends for a vacation. A customs officer at the airport, with Van de Merwe's consent, inspected his bag and discovered an amount of money that required a declaration in advance of his departure and which also

[43] *Ferreira v. Levin NO and Others; Vryenhoek and Others v. Powell NO and Others* [1995] ZACC 13; 1996 (1) SA 984 (CC).
[44] *S v. Coetze and Others* [1997] ZACC 2; 1997 (3) SA 527 (CC).
[45] *President of the Republic of South Africa and Another v. Hugo* [1997] ZACC 4; 1997 (4) SA 1 (CC).
[46] *De Lange v. Smuts NO and Others* [1998] ZACC 6; 1998 (3) SA 785 (CC).
[47] *Van der Merwe* [2007] ZACC 16.
[48] *Mphaphuli* [2009] ZACC 6.

exceeded the amount permitted for one person to take out of the country. Thus the seizure of the money and his arrest.

The initial question, in answering which the Justices disagreed, was whether the court should consider the case at all. This matter aside, all the justices agreed that he owned a portion of the money, but disagreed as to whether he owned the rest. Also in dispute was whether the theory that property must be returned to the rightful owner applied.

The court did grant leave to appeal. In the opinion written for the court by Nkabinde and one other justice, they held he was not the rightful owner of the disputed amount, but merely a custodian because he claimed he held it on behalf of the family members he was attempting to join. The opinion also supported the state's justification that it needed to hold the money as evidence in the criminal case.

> The applicants [i.e. Van der Merwe and another] have succeeded in part in their…claim. That part related to our finding that they have established ownership of [the portion of the money]. However, the applicants have not shown that they are the owners of the [ltotal amount] and, what is more, they have not shown that the respondents are not entitled to hold the amount seized pending an order of disposal at the end of the criminal trial. [49]

O'Regan, while concurring, argued that the Court should not have taken the case.

> I do not conclude that the legal principle relied on by the majority is incorrect…. It relates to an important remedy of the common law, which should ordinarily first be determined by the Supreme Court of Appeal. There are, too, other legal issues which may well be relevant…upon which we have not had the benefit of argument. [50]
>
> In my view, these complex and difficult legal issues upon which neither we, nor the courts below, have had the benefit of argument indicate that it is not in the interests of justice for this Court to entertain this appeal. [51]
>
> Accordingly, I would refuse to grant leave to appeal. In summary, I would emphasize that it is undesirable for this Court to decide important and complex issues of the common law as a court of first and final instance, and especially …where the issues have not been properly ventilated on the pleadings or in argument. [52]

Mokgoro, in dissent, argued that the case **should** have been heard and, further, that the money should be returned to Van der Merwe. Her dissent builds on the constitutional protection against arbitrary deprivation of property.

> Once the state seizes private property as it did in this case, and the legal basis for the seizure and holding is in dispute, the question of arbitrary deprivation of property under…the Constitution is clearly implicated, making the matter intrinsically a constitutional one…. [53]

[49] *Van der Merwe* at para. 137.
[50] *Id*. at para. 100.
[51] *Id*. at para. 102.
[52] *Id*. at para. 103.
[53] *Id*. at para. 20.

Mokgoro elaborated on the importance of checking arbitrary police action by connecting it to the injustices of the apartheid past.

> In this constitutional era, where the constitution envisages, a public administration which is efficient, equitable, ethical, caring and accountable and respectful of fundamental rights , the execution of public power is subject to constitutional values. Section 195 ["Basic values and principles governing public administration"] reinforces these constitutional ideals. It contemplates a public service in the broader context of transformation as envisaged in the Constitution and aims to reverse the disregard, disdain and indignity with which the public in general had been treated by the administration in the past. Section 195 envisions that a public service reminiscent of that era has no place in our constitutional democracy. The remissness on the part of the [South African Police Service] is not conducive to the current effort of public service transformation. It must certainly be discouraged. [54]

There was another partial dissent but the dissenter does not stand on Mokgoro's high ground.

Lufano Mphaphuli and Associates (Pty) Ltd. v. Andrews and Another

The Constitution asserts that "[e]veryone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum." [55] The issues raised in this case are whether this right applies to private arbitration and whether this arbitration itself was fair.

The case involves a dispute about money between two contractors, Mphaphuli and Bopanang. They agree to take their dispute to arbitration. Mphaphuli, dissatisfied with the arbitrator's decision, appeals the decision to the High Court and then to the Supreme Court of Appeal. He appealed further to the Constitutional Court raising the constitutional issues that the rights provided in Section 34 of the Constitution apply to arbitration and that in this case the arbitration process violated that right.

The judgment, to which Nkabinde signed on, held that section 34 does apply "[b]ecause the courts are requested to adopt, support and trigger the enforcement of arbitration awards, it is permissible for, and incumbent on, them to ensure that arbitration awards meet certain standards to prevent injustice." [56]

Having resolved that Section 34 does apply, the judgment then turns to " one of the key constitutional issues that arises in this case" —viz., whether the arbitration procedure was fair. [para 28] While acknowledging that" the same level of procedural fairness required in court proceedings is [not] …required in arbitration proceedings,". ."[para 95] the judgement concludes that "the factors invoked by Mphaphuli, viewed objectively, both separately but more particularly cumulatively, must result in a finding that a reasonable apprehension of bias has been demonstrated: a reasonable person in Mphaphuli's position would reasonably apprehend that he/she had been the victim of bias, albeit unintentional, and that he/she had not received a

[54] *Id*. at para. 72.
[55] S. AFR. CONST.,1996.
[56] *Mphaphuli* at para. 27.

fair hearing." [57]

O'Regan's opinion, to which Mokgoro and others signed on, rejected the application of Section 34 to private arbitration arguing that"the effect of a person choosing private arbitration for the resolution of a dispute is …[that they] have…chosen not to exercise their right under section 34."[58]

In support of her position she invokes the authority of Roman-Dutch law. She also refers to international and comparative law considered in this judgment which suggest "that courts should be careful not to undermine the achievement of the goals of private arbitration by enlarging their powers of scrutiny imprudently." [59]

"After this somewhat lengthy introduction on the law and private arbitration," she then considers

> whether this case raises a constitutional issue within the jurisdiction of the Court and one which it is in the interests of justice to hear. At the outset I should say that ordinarily the question whether a particular arbitration award should be set aside, turning as it must on the precise terms of the arbitration agreement which regulated it, will not raise a constitutional issue of sufficient substance to warrant being entertained by this Court. [60]

She concludes that the procedure followed the arbitration agreement, [Para 258] acknowledging though that

> [t]his does not mean that anything goes in an investigative process. The requirement of fairness obtains there, as it does in adversarial proceedings. Its content is simply different. In each case, the question will be whether the procedure followed afforded both parties a fair opportunity to present their case." [61]

Examining the procedure, she concludes that the claim that the arbitrators' private meeting with one of the parties did not constitute "a gross irregularity." [62]

What can be said

Did the women Constitutional Court Justices provide perspectives that would otherwise have been weaker or absent? In *Jordan* and *Volks*, cases in which only Albie Sachs also dissented, the answer seems affirmative. In *Masiya*, the third case involving an issue of concern to women, all but one of the men signed onto the majority opinion written by Nkabinde. It is possible that the three women in this case had influenced all but one of their male colleagues to share their understanding; but, whether this occurred cannot even be contemplated on the basis of this study.

[57] *Mphaphuli* at para. 184.
[58] *Id.* at para. 216.
[59] *Id.* at para. 235.
[60] *Id.* at para. 27.
[61] *Id.* at para. 261.
[62] *Id.* at para. 266.

The possible influence that the women had on the opinions expressed by others in these and other cases not considered here, is worthy of consideration because the Constitutional Court Justices in conferences discuss in depth the cases before them. They circulate opinion drafts to all the Justices and receive comments from even those who have expressed opposing views.

This study based on cases in which the women expressed agreement and disagreement, considered only a percentage of the total number of cases decided by the court. In the cases not examined there were permutations with one or more of the women Justices joining their male colleagues in majority opinions, concurring opinions and dissents.

The study more than suggests that the women justices were not without influence-- in 111 of the 129 cases examined, one of the women wrote either the court's judgment or a concurring opinion. Though, the extent of their influence is not even considered here.

As *Van der Merwe* illustrates, the women did not speak with one voice in cases that didn't involve women's concerns.

But, what they said -- reflecting their cumulative knowledge and experiences, has been and continues to be important to the development of the country's jurisprudence. This is not insignificant . While many in and outside of South Africa without doubt see only that they are women—for those who look through but one lens, gender is all they see. While indeed they are women, they are women who are educated in the law, who are intelligent, who bring expertise in areas of law—such as traditional law, who are articulate, who were engaged in the struggle for democracy, who are members of families and of communities and much more. They are not simple minded—that is, not single minded-- and that they are not, must surely be taken into account when considering the contribution— the difference—that they make as jurists.

While the study does not answer the question so frequently asked, it is hoped that it provided a beginning and offered the opportunity to "hear their voices"

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